

# Not Quite a First Place Finish: An Argument That Recent Title IX Policy Clarification from the United States Department of Education Does Not Adequately Protect Transgender Interscholastic Athletes

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## I. INTRODUCTION

Pat is a transgender girl.<sup>1</sup> Based on her genitalia, at birth, she was assigned the sex of “male.” However, throughout her childhood, Pat

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never felt comfortable living as a boy. She preferred to play with girls at recess—more interested in jumping rope than wrestling with the boys. However, she did have one “traditionally masculine” love: baseball. As the daughter of a recreational baseball coach, Pat began playing ball at the age of four. Throughout her childhood, Pat’s father would take her and her three sisters to a nearby field to practice drills; baseball became the preferred family pastime.

When Pat started high school, she tried out for the baseball team. But, on the field with the boys, she never felt included or even wanted—so she eventually quit. The next year, as a sophomore, Pat came to accept her gender identity. With the support of her family, she began to express herself as a girl by wearing makeup and girls’ clothing. Yet, due to her age and family’s socioeconomic status, Pat did not start hormone therapy, nor had she undergone sex reassignment surgery. Finally able to be herself, Pat’s confidence thrived: she rose to the top 10% of her class, became class president, and even won the title of Homecoming Queen. When California’s School Success and Opportunity Act (AB 1266) passed, Pat finally had the opportunity to play the sport that she loved in a manner consistent with her gender identity. She tried out for softball and made the varsity team at Azusa High School. Surrounded by encouragement from school leaders and peers, the overall experience had been quite positive for Pat.<sup>2</sup> However, if Pat lived in another state, her

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1. Although “transgender” can be seen as an umbrella term that represents many shades of gender nonconforming persons, in this Comment, “transgender” will refer to people whose gender identity, expression, or behavior is different from behavior that is generally coupled with their assigned sex at birth. A transgender girl, or woman, is a transgender individual who currently identifies as a woman. Sometimes a transgender girl or woman is referred to as “MTF,” meaning she was assigned male at birth, but now identifies and lives as a female. Similarly, a transgender boy, or man, is a transgender individual who currently identifies as a male. An “FTM” is one who was assigned female at birth, but now identifies and lives as a male. Not all transgender individuals undergo sex reassignment surgery during their “transitioning” from one sex to the other. Sex reassignment surgery includes surgical procedures that change one’s body to better suit his or her gender identity, such as “top surgery” (breast removal or augmentation) and “bottom surgery” (an alteration of genitalia). Further, this Comment will not use the term “transsexual,” which is sometimes used synonymously with “transgender,” as the author feels that it perpetuates the incorrect interchanging of the words “gender” and “sex.” Finally, transgender is not to be confused with “intersex”—a term used for people born with a reproductive or sexual anatomy and/or chromosomes that does not fit typical definitions of male or female. *Transgender Terminology*, NAT’L CTR. FOR TRANSGENDER EQUALITY (2014), [http://transequality.org/Resources/TransTerminology\\_2014.pdf](http://transequality.org/Resources/TransTerminology_2014.pdf); Jillian T. Weiss, *The Transgender Tipping Point: An Overview for the Advocate*, AM. CONST. SOC’Y FOR LAW & POL’Y 2 (Nov. 2014).

2. This is the true story of Pat Cordova-Goff, the first transgender student to benefit from California’s new state law, A.B. 1266. This law allows transgender youth the opportunity to participate in school athletics according to their gender identity, irrespective of the sex listed on their birth certificate. CAL. EDUC. CODE § 221.5 (West 2015); Rebecca Ruiz, *Transgender Teen Takes Softball Field with All the Other California Girls*, AL JAZEERA AM. (Mar. 15, 2014, 5:00

experience could have been drastically different. While some states, like California, allow students to participate in sports according to their gender identity, irrespective of the sex listed on their birth certificate and without having undergone sex reassignment surgery or hormone therapy, other states require that students participate in sports as the sex listed on their birth certificate unless they have undergone sex reassignment surgery or hormone therapy, and some states do not have any sort of transgender student-athlete policy at all.<sup>3</sup> As a transgender interscholastic athlete, does Pat have any federal protections against discriminatory state policies? It is not clear.

Although the United States Department of Education has made recent clarifications regarding Title IX's protection of transgender students, the department has not addressed student-athlete protection. As a result, policies regarding the interscholastic participation of transgender athletes vary among the states. Thus, this Comment argues that even with such important clarifications from the U.S. Department of Education, more explicit policies, and even statutory changes, are needed to fully protect transgender interscholastic athletes.<sup>4</sup> Part II of this Comment will discuss the history of Title IX and transgender inclusion in Title IX protections. Next, Part III of this Comment will explore the varying state policies relating to transgender athletes, namely inclusive policies and discriminatory policies. Further, Part IV of this Comment will discuss the importance of transgender inclusion in interscholastic

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AM), <http://america.aljazeera.com/articles/2014/3/15/transgender-teentakestothestsoftballfieldwithalltheothergirls.html>; Melissa Masatani, *Experts, Officials Address Concerns Over Transgender Student Athletes*, SAN GABRIEL VALLEY TRIB. (Mar. 12, 2014), <http://www.sbsun.com/social-affairs/20140312/experts-officials-address-concerns-over-transgender-student-athletes>; Pat Cordova-Goff, *Op-ed: Transgender Student, Softball Star*, ADVOCATE.COM (Apr. 7, 2014, 6:00 AM), <http://www.advocate.com/commentary/2014/04/07/op-ed-transgender-student-softball-star>.

3. See CAL. EDUC. CODE § 221.5 (West 2015); *Constitution and Bylaws: Guidelines for Gender Identity Participation*, CAL. INTERSCHOLASTIC FED'N (2013-14), [http://www.cifstate.org/governance/constitution/Guidelines\\_for\\_Gender\\_Identity\\_Participation.pdf](http://www.cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf) (allowing participation according to gender identity); *Section VI Eligibility (Bylaws)*, N.M. ACTIVITIES ASS'N, [http://www.nmact.org/file/Section\\_6.pdf](http://www.nmact.org/file/Section_6.pdf) (last visited Sept. 17, 2015) (requiring students to participate as the sex listed on their birth certificate); N.M. STAT. ANN. § 24-14-25(D) (West 2015) (stating that the sex listed on a New Mexico birth certificate may only be amended upon proof of surgical procedure); *Official Handbook*, DEL. INTERSCHOLASTIC ATHLETIC ASS'N, <http://www.doe.k12.de.us/Page/1670> (last updated Sept. 15, 2014) (providing no policy for transgendered athletes).

4. For the purpose of this Comment, the term "interscholastic athletics" refers to competitive, club, or intramural sports in the K-12 setting. This distinction has been made, as it may be appropriate to govern athletics differently at the collegiate level. See Pat Griffin & Helen J. Carroll, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES, Co-Sponsored by: Nat'l Ctr. for Lesbian Rights, Women's Sports Found., & It Takes a Team! 13, (Oct. 4, 2010) ("At the high school level, the focus should be on full participation in athletics for all students.").

athletics according to gender identity and dispel any arguments to the contrary. Part V of this Comment will introduce what policy changes need to occur to better protect transgender interscholastic athletes, as well as outline the importance of such changes. Proposed changes include a “significant guidance document” from the U.S. Department of Education expressing that Title IX requires an inclusive transgender policy among interscholastic athletic programs in every state and the addition of “gender identity” into the statutory language of Title IX. Finally, Part VI of this Comment will discuss why these particular changes are necessary: Subpart A will discuss state community and legislative backlash in states with inclusive transgender interscholastic student athlete policies, while Subpart B will highlight the unpredictability of transgender student-athlete protection from the court.

