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“HURDLING” GENDER IDENTITY DISCRIMINATION: THE IMPLICATIONS OF STATE PARTICIPATION POLICIES ON TRANSGENDER YOUTH ATHLETES’ ABILITY TO THRIVE

KAYLA L. ACKLIN*

Abstract: The number of students, in grades kindergarten through high school, who identify as transgender has steadily increased during the last decade. These students seek the same opportunities as their cisgender peers, but are often denied participation in athletic activities because of their non-conforming gender-behavior. Currently, there is no federal law governing transgender participation in sports, which has resulted in an inconsistency among state athletic associations’ participation policies; the vast majority of states restricts participation. These states are limiting transgender students’ ability to receive the benefits that sports provide. To solve this inconsistency and provide equal opportunity for transgender students, this Note argues that the Civil Rights Act of 1964 be amended to prohibit gender-based discrimination. As a supplementary solution, the U.S. Department of Education should recommend Congress pass a bill conditioning federal funding of state after-school sports programs on the inclusion of *all* students, including transgender students.

INTRODUCTION

Seventeen-year-old Alex Trujillo was just like any other young female athlete trying out for Laguna-Acoma High School’s girls’ volleyball team in Casa Blanca, New Mexico, but with one difference: she was born male.¹ At a young age, Alex realized that although anatomically she was male, she did not identify as such.² Instead, Alex identified as transgender.³

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¹ Justin Block, *Transgender High Schooler Not Allowed to Play Sport She Loves Because of a Piece of Paper*, HUFFINGTON POST (July 17, 2015), http://www.huffingtonpost.com/entry/alex-trujillo-trans-volleyball_us_55a9340fe4b0896514d12ecc [<https://perma.cc/3UH4-WHRH>].

² Emily Shapiro, *Caitlyn Jenner Inspires Transgender Teen Barred from Playing High School Volleyball*, ABC NEWS (July 16, 2015), <http://abcnews.go.com/US/caitlyn-jenner-inspired-transgender-teen-barred-high-school/story?id=32492319> [<https://perma.cc/M5P7-4UJG>]. In schools throughout the United States, transgender and “gender non-conforming” students are coming forth in increasing numbers. CONN. SAFE SCH. COAL., GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS: FREQUENTLY ASKED

Around the age of three, Alex began expressing herself as female to her family by pretending to be Pocahontas and playing with young girls' toys, rather than participating in activities generally accepted as "male."⁴ In middle school, Alex struggled to find her self-identity, particularly because "transgender" was an unfamiliar and unknown concept within the small community in which she was raised.⁵ During the summer of 2013, between ninth and tenth grade, Alex decided to transition from male to female.⁶ Alex did not undergo a surgical procedure, nor did she take hormone treatments.⁷ Instead, like many young transgender children, she underwent an experiential transition, meaning she fully expressed herself to the public as female.⁸ The summer she decided to transition, Alex began to wear makeup, curl her eyelashes, and style her hair as a female.⁹ With her family's support, Alex grew more and more comfortable expressing herself as female.¹⁰ At school, however, Alex did not experience the same sort of compassion; she was prohibited from expressing her female identity.¹¹ Alex turned to volleyball as an escape from the daily harassment she faced at school.¹²

QUESTIONS 5, http://media.wix.com/ugd/2bc3fc_906b9d9cbfa6c81a4ffd5f11e4eef3ce.pdf [https://perma.cc/6A3W-JWXU]. Transgender students are individuals whose internalized sense of self does not match their anatomical make-up. *Id.* For example, a transgender girl is someone who was born male, but identifies persistently as female; a transgender male is someone who was born female, but consistently identifies as male. *Id.* Likewise, "gender non-conforming" students are individuals, such as transgender individuals, whose appearance and behavior do not match the stereotypical norms of their assigned birth-sex. *Id.*

³ Block, *supra* note 1.

⁴ Shapiro, *supra* note 2.

