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# “CAN” VERSUS “SHOULD”: TITLE IX, TRANSGENDER, AND ATHLETIC OPPORTUNITIES

J. BRAD REICH\*

*When the gender equity legislation known as Title IX became law in 1972, the politics of transgender sports was not even a blip in the national conversation. Today, it is one of the sharpest dividing points in American culture.<sup>1</sup>*

As we discuss the fiftieth anniversary of Title IX, I begin with two premises. First, “[c]ivil rights law deals with the protections and liberties enjoyed by the American people. These rights are designed to ensure that people are treated equally . . . .”<sup>2</sup> Second, Title IX is a dynamic and evolving piece of civil rights law.<sup>3</sup> Over time it clearly grew beyond both its original and amended text.<sup>4</sup> To some it is an iconic symbol of women’s rights and opportunities, a force that

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1. Eddie Pells, *Title IX’s Next Battle: The Rights of Transgender Athletes*, U.S. NEWS (June 19, 2022, 9:34 PM), <https://www.usnews.com/news/us/articles/2022-06-19/title-ixs-next-battle-the-rights-of-transgender-athletes>.

2. *What is Civil Rights Law?*, HG LEGAL RES., <https://www.hg.org/civilrgt.html> (last visited Dec. 30, 2022).

3. *Equal Access to Education: Forty Years of Title IX*, U.S. DEP’T OF JUST. 1 (June 23, 2012), [www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf).

4. Once enacted, Title IX administration technically fell to the then existing Department of Health,

Education, and Welfare (HEW), but HEW’s Office of Civil Rights (OCR) was, and still is, the administrative sub-agency primarily responsible for Title IX enforcement. As this subsection highlights, the OCR aggressively interpreted Title IX to encompass sexual violence on campus. It did so in two steps. First, it interpreted Title IX sexual discrimination to encompass sexual harassment. Second, it then interpreted Title IX sexual harassment to encompass sexual violence. Perhaps the OCR felt it had to be so aggressive because it knew that nothing in Title IX’s text applied the law to sexual violence on campuses.

J. Brad Reich, *When is Due Process Due?: Title IX, “The State,” and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 7-8 (2017).

almost always seemingly moved “forward.”<sup>5</sup> But, it may be the case that Title IX’s seemingly irresistible force of expansion is about to encounter the potentially immovable object created by transgender participation in athletics. This article begins that discussion and proceeds in five parts.

Section I briefly looks at Title IX’s evolution, focusing on the developments most pertinent to this discussion. Section II provides critical, operational definitions and context. These include sex, gender, transgender, and gender transition. Section III turns our attention to the physical impacts of those transitioning from male to female. We will learn that a male athlete, transitioning to a female athlete, may retain significant physical advantages for extended periods of time. Section IV focuses on administrative action, common law analysis, the Court of Public Opinion, and athletic regulatory body policies regarding potential transgender protection under Title IX. Finally, Section V addresses the central issue of “can” versus “should”; can Title IX prohibit transgender based discrimination in applicable athletic contexts versus should it do so?

## I. THE EVOLUTION OF TITLE IX

This article is part of a symposium issue, so I assume that many companion pieces will discuss the overall evolution of Title IX. For purposes of this article I highlight the four events most pertinent to Title IX’s potential application to transgender athletes.

First, in 1972, Representative Edith Green and Senator Birch Bayh sponsored what became “Title IX,”<sup>6</sup> but recorded legislative history is limited.<sup>7</sup> Senator Bayh formally proposed an amendment to the Educational Amendments of 1971<sup>8</sup> and the Supreme Court is clear that his remarks are “an authoritative guide to the statute’s construction.”<sup>9</sup> Senator Bayh proffered the

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5. See Kendra Nordin Beato & Tara Adhikari, *Title IX at 50: How 37 Words Changed the World for Women*, CHRISTIAN SCI. MONITOR (June 20, 2022), <https://www.csmonitor.com/USA/Society/2022/0620/Title-IX-at-50-How-37-words-changed-the-world-for-women>.

6. Reich, *supra* note 4, at 6.

7. Steven S. Rhine, A Review and Analysis of Title IX of the Education Amendments of 1972 13-14 (2005) (Ph.D. dissertation, University of Georgia), [http://getd.galib.uga.edu/public/rhine\\_steven\\_s\\_200512\\_edd/rhine\\_steven\\_s\\_200512\\_edd.pdf](http://getd.galib.uga.edu/public/rhine_steven_s_200512_edd/rhine_steven_s_200512_edd.pdf).

The legislative history of Title IX comes from Congressional testimony in committees and dialogue between members of Congress. Congress included no committee report with the final bill . . . . Because Title IX was first introduced as a floor amendment, its legislative history is unusually sparse.

*Id.*

8. *Title IX Legal Manual*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/title-ix> (Aug. 12, 2021).

9. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

amendment to combat “the continuation of corrosive and unjustified discrimination against women [in the American educational system],”<sup>10</sup> and to:

provide for the women of America something that is rightfully theirs – an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.<sup>11</sup>

Eventually, that proposal became Title IX of the Educational Amendments of 1972 (Title IX)<sup>12</sup> and President Nixon signed that act into law on June 23, 1972.<sup>13</sup>

Second, once enacted, Title IX administration fell to the then existing Department of Health, Education, and Welfare (HEW). HEW’s Office of Civil Rights (OCR) was, and still remains, the administrative sub-agency primarily responsible for Title IX enforcement.<sup>14</sup> The OCR has been very aggressive in expanding the scope of Title IX over the ensuing years.<sup>15</sup>

Third, Title IX’s original text never specified “athletics” as part of the scope of covered “program or activity.”<sup>16</sup> However, in 1974, Congress expanded Title

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10. 118 CONG. REC. 5803 (1972).

11. *Id.* at 5808.

12. *Title IX of the Education Amendments of 1972*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/title-ix-education-amendments-1972> (Aug. 6, 2015).

13. Gerhard Peters & John T. Woolley, *Statement on Signing the Education Amendments of 1972*, AM. PRESIDENCY PROJECT (June 23, 1972), <https://www.presidency.ucsb.edu/documents/statement-signing-the-education-amendments-1972>.

14. *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (Aug. 20, 2021).

#### OCR’s Enforcement of Title IX

OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from ED comply with the law. OCR evaluates, investigates, and resolves complaints alleging sex discrimination. OCR also conducts proactive investigations, called compliance reviews, to examine potential systemic violations based on sources of information other than complaints.

In addition to its enforcement activities, OCR provides technical assistance and information and guidance to schools, universities and other agencies to assist them in voluntarily complying with the law.

*Id.* (emphasis in the original) (citing *Discrimination Complaint Form*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/complaintform.pdf> (July 2022); *Reading Room (oFOIA Index)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Oct. 15, 2015), <https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX>).

15. Beato & Adhikari, *supra* note 5.

16. 20 U.S.C. § 1687 (2022).

IX's breadth when it passed the "Javits Amendment."<sup>17</sup> That amendment directed HEW to implement regulations with a provision stating that such regulations, "shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports."<sup>18</sup> HEW did so effective July 21, 1975,<sup>19</sup> mandating that:

[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>20</sup>

This language created significant operational questions and, "[b]y the end of 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education."<sup>21</sup> The OCR quickly responded and issued its 1979 Policy Interpretation: Title IX and Intercollegiate Athletics.<sup>22</sup> That Interpretation clarified that:

17. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 95 (4th Cir. 2011) (stating "Title IX did not specifically address its application to athletics, and in 1974, Congress enacted the Javits Amendment.").

18. Education Amendments of 1974 § 844; *see also* A Policy Interpretation: Title IX and Intercollegiate Athletics, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Dec. 11, 1979), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides

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.

Section 844 of the Education Amendments of 1974 further provides

The Secretary of [of HEW] shall prepare and publish \* \* \* proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

*Id.* (emphasis in the original).

19. 34 C.F.R. § 106.1 (2022).

20. *Id.*

21. A Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 18.

22. *Id.*

[t]his Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department.<sup>23</sup>

As a result of those concerted activities, Title IX now applied to all athletic opportunities arising out of educational activities receiving direct and/or indirect federal funds.

Fourth, particularly over the past decade, the OCR aggressively worked to expand the scope of Title IX beyond its written boundaries. As a result, Title IX now encompasses legal issues such as sexual harassment and sexual violence,<sup>24</sup> even though those do not exist in Title IX's text. While such topics are beyond the scope of this article, this ambitious expansion demonstrates that Title IX's potential scope is not limited to its actual language. That is significant as Title IX also does not include the terms "gender" or "transgender."

## II. SEX, GENDER, TRANSGENDER, AND GENDER TRANSITION

*Historically, the terms "sex" and "gender" have been used interchangeably, but, in modern society, their meanings are becoming increasingly distinct.*<sup>25</sup>

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23. *Id.*

24. Reich, *supra* note 4, at 10-11.

In 2011 the OCR issued its now famous Dear Colleague letter ["2011 Dear Colleague Letter"]. Pursuant to its own language, that nineteen-page letter provided "significant guidance" regarding campus sexual violence policies, and starkly reminded schools of the potential consequences of non-compliance. It specifically tied sexual discrimination, sexual harassment, and sexual violence together and made all subject to Title IX. The letter then defined "sexual violence" broadly and clarified that "[u]se of the term 'sexual harassment' throughout this document includes sexual violence unless otherwise noted."

*Id.*

25. Tim Newman, *Sex and Gender: What's the Difference?*, MED. NEWS TODAY (May 11, 2021), <http://www.medicalnewstoday.com/articles/232363.php>.

Title IX's text seems straight forward, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."<sup>26</sup> So does Title IX "sex" encompass gender? If so, does it also encompass transgender? We begin by defining those key operational terms.

### A. *What is Sex?*

"In general terms, sex refers to," the biological differences between male and female.<sup>27</sup> Many likely think of the human sex continuum as simply binary,<sup>28</sup> meaning humans are either "male" or "female."<sup>29</sup> This assumption is understandable when human sex is defined solely by potential reproductive contributions because, when analyzed in such manner, there are only two sexes: the female, capable of producing large gametes (ovules); and the male, able to produce small gametes (spermatozoa).<sup>30</sup> These relatively simplistic definitions, based on "gonadic criterion," fail to consider additional criterion making the discussion more nuanced.<sup>31</sup>

Humans are born with twenty-three pairs of chromosomes.<sup>32</sup> Of those, the X and Y chromosomes determine sex.<sup>33</sup> This is "genetic sex."<sup>34</sup> The male has

26. 20 U.S.C. § 1681(a) (2022).

27. Newman, *supra* note 25.

28. Meaning comprised of only two parts. *Binary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/binary> (last visited Dec. 30, 2022); *Definition of 'Binary'*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/binary> (last visited Dec. 30, 2022).

29. See John Skalko, *Why There Are Only Two Sexes*, PUB. DISCOURSE (June 5, 2017), <http://www.thepublicdiscourse.com/2017/06/19389/>.

30. Philippe Testard-Vaillant, *How Many Sexes Are There?*, CNRS NEWS (Aug. 1, 2016), <https://news.cnr.fr/articles/how-many-sexes-are-there>.

31. *Id.*

32. Sarah A. Bates, *Chromosome*, NAT'L HUM. GENOME RSCH. INST., <https://www.genome.gov/genetics-glossary/Chromosome> (Sept. 22, 2022).