## II. TITLE IX AND TRANSGENDER STUDENTS

In the United States, the abundance of educational opportunities for women is a relatively new concept. Prior to the 1970s, women were often excluded from higher education or only had limited opportunities to attend elite colleges and universities.<sup>5</sup> As a part of the Education Amendments of 1972, Congress passed Title IX to combat such inequalities.<sup>6</sup> Section 1681(a) specifically reads that “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.”<sup>7</sup> Although Title IX was originally envisioned as a tool to ensure that women were not denied educational opportunities on the basis of sex, the statutes have led to the protection of underrepresented groups in educational areas outside the classroom; this has come to include athletics. While athletics are not specifically mentioned in the text of Title IX, Title IX’s implementing regulations state that sex discrimination will not be tolerated “in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient of federal funds.”<sup>8</sup> Furthermore, the U.S. Department of Education, Office for Civil Rights (OCR),<sup>9</sup>

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5. *Equal Access To Education: Forty Years of Title IX*, U.S. DEP’T OF JUSTICE 2 (June 23, 2012), <http://www.justice.gov/crt/about/edu/documents/titleixreport.pdf>.

6. *Id.*

7. Education Amendments of 1972, Title IX, 20 U.S.C. § 1681(a) (1972).

8. 34 C.F.R. § 106.41 (2015).

9. The Department of Education, Office of Civil Rights Division has the administrative right to enforce Title IX against schools receiving federal funding. Lindsay Hart, *With Inadequate Protection Under the Law, Transgender Students Fight To Access Restrooms in Public Schools Based on Their Gender Identity*, 41 N. KY. L. REV. 315, 318 (2014).

has long established that school athletics are covered under this law.<sup>10</sup> Thus, not only has Title IX opened the door for women in education, but it has also allowed them access to the playing field.<sup>11</sup>

Whereas Title IX's protection of women has been recognized since the policy's inception, it is not until recently that federal government actors expanded the law to cover other victims of sex discrimination: transgender persons. On April 29, 2014, the OCR expressly clarified that Title IX protects transgender individuals as well.<sup>12</sup> In a fifty-three-page document entitled, "Questions and Answers on Title IX and Sexual Violence," the Assistant Secretary of the OCR discussed what protections Title IX offers students, teachers, and staff in response to sexual violence, and that schools need to have policy in place to address these protections.<sup>13</sup> In response to the question of, "Does Title IX protect all students from sexual violence?" the OCR reads:

Yes. Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.<sup>14</sup>

Furthermore, the document also subsequently notes, "[t]he actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations."<sup>15</sup> Although this document addresses Title IX in the sexual violence context, such language has been understood as the OCR's first public and mass-distributed clarification that Title IX

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10. *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last updated Mar. 14, 2005).

11. Because Title IX has offered women equal access to athletic opportunities, there has been a substantial increase in female participation in school-sponsored athletics. For example, the number of female participants in high school athletics has risen from less than 500,000 in 1972 to over 3,000,000 in 2011. *Equal Access to Education: Forty Years of Title IX*, U.S. DEP'T OF JUSTICE 1-4 (June 23, 2012), <http://www.justice.gov/crt/about/edu/documents/titleixreport.pdf>.

12. *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T OF EDUC. OFF. FOR C. R. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Prior to this clarification, any Title IX protection of transgender or gender nonconforming individuals has been established by the court. See, e.g., *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (holding that a transgender student was protected from sexual harassment from her professor under Title IX); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011) (holding that one could bring a claim under Title XI for harassment due to nonconformity with sex stereotypes).

13. *Questions and Answers on Title IX and Sexual Violence*, *supra* note 12.

14. *Id.* at 5.

15. *Id.*

protects transgender individuals.<sup>16</sup> Thus, it has been interpreted that schools need to develop policies for transgender students in all areas covered by Title IX, including athletics.<sup>17</sup>

Later that year, on December 1, 2014, the OCR released another statement clarifying transgender protections under Title IX. This statement, “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,” clarifies that:

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 in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.<sup>18</sup>

However, the document also states that such explanation of protections does not include interscholastic, club, or intramural athletics.<sup>19</sup> Thus, it follows that transgender students are able to participate in some school-based activities in accordance with their gender identity, but not all. As a result, the OCR’s recent clarifications fail to consistently and adequately protect the rights of transgender interscholastic athletes.

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16. See *Big News! DOE Guidance Says Transgender Students Protected Under Federal Law*, TRANSGENDER L. CTR., <http://transgenderlawcenter.org/archives/10249> (last visited Nov. 5, 2014); Ian S. Thompson, *Victory! Title IX Protects Transgender Students*, AM. C.L. UNION, WASH. LEGIS. OFF. (May 1, 2014, 11:43 AM), <https://www.aclu.org/blog/lgbt-rights-womens-rights/victory-title-ix-protects-transgender-students>; Emma Margolin, *Transgender Students Protected Under Title IX, DOE Says* (Apr. 30, 2014, 4:15PM), MSNBC, <http://www.msnbc.com/msnbc/transgender-students-protected-under-title-ix>; Michel Martin, *Controversy over Title IX Protecting Transgender Students*, NPR (May 06, 2014, 11:50 AM ET), <http://www.npr.org/2014/05/06/310099267/controversy-over-title-ix-protecting-transgender-students>; Tim Stevens, *Transgender Policy Established by NCHSAA*, NEWSOBSERVER.COM (May 21, 2014), [http://www.newsobserver.com/2014/05/21/3878788\\_nchsaa-joins-transgender-discussion.html?rh=1](http://www.newsobserver.com/2014/05/21/3878788_nchsaa-joins-transgender-discussion.html?rh=1).

17. See TRANSGENDER L. CTR., *supra* note 16; Thompson, *supra* note 16; Margolin, *supra* note 16; Stevens, *supra* note 16, at 1.

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

19. *Id.* at 3.

III. STATE POLICIES<sup>20</sup>

Because the OCR has not explicitly stated that Title IX protects transgender student-athletes in their recent Title IX clarifications, state policies for transgender student-athlete participation vary across the country.<sup>21</sup> Most of these policies are the creation of the state's athletic association that governs high school sports, rather than the legislature.<sup>22</sup> While a majority of states *do* have a transgender student-athlete policy,<sup>23</sup> as of the 2015-2016 school season, only seventeen states and Washington, D.C. have a truly inclusive transgender policy.<sup>24</sup> Inclusive policies allow

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20. It is important to note that this Comment solely discusses state policies or state interscholastic athletic association policies that specifically protect transgender student athletes. Other states, cities, or school districts may have policies that protect citizens or students based on their gender identity. However, without judicial interpretation, it is unclear how such a policy would affect transgender rights in athletic participation. But, it is important to recognize with the current lack of clear federal protection, a local policy may be a beneficial option for transgender individuals seeking justice. Further, any policies mentioned in this Comment are as of August 11, 2015.

21. See *Constitution and Bylaws: Guidelines for Gender Identity Participation*, *supra* note 3; *Section VI Eligibility (Bylaws)*, *supra* note 3; *Official Handbook*, *supra* note 3.

22. However, because such statewide associations are incorporated to regulate interscholastic athletics among most schools in the state, including all public schools, and involve “pervasive entwinement of state school officials” in the structure of the association, the Court has recognized these association may be treated as a state actor, and thus subject to federal regulations like Title IX. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 290-91 (2001).