⁵ *Id.* In eighth grade, Alex wore eyeliner to school and would wipe it off before she came home and faced her Native American community, which had yet to experience or accept the progressive and non-conforming behavior of transgender individuals. *See id.*

⁶ Block, *supra* note 1. Transgender individuals decide to transition in various ways, including counseling with a mental health professional, living as the target gender for a period of time to conduct a "real life" experiential transition, undergoing hormone therapy, or undergoing various surgical procedures to physically reflect the transition. NAT'L CTR. FOR TRANSGENDER EQUAL., UNDERSTANDING TRANSGENDER: FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE 3 (2009), http://www.transequality.org/sites/default/files/docs/resources/NCTE_UnderstandingTrans.pdf [https://perma.cc/GK95-94PF].

⁷ *See* Shapiro, *supra* note 2.

⁸ *Id.*

⁹ *Id.* Alex's mother recognized at this point that her child needed to fully express herself as female in order to be happy, and supported her transition by purchasing her more feminine clothing and praising Alex's new look. *Id.* "The smile on my daughter's face that day, I will never forget," Terri Trujillo said. "It was just like a flower blooming right before my eyes. She got her clothes and that's when she knew it was OK for her to be who she wanted to be." *Id.*

¹⁰ *See id.*

¹¹ *Id.* Alex was suspended for attempting to use the female-designated restroom, after being instructed to only use the male or unisex restrooms. *Id.*

¹² *Id.* As a teenager, Alex developed a passion for volleyball and was welcomed by the girls' team, which made her feel like she belonged in the world as female. *Id.*

After Alex had socially transitioned to female, she sought a spot on the girls' high school volleyball team at the start of the 2013 season, her sophomore year.¹³ Having been approved for participation by both the principal at Laguna-Acoma High School and the coach of the girls' volleyball team, Alex began preparing for tryouts.¹⁴ Still, Alex needed the approval of the New Mexico Activities Association (NMAA), which governs interscholastic sports in New Mexico.¹⁵ Unfortunately, the NMAA denied Alex's request to join the girls' volleyball team after she had already attended a few days of pre-season conditioning.¹⁶ According to state policy, the sex stated on an individual's birth certificate dictates the gendered-team for which a student can play.¹⁷ Alex's birth certificate stated "male."¹⁸ Thus, she was precluded from joining the girls' team.¹⁹ When she learned the news of her denial, Alex was heartbroken; a state policy defined her gender identity for her, and prevented her from pursuing her passion with the team she felt most comfortable joining.²⁰

Alex Trujillo's experience is not uncommon among transgender athletes.²¹ Transgender athletes face a myriad of obstacles every day, stemming

¹³ Block, *supra* note 1.

¹⁴ *Id.*; Shapiro, *supra* note 2.

¹⁵ Block, *supra* note 1; Shapiro, *supra* note 2. The NMAA is a "membership-led organization" in which "[m]ember schools have an active voice and vote in establishing all rules and regulations in regard to interscholastic activities and athletics." Shapiro, *supra* note 2.

¹⁶ Block, *supra* note 1; Shapiro, *supra* note 2.

¹⁷ Block, *supra* note 1; Shapiro, *supra* note 2. NMAA's Transgender Policy states:

A transgender student, defined as a student whose gender identity differs from the student's birth sex, shall be eligible to participate in interscholastic athletics in a manner that is consistent with the student's gender identity, under any of the following conditions: (a) The student provides an official record, such as a revised birth certificate, a driver's license or a passport, demonstrating legal recognition of the student's reassigned sex, or (b) A physician certifies that the student has had appropriate clinical treatment for transition to the reassigned sex, or (c) A physician certifies that the student is in the process of transition to the reassigned sex.

N.M. ACTIVITIES ASS'N, *Transgender Policy*, in NMAA COMMISSION MEETING 1, 11 (2013), http://media.wix.com/ugd/2bc3fc_c2a3505ea21c46e49733cce441f59205.pdf [<https://perma.cc/SJQ6-RZFU>]. In New Mexico, an individual can only revise his or her birth certificate by undergoing sex reassignment surgery. Block, *supra* note 1.

¹⁸ Block, *supra* note 1.