33. Regina Bailey, *Sex Cells Anatomy and Production*, THOUGHT CO., <https://www.thoughtco.com/sex-cells-meaning-373386> (Nov. 19, 2018).

Male sperm cells in humans and other mammals are heterogametic and contain one of two types of sex chromosomes. They contain either an X chromosome or a Y chromosome. Female egg cells, however, contain only the X sex chromosome and are therefore homogametic. The sperm cell determines the sex of an individual. If a sperm cell containing an X chromosome fertilizes an egg, the resulting zygote will be XX or female. If the sperm cell contains a Y chromosome, then the resulting zygote will be XY or male.

*Id.* (citing Regina Bailey, *How Chromosomes Determine Sex*, THOUGHT CO., <https://www.thoughtco.com/how-chromosomes-determine-sex-373288> (Aug. 11, 2019)).

34. Testard-Vaillant, *supra* note 30.

XY chromosomes and the female has XX.<sup>35</sup> In actuality, human chromosomes may create multiple sexes.<sup>36</sup> Chromosomal “pairings” include:

- X – Roughly 1 in 2,000 to 1 in 5,000 people
- XX – Most common form of female
- XXY – Roughly 1 in 500 to 1 in 1,000 people
- XY – Most common form of male
- XYY – Roughly 1 out of 1,000 people
- XXXY – Roughly 1 in 18,000 to 1 in 50,000 births.<sup>37</sup>

Both gonadic criterion and chromosomal pairings define human “sex,” but these are not the only definitions of human sex,<sup>38</sup> nor do they define gender.<sup>39</sup>

### *B. What is Gender?*

*Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed.*<sup>40</sup>

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35. Bailey, *supra* note 33.

36. Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCI., Mar.-Apr. 1993, at 20, 22, <https://chnm.gmu.edu/courses/ncc375/5sexes.html>; see also *The Six Most Common Biological Sexes in Humans*, JOSHUA KENNON (June 7, 2013), <https://www.joshuakennon.com/the-six-common-biological-sexes-in-humans/>.

37. *Id.*

38. While it is beyond the scope of this subsection, there is also “intersex.” *What is Intersex?*, INTERSEX SOC’Y OF N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Dec. 30, 2022). “Intersex is a socially constructed category that reflects real biological variation.” *Id.* “Intersex is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” *Id.*

39. Testard-Vaillant, *supra* note 30. Although the author uses “gender” as a synonym for “sex.”

However, this gonadic criterion (based upon reproductive glands) is not the only factor on which the definition of biological gender rests. We must also consider genetic sex (based on X and Y chromosomes), anatomical (based on the appearance of the genitalia), hormonal gender (based on the predominant hormones), and so on. Moreover, “each sexual parameter can have variants,” explains Éric Vilain, of the Epigenetics, Data & Politics Laboratory. For example, “XX/XY mosaics” are individuals with gonads comprising both ovaries and testicles.

*Id.*

40. See *Gender and Health*, WHO, <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> (last visited Dec. 30, 2022).



As seen in the prior subsection, human sex is more complicated than simply male and female, but human gender is almost mystifying because it does not exist, at least in any measurable manner, at all.<sup>41</sup> Gender is often categorized as a “social construct”<sup>42</sup> and the term “gender” has no uniform, legal definition.<sup>43</sup>

A social construct is a societal stereotype or shortcut; it is a term or category created by a society, or a part of a society, and then established through practice.<sup>44</sup> As a social construct, the meaning of gender varies across cultures and over time.<sup>45</sup> Historically, in the United States, two genders exist: masculine and feminine.<sup>46</sup> Those terms reflected behaviors or characteristics society deemed “appropriate” for a male or female.<sup>47</sup> While gender is how a society

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41. Or, perhaps sex and gender are both largely uncharted. Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337, 342 (2005) (“[T]heoretical discourse has not yet managed a satisfactory account of all the nuances and distinctions that the terms ‘sex’ and ‘gender’ require.”).

42. See e.g., Zuleyka Zevallos, *Sociology of Gender*, OTHER SOCIOLOGIST, <https://othersociologist.com/sociology-of-gender/> (last visited Dec. 30, 2022) (“[G]ender, like all social identities, is socially constructed.”) (emphasis in the original).

43. *Gender Definition & Legal Meaning*, LAW DICTIONARY, <https://thelawdictionary.org/gender/> (last visited Dec. 30, 2022) (“Defined differences between men and women based on culturally and socially constructed mores, politics, and affairs. Time and location rise to a variety of local definitions. Contrasts to what is defined as the biological sex of a living creature.”).

44. *Social Construct*, U.N. ECON. & SOC. COMM’N FOR W. ASIA, <https://archive.unescwa.org/social-construct#:~:text=Definition%20English%3A,through%20cultural%20or%20social%20practice> (last visited Dec. 30, 2022) (defining “social construct” as “a social mechanism, phenomenon, or category created and developed by society; a perception of an individual, group, or idea that is ‘constructed’ through cultural or social practice.”).

45. Shults, *supra* note 41, at 342.

46. William Cummings, *When Asked Their Sex, Some are Going with Option “X”*, USA TODAY (June 27, 2017, 8:30 PM), <https://www.usatoday.com/story/news/2017/06/21/third-gender-option-non-binary/359260001/> (“America has slowly begun to acknowledge that for many people, gender is not easily defined as either male or female.”).

47. Zevallos, *supra* note 42 (“Gender involves social norms, attitudes and activities that society deems more appropriate for one sex over another.”).

describes or identifies an individual, it is also how an individual describes or identifies himself.<sup>48</sup> This latter piece is “gender identity.”<sup>49</sup>

Gender identity is key to understanding the gender discussion. As explained by one author, “[g]ender identity is an extremely personal part of who we are, and how we perceive and express ourselves in the world. It is a separate issue entirely from sex, our biological makeup; or sexual orientation, who we are attracted to.”<sup>50</sup> Gender identity may be tied to gender dysphoria, gender transition, and gender expression. Gender dysphoria is defined as “[the] distress caused when a person’s assigned birth gender is not the same as the one with which they identify,”<sup>51</sup> gender transition is “[t]he process by which some people strive to more closely align their internal knowledge of gender with its outward appearance[,]”<sup>52</sup> and gender expression is the “[e]xternal appearance of one’s gender identity . . . .”<sup>53</sup> Gender identity is “[o]ne’s innermost concept of self as male, female, a blend of both or neither,”<sup>54</sup> and current gender identity definitions include, but are not limited to, the following:

Agender: A term for people whose gender identity and expression does not align with man, woman, or any other gender. A similar term used by some is gender-neutral.<sup>55</sup>

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48. *Id.*

Gender is more fluid – it may or may not depend upon biological traits. More specifically, it is a concept that describes how societies determine and manage sex categories; the cultural meanings attached to men and women’s roles; and how individuals understand their identities including, but not limited to, being a man, woman, transgender, intersex, gender queer and other gender positions. Gender involves social norms, attitudes and activities that society deems more appropriate for one sex over another.

*Id.* (emphasis in the original).

49. Sam Killermann, *Comprehensive List of LBGTQ+ Vocabulary Definitions*, IT’S PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/> (last visited Dec. 30, 2022) (“[G]ender identity – *noun* : the internal perception of an [sic] one’s gender, and how they label themselves . . . .”) (emphasis in the original).

50. Cydney Adams, *The Gender Identity Terms You Need to Know*, CBS NEWS (Mar. 24, 2017, 10:22 AM), <https://www.cbsnews.com/news/transgender-gender-identity-terms-glossary/> (emphasis in the original).

51. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, [www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions](http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions) (last visited Dec. 30, 2022) (emphasis in the original).

52. *Id.*

53. *Id.*

54. *Id.*

55. Adams, *supra* note 50.

Androgynous: Identifying and/or presenting as neither distinguishably masculine nor feminine.<sup>56</sup>

Bigender: Someone whose gender identity encompasses both man and woman. Some may feel that one side or the other is stronger, but both sides are present.<sup>57</sup>

Cisgender: A term used to describe someone whose gender identity aligns with the sex assigned to them at birth.<sup>58</sup>

Gender fluid: A person who does not identify with a single fixed gender, and expresses a fluid or unfixed gender identity. One's expression of identity is likely to shift and change depending on context.<sup>59</sup>

Gender non-conforming: A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category.<sup>60</sup>

Genderqueer: A term for people who reject notions of static categories of gender and embrace a fluidity of gender identity and often, though not always, sexual orientation. People who identify as genderqueer may see themselves as being both male and female, neither male nor female or as falling completely outside these categories.<sup>61</sup>

Non-binary: Any gender that falls outside of the binary system of male/female or man/woman.<sup>62</sup>

Queer: An umbrella term people often use to express fluid identities and orientations.<sup>63</sup>

As seen above, gender is not limited to masculine and feminine, and gender is not biologically measurable. When we recognize these facts two conclusions are irrefutable. First, the number of genders could be infinite. Second, “sex” and

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

“gender” are not one and the same.<sup>64</sup> The latter distinction is critical as “[m]any courts, including the Supreme Court, appear to have used ‘sex’ and ‘gender’ synonymously.”<sup>65</sup>

### C. What is “Transgender”?

*Transgender people are people whose gender identity is different from the gender they were thought to be at birth. “Trans” is often used as shorthand for transgender.*<sup>66</sup>

*When we’re born, a doctor usually says that we’re male or female based on what our bodies look like. Most people who were labeled male at birth turn out to actually identify as men, and most people who were labeled female at birth grow up to be women. But some people’s gender identity – their innate knowledge of who they are – is different from what was initially expected when they were born. Most of these people describe themselves as transgender.*<sup>67</sup>

So there is an initial assumption linking sex and gender. It proceeds in two steps. First, a child is born with chromosomes and/or reproductive organs commensurate with binary male or female sex. Second, that child then demonstrates traditional masculine or feminine behaviors, and that is their gender. Transgender changes that “assumption” because a person identifies as other than their binary birth sex and/or exhibits behaviors or physical

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64. Anne-Maree Nobelius, *Sex and Gender*, SLIDE PLAYER (July 29, 2003), <https://slideplayer.com/slide/7329505/>.

Sex = male and female

Gender = masculine and feminine

So in essence:

Sex refers to biological differences; chromosomes, hormonal profiles, internal and external sex organs.

Gender describes the characteristics that a society or culture delineates as masculine or feminine.

*Id.* Or, for a more light-hearted summary see Jillian T. Weiss, *Schroer v. Billington: What Does it Mean for Transgender Employees?*, BILERICO PROJECT (Sept. 21, 2008, 4:30 PM), [http://bilerico.lgbtqnation.com/2008/09/schroer\\_v\\_billington\\_what\\_does\\_it\\_mean\\_f.php](http://bilerico.lgbtqnation.com/2008/09/schroer_v_billington_what_does_it_mean_f.php) (“Now just wait a minute! Hold the phone! I hear all of the academic gender theory people groaning - but sex and gender are different! Sex is between the legs and gender is between the ears!”).

65. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 343 n.1 (7th Cir. 2017).

66. *Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. 1 (July 9, 2016), [https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016\\_0.pdf](https://transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf).