23. Currently, twelve states do not have a policy set forth for transgender student athletes. These states include Alaska, Delaware, Hawaii, Indiana, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Tennessee, Texas, and West Virginia. See ALASKA SCH. ACTIVITIES ASS’N 2015-2016 HANDBOOK, <http://asaa.org/wp-content/uploads/handbook/1516handbook/asaa/complete/2015-2016-ASAA-Handbook.pdf> (last updated July 20, 2015); *Handbook*, DEL. INTERSCHOLASTIC ATHLETIC ASS’N (2014-15), <http://www.doe.k12.de.us/Page/1670> (last updated Sept. 15, 2014); *HHSAA Handbook*, HAW. HIGH SCH. ATHLETIC ASS’N (2014), <http://www.sportshigh.com/handbook>; *Bylaws and Articles of Incorporation*, IND. HIGH SCH. ATHLETIC ASS’N, INC. (2015-16), <http://www.ihsaa.org/Portals/0/ihsaa/documents/about%20ihsaa/2015-16%20By-Laws.pdf>; *Handbook*, LA. HIGH SCH. ATHLETIC ASS’N, [http://www.lhsaa.org/handbook/section\\_1\\_-\\_Eligibility98.pdf](http://www.lhsaa.org/handbook/section_1_-_Eligibility98.pdf) (last updated Sept. 9, 2015); *MHSAA Handbook*, MISS. HIGH SCH. ACTIVITIES ASS’N (2015-16), <http://www.misshsaa.com/Schools/Publications.aspx>; *Handbook*, MONT. HIGH SCH. ASS’N (2014-15), <http://www.mhsa.org> (follow “Handbook and Forms” hyperlink; then follow “MHSA Handbook” hyperlink); *Constitution and Bylaws*, NEB. SCH. ACTIVITIES ASS’N (2015-16), <http://nsaahome.org/textfile/yb/c&b.pdf>; *Constitution & Bylaws and Handbook of Interpretations*, N.D. HIGH SCH. ACTIVITIES ASS’N (July 2015), [http://www.ndhsaa.com/files/Constitution\\_and\\_ByLaws.pdf](http://www.ndhsaa.com/files/Constitution_and_ByLaws.pdf); *TSAA Handbook*, TENN. SECONDARY SCH. ATHLETIC ASS’N (2015-16), <http://tssaa.org/wp-content/uploads/handbook.pdf>; *District Executive Committee Athletic Handbook*, UNIV. INTERSCHOLASTIC LEAGUE (2015-16), [http://www.uiltexas.org/files/athletics/manuals/DEC\\_Handbook\\_15-16.pdf](http://www.uiltexas.org/files/athletics/manuals/DEC_Handbook_15-16.pdf); *Rules and Regulations Handbook*, W. VA. SECONDARY SCH. ACTIVITIES COMM’N, <http://www.wvssac.org/rules-and-regulations/> (last updated July 2015).

24. States with inclusive transgender student-athlete policies include California, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington,

transgender students to participate on interscholastic sports teams in a manner consistent with their gender identity, irrespective of the sex listed on their birth certificate and absent sex reassignment surgery or hormone therapy.<sup>25</sup>

In 2008, the Washington Interscholastic Activities Association (WIAA) established the first inclusive policy for transgender and gender nonconforming athletes.<sup>26</sup> Along with providing helpful information regarding gender identity, the WIAA policy lays out an in-depth process

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Wyoming. Further, Washington D.C. also has an inclusive policy for transgender interscholastic athletes. See *Constitution and Bylaws: Guidelines for Gender Identity Participation*, CAL. INTERSCHOLASTIC FED'N (2015-16), [http://www.cifstate.org/governance/constitution/Guidelines\\_for\\_Gender\\_Identity\\_Participation.pdf](http://www.cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf); *Constitution of the Colorado High School Activities Association, Article 3§ 300*, COLO. HIGH SCH. ACTIVITIES ASS'N 1, <http://www2.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf> (last visited Aug. 11, 2015); *Handbook*, CONN. INTERSCHOLASTIC ATHLETIC CONF. 55-56 (2015-16), [http://www.casciac.org/pdfs/ciachandbook\\_1516.pdf](http://www.casciac.org/pdfs/ciachandbook_1516.pdf); *FHSAA Handbook*, FLA. HIGH SCH. ATHLETIC ASS'N 48-49 (2015-16), <http://www.fhsaa.org/rules/fhsaa-handbook> (follow hyperlink "Complete 2015-16 Handbook" hyperlink); *IHSA Transgender Policy*, ILL. HIGH SCH. ASS'N, [http://www.ihsa.org/documents/equity/Equity-Transgender\\_Policy\\_Revised.pdf](http://www.ihsa.org/documents/equity/Equity-Transgender_Policy_Revised.pdf) (last visited Sept. 28, 2015); *K-12 Policies: Maryland*, TRANS\*ATHLETE, [http://media.wix.com/ugd/2bc3fc\\_c27051cd7b4a48759fcc5c77e34f7fab.pdf](http://media.wix.com/ugd/2bc3fc_c27051cd7b4a48759fcc5c77e34f7fab.pdf) (last visited Sept. 28, 2015); *Nondiscrimination on the Basis of Gender Identity*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC. (2013), <http://www.doe.mass.edu/ssce/GenderIdentity.pdf#search=%22Guidance%22>; Tim Post, *High School League Votes to Let Transgender Athletes Pick Their Teams*, MINN. PUB. RADIO NEWS (Dec. 4, 2014, 5:05 PM) <http://www.mprnews.org/story/2014/12/04/transgender-athletes-policy-vote>; *NIAA Board Meeting Minutes*, NEV. INTERSCHOLASTIC ACTIVITIES ASS'N, 4 (Jan. 2014) [http://static.psbins.com/d/9/ne9jn6ezuc7rui/Board\\_Meeting\\_Minutes\\_-\\_January\\_2014.pdf](http://static.psbins.com/d/9/ne9jn6ezuc7rui/Board_Meeting_Minutes_-_January_2014.pdf); *By-Law Article III Sports Medicine*, N.H. INTERSCHOLASTIC ATHLETIC ASS'N, [http://nhiaa.org/pdfs/5510/5bylawarticleiii\\_sportsmedicine.pdf](http://nhiaa.org/pdfs/5510/5bylawarticleiii_sportsmedicine.pdf) (last visited Sept. 28, 2015); *New York Approves Guidelines for Transgender High School Student-Athletes*, ABC7NY (July 30, 2015) <http://abc7ny.com/sports/new-york-approves-guidelines-for-transgender-high-school-student-athletes/893803/>; *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students*, THE STATE EDUC. DEP'T: N.Y. (July 2015), [http://www.p12.nysed.gov/dignityact/documents/Transg\\_GNCGuidanceFINAL.pdf](http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf); *Article 1 Organization*, THE R.I. INTERSCHOLASTIC LEAGUE, 11-13, [http://www.riil.org/files/8214/3861/6354/ARTICLE\\_1\\_ORGANIZATION\\_2015.pdf](http://www.riil.org/files/8214/3861/6354/ARTICLE_1_ORGANIZATION_2015.pdf) (last visited Sept. 28, 2015); *Athletic Handbook: General Sports Information*, S.D. HIGH SCH. ACTIVITIES ASS'N (2015-16), <http://www.sdhsaa.com/Portals/0/PDFs/Handbook/Athletics/6-GeneralSportsInformation.pdf>; *Handbook*, UTAH HIGH SCH. ACTIVITIES ASS'N (Sept. 25, 2015), <http://uhsaa.org/Publications/Handbook/Handbook.pdf>; *VPA Activities/Athletic Policies*, VT. PRINCIPALS' ASS'N, 4-7, <http://www.vpaonline.org/cms/lib6/VT08001199/Centricity/Domain/11/VPAPOLICIESUpdated3-26-15.pdf> (last updated Mar. 26, 2015); *Handbook and Policy Manual*, VA. HIGH SCH. LEAGUE, INC., 106 (July 2015), <http://www.vhsl.org/doc/upload/pub-handbook-2015-161.pdf>; *Handbook*, WASH. INTERSCHOLASTIC ACTIVITIES ASS'N 49-50, 95 (2014-2015), <http://www.wiaa.com/ConDocs/Con1287/handbook2014/2014-15%20Handbook%20web.pdf>; *Handbook*, WYO. HIGH SCH. ACTIVITIES ASS'N, 39-41 (2015-16), <http://www.whsaa.org/handbook/Handbook.pdf>; *DCSAA Handbook*, D.C. STATE ATHLETIC ASS'N 52-53 (Sept. 1, 2014), <https://www.dcsaasports.org/wp-content/uploads/2012/10/2014-15-Handbook-English.pdf>.