¹⁹ *Id.*

²⁰ *Id.* "I just cried. It may not seem like a big deal, but it made me feel like I was less than my peers, that I didn't have the same rights and the same privileges . . . [a]nd it really hurt knowing that I was still seen as male in the state's eyes." *Id.*

²¹ See *id.* Currently, only thirteen states and the District of Columbia have policies designed to protect students from discrimination based on their gender identity. Pat Griffin, *Developing Policies for Transgender Students on High School Teams*, NAT'L FED'N STATE HIGH SCH. ASS'NS (Sept. 8, 2015), <https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/> [<https://perma.cc/89SR-4UEZ>]. Participation in sports, particularly at the youth level, is recognized as an important step in developing self-esteem, a sense of belonging and inclusion in a

from society's misconceptions and fears regarding transgender individuals in general.²² For instance, many people believe, incorrectly, that "transgender" is related to sexual orientation.²³ Thus, many groups—conservative ones in particular—believe that combining transgender athletes with non-transgender ("cisgender") athletes will encourage inappropriate behavior.²⁴ This belief misconstrues the meaning of transgender, and perpetuates the demeaning stereotype that transgender individuals are merely pretending to identify as another sex in an attempt to gain access into the private lives of their desired sexual partners.²⁵

One of society's most frequently expressed concerns is that transgender girls will have a competitive advantage over cisgender girls in athletics because of their biological make-up.²⁶ This fear stems from the belief that transgender girls will be bigger, stronger, and unable to exercise adequate body control, which could also result in an increased risk of injury for cisgender girls.²⁷ These concerns persist even at the elementary and secondary

community, and a deterrent from unhealthy activities; yet, so many states restrict transgender students from participating on the teams with which they identify. *Id.*

²² Griffin, *supra* note 21. The relationship between public policy and public opinion impacts the health and well-being of minority populations, including transgender individuals. Andrew R. Flores, *Attitudes Toward Transgender Rights: Perceived Knowledge and Secondary Interpersonal Contact*, in 3 POL., GROUPS & IDENTITIES 400, 400 (2015), <http://tandfonline.com/doi/full/10.1080/21565503.2015.1050414> [<https://perma.cc/6NGD-JZYU>]. These misconceptions stem from a lack of personal connections with transgender individuals, making it difficult for much of America to truly understand what it means to be transgender. *Id.*; Brynn Tannehill, *Do Transgender Athletes Have an Unfair Advantage?* HUFFINGTON POST (Mar. 7, 2014, 2:32 PM), http://www.huffingtonpost.com/brynn-tannehill/do-transgender-athletes-have-an-unfair-advantage_b_4918835.html [<https://perma.cc/H44D-Z8JT>]. There remains a stereotype that being transgender is a mental illness that can be cured, which is a common misconception that reflects the lack of familiarity with current medical thought on the issue of transgender. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 6.

²³ Flores, *supra* note 22, at 401.

²⁴ Rachel E. Moffitt, Note, *Keeping the John Open to Jane: How California's Bathroom Bill Brings Transgender Rights Out of the Water Closet*, 16 GEO. J. GENDER & L. 475, 489 (2015); Carlos Maza, *This Is What Conservative Media Think a Transgender Woman Looks Like*, MEDIA MATTERS FOR AM. (Aug. 19, 2013, 9:21 AM), <http://mediamatters.org/blog/2013/08/19/this-is-what-conservative-media-think-a-transge/195448> [<https://perma.cc/5M22-PM46>]. The concern is that equal access to public facilities will increase sexual assault and battery of cisgender females. Moffitt, *supra*; Maza, *supra*.

²⁵ Moffitt, *supra* note 24, at 488.

²⁶ *Id.* at 498; Griffin, *supra* note 21. Some of this concern reflects society's observation of male participation and apparent domination in female sports. Annie Maroon, *Hockey Standout Beau Kass Becomes First Boy to Play on South Hadley Field Hockey Team Since Menard Brothers in 2010*, MASSLIVE (Sept. 5, 2014), <http://highschoolsports.masslive.com/news/article/7948134831125056557/south-hadley/> [<https://perma.cc/E382-ZW3M>].