67. *Id.*

characteristics that do not align with the gender “expectations” for their birth sex. In other words, they do not fit the traditional assumptions. Common operational definitions include, but are not limited to:

“Transgender: Identifying as or having undergone medical treatment to become a member of the opposite sex.”<sup>68</sup>

“Transsexual: A person with the external genitalia and secondary sexual characteristics of one gender, but whose personal identification and psychosocial configuration are that of the opposite gender; a study of morphologic, genetic, and gonadal structure may be genitally congruent or incongruent.”<sup>69</sup>

“Trans man: A female-to-male transgender or transsexual person who was an assigned female at birth but identifies as male.”<sup>70</sup> This is also known as Female-To-Male (FTM) transition.<sup>71</sup> This article uses the terms “transman” and “transmen” as synonyms.

“Trans woman: A male-to-female transgender or transsexual person who was an assigned male at birth but identifies as female.”<sup>72</sup> This is also known as Male-To-Female (MTF) transition.<sup>73</sup> This article uses the terms “transwoman,” “transwomen,” and “transfemale” as synonyms.

While the broad subject of “transgender” is increasingly discussed,<sup>74</sup> there is little information regarding the percentage of those in the United States who actually identify as transgender. The somewhat detailed data that exists appears

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68. *Transgender*, MED. DICTIONARY, <https://medical-dictionary.thefreedictionary.com/transgender> (last visited Dec. 30, 2022) (emphasis in the original).

69. *Transsexual*, MED. DICTIONARY, <https://medical-dictionary.thefreedictionary.com/transsexual> (last visited Dec. 30, 2022) (emphasis in the original).

70. *Transman*, MED. DICTIONARY, <https://medical-dictionary.thefreedictionary.com/Trans+Male> (last visited Dec. 30, 2022) (emphasis in the original).

71. Linell Smith, *Glossary of Transgender Terms*, JOHNS HOPKINS MED. (Nov. 20, 2018), <https://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1>.

72. *Trans Woman*, MED. DICTIONARY, <https://medical-dictionary.thefreedictionary.com/Trans+woman> (last visited Dec. 30, 2022) (emphasis in the original).

73. Smith, *supra* note 71.

74. This is impossible to quantify. But, for related perspective, see *infra* text accompanying notes 210-12 (discussing that, just between 2020 and 2022, 38 states formally addressed and/or enacted transgender legislation).

to begin with a 2011 survey, with results published in 2012.<sup>75</sup> That study focused on discrimination against transgender people and had more than 6,450 respondents from all states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.<sup>76</sup>

Next came the 2015 U.S. Transgender Survey (USTS), with results published in 2016.<sup>77</sup> The USTS was different; it focused on the “experiences of transgender people in the United States . . . .”<sup>78</sup> It covered the same geographic areas as the prior survey, plus American Samoa, Guam and overseas U.S. military bases,<sup>79</sup> and had 27,715 respondents.<sup>80</sup> The USTS may be “the largest survey ever devoted to the lives and experiences of trans people,”<sup>81</sup> but it still did not tell us how many people identified as transgender. A subsequent study survey is planned by the National Center for Transgender Equality,<sup>82</sup> and may be in the early data collection phase,<sup>83</sup> but has been disrupted by the COVID-19 pandemic and other issues.<sup>84</sup> The end result is that, at Title IX’s fiftieth anniversary, we do not know how many Americans identify as transgender. That means, at least for now, we must turn to other sources for additional data and perspective.

The Williams Institute, at the University of California Los Angeles School of Law, used an extrapolation model to conclude that, as June 2016, 0.6% of U.S. adults identified as transgender.<sup>85</sup> This study is significant for at least three reasons. First, it is not the result of a single, direct survey; it is an extrapolation

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75. See Jaime M. Grant et al., *Injustice at Every Turn*, NAT’L CTR. FOR TRANSGENDER EQUAL. (2011) [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

76. *Id.* at 2.

77. See Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

78. *Id.* at 4.

79. *Id.*

80. *Id.*

81. *Issues / U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/us-trans-survey> (last visited Dec. 30, 2022).

82. Kate Sosin, *Work Resumes on the Nation’s Only Major Transgender Study*, 19TH NEWS (Jan. 3, 2022, 2:56 PM), <https://19thnews.org/2022/01/us-transgender-survey-work-resumes-2022/>.

83. It is unclear where the National Center for Transgender Equality may be in terms of data collection. As of March 19, 2022, one could “pledge”, in advance, to take the 2022 U.S. Survey. *Pledge Now to Take the 2022 U.S. Trans Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Jan. 20, 2022), <https://transequality.org/blog/pledge-now-to-take-the-2022-us-trans-survey>.

84. Kate Sosin, *The Only Comprehensive Study on Transgender People is Not Coming Out as Planned*, 19TH NEWS (Aug. 25, 2020, 10:00 AM), <https://19thnews.org/2020/08/the-only-comprehensive-study-on-transgender-people-is-not-coming-out-as-planned/>.

85. Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf>.

based on data from prior surveys, ranging from 2003 to 2014.<sup>86</sup> Second, this study estimates that the percentage of people in the United States identifying as transgender doubled over approximately the prior decade, resulting in a then current estimate of 1.4 million people.<sup>87</sup> Third, this study was published in 2016. That was six years ago. That study concluded that the U.S. population of those identifying as transgender doubled in a prior ten-year period; it is then certainly possible that population has significantly increased since that study was published.<sup>88</sup> We turn to related research for additional context.

In July of 2021 the Pew Research Center (Pew) published a study that did not attempt to survey those who identify as transgender, but rather sought to examine how many Americans “knew” someone who was transgender or who went by a gender-neutral pronoun.<sup>89</sup> The Pew researchers found that,

[o]verall, about four-in-ten Americans (42%) say they personally know someone who is transgender, up 5 percentage points since 2017. And about a quarter (26%) say they know someone who prefers that others use gender-neutral pronouns such as ‘they’ instead of ‘he’ or ‘she’ when referring to them, up from 18% in 2018 . . . .<sup>90</sup>

While not directly on point, this seems to recognize that the United States’ transgender population is “increasing,” either in actual number, through different reporting, or because diverse methodologies provide a different picture of the true population. It may also be the case that this population continues to increase as experience and attitudes change. Specifically, the research concluded that, “[s]ome 53% of those younger than 30 say they know a transgender person, up from 44% in 2017.”<sup>91</sup> Additionally, “[a] 56% majority

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86. *Id.* at 2.

87. *Id.*

88. There is another study available. It is published by the National Library of Medicine. Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH e1, e1 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227946/> (It estimated a United States population of approximately 1,000,000 transgender people, using data from 2006-2016. It also noted that, “[f]uture national surveys are likely to observe higher numbers of transgender people.”).

89. Rachel Minkin & Anna Brown, *Rising Shares of U.S. Adults Who Know Someone Who is Transgender or Goes by Gender-Neutral Pronouns*, PEW RSCH. CTR. (July 27, 2021), <https://www.pewresearch.org/fact-tank/2021/07/27/rising-shares-of-u-s-adults-know-someone-who-is-transgender-or-goes-by-gender-neutral-pronouns/>.

90. *Id.*

91. *Id.*

of adults younger than 30 say gender can differ from sex at birth, compared with roughly [40%] or fewer among older age groups.”<sup>92</sup> If we piece these surveys and studies together it seems clear that we will see more individuals identify as transgender in American society. If that is accurate, we could see more transgender participation and interest in athletics as well.

*D. What is Gender “Transition”? How Does One “Change” Gender?*

*Transitioning is the time period during which a person begins to live according to their gender identity, rather than the gender they were thought to be at birth. Gender transition looks different for every person. Possible steps in a gender transition may or may not include changing your clothing, appearance, name, or the pronoun people use to refer to you (like “she,” “he,” or “they”). Some people are able to change their identification documents, like their driver’s license or passport, to reflect their gender. And some people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body better reflect the gender they know themselves to be.*<sup>93</sup>

Gender transitioning occurs in two broad forms, non-medical and medical. Non-medical includes behaviors and opportunities such as living your “new” gender and utilizing counseling and other forms of support.<sup>94</sup> Non-medical transition does not create any difference in the transitioning person’s physical abilities as their bodies, and bodily functions, are unchanged.

Medical transition takes two forms, surgical and/or hormonal. Surgical procedures are also known as “gender reassignment surgery” and may be extremely complex.<sup>95</sup> They are also quite rare, with estimates indicating there may be fewer than 500 surgical transitions per year in the United States.<sup>96</sup>

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92. *Id.*

93. *Id.* See also Smith, *supra* note 71 (“Transition: An individualized process in which transgender people move from living aligned with the sex they were assigned at birth to living aligned with their gender identity.”) (emphasis in the original).

94. *Medical and Nonmedical Options for Gender Affirmation*, UNIV. OF MICH. HEALTH (Nov. 22, 2021), <https://www.uofmhealth.org/health-library/acd1551>.

95. *What is Gender Reassignment Surgery?*, INT’L SOC’Y FOR SEXUAL MED., <https://www.issm.info/sexual-health-qa/what-is-gender-reassignment-surgery/> (last visited Dec. 30, 2022).

96. Lenny Bernstein, *Here’s how Sex Reassignment Surgery Works*, WASH. POST (Feb. 9, 2015, 7:10 AM), <https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/>.



Hormonal therapy, also referred to as a “gender affirming,” is a process where, “[g]ender-affirming hormones are used to alter someone’s physical appearance to more closely align their physical body with their gender identity. For trans, non-binary, and gender expansive people seeking gender-affirming medical care, it is the most common medical path.”<sup>97</sup> We will learn that females transitioning to transmales do not undergo physical changes that likely make them athletically competitive relative to cisgender males,<sup>98</sup> but males transitioning to transfemale may retain significant physical advantages over their cisgender female competitors.<sup>99</sup> Accordingly, for purposes of this article, I focus on male to female hormonal transitioning, often termed “feminizing hormone therapy”<sup>100</sup> (FHT).

FHT uses medications to block the action of the hormone testosterone,<sup>101</sup> and the recipient is also given the hormone estrogen to decrease testosterone production and induce feminine secondary sex characteristics.<sup>102</sup> “Changes caused by these medications can be temporary or permanent.”<sup>103</sup> Such changes include, but are not limited to, breast development, redistribution of body fat, and decreased muscle mass.<sup>104</sup> But these developments will not happen immediately, and maximum effects are likely to manifest one to five years after FHT begins.<sup>105</sup> These “delayed effects” could mean that transfemale athletic

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*How many people have sex reassignment surgery?*

It’s very difficult to know. The Encyclopedia of Surgery says that “the number of gender reassignment procedures conducted in the United States each year is estimated at between 100 and 500. The number worldwide is estimated to be two to five times larger.” At least one other researcher says there are many more. Marci Bowers, a transgender obstetrician and gynecologist in Burlingame, Calif., who performs the surgeries, said in an interview that she does about 200 per year herself, about three quarters of them male to female.

Fred Ettner, a physician in Evanston, Ill., who works with people going through transition, estimated that only about 25 percent to 30 percent of transgender people have any kind of surgery.

*Id.* (quoting *Sex Reassignment Surgery*, ENCYCLOPEDIA OF SURGERY, <https://www.surgeryencyclopedia.com/Pa-St/Sex-Reassignment-Surgery.html> (last visited Dec. 30, 2022)).