25. See sources cited *supra* note 24.

26. Scott Skinner-Thompson & Iona M. Turner, *Title IX's Protections For Transgender Student Athletes*, WIS. J. LAW, GEND. & SOC'Y. 271, 289 (2013).

for transgender student-athletes wishing to participate in a sport in a manner consistent with their gender identity—allowing them a space “to exist and thrive” while ensuring fairness for all competitors.<sup>27</sup>

In the state of Washington, in order for a student to participate in sports according to his or her gender identity, the student must supply notice to the school that he or she wishes to participate on a school sports team that is consistent with his or her gender identity, although this conflicts with the sex listed on his or her birth certificate.<sup>28</sup> Once the school has received notice, the administrator will notify the WIAA.<sup>29</sup> Next, the student will appear before an eligibility committee, specifically established to address gender identity appeals.<sup>30</sup> This committee is composed of three of the following: a physician experienced in gender identity healthcare and standards of care, a licensed mental health professional also experienced in gender identity healthcare, a school administrator from a nonappealing school, a WIAA staff member, and an advocate familiar with gender identity and expression issues.<sup>31</sup> During the appeal, the committee will examine the student’s current transcript and school registration information, documentation depicting the student’s consistent gender identification (this may include written statements from the student, his or her parents or legal guardians, and healthcare providers), and any other relevant information.<sup>32</sup> If the Gender Identity Eligibility Committee does not find the student’s request to be bona fide, the student may appeal to the WIAA Executive Director.<sup>33</sup> When there is confirmation that the student consistently lives according to his or her proclaimed gender identity, the eligibility committee or the WIAA Executive Director will affirm that the student is able to participate in WIAA athletics in a manner that facilitates his or her gender needs.<sup>34</sup> Once the determination is made, it is final; a student does not need to undergo this process again to participate in a sport under

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27. All information received for this process remains confidential. *Handbook*, WASH. INTERSCHOLASTIC ACTIVITIES ASS’N 49-50, 95, 97 (2014-2015), <http://www.wiaa.com/ConDocs/Con1287/handbook2014/2014-15%20Handbook%20web.pdf>.

28. *Id.* It should also be recognized that inclusive policies do not require transgender students to play on the sports team consistent with their gender identity; they only allow students to do so if they choose. A student’s decision should be personal, based on “privacy, safety, and comfort.” Skinner-Thompson & Turner, *supra* note 26, at 296.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

the jurisdiction of WIAA.<sup>35</sup> Upon request, the WIAA will also provide gender identity resources and training to the student's school to aid in the transition.<sup>36</sup>

Being the first of its kind, the WIAA policy created a "best practice" model for the other states with inclusive policies. In fact, most of the other state interscholastic athletic associations that have established an inclusive policy towards transgender athletes follow a very similar format to the WIAA policy. Such policies include that a student must provide notice to his or her school that he or she wishes to participate in athletics in a manner corresponding with his or her gender identity, the production of documentation that depicts the youth's gender identity is sincerely held, a ruling at the school or athletic association level, and appeals opportunities.<sup>37</sup> However, one state with a slight difference in its inclusion methods is California.

While most of the states with inclusive policies for transgender interscholastic athletes are like Washington, in that their policies are only regulatory in nature, California's policy is actually set in statute.<sup>38</sup> In 2013, California Governor Brown signed AB 1266 into law, a revolutionary law that allows K-12 students to fully participate in all activities, sports teams, programs, and facilities in a way consistent with their gender identity.<sup>39</sup> This statutory addition shows that California is dedicated to the long-lasting rights of transgender interscholastic athletes, putting the state "at the forefront of leadership on transgender rights," and far ahead of states with discriminatory policies towards transgender interscholastic athletes.<sup>40</sup>

In response to the OCR's clarification that Title IX protects transgender students, the National Federation of State High School Associations, the national organization that guides state interscholastic athletic associations, stressed the need for state associations to develop

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35. *Id.*

36. *Id.*

37. *Id.*

38. Cal. Educ. Code § 221.5 (West 2015).

39. *CA Governor Brown Signs Historic Transgender Students Bill into Law*, TRANSGENDER L. CTR., <http://transgenderlawcenter.org/archives/8756> (last visited Nov. 30, 2014); *California Law Allows Transgender Students To Pick Bathrooms, Sports Teams They Identify With*, CBS NEWS (Aug. 12, 2013), <http://www.cbsnews.com/news/california-law-allows-transgender-students-to-pick-bathrooms-sports-teams-they-identify-with/>.

40. *California Law Allows Transgender Students To Pick Bathrooms, Sports Teams They Identify With*, *supra* note 39 (quoting Democratic Assembly Speaker John Perez).

transgender student-athlete policies.<sup>41</sup> However, as a result, some states developed discriminatory state transgender interscholastic policies. Such policies require a transgender student to either participate as the sex listed on his or her birth certificate (states differ as to if an amended birth certificate will suffice), undergo sex reassignment surgery in order to play on a team consistent with a student's gender identity, take hormones in order to play on a team consistent with a student's gender identity, or a mixture of these three provisions.<sup>42</sup> Such policies directly diminish the importance of the student's self-identification as they impose policies that require body modification and do so for no legitimate reason.<sup>43</sup>

#### IV. THE IMPORTANCE OF TRANSGENDER INCLUSION IN INTERSCHOLASTIC ATHLETICS CONSISTENT WITH IDENTITY

Inclusive interscholastic athletic policies are ideal, as they provide safe and respectful access to school athletics for all students. This is especially important as athletics are seen as a major component of the U.S. education system—commonly justified as an academic aid.<sup>44</sup> Sports participation is said to foster “teamwork, self-knowledge, self-esteem, and citizenship,” as well as improve a student's emotional well-being and actually boost a student's chance of college acceptance.<sup>45</sup> Consequently,

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41. *Boston To Host 95th Annual NFHS Summer Meeting*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Jan. 8, 2015), <http://www.nfhs.org/articles/boston-to-host-95th-annual-nfhs-summer-meeting/>.

42. *See GHSA Constitution and By-Laws*, GA. HIGH SCH. ASS'N 16 (2015-16), <http://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2015-16Complete.pdf> (stating that “[a] student's gender is determined by the gender noted on his/her certificate at birth.”); *Section VI Eligibility (Bylaws)*, N.M. ACTIVITIES ASS'N, VI-1, [http://www.nmact.org/file/Section\\_6.pdf](http://www.nmact.org/file/Section_6.pdf) (last visited Sept. 28, 2015) (stating that “[p]articipating students are required to compete on their original or amended birth certificates.”) *But see*, N.M. Stat. Ann. § 24-14-25(D) (West 2006), (requiring that proof of a surgical procedure is necessary in order to amend a New Mexico birth certificate); *Handbook*, OR. SCH. ACTIVITIES ASS'N (2015-16), <http://www.osaa.org/docs/handbooks/osaahandbook.pdf> (stating that hormone therapy is necessary in order for MTF student athletes to participate on a female team); *Handbook*, KY. HIGH SCH. ATHLETIC ASS'N 26 (2014-15), <http://khsaa.org/general/regulations-and-policies/handbook/> (follow “2014-15 KHSAA Handbook, Section by Section” hyperlink, then follow “E-Board of Control Policies and Procedures” hyperlink) (stating that transgender students must participate in athletics according to the sex on their birth certificates unless they have undergone sex reassignment surgery and take hormones if the surgery occurred postpuberty).

43. *See infra* Part IV.

44. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1741 (2014).

45. *Id.*

it is not surprising that more than 7.7 million students played school-sponsored sports in the 2012-2013 school year.<sup>46</sup>

These academic benefits may be especially important for transgender students. The Gay, Lesbian & Straight Education Network (GLSEN) recently released *The 2013 National School Climate Survey*, which is a detailed look into the experiences of Lesbian, Gay, Bisexual, and Transgender (LGBT) youth in United States schools. The survey found that a third of students reported frequently hearing negative remarks about transgender persons, such as “tranny” or “he-she.”<sup>47</sup> Furthermore, 42.2% of transgender students reported being prevented from using their preferred names; 59% of transgender students have been required to use the bathroom of their legal sex, despite their gender identity; and 31.6% of transgender students have been prevented from wearing attire that does not correspond to their legal sex.<sup>48</sup> Such LGBT students that reported victimization due to their gender identity were more than three times more likely to miss school, had lower GPAs, were twice as likely to report that they did not plan to pursue postsecondary education, and had higher levels of depression and lower levels of self-esteem.<sup>49</sup> However, by feeling safe and welcome to partake in interscholastic sports in a manner consistent with their gender identity, transgender students can reap the academic benefits of such participation. Thus, it is imperative that states adopt inclusive policies because the value of athletics should be accessible to all students.