²⁷ Griffin, *supra* note 21. This fear is a serious overgeneralization. John Wright, *Texas Rule Would Effectively Bar Transgender Youth and Teens from Playing Sports*, NEW CIV. RTS. MOVEMENT (Oct. 21, 2015, 5:31 PM), http://www.thenewcivilrightsmovement.com/johnwright/texas_moves_to_bar_trans_youth_from_playing_sports [<https://perma.cc/6BHE-X9NR>]. Just as there is variation in physical build and skill within a sex and between sexes, transgender girls and boys

school levels, despite medical evidence that such discrepancies among sexes do not exist at those ages.²⁸ As a result of these societal fears, transgender athletes, like Alex Trujillo, are significantly restricted or completely excluded from playing on the teams with which they identify.²⁹

In response to these concerns, athletic organizations, such as the National College Athletic Association (NCAA) and the International Olympic Committee (IOC), created guidelines for transgender participation that state and local organizations were encouraged to follow when drafting their own policies.³⁰ These guidelines, however, often conflict with one another, and thus fail to provide states with consistent recommendations that can be uniformly applied.³¹ Compounding this issue of lack of uniformity, at the inter-scholastic level there is no federal law governing transgender participation in sports.³² Regulation of transgender participation in sports has therefore been left to state discretion.³³ States have approached this issue in a variety of ways, including: (1) allowing transgender athletes to play for whichever teams align with their gender recognition; (2) requiring transgender students to undergo hormone therapy or sex reassignment surgery; (3) restricting transgender athletes to the gendered-teams matching their birth certificate; and (4) implementing no statewide policy, but leaving the decision up to each individual school district.³⁴ The inconsistency among state policies means

vary in skill and build, too. *Id.* Transgender girls might be small and slight, even before taking hormones or undergoing testosterone suppression. *Id.*

²⁸ Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 271–72 (2013). In K–12 athletics, concerned parents and administrators argue that permitting transgender students to participate on the teams with which they identify will lead to increased injury of cisgender athletes and unfair competitive advantages. *Id.* at 274. At such a young age, however, the physical differences between boys and girls are not as prevalent, thus, this concern is unfounded. Wright, *supra* note 27. If a transgender athlete excels in his or her sport, it is not because he or she is transgender; it is because he or she is a talented athlete who has trained to develop the necessary skills it takes to succeed. *Id.*

²⁹ See Tannehill, *supra* note 22.

³⁰ *Id.* The NCAA released guidelines suggesting that transgender females were permitted to play on female sports teams so long as they had at least one year of testosterone suppression. *Id.* Medical surgery was not required because any strength or endurance advantages a transgender woman might have dissipates after about one year of estrogen or testosterone suppression. *Id.* Muscle mass decreases, bone density decreases, and physical strength is minimized, placing the transgender female on equal physical footing as a cisgender female. *Id.* In contrast, for many years the IOC required that transgender individuals undergo gender reassignment surgery. *Id.*

³¹ See *id.*

³² Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 112–13 (2015).

³³ Griffin, *supra* note 21.

³⁴ *Id.* The problem with states that require youth athletes to undergo hormone therapy or sex reassignment surgery—or have no policy at all and therefore use the guidelines instructed by the NCAA and outdated version of the IOC—is that they fail to recognize that a youth athlete's physical make-up and skill level is very different from that of an adult; therefore, youth athletes should not be required to undergo the same level of extensive transitioning. Matt Comer, *New High*

that a transgender student's opportunity to participate in school sports is determined by the state in which he or she resides.³⁵

Part I of this Note discusses the legal hurdles transgender individuals face when seeking equal opportunities in society, and how those hurdles have resulted in serious consequences for transgender youth athletes in grades kindergarten through high school (collectively "K-12"). It also shares different state participation policies to illustrate the implications of the inconsistency regarding transgender youth participation in sports. Part II dives deeper into the social and educational benefits that transgender youth athletes are deprived of due to the restrictions on their participation in sports. Several current state policies are examined to illustrate the insufficiency and impracticality of applying adult-based participation policies to youth athletes. Finally, Part III proposes two solutions to help alleviate the inconsistency among participation policies for transgender youth athletes: (1) an amendment to the Civil Rights Act of 1964, which will prohibit gender-based discrimination and award transgender individuals protection under federal law; and (2) as a supplementary, short-term solution, the effectuation of a bill that conditions federal funding of state after-school competitive sports programs on the complete inclusion of *all* students, and that, most importantly, includes a detailed inclusive transgender participation policy.