97. *Gender-Affirming Hormones*, TEMP. HEALTH, <https://www.templehealth.org/services/treatments/gender-affirming-hormones> (last visited Dec. 4, 2022).

98. *See infra* text accompanying note 114.

99. *Id.*

100. *Feminizing Hormone Therapy*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096> (last visited Dec. 30, 2022).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

participants are closer to their male bodies than female bodies for a period of time while potentially competing in athletics. Could that make any performance difference in the short or long terms?

### III. POTENTIAL TRANSGENDER PHYSICAL IMPACTS ON SPORTS PARTICIPATION

*Most sports are positive to include trans people, but at the same time they consider it important to protect the women's category of sport from unfair advantages. Therefore, it is important that studies are investigating changes in physical parameters such as muscle mass, strength, and endurance capacity during ongoing treatment.*<sup>106</sup>

We begin with averages<sup>107</sup> for cisgender males and females. The average United States male, age twenty years or older, is five feet nine inches tall.<sup>108</sup> The average United States female, age twenty years or older, is five feet three and a half inches.<sup>109</sup> One study found that men had an average of twenty-six pounds more skeletal muscle mass than women,<sup>110</sup> while women exhibited about forty-percent less upper-body strength and thirty-three percent less lower-body strength, on average.<sup>111</sup> Additionally, men are faster than women.<sup>112</sup> So, how do these potential differences apply to transathletes?

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Breast development. This will begin three to six months after treatment. The maximum effect will occur within two to three years.

Redistribution of body fat. This will begin three to six months after treatment. The maximum effect will occur within two to five years.

Decreased muscle mass. This will begin three to six months after treatment. The maximum effect will occur within one to two years.

*Id.* (emphasis in the original).

106. Tommy Lundberg, *New Study on Changes in Muscle Mass and Strength After Gender-Affirming Treatment May Have an Impact on Sports Regulations*, KAROLINSKA INST. (Dec. 13, 2019, 2:52 PM), <https://news.ki.se/new-study-on-changes-in-muscle-mass-and-strength-after-gender-affirming-treatment-may-have-an>.

107. Of course, these are only averages and there will always be outliers, including extreme outliers.

108. *Height Chart of Men and Women in Different Countries*, DISABLED WORLD, <https://www.disabled-world.com/calculators-charts/height-chart.php> (Aug. 20, 2021).

109. *Id.*

110. Ian Janssen et. al., *Skeletal Muscle Mass and Distribution in 468 Men and Women Aged 18-88 Yr.*, 89 J. APPLIED PHYSIOLOGY 81, 81 (2000).

111. *Id.*

112. Tia Ghose, *Women in Combat: Physical Differences May Mean Uphill Battle*, LIVE SCI. (Dec. 7, 2015), <https://www.livescience.com/52998-women-combat-gender-differences.html>.

There is not much data to date, but The British Journal of Sports Medicine conducted a study that provides some insight.<sup>113</sup> It reviewed fitness test results and medical records of twenty-nine transmen and forty-six transwomen who started gender affirming hormones while in the United States Air Force.<sup>114</sup> The goal was to, “examine the effect of gender affirming hormones on body composition and athletic performance among transgender individuals to help improve future guidelines for transgender inclusion in sporting competition.”<sup>115</sup> The data was illuminating:

[p]rior to gender affirming hormones, transwomen performed 31% more push-ups and 15% more sit-ups in 1 min and ran 1.5 miles 21% faster than their female counterparts. After 2 years of taking feminising hormones, the push-up and sit-up differences disappeared but transwomen were still 12% faster.<sup>116</sup>

The researchers concluded that, “[o]ur results capture differences in both endurance and strength rather than just strength and probably have more relevance to sports that require sustained effort over time rather than single explosive efforts like power lifting.”<sup>117</sup> And that, “transwomen retain[ed] an

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The fastest woman in the world, Florence Griffith Joyner, ran the 100-meter dash in just 10.49 seconds in 1988, and that record remains unbroken. Yet her fastest time wouldn't have even qualified her for the men's 2016 Olympic competition, which requires competitors to finish the 100-meter sprint in 10.16 seconds or less.

*Id.*

113. See Timothy A. Roberts et al., *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organizations and Legislators*, 55 BRIT. J. SPORTS MED. 577 (2020).

114. *Id.* at 577. The methodology compared, “pre- and post-hormone fitness test results of the transwomen and transmen with the average performance of all women and men under the age of 30 in the Air Force between 2004 and 2014. We also measured the rate of hormone associated changes in body composition and athletic performance.” *Id.*

115. *Id.*

116. *Id.*; Stephanie Burnett, *Fact Check: Do Trans Athletes Have an Advantage in Elite Sport?*, DW (July 24, 2021), <https://www.dw.com/en/fact-check-do-trans-athletes-have-an-advantage-in-elite-sport/a-58583988>.

117. Roberts et al., *supra* note 113, at 580; see also Peyton MacKenzie, *Transgender Women Should not Compete Against Biological Women*, LIBERTY CHAMPION (Jan. 24, 2022), <https://www.liberty.edu/champion/2022/01/transgender-women-should-not-compete-against-biological-women/>.

If you are familiar with MMA, the name Fallon Fox probably rings a bell. She is known for, in 2014, fighting Tamikka Brents and fracturing her skull within the first two and a half

advantage in muscle mass, volume, and strength over female [study] controls after 1 year on oestrogen,”<sup>118</sup> while separate research based on literature review concluded this window may be thirty-six months.<sup>119</sup>

An additional study’s results laid out the likely physical disparities even more starkly:

Results: Thigh muscle volume increased (15%) in [transmales], which was paralleled by increased quadriceps cross-sectional area (CSA) (15%) and radiological density (6%). In [transwomen], the corresponding parameters decreased by -5% (muscle volume) and -4% (CSA), while density remained unaltered. The [transmales] increased strength over the assessment period, *while the [transwomen] generally maintained their strength levels.*<sup>120</sup>

This is particularly informative when we combine it with the “averages” discussion, and related data, above. In simplest terms a male transitioning to

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minutes of the first round of the fight. Fox is a biological male who transitioned to female, after hitting puberty.

*Id.*

Here lies a deeper problem with transgender athletes competing against biological athletes. It’s no longer about fairness, but about safety. Men are at an astronomical physical advantage after their bodies go through puberty, which makes competing against women unfair and dangerous.

Transgender woman India Willoughby said on “Good Morning Britain” that there are 2,000 men in the world right now that run 100 meters faster than the greatest female sprinter of all time. Furthermore, Piers Morgan explained that 1,500 of the top male tennis players could beat Serena Williams. Willoughby elaborated that if a man goes through puberty, he will be taller, broader, his stride greater and his reach longer.

“If you go through puberty, you have all of the benefits of having a male body. Even if you transition and reduce your testosterone, you’re still going to have those benefits,” said Olympic medalist Sharon Davies. “The bone structure, the slightly bigger hearts, more red blood cells, you know the smaller pelvis – sitting on a cycle that makes quite a big difference, so therefore for a female athlete competing with a transgender female is always going to be at a disadvantage.”

*Id.* (quoting Good Morning Britain, *Do Transgender Athletes Have an Advantage in Female Sporting Events?*, YOUTUBE (Mar. 4, 2019), <https://www.youtube.com/watch?v=I75kfAVF64A>).

118. Roberts et al., *supra* note 113.

119. Joanna Harper et al., *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implications for Sport Participation*, 55 BRIT. J. SPORTS MED. 865, 865 (2021).

120. Anna Wilk et al., *Muscle Strength, Size, and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, NAT’L LIBR. MED. (Mar. 1, 2020), <https://pubmed.ncbi.nlm.nih.gov/31794605/> (emphasis added).

female begins, on average, significantly bigger, stronger, and faster. As he transitions to female, they still retain ninety-five percent of muscle volume and generally maintain overall strength levels. On average, at some point, and potentially for years, the transfemale athlete may have significant physical advantages over her cisgender competition.

#### IV. POTENTIAL TRANSGENDER PROTECTION UNDER TITLE IX

##### *A. Administrative Perspective*

Title IX interpretation and enforcement is often political. Some may not like to read or admit that, but it is true and demonstrable. The Office of Civil Rights (OCR) and the Department of Justice (DOJ) are the two administrative agencies most in charge of directly making and implementing Title IX policy. We need only look at the actions of those entities, under the three most recent Presidential administrations (Presidents Obama, Trump, and Biden), to see how political Title IX interpretation and enforcement can become, and how such variance includes who Title IX might “protect” and who it might not. I proceed chronologically, beginning with significant actions in President Obama’s second term.<sup>121</sup>

President Obama was inaugurated January 21, 2013. On April 29, 2014, the OCR issued *Questions and Answers on Title IX and Sexual Violence*.<sup>122</sup> While that document primarily focused on sexual violence, it also addressed gender: “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 . . . .”<sup>123</sup> Later that year, the OCR released a series of questions and answers.<sup>124</sup> Those included the following, in pertinent part, addressing transgender students:

31. How do the Title IX requirements on single-sex classes apply to transgender students?

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121. *Barack Obama – Key Events*, MILLER CTR., <https://millercenter.org/president/barack-obama/key-events> (last visited Dec. 30, 2022).

122. See Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

123. *Id.* at 5.

124. See Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-2014-12.pdf>.

Answer: All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. *Under Title IX, a recipient generally must treat transgender students consistent with their gender identity . . .*<sup>125</sup>

On January 7, 2015, the OCR published a response letter addressing transgender student access to school restrooms.<sup>126</sup> It explained that, “[w]hen 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.”<sup>127</sup> Three months later the OCR issued its Title IX Resource Guide.<sup>128</sup> That guide specified that, “Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.”<sup>129</sup>

On November 2, 2015, the OCR issued formal findings *In the Matter of Township High School District 211, Palatine, Illinois*, concluding the school district violated Title IX via discrimination based on transgender status of a student.<sup>130</sup> On April 19, 2016, the Fourth Circuit held, in *G.G. v. Gloucester*

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125. *Id.* at 25 (emphasis added).

126. See Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec’y for Pol’y, Off. for Civ. Rts. to Emily T. Prince (Rescinded), U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf>.

127. *Id.* at 2. The letter also explained, “it may be useful to be aware that in response to OCR’s recent investigations of two complaints of gender identity discrimination, recipients have agreed to revise policies to make clear that transgender students should be treated consistent with their gender identity for purposes of restroom access.” *Id.*

128. See Catherine E. Lhamon, Assistant Sec’y, *Title IX Resource Guide (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

129. *Id.* at 1. Informing readers that schools’ requisite Title IX coordinators can be “effective agents for ensuring gender equity within their institutions . . .” *Id.* at 2. The guidance suggested that multiple coordinators be utilized to specialize in areas including “gender equity in academic programs or athletics, harassment, or complaints from employees.” *Id.* at 3.