Inclusive student athletic policies across the states also aid in reducing economic barriers to transgender student athletes because they do not require expenses such as hormone therapy, gender reassignment surgery, and the changing of the sex on the birth certificate. Cost is one of the many reasons that minors do not undergo medical and hormone therapy.<sup>50</sup> It is estimated that only 42% of insurance plans cover mental

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46. *2012-13 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCH. ASS'N (2013), [http://www.nfhs.org/ParticipationStatics/PDF/2013-14%20NFHS%20Handbook\\_pgs52-70.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2013-14%20NFHS%20Handbook_pgs52-70.pdf).

47. Joseph G. Kosciw, Emily A. Greytak, Neal A. Palmer & Madelyn J. Boesen, *THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK (GLSEN)* xvii (2013).

48. *Id.* at xvii-xviii.

49. *Id.* at xviii.

50. Skinner-Thompson & Turner, *supra* note 26, at 276. Cost is not the only barrier to minors undergoing medical treatment for transitioning; some medical professionals do not suggest this transition at an early age. This is especially true for irreversible medical interventions, like genital surgery. See World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender- Nonconforming People, Version 7*, 13 INT'L J. OF TRANSGENDERISM 165, 178 (2012), [http://www.wpath.org/uploaded\\_files/140/](http://www.wpath.org/uploaded_files/140/)

health counseling, hormone therapy, and surgical procedures.<sup>51</sup> As a result, many transgender individuals and their families must pay for medical procedures associated with transitioning out-of-pocket. Such costs can range from \$30 a month for hormones, \$100 for therapy visits, and between \$5,000 and \$30,000 for sex reassignment surgery.<sup>52</sup> Furthermore, changing one's sex on a birth certificate can be costly as well. In many states, in order to change the sex of your birth certificate, a court order is required.<sup>53</sup> Thus, in many instances, it is necessary for a transgender individual, seeking to change his or her birth certificate to obtain a lawyer for this process.<sup>54</sup> This necessity can produce significant costs above the standard certificate-change fees. Therefore, in states with policies that require transgender interscholastic athletes to participate on a sports team as the sex listed on his or her birth certificate or undergo sex reassignment surgery and/or hormone therapy, such related costs can be a huge barrier to athletic participation. For low-income transgender students, it can be hard to buy clothes or makeup that conform to their gender identity, let alone undergo medical procedures or legal status changes.<sup>55</sup> Thus, an inclusive state policy toward transgender student-athletes actually facilitates further student athletic participation.

Finally, by having an inclusive policy towards transgender students, schools model societal inclusion practices. This is extremely important, as one of the missions of education is to promote the notion of

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files/IJT%20SOC,%20V7.pdf ("Genital surgery should not be carried out until patients reach the legal age of majority to give consent for medical procedures in a given country and patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity.").

51. Blake Ellis, *Transgender and Struggling To Pay Medical Costs*, CNNMONEY (Aug. 22, 2013 5:40 PM), <http://money.cnn.com/2013/08/22/pf/transgender-medical-costs/>.

52. *Id.*

53. See *Changing Birth and Death Certificates*, ARK. DEP'T OF HEALTH, <http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/ChangingBirthandDeathCertificates.aspx> (last visited Sept. 28, 2015); *Vital Records FAQ*, GA. DEP'T OF PUB. HEALTH, <http://dph.georgia.gov/vital-records-faq> (last visited Sept. 28, 2015); *Frequently Asked Questions*, KY. CABINET FOR HEALTH AND FAMILY SERV., <http://chfs.ky.gov/dph/vital/faqs.htm> (last updated July 15, 2014); *Correcting a Vital Record*, N.Y. DEP'T OF STATE DIV. OF VITAL RECORDS ADMIN., <https://www.sos.nh.gov/CorrectVR.aspx> (last visited Nov. 22, 2014); *Birth Certificates*, N.M. DEP'T OF HEALTH, <http://nmhealth.org/about/erd/bvrhs/vrp/birth/> (last visited Sept. 28, 2015); *Fees at a Glance*, STATE OF N.J. DEP'T OF HEALTH, <http://www.state.nj.us/health/vital/fees.shtml> (last visited Sept. 28, 2015). This is not an exhaustive list of states that require a court order.

54. See *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines> (last updated Feb. 3, 2015).

55. This situation can be seen in the home life of California softball player, Pat Cordova-Goff. She has been living in a motel for the last four years with her family, but sometimes they cannot afford the nightly rate. Pat can barely afford makeup, let alone medical procedures for her transitioning. Cordova-Goff, *supra* note 2.

“citizenship and personal and community development.”<sup>56</sup> It is suggested that “fostering such inclusion while students are still in primary and secondary school will have a dramatic impact in reducing feelings of stigmatization and isolation that many transgender individuals experience.”<sup>57</sup> Policies that allow a student to participate in interscholastic athletics in a manner consistent with his or her gender identity create an environment where all students feel included and valued for who they are. By creating this safe environment, such policies teach students how to treat one another in an accepting manner. This is ideal for community development, diversity, and the reduction of stigmatization. Thus, this is the standard that schools should adopt, as the consequences are beneficial to all students, not just transgender students.

These benefits of inclusive transgender interscholastic policies largely outweigh the negative connotations associated with such policies. The main fears surrounding inclusive policies involve unfair athletic advantages for male-to-female (MTF) students, injury to cisgender<sup>58</sup> females playing on a sports team with transgender females, the possibility that male athletes will “pose” as a female in order to succeed in interscholastic athletics, and lack of privacy rights in the locker room.<sup>59</sup> However, in K-12 education, these theories are not well founded.

In preadolescent children, hormone levels do not differ significantly between the sexes.<sup>60</sup> Upon puberty, there will be a difference in hormones between girls and boys. However, the age range of puberty for girls and boys differ; while most girls will be physically mature by the age of 15-17, some boys may be still maturing during this time.<sup>61</sup> Also, hormone levels and advances through puberty will be unique with every

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56. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 44, at 1726.

57. Skinner-Thompson & Turner, *supra* note 26, at 273.

58. “Cisgender” is a term used by some to describe people who are not transgender. “Cis-” is a Latin prefix meaning “on the same side as,” and is therefore an antonym of “trans-.” *GLAAD Media Reference Guide—Transgender Issues*, GLADD, <http://www.glaad.org/reference/transgender> (last visited Sept. 28, 2015).

59. Stephanie Francis Ward, *A Gender Change at a Tender Age*, 99 A.B.A. J. 42, 47-48 (Oct. 2013).

60. *Guidelines for Creating Policies for Transgender Children in Recreational Sports*, TRANSGENDER L. & POLY INST. 3, [http://media.wix.com/wgd/26c3fc\\_bcd03b8e19147c71c0153c81e96babcb.pdf](http://media.wix.com/wgd/26c3fc_bcd03b8e19147c71c0153c81e96babcb.pdf) (last updated Sept. 2009).

61. *Teenagers (15-17 years of age)*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/adolescence2.html> (last updated Aug. 24, 2015).

student, meaning some will develop faster than others anyway.<sup>62</sup> As a result, “[d]ifferences within the sexes are considerable and often times larger than differences between the sexes.”<sup>63</sup> Further, this does not take into consideration variations at the chromosomal level and intersex students.<sup>64</sup> Scientists are increasingly arguing that there may not be a fine line between the sexes, that “a body’s sex is simply too complex. There is no either/or. Rather, there are shades of difference.”<sup>65</sup> Thus, there will be ranges of hormones, maturity levels, and athletic ability on the field without considering transgender athletes.