I. HOW THE LEGAL SYSTEM FALLS SHORT OF PROTECTING TRANSGENDER INDIVIDUALS FROM GENDER-BASED DISCRIMINATION

The number of people identifying as transgender has rapidly increased in recent years, making it even more important for society to understand what it means to be transgender.³⁶ Transgender individuals are those whose assigned birth sex does not match their internalized gender identity.³⁷ The des-

School Athletics Gender Rule May Cause Discrimination, QNOTES (May 8, 2014), <http://goqnotes.com/29224/new-high-school-athletics-gender-rule-may-cause-discrimination/> [<https://perma.cc/V88L-PTQQ>].

³⁵ Griffin, *supra* note 21. For example, because she resides in New Mexico, Alex Trujillo is unable to participate on the girls' volleyball team unless she undergoes sex reassignment surgery; however, if Alex were to live in a state that had a more inclusive policy, such as Connecticut, she would be allowed to follow her passion and compete on any team she desired. See CONN. SAFE SCH. COAL., *supra* note 2, at 1; Block, *supra* note 1.

³⁶ Moffitt, *supra* note 24, at 483 (citing *Transgender Issues: A Fact Sheet*, TRANSGENDER L. & POL'Y INST., <http://www.transgender.org/resources/transfactsheet.pdf> [<https://perma.cc/FS27-VXEN>]). Although less than five percent of the population identifies as transgender, the number of young students who are beginning to identify and transition has been increasing as communities become more accepting. *Id.*

³⁷ CONN. SAFE SCH. COAL., *supra* note 2, at 5. Gender identity is the way an individual understands his or herself and his or her gender; it is an internal sense of masculinity or femininity that one feels. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 6. Gender identity can be shown "in various ways, including (1) medical history, (2) care or treatment of the gender-related identi-

ignation of transgender includes individuals who have undergone medical treatment to transition, commonly known as transsexuals, and those who have not undergone surgery, but have chosen to express themselves in a manner that does not match their assigned biological gender.³⁸ Regardless of how they transition, the acceptance of transgender individuals in their local communities is often dependent on how society as a whole treats them.³⁹

A. Federal Law Offers No Recourse for Transgender Individuals Experiencing Gender-Based Discrimination

Because federal cases do not address the rights of transgender athletes specifically, one must turn to other contexts where broader transgender rights have been significantly examined by the courts.⁴⁰ In the current legal climate, transgender individuals lack a myriad of rights afforded to other populations, particularly in employment and education.⁴¹ This is primarily rooted in the fact that transgender individuals are not considered a protected class under the Equal Protection Clause of the Fourteenth Amendment.⁴² As a result, transgender individuals struggle to find recourse under Title VII of the Civil Rights Act of 1964 (“Title VII”) and Title IX of the Civil Rights Act of 1964

ty, (3) consistent and uniform assertion of such identity, or (4) any other evidence that the identity is sincerely held, part of a person’s core identity” CONN. SAFE SCH. COAL., *supra* note 2, at 2.

³⁸ Krista D. Brown, Comment, *The Transgender Student-Athlete: Is There a Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?* 25 MARQ. SPORTS L. REV. 311, 313 (2014). Transsexualism is a condition that exists when an individual experiences discomfort about his or her biological sex, and takes steps such as undergoing hormonal or surgical procedures to become the opposite sex. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984) (citing expert witness for plaintiff). Transgender individuals who do not undergo medical procedures to transition instead externally express their desire to be of the opposite sex through dress, mannerisms, speech patterns, and social interactions. Weatherby, *supra* note 32, at 102. It is important to note that the term “transgender” differs from “intersex,” which describes an individual who has both male and female genitalia. Brown, *supra* at 313.