130. See Letter from Adele Rapport, Reg’l Dir., to Dr. Daniel E. Cates, Superintendent, Township High Sch. Dist. 211, *Re: OCR Case No. 05-14-1055*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>. According to the OCR, this was the first time it found a school district violated Title IX based on transgender issues. Angie Leventis Lourgos, *Palatine-Based High School District Settles Transgender Discrimination Lawsuit, Ending Four-Year Battle Over Locker Room Access*, CHL. TRIB. (Feb. 14, 2020, 2:42 PM), <https://www.chicagotribune.com/news/breaking/ct-palatine-transgender-lawsuit-settlement-20200214-ldgh6vw7zfnfsibwcury3bnn4a-story.html>; see also *Agreement to Resolve Between Township High School District 211 and the U.S. Department of*

*County School Board*, that it gave the OCR's interpretations of Title IX controlling weight,<sup>131</sup> and the court deferred to the OCR's previous guidance that Title IX required schools to generally accommodate gender identities.<sup>132</sup>

Just two weeks later the OCR and DOJ issued a "Joint Guidance" statement containing the following: "[u]nder Title IX of the Education Amendments of 1972, schools receiving federal money may not discriminate based on a student's sex, including a student's transgender status. The guidance makes clear that both federal agencies treat a student's gender identity as the student's sex for purposes of enforcing Title IX."<sup>133</sup>

The "final word" seemed to come on May 13, 2016, when the OCR and DOJ issued their joint *Dear Colleague Letter on Transgender Students*.<sup>134</sup>

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. *In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for*

*Education, Office. for Civil Rights OCR Case # 05-14-1055*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Dec. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>.

131. G. G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016).

132. *Id.* at 715 (stating "[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."). The DOJ also filed an amicus brief in the matter. It advised that gender issues, specifically transgender issues, fell under Title IX. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant, G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (No. 15-2056). "Treating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment 'on the basis of sex' under Title IX." *Id.* at 9.

A transgender person's transgender status is unquestionably related to his sex: indeed, the very definition of being "transgender" is that one's gender identity does not match one's "biological" or birth-assigned sex. (citations omitted) Thus, discrimination against a transgender person based on the divergence between his gender identity and birth-assigned sex denies that person an opportunity or benefit based on a consideration "related to" sex.

*Id.* at 10-11.

133. 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 JUST. (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civilrights#:~:text=Under%20Title%20IX%20of%20the,purposes%20of%20enforcing%20Title%20IX> (citing *Title IX and Sex Discrimination (Rescinded)*, U.S. DEP'T OF EDUC., OFF. OF CIV. RTS. (Aug. 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)). "No student should ever have to go through the experience of feeling unwelcome at school or on a college campus," said U.S. Secretary of Education John B. King Jr. "This guidance further clarifies what we've said repeatedly—that gender identity is protected under Title IX." *Id.*

134. See Catherine E. Lhamon & Vanita Gupta, Assistant Sec'y for Civ. Rts. & Principal Deputy Assistant Att'y Gen. for Civ. Rts., *Dear Colleague Letter on Transgender Students (Rescinded)*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

*transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student's gender identity . . . .*<sup>135</sup>

Then three things happened in rapid succession. First, President Donald Trump officially took office on January 20, 2017.<sup>136</sup> Second, his nominee for Secretary of Education, Betsy DeVos, was sworn into office on February 7, 2017.<sup>137</sup> Third the OCR, an administrative sub-agency of the Department of Education,<sup>138</sup> issued its vague and confusing Dear Colleague Letter of February 22, 2017.<sup>139</sup>

That document clearly repealed the May 13, 2016, Dear Colleague Letter<sup>140</sup> stating that while “[a]ll schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment,”<sup>141</sup> “the [OCR and DOJ] believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy”<sup>142</sup> and, as a result, “[i]n these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind [the May 13, 2016, Dear Colleague letter] . . . in order to further and more completely consider the legal issues involved.”<sup>143</sup> While it unquestionably repealed the prior Dear Colleague Letter, the February 22, 2017, Dear Colleague Letter left the issues of gender identity and transgender status, as potentially protected under Title IX, absolutely unclear.

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135. *Id.* at 1 (emphasis added).

136. Carrie Johnson, *In Inaugural Address Trump Decries ‘Carnage’ and Promises ‘America First’*, NPR (Jan. 20, 2017, 12:01 PM), <https://www.npr.org/2017/01/20/510746700/donald-trump-sworn-in-as-the-45th-president-of-the-united-states>.

137. Dave Boyer, *DeVos Sworn-in as Education Secretary by Pence*, WASH. TIMES (Feb. 7, 2017), <https://www.washingtontimes.com/news/2017/feb/7/betsy-devos-sworn-education-secretary-pence/>.

138. *About OCR*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., [https://www2.ed.gov/about/offices/list/ocr/about ocr.html](https://www2.ed.gov/about/offices/list/ocr/about%20ocr.html) (July 13, 2022).

139. See Sandra Battle & T.E. Wheeler II, Acting Assistant Sec’y for Civ. Rts. & Acting Assistant Att’y Gen. for Civ. Rts., *Dear Colleague Letter*, U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST. (Feb. 22, 2017), <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>.

140. *Id.* at 1.

141. *Id.* at 2.

142. *Id.* at 1.

143. *Id.*



On January 20, 2021, President Joe Biden was sworn into office.<sup>144</sup> On March 8, 2021, he issued the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.<sup>145</sup> That Order (section 1) stated that, “[i]t is the policy of my Administration that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.”<sup>146</sup> It directed that, “[t]he Secretary of Education shall consider suspending, revising, or rescinding . . . those agency actions that are inconsistent with the policy set forth in section 1 of this order as soon as practicable and as appropriate and consistent with applicable law . . . .”<sup>147</sup> It seems clear that the Biden Administration is exploring significant Title IX clarification and reform, but the potential scope of such is unclear.<sup>148</sup> However, recent administrative action may give us two clues.

First, in February of 2021, approximately one month into the Biden Administration, the DOJ and OCR withdrew their previous support in a Connecticut transgender policy lawsuit.<sup>149</sup> Connecticut allowed transgender athletes to compete according to their gender identities.<sup>150</sup> That meant transfemales could compete directly with cisgender females. Cisgender females brought suit, alleging the policy deprived them of athletic opportunities.<sup>151</sup> The then-Trump Administration intervened, with then-United States Attorney General William Barr arguing that the policy violated Title IX because it discriminated against the cisgender athletes.<sup>152</sup> The suit was still pending when President Trump’s term expired and President Biden took office. Under the Biden Administration, the DOJ and OCR withdrew their support shortly before

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144. Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/20/us/politics/biden-president.html>.

145. Apalla U. Chopra et al., *Biden Executive Order on Title IX: Where We’ve Been and Where We’re Going*, O’MELVENY & MYERS LLP (Mar. 9, 2021), <https://www.omm.com/resources/alerts-and-publications/alerts/biden-executive-order-on-title-ix/>.

146. Exec. Order No. 14021, 3 C.F.R. 538 (2022).

147. *Id.* at 539.

148. Lauren Camera, *Education Department Begins Sweeping Rewrite of Title IX Sexual Misconduct Rules*, U.S. NEWS (June 7, 2021, 5:45 PM), <https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules>.

149. *Biden Administration Withdraws From Conn. Transgender Athlete Case*, NBC CT. (Feb. 24, 2021, 4:33 PM), <https://www.nbcconnecticut.com/news/politics/biden-administration-withdraws-from-conn-transgender-athlete-case/2429799/>.

150. *Id.*

151. *Id.*

152. *Id.*

a hearing on a motion to dismiss. Additionally, “Connecticut U.S. Attorney John Durham and other department officials withdrew Barr’s statement, saying, ‘The government has reconsidered the matter.’”<sup>153</sup>

Second, on June 22, 2021, six months into the Biden Presidency, the Department of Education issued its Notice Of Interpretation<sup>154</sup> regarding the then-recent United States Supreme Court case *Bostock v. Clayton County, Georgia*.<sup>155</sup> In pertinent part, that Interpretation stated, “[the] OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination.”<sup>156</sup> “Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the [OCR] interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity.”<sup>157</sup>

[The OCR] has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*— that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.<sup>158</sup>

The Interpretation also cited multiple, recent cases involving alleged Title IX violations and transgender students.<sup>159</sup>

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153. *Id.*

154. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637 (June 22, 2021).

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

156. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32,637.

157. *Id.*

158. *Id.* at 32,638.

159. *Id.* at 32,639.

The Department also concludes that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school’s policy or actions that treat gay, lesbian, or transgender students differently from

Not surprisingly, the Title IX administrative flag often blows with the changing winds of political power. Do we see more consistency at common law?

### *B. Common Law*

The United States Supreme Court has not ruled on whether or not Title IX prohibits transgender based discrimination. However, we have a small, but growing, body of lower court cases, as well as an analogous Supreme Court holding, to provide guidance on the issue.

#### 1. Lower Court Cases

The recent lower court line of applicable transgender cases appears to begin<sup>160</sup> in 2016 with *G.G. v. Gloucester County School Board*.<sup>161</sup> Plaintiff was transmale and a junior in high school. He sought to use the boys' bathroom, but school policy prohibited him from doing so.<sup>162</sup> Plaintiff brought action alleging a Title IX violation and sought a preliminary injunction allowing him to use the boys' bathroom.<sup>163</sup> The court was clear, "[a]t the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity."<sup>164</sup> It cited administrative guidance,

[i]n an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects

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other students may cause harm. See, e.g., *Grimm*, 972 F.3d at 617-18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams*, 968 F.3d at 1306-07 (describing "emotional damage, stigmatization and shame" experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1044-46, 1049-50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); and *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (describing "substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old" transgender girl from denial of equal treatment).

*Id.*

160. I say "appears" as the line may actually begin with *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997), but I find the opinion strangely worded and do not wish to cite it for something it may not be.

161. *G.G. ex. rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017).

162. *Id.* at 714.

163. *Id.* at 717.

164. *Id.* at 715.

to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”<sup>165</sup>

The court reversed the lower court’s denial of Plaintiff’s request for injunction and remanded for further proceeding. While the ruling was not ultimately dispositive, G.G.’s Title IX action, based upon transgender based discrimination, remained alive. *G.G.* was quickly followed by two highly similar cases.

The next applicable case was *Board of Education of the Highland Local School District v. U.S. Department of Education*.<sup>166</sup> While it also did not decide if Title IX prohibited discrimination based on transgender status, *Highland* involved an eleven-year-old transfemale who alleged a Title IX violation when her school policy did not allow her to use the girls’ restroom. In ruling on dueling Motions for Preliminary Injunctions, the court granted Plaintiff’s injunction, ordering that the school allow her to use the girls’ restroom, and concluded that Plaintiff was likely to succeed on the merits of her Title IX claim.<sup>167</sup> Interestingly, the court also reasoned that the definition of “sex” under Title IX, at the time Title IX was originally enacted, was likely indeterminable.<sup>168</sup> This implies that any “current” interpretation of Title IX “sex” is not limited to what may or may not have been contemplated when the law was enacted in 1972.

2017 brought *Whitaker v. Kenosha Unified School District No. 1 Board of Education* where the Defendant high school refused to allow a 17-year-old transmale student to use the boys’ bathroom.<sup>169</sup> Plaintiff brought multiple

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165. *Id.*

166. *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016).

167. *Id.* at 856, 871, 879.

168. *Id.* at 866-67.

Turning first to the language of the statute and regulations, the parties debate the dictionary definition of “sex” at the time of the enactment of Title IX, but the Court sees no need to recite those definitions extensively because they do not settle the question of ambiguity. Suffice it to say that dictionaries from that era defined “sex” in myriad ways and, therefore, Highland has not persuaded the Court that dictionary definitions reflect a uniform and unambiguous meaning of “sex” as biological sex or sex assigned at birth. To the extent that Highland tries to divine Congress’s view of “sex” at the time of Title IX’s enactment, the Court puts little stock in the wisdom of that endeavor or its possibility of success.