There is also evidence that hormones are not the only physical attribute that may be beneficial in sports. In 1968, medical statistician Thomas Khosla, published an article entitled, *Unfairness of Certain Events in the Olympic Games*, in the British Medical Journal. This article discussed the finding that another physical characteristic led to athletic success: tallness.<sup>66</sup> This was found to be especially true in sporting events that involve running and jumping.<sup>67</sup> If height is a factor that contributes to athletic success, it is a factor that is not taken into consideration when teams are separated by sex. Further, as girls tend to experience increased growth velocity two years prior to boys,<sup>68</sup> it is likely that on an interscholastic sports team, a cisgender female would be taller than a cisgender male or transgender female. Therefore, it follows, that it is fair for boys and girls in the K-12 age range, that are at differing levels of puberty and height, to compete in athletic events together. Thus, the argument that transgender inclusion in interscholastic athletics will lead to inequity in sport competition is only a discriminatory method used to

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62. See *Talking with Teens: Puberty*, OFF. OF ADOLESCENT HEALTH, <http://www.hhs.gov/ash/oah/resources-and-publications/info/parents/just-facts/puberty.html> (last updated Dec. 11, 2014).

63. Griffin & Carroll, *supra* note 4, at 15.

64. One out of every 1500-2000 births are intersex, defying classification as either male or female. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 35-37 (2011).

65. *Id.* (quoting Brown University scientist and author, Anne Fausto-Seterling).

66. Khosla, *Unfairness of Certain Events in the Olympic Games*, BRITISH MED. J., 111-13 (1968); see also Vanessa Heggie, *Forget Testosterone, There’s Another ‘T’ We Need To Tackle To Make Sports Fair*, GUARDIAN (Apr. 30, 2014, 6:41 AM), <http://www.theguardian.com/science/the-word/2014/apr/30/forget-testosterone-theres-another-t-we-need-to-tackle-to-make-sports-fair>.

67. *Id.*

68. “The beginning of the increase in growth velocity is about age 11 in boys and 9 in girls but varies widely from individual to individual. The peak height velocity occurs at a mean of 13.5 years in boys and 11.5 years in girls.” Lawrence S. Neinstein, *Puberty—Normal Growth and Development (A1)*, USC KECK SCHOOL OF MEDICINE, [https://www.usc.edu/student-affairs/Health\\_Center/adolhealth/content/a1.html](https://www.usc.edu/student-affairs/Health_Center/adolhealth/content/a1.html) (last visited Sept. 28, 2015).

keep transgender students from participating in interscholastic athletics. This argument should not have an effect on interscholastic policies.

Those opposed to inclusive transgender student athlete policies are not only worried that competition will be unfair, they are also concerned with cisgender females being hurt by playing with transgender females or transgender males being hurt by playing with cisgender males.<sup>69</sup> However, this fear is irrational because many state athletic associations already allow girls to compete on male teams when an equivalent sports team is not available for girls at the school.<sup>70</sup> Further, while this type of co-ed sport participation policy has been enacted through regulations, courts have also supported this type of participation policy. For example, in *Force v. Pierce City R-VI School District*, a federal district court ruled that a prohibition for females to participate on a junior high school football team was a violation of the Equal Protection Clause, as the gender-based classification did not bear “a sufficiently substantial relationship” to the objectives of maximizing sport participation for both sexes and maintenance of safe athletic conditions to withstand a constitutional challenge.<sup>71</sup> Through expert testimony presented, the court observed that “some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not,” and yet the Pierce City R–VI School District “permits *any* male to compete in football.”<sup>72</sup> Thus, it is clear that mechanisms are already in place at the interscholastic level to allow co-ed opportunity in sports and that any fears of unsafe conditions as a result of such co-ed participation are not substantial enough to eliminate such opportunities. Therefore, transgender student-athlete involvement on teams consistent with their gender identity should not be considered to create a dangerous occasion in interscholastic athletics.

There is also worry that the inclusion of transgender participation in interscholastic athletics will allow opportunities for exploitation of the system, as mediocre boy athletes will be driven to compete on girl teams

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69. See Skinner-Thompson & Turner, *supra* note 26, at 274.

70. For a brief example, see *Handbook 2015-16*, ALASKA SCH. ACTIVITIES ASS'N (2015-16), <http://asaa.org/wp-content/uploads/handbook/1516handbook/asaa/complete/2015-2016-ASAA-Handbook.pdf>; *Handbook*, LA. HIGH SCH. ATHLETIC ASS'N (2014), <http://lhsaa.org/handbook> (follow “Eligibility” hyperlink); *Bylaws of the Florida High School Athletic Association, Inc.*, FLA. HIGH SCH. ATHLETIC ASS'N 48-49 (2014-15), <http://www.fhsaa.org/rules/fhsaa-handbook>; *OSAA Handbook*, OR. SCH. ACTIVITIES ASS'N 97 (2014-15), <http://www.osaa.org/docs/handbooks/osaahandbook.pdf>.

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

72. *Id.* at 1029.

to gain an advantage.<sup>73</sup> However, there is no evidence that a boy (or even a man in higher levels of athletics) has ever posed a female or MTF in order to gain a competitive advantage in sport.<sup>74</sup> Also, it is very unlikely that a cisgender student will subject themselves to the emotional and social traumas felt by transgender students in our society only to gain a competitive advantage.<sup>75</sup> Further, as previously stated, in inclusive transgender student athlete participation policies, methods are in place to ensure that the petition is genuine. These methods include personal testimony and testimony from family and friends in front of a neutral decision making board.<sup>76</sup> Therefore, it is even more unlikely that a male will pose as a MTF in order to gain a competitive advantage in interscholastic athletics.

Finally, another main concern of those that are against inclusive transgender student-athlete policies is that of privacy.<sup>77</sup> Opponents are worried that by allowing a transgender student to participate on an athletic team consistent with his or her gender identity, irrespective of any sex reassignment surgery, would lead to “biological boys participating in athletics as girls [accessing the] girls’ locker rooms, showers, bathrooms, and hotel rooms.”<sup>78</sup> However, most inclusive policies do not discuss locker rooms, showers, bathrooms, or hotel rooms at all.<sup>79</sup> Other states with inclusive policies that do address locker rooms state that it is either in the schools’ locus of control or to be determined on an individual basis.<sup>80</sup> This shows that issues of locker room accessibility can be distinguished from and are not tied to inclusive transgender student-athlete policies. Further, courts are beginning to

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73. Stephanie Francis Ward, *supra* note 59, at 5 (“I don’t want a guy coming in to play on the girls team so he can get a \$100,000 scholarship because it’s just unfair.”); Kate Raddatz, *MSHSL Votes To Approve Policy for Transgender Athletes*, CBS LOCAL (Dec. 4, 2014, 7:17 PM), <http://minnesota.cbslocal.com/2014/12/04/transgender-athlete-policy-heads-to-vote/>.

74. Scott Skinner-Thompson & Turner, *supra* note 26, at 288-89 (“[F]ears that men will pretend to be female to compete on a women’s team are unwarranted given that in the entire 40 year history of “sex verification” procedures in international sport competitions, no instances of such “fraud” have been revealed.” (quoting NCAA, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (Aug. 2011), [http://www.uh.edu/lgbt/docs/Transgender\\_Handbook\\_2011\\_Final.pdf](http://www.uh.edu/lgbt/docs/Transgender_Handbook_2011_Final.pdf)).

75. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 44, at 1743.

76. *Handbook*, *supra* note 28.

77. See *MSHSL Transgender Policy*, MINN. FAM. COUNSEL, <http://www.mfc.org/mshsl-transgender-policy> (last visited Sept. 28, 2015).

78. *Id.* at 5.

79. See sources cited *supra* note 24.

80. See sources cited *supra* note 24.

decide cases regarding transgender access to school restrooms.<sup>81</sup> This further shows that access to bathrooms and other intimate areas is a separate issue from inclusive transgender athletic policies. Thus, even though locker room sharing and issues of privacy may be legitimate concerns for individuals, they are not reasons to attack inclusive policies for transgender interscholastic athletes.

#### V. PROPOSED POLICY CHANGES

As examined above, it is clear that inclusive policies should be replicated among the states and discriminatory policies should be eliminated. In order for this to be done in a consistent way among the states, the U.S. Department of Education OCR must distribute another policy clarification regarding Title IX to address transgender student athletes. Just like they released “significant guidance documents” that touched on transgender students’ rights under Title IX in the context of sexual harassment and participation in single-sex classes and activities, the OCR needs to make it a priority to do the same for interscholastic athletes. Specifically, the OCR needs to state that transgender interscholastic athletes are to be treated in a manner consistent with transgender students in single-sex classrooms and activities, that “under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”<sup>82</sup> Then, the document should provide a model procedure for interscholastic sport associations and schools to facilitate the addition of transgender students on athletic teams that conform to their gender identity. This model procedure should emulate Washington State’s WIAA policy. As this policy is not only inclusive, but provides fair steps to ensure the integrity of sport, it should continue to be the model for states that wish to make their own policies inclusive toward transgender athletes.