³⁹ See NAT’L CTR. FOR TRANSGENDER EQUAL., *supra* note 6, at 3. Transgender individuals transition in various ways, including: through counseling with a mental health professional; going through “real life” experiences during which they live as the “target gender” for a period of time; learning about the available options and effects of medical treatment; undergoing hormone therapy, which includes receiving estrogen for transgender women or testosterone for transgender men; and undergoing various surgeries to alter the face, chest, and genitals to be more congruent with their sense of self. *Id.* Surgical procedures often include genital reconstructive surgery, facial reconstructive surgery, breast removal or augmentation, surgery to remove the ovaries and uterus, and surgery to reduce the Adam’s apple or change the thorax. *Id.* Many transgender individuals take legal steps to change their name and gender markers as a final declaration of their transition. *Id.*

⁴⁰ See Moffitt, *supra* note 24, at 481.

⁴¹ *Id.*

⁴² *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, No. 3:13-213, 2015 U.S. Dist. LEXIS 41823, at *2, *22 (W.D. Pa. Mar. 31, 2015); Moffitt, *supra* note 24, at 495.

(“Title IX”) for gender-based discrimination experienced at work and school.⁴³

1. It’s All About “Sex”: The Fourteenth Amendment Fails to Protect Against Gender-Based Discrimination

The Fourteenth Amendment to the U.S. Constitution, passed in 1868, was enacted to afford citizens of the United States equal protection of the laws.⁴⁴ The Fourteenth Amendment guarantees equal protection of the laws by prohibiting legislation that classifies individuals based on certain “suspect” characteristics.⁴⁵ Historically, “paradigmatic” of a “suspect” characteristic was classification based on race.⁴⁶ The Supreme Court eventually accorded other classifications, such as sex classifications, a heightened standard of review, as well.⁴⁷ Legislation, which in its application discriminates against individuals solely on the basis of race or sex, is thereby prohibited under the Fourteenth Amendment.⁴⁸

Under the Fourteenth Amendment, a discrimination claim must allege a violation of a right secured by the Constitution, and allege that a state actor—for instance, the U.S. government—committed the violation.⁴⁹ By requiring a higher standard of justification for classifications based on sex, the Supreme Court has established that an individual has a constitutional right not to be

⁴³ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that discrimination against a transsexual based on the individual’s status as a transsexual was not discrimination under Title VII); *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *34 (holding that discrimination against a transgender student based on the student’s status as a transgender was not discrimination under Title IX).

⁴⁴ U.S. CONST. amend. XIV, § 1.

⁴⁵ *CRS Annotated Constitution: Fourteenth Amendment*, CORNELL U. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/anncon/html/amdt14ffrag3_user.html#amdt14f_hd9 [<https://perma.cc/D24C-SXS7>]. The classes of persons awarded protection under the Fourteenth Amendment are determined by classifications made by legislative and other official bodies. *Id.* The Equal Protection Clause protects certain classes of persons from government laws that fail to meet the Supreme Court’s strict scrutiny standard. *Id.* Under this standard, the governmental unit enacting the law must demonstrate a compelling state interest and the chosen means must be both necessary to achieve that compelling interest and narrowly tailored. *Id.*

⁴⁶ *Id.* In its path to articulating the strict scrutiny standard, the Supreme Court struck down legislation that classified individuals based on race, declaring that racial classifications bear a heavier burden of justification than other classifications. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192, 194 (1964); *Brown v. Bd. Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

⁴⁷ *Id.*

⁴⁸ *Id.* The standard of strict scrutiny is an incredibly high standard to meet. *Id.*

⁴⁹ U.S. CONST. amend. XIV, § 1; *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, No. 3:13-213, 2015 U.S. Dist. LEXIS 41823, at *17 (W.D. Pa. Mar. 31, 2015). To state a claim of sex discrimination, an individual must allege that a law was enacted with the sole intent to discriminate based on his or her sex. *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *17-18.

discriminated against on the basis of his or her sex.⁵⁰ Courts have refused to use the terms “sex” and “gender” interchangeably, meaning that discrimination based on gender is not protected under the Constitution.⁵¹ Sex has been defined as “the distinction between male and female; or the property or character by which an animal is male or female,” whereas gender has been defined as “the difference between men and women based on culturally and socially constructed mores, politics, and affairs.”⁵²