*Id.*

169. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1034 (7th Cir. 2017).

claims, including an alleged Title IX violation, and sought a preliminary injunction allowing him access. The Seventh Circuit succinctly held that:

[Plaintiff] can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District has denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects [Plaintiff], as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.<sup>170</sup>

The following year, 2018, provided two cases citing *Whitaker* extensively. The first was *Flack v. Wisconsin Department of Health Services*.<sup>171</sup> While *Flack* involved no Title IX claim, the legal definition of "sex" was at issue when the Wisconsin Department of Health Services denied the Plaintiff's pre-authorization request for transition-related surgical services. The *Flack* court utilized Title IX analysis and stated that, "the scope of what qualifies as prohibited sex discrimination has changed over time."<sup>172</sup> It then elaborated on such changes and how actionable "sex" based discrimination likely encompassed transgender status.<sup>173</sup>

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170. *Id.* at 1034, 1049-50.

171. *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018).

172. *Id.* at 948 (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc)).

173. *Id.* at 948-49.

As the *Hively* court explained, Title VII's prohibition on sex discrimination "has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B"; it now "reaches sexual harassment in the work place, including same-sex workplace harassment; it reaches discrimination based on actuarial assumptions about a person's longevity; and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes," which may "have surprised some who served in the 88th Congress." *Id.* (internal citations omitted). As the Seventh Circuit explained in *Whitaker*, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." 858 F.3d at 1048; see also *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018) ("[T]ransgender is

The second case was *J.A.W. v. Evansville Vanderburgh School Corporation*.<sup>174</sup> Defendant's school policy prohibited a transmale student from using the boys' bathroom. While the court did not ultimately rule on the merits, it reasoned:

this case is indistinguishable from *Whitaker*. In other words, there likely is a line to be drawn with regard to when Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity, but in this case [Defendant] has drawn that line in a place that the Seventh Circuit has already indicated is likely unacceptable. Therefore, the Court finds that J.A.W. has sufficiently established a reasonable likelihood of success on the merits of his claim under Title IX.<sup>175</sup>

*Whitaker* also controlled in 2019's *Grimm v. Gloucester County School Board*.<sup>176</sup> Plaintiff Grimm was transmale. He brought suit contending a Title IX violation based on his high school's policy prohibiting him from using male designated bathrooms.<sup>177</sup> The Defendant argued that Title IX's "plain language" limited "sex" to "a binary term encompassing the physiological distinctions between men and women."<sup>178</sup> The court was clearly, and strongly, not persuaded<sup>179</sup> finding that, "[i]n sum, there is no question that the Board's policy discriminates against transgender students on the basis of their gender nonconformity."<sup>180</sup> "The Court concludes that the Board has discriminated against Gavin Grimm on the basis of his transgender status in violation of Title IX."<sup>181</sup>

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an adjective used to describe a person who has a gender identity that differs, in varying degrees, from the sex observed and assigned at birth.").

*Id.*

174. See *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030 (S.D. Ind. 2018).

175. *Id.* at 1037.

176. *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 444 (E.D. Va. 2019).

177. *Id.* at 450.

178. *Id.* at 456.

179. *Id.*

180. *Id.*

181. *Id.* at 458.

## 2. Potential Supreme Court Guidance

While the Supreme Court has not yet spoken about Title IX and transgender discrimination, it provides case law insight regarding what it is likely to do. Title VII of the Civil Rights Act of 1964 is landmark civil rights law.<sup>182</sup> It prohibits, “employment discrimination based on race, color, religion, sex and national origin.”<sup>183</sup> Both Title VII, and the later Title IX, specifically prohibit sex discrimination,<sup>184</sup> though neither define “sex.”<sup>185</sup> According to at least one author, courts “routinely use Title VII cases in interpreting Title IX,”<sup>186</sup> while another contends that “[t]he Supreme Court had gradually reformed Title IX in the image of Title VII,”<sup>187</sup> and a third asserts that, “[c]ourts have generally mimicked Title VII interpretations in the application of Title IX to combat sex discrimination.”<sup>188</sup> The Court acknowledges that it often “look[s] to its Title VII interpretations of discrimination in illuminating Title IX.”<sup>189</sup> Accordingly, as the Court has not specifically addressed the issue to date, we turn to Title VII to analyze gender and transgender discrimination as potential Title IX “sex” discrimination.

For purposes of this article the most applicable Supreme Court “line” of cases really boils down to two, five decades apart. The foundational “gender” Title VII case is *Price Waterhouse v. Hopkins*.<sup>190</sup> Plaintiff Hopkins alleged unlawful sex discrimination when she was not promoted.<sup>191</sup> She argued the promotion denial rested, at least in part, on her “macho”<sup>192</sup> behavior and her

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182. See, e.g., Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SHRM (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx>.

183. *Title VII of the Civil Rights Act of 1964*, EEOC, at § 2000e, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Dec. 30, 2022).

184. *Id.* at § 2000e(k) (intentionally not limiting Title VII’s protected “sex” to one’s biological sex: “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”).

185. Erin E. Buzuvis, “*On the Basis of Sex*”: *Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J.L. GENDER & SOC’Y 219, 228 (2013) (“Congress did not define ‘sex’ in this context either, nor did it leave a useful record suggesting how it may have interpreted the term.”).

186. Devi M. Rao, *Gender Identity Discrimination is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Under Title IX*, 28 WIS. J.L. GENDER & SOC’Y 245, 263 (2013).

187. Douglas P. Ruth, *Title VII & Title IX =?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector*, 5 CORNELL J.L. & PUB. POL’Y 185, 197 (1996).

188. See Emily Q. Shults, *Sharply Drawn Lines: An Examination of Title IX, Intersex, and Transgender*, 12 CARDOZO J.L. & GENDER 337, 344-45 (2005).

189. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 618 n.1 (1999) (Thomas, J., dissenting).

190. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

191. *Id.* at 231-32.

192. *Id.* at 235.

failure to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>193</sup> The discrimination at issue was not based on her biological sex, but upon gender (her failure to conform to others’ expectations of a person of her biological sex).<sup>194</sup> The Court explained that, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>195</sup> The Court further recognized, “[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees,”<sup>196</sup> and held that “Congress’ intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.”<sup>197</sup> So, *Price Waterhouse* clarified that the undefined class of “sex,” under Title VII, included gender.

The Court decided *Price Waterhouse* in 1989. The Court then decided *Bostock v. Clayton County, Georgia*<sup>198</sup> in 2020. *Bostock* consolidated three separate appeals with functionally indistinguishable operational facts, “[i]n each of these cases an employer allegedly fired a long-time employee simply for being homosexual or transgender.”<sup>199</sup> The Court then laid out a straight-forward issue, “[t]oday, we must decide whether an employer can fire someone simply for being homosexual or transgender.”<sup>200</sup>

The Court specifically rejected the argument that Title VII “sex” should not be interpreted to include transgender status because such language is not in Title VII’s text:

[t]he employers also stress that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. But when Congress chooses not

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193. *Id.*

194. *Id.* at 256. “Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper department.” *Id.*

195. *Id.* at 250.

196. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

197. *Id.* (emphasis added).

198. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

199. *Id.* at 1734.

200. *Id.* at 1737.



to include any exceptions to a broad rule, this Court applies the broad rule.<sup>201</sup>

It then held that “[b]ecause discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.”<sup>202</sup> Finally, the Court provided analytical, as well as pragmatic, perspective:

[t]hose who adopted [Title VII] might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years . . . . But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.<sup>203</sup>

*Bostock’s* impact was quick and significant. Less than two months after *Bostock* the Eleventh Circuit decided *Adams v. School Board*.<sup>204</sup> The plaintiff’s claim was remarkably similar to several addressed above, but those cases were decided before the guidance *Bostock* provided.<sup>205</sup>

Plaintiff Adams was a transmale student. He brought suit against his school, alleging a Title IX violation when school policy prohibited him from using the boys’ bathroom. The court quickly turned to *Bostock*,

[o]ur analysis of Mr. Adams’s Title IX claim benefits from the Supreme Court’s recent decision in *Bostock v. Clayton County*. *Bostock* announced that Title VII’s prohibition on sex discrimination also forbids discrimination based on transgender

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201. *Id.* at 1736.

202. *Id.* at 1735.

203. *See id.* at 1737. “The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. But legislative history has no bearing here, where no ambiguity exists about how Title VII’s terms apply to the facts.” *Id.* at 1736.

204. 968 F.3d 1286 (11th Cir. 2020).

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

status. The Court instructed that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” *Bostock* has great import for Mr. Adams’s Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex. *Bostock* teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the “starkly broad terms” of the statute require nothing less. This reasoning applies with the same force to Title IX’s equally broad prohibition on sex discrimination.<sup>206</sup>

While political winds may shift, it appears that critical administrative agencies either are taking, or are likely to take, the official position that Title IX prohibits transgender based discrimination. The recent line of cases on point, as well as analogous Supreme Court guidance, supports this even more strongly. But perhaps there is another body that could influence whether Title IX can, or should, prohibit discrimination based on transgender status?

### C. The Court of Public Opinion

*“Making Title IX as strong as possible is a no-brainer,” said [then United States] Vice President [Joe] Biden. “What we’re doing here today will better ensure equal opportunity in athletics, and allow women to realize their potential –so this nation can realize its potential.”*<sup>207</sup>

I do not know what role the Court of Opinion may play in the issue of Title IX potentially encompassing transgender based discrimination, but we must examine it as the attendant issue of transgender athletic participation is extremely controversial. “At a time when a rising share of U.S. adults say they know someone who is transgender, there is no public consensus on whether greater social acceptance of transgender people is good or bad for society

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206. *Adams*, 968 F.3d at 1305-07 (citations omitted). See also *Scott v. St. Louis Univ. Hosp.*, 600 F. Supp. 3d 956, 965 (E.D. Mo. 2022) (“Although the Supreme Court has yet to consider whether discrimination against a person for being transgender violates Title IX, ‘[i]t would be logically inconsistent with *Bostock* to find that Title IX permits discrimination for being transgender.’”).

207. *Vice President Biden Announces Strengthening of Title IX*, WHITE HOUSE OFF. VICE PRESIDENT (Apr. 20, 2010), <https://obamawhitehouse.archives.gov/the-press-office/vice-president-biden-announces-strengthening-title-ix>.

. . . .”<sup>208</sup> However, and this is extremely important, “[a] majority of Americans (62%) say trans athletes should only be allowed to play on sports teams that correspond with their *birth* gender, while 34% say they should be able to play on teams that match their gender identity.”<sup>209</sup> At least eleven states have laws limiting sports participation to birth sex.<sup>210</sup> All such state laws were enacted between 2020 and 2021,<sup>211</sup> so these are very recent statutory developments. During that same time twenty-seven states failed to pass, or had vetoed, transgender bills.<sup>212</sup> Regardless of outcome, between 2020 and 2022, thirty-eight states proffered transgender legislation.

We hope that the courts are not susceptible to public opinion, but we have seen that administrative interpretation and enforcement of Title IX certainly can be politically motivated. Perhaps public opinion might influence such actions or agendas. Additionally, public opinion might influence the actions of entities governing athletic opportunities.