However, it should be noted in the significant guidance document that such inclusion is for interscholastic athletes only. Experts agree that in order to ensure fairness at the collegiate level, hormones are necessary for equal play among female-to-male (FTM) or MTF athletes on sport teams consistent with their gender identity.<sup>83</sup> This distinction is made between interscholastic athletics and collegiate athletics due to the

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81. See *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (holding that a school violated the Maine Human Rights Act and discriminated against a transgender student based on student's transgender status).

82. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 18 at 25.

83. See Griffin, *supra* note 4.

completion of puberty, medical protocols regarding transitioning, and governing differences.<sup>84</sup> Thus, it is appropriate for the OCR to defer to experts and the National Collegiate Athletic Association (NCAA) policy of requiring hormones for transgender athletic participation on teams consistent with gender identity.<sup>85</sup>

This type of memo is the best way for the OCR to approach the issue because as a “significant guidance document,” it provides recipients with “information to assist them in meeting their obligations,” while providing members of the public information about their rights under federal law.<sup>86</sup> While such documents do not add to or change the law, they provide information regarding how the OCR will evaluate whether entities are complying with the federal legal obligations.<sup>87</sup> Thus, they are a good method for informing entities and the public of OCR expectations.

However, a “significant guidance document” from the OCR is not enough. In order to ensure a full shift from discriminatory policies regarding transgender student athletes to inclusive policies, there needs to be a statutory change. This means that Title IX needs to be amended to protect not only “sex,” but also “gender identity.” This amendment protects gender nonconforming students from future conservative executive branches that may not agree with the OCR’s “significant guidance document” regarding the treatment of transgender interscholastic athletes.

## V. WHY THE PROPOSED POLICY CHANGES ARE NECESSARY

### A. *State Community and Legislative Backlash*

It is important that such changes occur at the federal level to avoid backlash from communities and legislatures within the states. Such backlash is usually founded on discriminatory ideas about transgender persons, but threatens to overturn statewide inclusive policies regarding

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84. *Id.* at 13-14.

85. It is worth noting that the NCAA policy is less burdensome on transgender athletes than professional policies, such as that by the International Olympic Committee. The IOC requires sex reassignment surgery, while the NCAA recognizes that “genitalia . . . do not impact athletic performance.” *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 44, at 1739; see Pat Griffin, *supra* note 4, at 12; *Champions of Respect: Inclusion of LGBTQ Student-Athletes and Staff in NCAA Programs*, NCAA (2012), <https://www.ncaapublications.com/p-4305-champions-of-respect-inclusion-of-lgbtq-student-athletes-and-staff-in-ncaa-programs.aspx>.

86. *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities*, *supra* note 18, at 1.

87. *Id.*

transgender athletes or aids in the delay of their implementation.<sup>88</sup> Further, because in most states, inclusive transgender student-athlete participation policies are a result of state athletic associations, disgruntled civilians and legislators take to state congresses to overturn inclusive policies. This is exactly what has been happening in Minnesota.

After months of delay due to community backlash and transphobic smear campaigns,<sup>89</sup> in December 2014, the Minnesota State High School League passed a policy that will allow transgender student athletes to participate on a team consistent with their gender identity.<sup>90</sup> The announcement of the new policy was met with cries of joy, but also cries of anger. After only three months, legislators had introduced the Student Physical Privacy Act (HF 1546) in the Minnesota House and Senate that would undo the Minnesota State high school League's new transgender athletic policy and prevent school districts from instituting similar policies.<sup>91</sup> Representative Tim Miller's (R-Prinsburgs) bill would not allow "males" to participate on female teams, and for the purpose of the bill, "sex" meant "the physical condition of being male or female, which is genetically determined by a person's chromosomes and is identified at birth by a person's anatomy."<sup>92</sup> Senator David Brown (R-Becker), who is sponsoring the bill in the Senate<sup>93</sup> says that the bill is about fairness to

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88. See Beau Yarbrough, *California Transgender Law Opponents File Suit Against Secretary of State*, SUN (Mar. 25, 2014, 12:09 PM), <http://www.sbsun.com/general-news/20140325/california-transgender-law-opponents-file-suit-against-secretary-of-state> (discussing the incident of conservative-based groups having collected signatures to put the matter before voters as a referendum and serving the Secretary of State); *Montana High Schools Shelve Policy for Transgender Athletes*, MISSOULIAN (Jan. 16, 2015, 4:14 AM), [http://missoulian.com/news/state-and-regional/montana-high-schools-...nsgender-athletes/article\\_948f2d52-9d6f-11e4-a44b-6b8e21cee72f.html](http://missoulian.com/news/state-and-regional/montana-high-schools-...nsgender-athletes/article_948f2d52-9d6f-11e4-a44b-6b8e21cee72f.html) (reporting that the Montana High School Association has benched proposed inclusive transgender interscholastic athlete participation policy for fear of insufficient support).

89. The Minnesota Child Protection League (MNCPL) is one of the primary interest groups opposing the inclusive transgender student athlete policy. This group ran full page newspaper ads such as "Your 14-year-old daughter just lost her position on an all-girl team to a male . . . and now she may have to shower with him." And "A male wants to shower beside your 14-year-old daughter. Are YOU ok with that?" Zach Ford, *Why a Transgender-Inclusive Athletic Policy For Minnesota Schools Should Be a No-Brainer*, THINKPROGRESS (Dec. 3, 2014, 10:27 AM), <http://thinkprogress.org/lgbt/2014/12/03/3598761/minnesota-transgender-student-athletes/>.

90. The policy does allow for exemptions for religious schools. The vote passed 18-1 with one abstention after only thirty minutes of discussion. Kate Raddatz, *supra* note 73 at 3.

91. Tim Pugmire, *Bill Would Reverse Transgender Sports Policy*, MINN. PUB. RADIO NEWS (Mar. 9, 2015, 2:22 PM), <http://blogs.mprnews.org/capitol-view/2015/03/bill-would-reverse-transgender-sports-policy/>.

92. This bill would also prevent transgender students from using school restrooms, locker rooms, and showers for the gender with which they identify. *HF 1546 as introduced in the 89th Legislature*, MINNESOTA STATE LEGISLATURE: MINNESOTA HOUSE OF REPRESENTATIVES (Mar. 9, 2015), [https://www.revisor.mn.gov/bills/text.php?number=HF1546&version=0&session=1s89&session\\_year=2015&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?number=HF1546&version=0&session=1s89&session_year=2015&session_number=0).

93. Pugmire, *supra* note 91, at 2.

females because “biological males typically are stronger than biological females,” yet cites nothing to support this assumption. Governor Mark Dayton has accused the opponents of the transgender policy of “despicable hate-mongering.”<sup>94</sup>

Because of the Governor of Minnesota’s support for the new high school league policy, it is likely that HF 1546 will not be enacted. However, this situation presents a very real possibility in states with athletic associations that have passed inclusive transgender student-athlete policies.<sup>95</sup> Because there is unclear support from the ORC regarding transgender protection in student athletics under Title IX and gender identity is not included in the text of Title IX, legislators are able to propose such bills without directly violating the Supremacy Clause of the United States Constitution.<sup>96</sup> Thus, states may be able to take away the rights of transgender students to fully participate in school sponsored athletic activities. As a result, federal policy changes are the only way to ensure that transgender students are given sufficient protection under the law.

*B. The Unpredictability of Transgender Student-Athlete Protection From the Court*

Further, clarification from the OCR that Title IX protects transgender student athletes and statutory changes to Title IX to include “gender identity” are necessary because as of now, there have been no cases concerning the ability of transgender athletes to participate in athletics according to their gender identity. As a result, in order to predict any case outcome, and thus transgender student-athlete protection, one must look to similar, yet factually different cases.

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94. Pugmire, *supra* note 91.

95. A similar bill was introduced in South Dakota, with the goal of voiding the High School Activities Association policy on transgender student participation in sport, yet was declined by the Senate. *S.D. Senate Declines To Consider Bill To Void Transgender Student Athletes Policy*, ASSOCIATED PRESS (Mar. 10, 2015), <http://www.lgbtqnation.com/2015/03/s-d-senate-declines-to-consider-bill-to-void-transgender-student-athletes-policy/>. However, the new South Dakota policy is not set in stone. *See Transgender athletes policy revised after GOP criticism*, ASSOCIATED PRESS (June 9, 2015) <http://www.argusleader.com/story/news/2015/06/09/sdhsaa-revisit-transgender-policy/28742577/?from=global&sessionKey=&autologin>.

96.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

There are very few cases that involve Title IX claims by transgender persons. One of the few definitive cases is *Miles v. New York University*, where a transgender women brought a Title IX claim against her university due to sexual harassment from her professor.<sup>97</sup> The court here held that Title IX did protect a biological male who had been “subjected to discriminatory conduct while perceived as a female.”<sup>98</sup> In this case, the court noted that Title IX was meant to deter such sexual harassment situations, “even though the legislators may not have had in mind the specific fact pattern” of the case.<sup>99</sup> However, this phrasing suggests the court’s desire to protect individuals from sexual harassment over any noteworthy advancement of transgender rights through the meaning of word “sex” in federal statutes. As a result, transgender individuals may be protected under Title IX in sexual harassment suits, but not in others.<sup>100</sup>

Because of the lack of Title IX case law involving transgender plaintiffs, courts often will look to precedent for interpretive guidance from Title VII of the 1964 Civil Rights Act.<sup>101</sup> Established nearly a decade before the Education Amendments of 1972, Title VII provided guidance in the drafting of Title IX and contains similar language.<sup>102</sup> Therefore, one may look to Title VII precedent regarding transgender persons to predict the court’s philosophy for Title IX claims regarding transgender persons.

The 1989 case *Price Waterhouse v. Hopkins* involved a female partnership candidate who was denied the status of partner in part due to her actions and demeanor not matching with feminine stereotypes.<sup>103</sup> The Court held that discrimination based on sex stereotyping is sex discrimination.<sup>104</sup> Thus, it follows that a transgender individual may have a claim under Title VII when an employer discriminates based on how *they* perceive the individual’s sex should be and not the gender identity or sexual identity of the individual. This language in *Price Waterhouse* has led to groundbreaking decisions like *Glenn v. Brumby*, where the court explicitly applied this rule based on sex discrimination due to gender

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97. *Miles v. New York University*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997).

98. *Id.* at 249.

99. *Id.* at 250.

100. The OCR did expressly state in their April 29, 2014 guidance document that transgender individuals are protected from sexual harassment under Title IX. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 12.

101. *Skinner-Thompson & Turner*, *supra* note 26 at 283.

102. *Id.*

103. She was “macho,” “harsh,” and used profanity. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

104. *Id.* at 258.

stereotypes to transgender individuals.<sup>105</sup> Therefore, in certain jurisdictions, transgender plaintiffs may bring a claim under Title VII for sex discrimination based on sex stereotype. This type of argument could be applied analogously to Title IX in the context of transgender student-athletes. Such student-athletes could argue that they deserve protection under Title IX from states that do not allow them to play on a sports team consistent with their gender identity. But it is important to note that this may only work in some jurisdictions, as in some places, Title VII protection for transgender individuals facing sex discrimination is not always guaranteed.

In the 2009 case, *Kastl v. Maricopa County Community College District*, a community college instructor brought a sex discrimination suit against the community college after the administration banned the teacher from using a restroom consistent with her gender identity.<sup>106</sup> Here, the court of appeals held that safety was a legitimate, nondiscriminatory justification under Title VII for the ban.<sup>107</sup> Such a ruling is ominous for transgender student-athletes looking to analogize Title VII precedent to Title IX claims, as safety is a standard concern of those that oppose inclusive transgender interscholastic athlete policies. Thus, this type of Title VII comparison does not necessarily lead to just and humane treatment of transgender athletes.

If a Title IX claim, even with Title VII precedent comparison, fails to protect transgender student-athletes that want to play on a school team consistent with their gender identity, a student may seek legal remedy for gender identity discrimination under the Equal Protection Clause. In order to succeed in asserting a violation of the Equal Protection of the Fourteenth Amendment, a plaintiff “must allege that the plaintiff is a member of an identifiable group, was subjected to differential treatment from others similarly situated, and the difference in treatment was based on his or her membership in that group.”<sup>108</sup> However, if a state can show that such actions, albeit discriminatory, were rationally related to a legitimate governmental purpose, such actions are presumed lawful.<sup>109</sup> In connection with discrimination towards certain groups, the Court has required heightened scrutiny. For example, in *United States v. Virginia*, the United States Supreme Court confirmed a level of intermediate

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105. *Glenn v. Brumby*, 663 F.3d 1312, 1315-21 (11th Cir. 2011).

106. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ. 02-1531PAX-SRB, 2004 WL 2008954, at \*6 (D. Ariz. June 3, 2004).

107. *Id.* at \*6. This included the “safety and privacy” of all restroom users.

108. Elizabeth M. Ziegler & Tamara Isadora Huntley, “*It Got Too Tough to Not Be Me*”: *Accommodating Transgender Athletes in Sport*, 39 J.C. & U.L. 467, 501 (2013).

109. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-447 (1985).

scrutiny when evaluating Equal Protection claims relating to sex discrimination.<sup>110</sup> This means that the state must show that the discriminatory action was substantially related to the achievement of important governmental objectives.<sup>111</sup>

At this point in time, only certain jurisdictions consider discrimination based on transgender status to be sex discrimination.<sup>112</sup> Therefore, protection for transgender individuals in Equal Protection claims may vary across the country. In some jurisdictions, discrimination rationally related to a legitimate government interest might be enough to be considered lawful, while in others, such discrimination must be substantially related to the achievement of an important government objective. As a result, some jurisdictions may see safety concerns as a legitimate government interest and rationally related to not allowing transgender student-athletes the ability to participate on a sports team consistent with their gender identity absent any medical intervention. While intermediate scrutiny will likely offer more protection, it is unclear how the court would view any of the reasoning asserted by the state or athletic associations for discriminatory transgender student athletic policies. Thus, Equal Protection remedies for such athletes are unclear as well.

## VI. CONCLUSION

As societal views towards LGBT issues are shifting, gender nonconforming identities are recognized at an earlier age. Thus, it is not unusual to see transgender youth in schools. While the OCR has established regulatory policies that recognize this, by clarifying expectations of schools in the treatment of transgender students under Title IX, they have not done so in reference to interscholastic athletics. Because there is not a federal stance on transgender interscholastic athlete participation, states have a wide range of policies. Some of these state policies are inclusive and allow transgender students to participate in interscholastic athletics in a manner that is consistent with their gender identity; however, some of these policies are discriminatory and violate fundamental constitutional rights.

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110. *United States v. Virginia*, 518 U.S. 515 (1996).

111. *Id.* at 532.

112. See *Glenn v. Brumby*, 663 F.3d 1312, 1315-21 (11th Cir. 2011) (applying intermediate scrutiny in the Equal Protection analysis regarding transgender discrimination); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at 8 (D. Ariz. June 3, 2004) (applying rational basis scrutiny in the Equal Protection analysis regarding transgender discrimination).

To combat the varying state policies, the creation of inclusive transgender interscholastic athlete policies on a federal level is imperative—this includes a Significant Guidance Document from the U.S. Department of Education, Office for Civil Rights and statutory changes to Title IX to include “gender identity.” Through such policy change and creation, transgender youth are given the opportunity to participate on school sports teams in a manner that is consistent with their gender identity, irrespective of the sex listed on their birth certificate, an opportunity that may not be available from the judicial branch alone. Such an opportunity translates to transgender youth having the opportunity to truly be themselves in the school environment—a luxury that most take for granted, but should be available to all.