#### *D. Competition Regulation*

While common law and federal administrative guidance appear to support Title IX “sex” encompassing transgender status, entities actually governing athletic competitions can take a different position, indirectly or directly. And may increasingly do so.

Title IX applies to any educational entity receiving federal financial assistance.<sup>213</sup> Such institutions are often voluntary members of governing athletic associations, such as the National Collegiate Athletic Association (NCAA), a private entity regulating the conduct of more than 500,000 student athletes at more than 1,100 colleges and universities.<sup>214</sup> The NCAA is not subject to Title IX because it does not receive the requisite federal support.<sup>215</sup> However many of its voluntary member institutions do. The NCAA recently

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208. Anna Brown, *Deep Partisan Divide on Whether Greater Acceptance of Transgender People is Good For Society*, PEW RSCH. CTR. (Feb. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/02/11/deep-partisan-divide-on-whether-greater-acceptance-of-transgender-people-is-good-for-society/>.

209. Justin McCarthy, *Mixed Views Among Americans on Transgender Issues*, GALLUP NEWS (May 26, 2021), <https://news.gallup.com/poll/350174/mixed-views-among-americans-transgender-issues.aspx>.

210. *Do State Laws that Ban Transgender Athletes Violate Title IX?*, PARISI, COAN & SACCOCIO PLLC (Mar. 23, 2022), <https://www.pandslawtitleix.com/blog/2022/march/do-state-laws-that-ban-transgender-athletes-viol/>.

211. *Id.*

212. *Id.*

213. 20 U.S.C. § 1681(a) (2022).

214. *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited Dec. 30, 2022).

215. *NCAA v. Smith*, 525 U.S. 459, 459 (1999).

issued transgender athletic participation guidance<sup>216</sup> and the NCAA requires testosterone testing.<sup>217</sup> If transgender status is protected from discrimination under Title IX, and the NCAA denies transfemale athletes the ability to compete with cisgender female athletes based on test results, there is no Title IX violation as Title IX does not apply to the NCAA. But what about the practical effect of such NCAA regulations and the realistic responses of its member institutions?

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216. See *Transgender Student-Athlete Participation Policy*, NCAA, <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> (last visited Dec. 30, 2022).

217. *Id.*

Phase One – 2022 winter and spring championships

For participation in 2022 winter and spring championships, transgender student-athletes must provide documentation to the CSMAS within four weeks before the selections date for their championship.

The documentation must demonstrate compliance with the 2010 NCAA policy which calls for one year of testosterone suppression treatment. It should also document a one-time serum testosterone level that falls below the maximum allowable level for the sport in which the student-athlete is competing within four weeks of championship selections for that sport. This means that student-athletes who have already fulfilled the 2010 NCAA policy need only provide one validated serum testosterone level in this time frame.

Transgender student-athletes who are participating in regular season competition (including conference championships) for the remainder of academic year 2022 remain subject to the 2010 NCAA policy only.

Phase Two – 2022-23 regular season and championships

Beginning Aug. 1, 2022, participation in NCAA sports requires transgender student-athletes to provide documentation that meets the above criteria for the 2010 NCAA policy (PDF), plus meet the sport standard for documented testosterone levels at the beginning of their competition season and again six months later. This means that student-athletes who have already been competing do not need to demonstrate the newly adapted sport-specific testosterone levels for the entire prior year if they are not available.

For participation in NCAA championships, transgender athletes must additionally provide documentation of testosterone levels to the CSMAS with laboratory work completed within four weeks of the championship selections.

Phase Three – 2023-24 full implementation

Beginning Aug. 1, 2023, participation in NCAA sports requires transgender student-athletes to provide documentation that meets the sport-specific standard submitted twice annually (once at the beginning of competition season and the second six months following) for one year. This process will continue annually for eligible student-athletes.

For participation in NCAA championships, transgender athletes must additionally provide documentation of testosterone levels to the CSMAS with laboratory work completed within four weeks of the championship selections.

*Id.* (citing *2010 NCAA Policy on Transgender Student-Athlete Participation*, NCAA (2010), [https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC\\_TransgenderStudentAthleteParticipationPolicy.pdf](https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderStudentAthleteParticipationPolicy.pdf)).

The NCAA is a voluntary association.<sup>218</sup> No college or university is required to become a member. But, for purposes of athletics, if a school is not a NCAA member, its students and teams cannot compete at the highest levels of collegiate athletics.<sup>219</sup> If a school joins the NCAA, in whole or in part for the ability to compete in athletics, the school will want to make sure its athletes are eligible under NCAA standards. Logically that means NCAA member schools will implement internal procedures consistent with meeting NCAA eligibility requirements. If a school utilizes testosterone level testing, commensurate with NCAA policy guidelines, and a transfemale student-athlete “fails,” then she cannot compete. It seems unlikely schools would place athletes on teams when they cannot compete, so schools would have little choice but to deny the transfemale the opportunity to participate. The real end result is that the transfemale is discriminated against because of her transgender status.

We see this at the secondary school level as well. Some state laws require athletic participants compete only in the sex assigned at their births.<sup>220</sup> Others utilize forms of “review boards” to determine if and how a transgender athlete may compete.<sup>221</sup> Some states look to medical information, including test results.<sup>222</sup> While others go so far as to potentially consider proof of gender reassignment surgery before a student athlete may compete in a classification other than their sex assigned at birth.<sup>223</sup> Again, the individual and cumulative results of these policies are transgender based discrimination directed by athletic governing bodies.<sup>224</sup>

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218. *Overview*, *supra* note 214; *see also NCAA Sports Contracts and Amateurism*, U.S. LEGAL, <https://sportslaw.uslegal.com/sports-agents-and-contracts/ncaa-sports-contracts-and-amateurism/> (last visited Dec. 30, 2022).

219. Marc Daniels, *Is the NCAA Obsolete?*, UNIV. OF CENT. FLA., <https://www.ucf.edu/pegasus/is-the-ncaa-obsolete/> (last visited Dec. 30, 2022) (“While membership in the NCAA is voluntary, there are no bona fide alternatives. To compete at the highest level of college athletics, a school must join the NCAA . . .”).

220. *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Dec. 30, 2022).

221. *Id.*

222. M. Olivia McQuade, *Drug-Free is the Way to Be Except If You’re Transgender: A Constitutional Analysis of High School Athletic Associations’ Transgender Policies*, 32 MARQ. SPORTS L. REV. 185, 187 (2021).

223. *K-12 Policies*, *supra* note 220.

224. On a related note, the International Swimming Federation (FINA) “[just] approved the new ‘gender inclusion’ policy [Sunday, June 19, 2022], after 71.5% of FINA’s member federations voted in support at the FINA Extraordinary General Congress 2022.” Homero De la Fuente, *International Swimming Federation Votes to Restrict Transgender Athletes From Competing in Elite Women’s Aquatics Competitions*, CNN (June 20, 2022, 7:04 AM), <https://www.cnn.com/2022/06/19/us/fina-vote-transgender-athletes/index.html>.

The new gender inclusion policy, which is set to go into effect on June 20, 2022, says that male-to-female transgender athletes will only be eligible to compete in the women’s

## V. “CAN” VERSUS “SHOULD”

*Sport is historically designated by the binary categorization of male and female [and] that conflicts with modern society.*<sup>225</sup>

## A. “Can” Title IX Prohibit Transgender Based Discrimination in Applicable Athletic Contexts?

The Supreme Court has not spoken directly on this issue but a recent, consistent line of lower court cases, as well as the Court’s analogous analysis in *Bostock*,<sup>226</sup> begins to answer this question. Those holdings are increasingly clear that Title IX “sex” encompasses transgender status.<sup>227</sup> Additionally, though perhaps less predictable due to potential political concerns, guidance from administrative agencies such as the OCR and DOJ further support this recognition.<sup>228</sup> In short, these myriad and diverse sources strongly indicate that Title IX’s “sex” based discrimination protection will prohibit transgender based discrimination within educational entities receiving federal financial support. That means such programs will not be able to exclude transgender athletes from competition. So, *can* Title IX prohibit transgender based discrimination in applicable athletic contexts? Yes, and this seems inevitable.

## B. “Should” Title IX Prohibit Transgender Based Discrimination in Applicable Athletic Contexts?

*Is it out of the question for those sports to also address the possibility of unearned bodily advantages posed by trans athletes? Arguably not, but the devil is certainly in the details. If the rules are not to be prejudicial, the standards prescribed will have to apply to all athletes, and they will have to be*

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categories in FINA competitions if they transition before the age of 12 or before they reach stage two on the puberty Tanner Scale.

The policy also says athletes who have previously used testosterone as part of female-to-male gender-affirming hormone treatment will only be eligible to compete in women’s competitions if the testosterone was used for less than a year in total, the treatment didn’t take place during puberty and testosterone levels in serum are back to pre-treatment levels.

*Id.* While FINA, like the NCAA, is not subject to Title IX as it does not receive the requisite federal financial support, it is a major sports governing body and these new regulations further demonstrate that the Court of Public Opinion may not support transfemale athletic participation.

225. Blair R. Hamilton et al., *Integrating Transwomen and Female Athletes with Differences of Sex Development (DSD) into Elite Competition: The FIMS 2021 Consensus Statement*, 51 NAT’L LIBR. MED. 1401, 1401 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7988249/>.

226. *See generally* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

227. *See supra* text accompanying notes 161-81.

228. *See supra* text accompanying notes 122-59.

*narrowly defined to address actual, gendered bodily advantages rather than mere bodily differences. I worry this can't reasonably be done . . . .*<sup>229</sup>

Rather than prematurely laud including transgender status under Title IX “sex,”<sup>230</sup> we must ask what the real results of such action might be. Title IX is an anti-discrimination law, but allowing transfemale athletes to compete against cisgender female athletes will actually create two forms of discrimination. The first, though obvious, is likely an unintentional impact. The second is intentional exclusion from participation.

Title IX prohibits discrimination, based on sex, in applicable programs. The Act never defines “sex,” it also never defines “discrimination.” A common definition of “discrimination” is, “the intended or accomplished differential treatment of persons or social groups for reasons of certain generalized traits.”<sup>231</sup> So, phrased differently, discrimination occurs when people are treated differently from each other, and discrimination may be intentional or unintentional.

Authors and commentators often speak of Title IX providing “equal opportunities,”<sup>232</sup> and creating “a level playing field,”<sup>233</sup> but bringing transgender status under Title IX protection clearly undermines both of those goals. I address them individually.

229. Conor Friedersdorf, *20 Reader Views on Transgender People in Competitive Sports*, ATLANTIC (Mar. 28, 2022), <https://www.theatlantic.com/newsletters/archive/2022/03/20-reader-views-on-transgender-people-in-competitive-sports/629410/>.

230. See, e.g., Li Cohen, *Title IX Protection Extended to Transgender Students Amid Surge of Legislation Attacking Their Rights*, CBS NEWS (June 17, 2021, 7:21 AM), <https://www.cbsnews.com/news/transgender-students-title-ix-protection/>. Or worse, to write that such inclusion exists, when it does not. Lauren Rowello, *How Could Title IX Protect Transgender Children?*, VERYWELLMIND (Aug. 18, 2021), <https://www.verywellmind.com/how-could-title-ix-protect-trans-kids-5194282> (citing Arlin Cuncic, *What is Gender Identity?*, VERYWELLMIND (July 31, 2021), <https://www.verywellmind.com/what-is-gender-identity-5187156>). This author contends that, “[t]his past June [of 2021], the Supreme Court issued an interpretation that declares that Title IX prohibits discrimination based on sexuality or gender identity . . . .” That is not true.

231. Wilhelm Heitmeyer & Kurt Salentin, *Discrimination*, BRITANNICA, <https://www.britannica.com/topic/discrimination-society> (last visited Dec. 30, 2022).

232. See, e.g., *What is Title IX?*, WOMEN’S SPORTS FOUND. (Sept. 10, 2019), <https://www.womenssportfoundation.org/advocacy/what-is-title-ix/>; *Title IX FAQ*, CAL. LUTHERAN UNIV., <https://www.callutheran.edu/title-ix/faq.html> (last visited Dec 30, 2022); *Equal Access to Education: Forty Years of Title IX*, U.S. DEP’T OF JUST. 2 (June 23, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleix-report.pdf>.

233. See, e.g., Hannah Weaver & Siena Swift, *50 Years Ago, Title IX Levelled the Playing Field for Women Athletes*, STUDENT LIFE (Apr. 15, 2022, 12:08 AM), <https://tsl.news/title-ix-level-playing-field/>; Logan Ross, *Title IX: Leveling the Playing Field For All*, 59 NEWS (Feb. 5, 2020, 11:44 AM), <https://www.wvnstv.com/news/title-ix-leveling-the-playing-field-for-all/>; J.C. Phillips, *Title 9 – Leveling the Playing Field*, BACCHUS TALES & CO. (Mar. 2017), <http://bacchustales.com/title-9-leveling-playing-field>.

Title IX prohibits opportunity disparity based on sex. The Department of Education (DOE), the federal department housing the OCR, issues regulations implementing Title IX.<sup>234</sup> Specifically those state, “in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex . . . limit any person in the enjoyment of any right, privilege, advantage, or opportunity.”<sup>235</sup> This includes athletics as,

[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic . . . athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>236</sup>

And

[t]he obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.<sup>237</sup>

As to a “level playing field,” the data is compelling. Transfemale athletes likely have significant physical advantages over cisgender competitors, at least for a period of time, and that period may last for several years.<sup>238</sup> If a primary purpose of Title IX is to create a proverbial “level playing field,” we will see the exact opposite when allowing transfemales to compete directly with cisgender females. This will have two results. First some cisgender competitors will simply be “beaten 3out” by transgender competitors and never able to

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234. 34 C.F.R. § 106 (2022).

235. *Id.* at § 106.31(b)(7) (2022).

236. *Id.* at § 106.41(a) (2022).

237. *Id.* at § 106.6(c) (2022).

238. *See supra* text accompanying notes 119-20.



participate.<sup>239</sup> Second, cisgender females may be beaten in head-to-head competition because they are physically disadvantaged compared to transfemale athletes. Bringing transgender status under the Title IX umbrella may sound inclusive, but it actually treats cisgender and transgender athletes differently from each other, in both real opportunities and true competition, and that is discrimination.

Conversely, if Title IX encompasses transgender status, but athletic governing bodies develop and enforce policies that treat transfemale athletes differently from cisgender female athletes, then we have intentional discrimination against transfemale athletes. There are a few current policy examples, and the number may increase in the near future.

The Missouri State High School Activities Association (MSHSAA) is a voluntary association<sup>240</sup> of approximately 580 Missouri secondary schools.<sup>241</sup> It is the governing body for high school activities throughout the state. The MSHSAA has a transgender athletic policy.<sup>242</sup> It addresses two forms of male to female transition. If a male is transitioning to female, but is not undergoing hormonal treatment, they may not compete on a girls' team, but may compete on co-ed or male teams.<sup>243</sup> However a male transiting to female, undergoing hormone treatment, may not compete on a girls' team, "until one calendar year

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239. As an example, a high school girls' cross country team in Texas has a minimum of five, and a maximum of seven, runners who compete in a meet. *Cross Country Plan, Univ. Interscholastic League*, § 1240(d), <https://www.uil.texas.org/files/constitution/uil-ccr-section-1240.pdf> (last visited Dec. 30, 2022). That means only seven runners may then compete as part of that "team." If a transfemale beats out a cisgender female, for one of those seven spots, then the cisgender athlete cannot compete on that team. And it may well be the case that the transfemale is likely to beat out the cisgender female as the transfemale is likely to be both faster and capable of higher sustained physical effort over time. See *supra* text accompanying notes 116-17. This example assumes a transfemale may compete on a girls' team in Texas. That might not be the case. *Cross Country Plan, supra* note 239, at § 1240(b) ("There shall be one division for boys and one for girls in the respective conferences. Boys' teams may not compete on or against girls' teams.").

240. 2022-23 MSHSAA *Official Handbook*, MO. STATE HIGH SCH. ACTIVITIES ASS'N 17 (July 2022), <https://www.mshsaa.org/resources/pdf/Official%20Handbook.pdf>.

The Missouri State High School Activities Association is a voluntary, nonprofit, educational association of secondary schools established for the purpose of working collaboratively to develop and adopt standards of supervision and administration to regulate the diverse interscholastic activities and contests which are delegated by the member schools to the jurisdiction of the Association.

*Id.* The Mission of the MSHSAA is to "[promote] the value of participation, sportsmanship, team play, and personal excellence to develop citizens who make positive contributions to their community and support the democratic principles of our state and nation." *Id.* at 15.

241. *Missouri State High School Activities Association*, AM. FOOTBALL DATABASE, [https://americanfootballdatabase.fandom.com/wiki/Missouri\\_State\\_High\\_School\\_Activities\\_Association](https://americanfootballdatabase.fandom.com/wiki/Missouri_State_High_School_Activities_Association) (last visited Dec. 30, 2022).

242. 2022-23 MSHSAA *Official Handbook, supra* note 240, at 138.

243. *Id.*

of documented medical/hormone treatment and/or suppression is completed. To maintain eligibility, a trans female student shall thereafter provide continuing medical documentation that the appropriate hormone levels are being maintained.”<sup>244</sup> This policy clearly discriminates against transfemales as they cannot compete as “girls” for one year after completing (not just beginning) hormonal therapy and they cannot continue to compete, after that time, unless they demonstrate ongoing “appropriate hormonal levels.” The state of Wisconsin has a similar policy preventing a male to female transitioning athlete from participating on a female team until completing one year of testosterone suppression therapy.<sup>245</sup>

In 2020, Idaho enacted the Fairness in Women’s Sports Act.<sup>246</sup> That law flatly prohibits transgender females from competing in women’s sports<sup>247</sup> and limits athletic competition classification to biological sex.<sup>248</sup> It is clear, if there is a dispute regarding the student’s sex, that such status shall be medically verified, including use of testosterone level testing.<sup>249</sup> Versions of that original bill spread to more than thirty other state legislatures.<sup>250</sup> It is unquestionable that each of the above policies discriminates based on transgender status because they allow cisgender female athletes to immediately compete as they desire, but they treat transfemale athletes differently by denying them the same opportunities. Additionally, we have at least ten other states that restrict or prohibit athletic participation based on transgender status.<sup>251</sup>

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244. *Id.*

245. *Transgender Participation Policy*, WIS. INTERSCHOLASTIC ATHLETIC ASS’N 2 (2018), <https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf> (“An MTF student must have one calendar year of medically documented testosterone suppression therapy to be eligible to participate on a female team . . .”).

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

247. *Id.* § 33-6203(2) (“Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.”).

248. *Id.* at § 33-6203(1).

249. *Id.* at § 33-6203(3).

250. Clark Corbin, *30 U.S. States Now Considering Version of Idaho’s Transgender Athlete Bill*, IDAHO ED NEWS (Apr. 2, 2021), <https://www.idahoednews.org/news/30-u-s-states-now-considering-version-of-idahos-transgender-athlete-bill/>.

251. *Do State Laws That Ban Transgender Athletes Violate Title IX?*, supra note 210.

## VI. “A TEMPORARY RESPITE”

*While the answer may be clear that Title IX was effective for most of its initial intentions, many have debated in recent years if our structure of collegiate athletics has outgrown the now-50-year-old law.*<sup>252</sup>

Ordinarily I would term this section my “Conclusion,” but that is inaccurate as nothing is concluded. Rather it is a time to ask, “so where does all of the above leave us on Title IX’s fiftieth anniversary?” It leaves us where Title IX often does, basically from inception, with tremendous possibilities and critical, unanswered questions.

Earlier, I opined that Title IX can encompass transgender status, and it seemed inevitable it would do so. I see, based on caselaw evolution and likely administrative action, nothing stopping such development at this time. Having said that, I also see large segments of the Court of Public Opinion, and multiple entities directly governing the rules and administration of transfemale sports participation, clearly contending it should not do so. I previously termed these “can versus should” results “irreconcilable.” They remain so.

Some may now expect me to take a position on the future of transgender protection, under Title IX, based on my above analysis. I do not as that would be unfounded, if not outright reckless. The underlying dilemma is that Title IX is civil rights law.<sup>253</sup> It is a legal device designed to address social inequalities.<sup>254</sup> That may sound admirable in the abstract, but what happens when the legal evolution of a statute, and the positions of significant segments of the society it governs, move in opposite directions on the same issue?

The purpose of law is to provide stability and predictability,<sup>255</sup> but we do not have that here. The issue of transgender protection under Title IX will not be resolved until the Supreme Court directly speaks. However, to date, the Court

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252. Mark Puleo, *Fifty Years of Title IX: What Is It, What Does It Cover and Do We Still Need It?*, ATHLETIC (June 23, 2022), [https://theathletic.com/3374461/2022/06/23/title-ix-facts-fifty/?source=daily\\_email&campaign=601983](https://theathletic.com/3374461/2022/06/23/title-ix-facts-fifty/?source=daily_email&campaign=601983).

253. Reich, *supra* note 4, at 7.

254. *Civil Rights*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/civil\\_rights](https://www.law.cornell.edu/wex/civil_rights) (last visited Dec. 30, 2022) (“Civil rights refer to legal provisions that stem from notions of equality.”); *see also* Rebecca Hamlin, *Civil Rights*, BRITANNICA, <https://www.britannica.com/topic/civil-rights> (Nov. 8, 2022) (citing *Equal Protection*, BRITANNICA, <https://www.britannica.com/topic/equal-protection> (last visited Dec. 30, 2022) (“civil rights, guarantees of equal social opportunities and equal protection under the law . . . .”)) (emphasis in the original).

255. Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability, and the Rule of Law: Stare Decisis as Reciprocity Norm*, U. TEX. SCH. L. 1 (2010), <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (“Legal stability and predictability are a fundamental part of ‘what people mean by the Rule of Law . . . .’”).

has only whispered as to what it might do. Until that day we will see both continuing championing of, and challenges to, transgender protection under Title IX, resulting in ongoing inconsistencies, frequent litigation, and no genuinely functional result. For lack of a better term, it will be a legal and social mess because, while Title IX's evolutionary expansion seemed an irresistible force to date, the actual, operational issues of Title IX encompassing transgender status just may be immovable objects.