The distinction between “sex” and “gender” has made it increasingly difficult for transgender individuals to challenge discriminatory laws.⁵³ Transgender individuals experience discrimination based on their gender non-conforming behavior, not because of their sex.⁵⁴ Therefore, because gender has not been recognized as a “suspect” classification under the Fourteenth Amendment, laws that discriminate on the basis of gender must only meet a rational basis standard of review, meaning that a court can uphold the law if the government can posit *any* justification for it.⁵⁵ For instance, a court can justify discrimination on the basis of privacy, historical treatment, or economic necessity.⁵⁶ Not being recognized as a protected class has been incredibly damaging to transgender individuals’ ability to bring successful discrimination claims, particularly against their workplaces and schools.⁵⁷

Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education is particularly illustrative of how easy it is for these gender based discriminatory laws to be upheld as constitutional.⁵⁸ In this 2015 case, the U.S. District Court for the Western District of Pennsylvania held that a University of Pittsburgh policy of segregating bathroom and locker room facilities on the basis of birth sex was sufficiently related to the government’s interest in maintaining privacy.⁵⁹ In upholding the policy, the court balanced

⁵⁰ *CRS Annotated Constitution: Fourteenth Amendment*, *supra* note 45.

⁵¹ Weatherby, *supra* note 32, at 101, n.44. The Fourteenth Amendment prohibits discrimination based on sex, but does not prohibit discrimination based on gender. *Id.* To establish a gender discrimination claim, an individual must still demonstrate that the discriminatory treatment was based on sex. *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *27.

⁵² *Gender*, LAW DICTIONARY, <http://thelawdictionary.org/gender/> [<https://perma.cc/65DL-8UPJ>]; *Sex*, LAW DICTIONARY, <http://thelawdictionary.org/sex/> [<https://perma.cc/Y7V3-CHDY>].

⁵³ Weatherby, *supra* note 32, at 103. If “sex” and “gender” were used interchangeably, then transgender individuals would qualify for protection under the Fourteenth Amendment because gender discrimination would equate to sex discrimination, which is unlawful when the law at issue does not pass heightened scrutiny. *Id.*

⁵⁴ Brown, *supra* note 38, at 319.

⁵⁵ *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *19.

⁵⁶ *Id.* at *21–22. Courts are extremely deferential to the government when examining gender-based discrimination claims. *Id.* at *20–22.

⁵⁷ *See id.* at *23.

⁵⁸ *See id.* at *25.

⁵⁹ *Id.* The plaintiff, a transgender male, alleged that the defendant University discriminated against him based on his transgender status by prohibiting him from using sex-segregated locker

the transgender plaintiff's interest in performing some of his most basic and routine functions in an environment consistent with his male gender identity, with the University of Pittsburgh's related interest in providing its students with a safe and comfortable environment for performing those same functions in sex-segregated spaces.⁶⁰ The court determined that the need to protect the privacy of students in the presence of the opposite sex outweighed the interest of providing gender-segregated, rather than sex-segregated, facilities for transgender individuals.⁶¹

Even in light of society's increased acceptance of transgender individuals, the Supreme Court has demonstrated an unwillingness to recognize them as a protected class, making it virtually impossible for transgender individuals to succeed in challenging gender-based discriminatory laws.⁶² Transgender individuals have no constitutional recourse for discrimination experienced in the workplace or schools unless they can demonstrate that the discriminatory law was based on *sex*, not *gender*.⁶³ This lack of constitutional protection makes it incredibly difficult for transgender youth athletes to successfully challenge discriminatory sports participation policies, so many do not even try.⁶⁴

2. It's *Still* All About "Sex": Title VII and Title IX Protect Against Sex-Based Discrimination but Not Gender-Based Discrimination

Individuals who have experienced sex-based discrimination in settings such as the workplace or school often find recourse under Title VII and Title IX, which do not require that the discriminating entity be a state actor.⁶⁵ Title

rooms and restrooms that were designated for men. *Id.* at *2–3. The plaintiff was assigned the sex of female at birth, but understood his male identity at the very early age of nine. *Id.* at *3. To transition into a male, the plaintiff held himself out to be male in all aspects of life, underwent hormone treatment, obtained a common law name change, amended the gender markers on his U.S. Passport and Social Security Record, and requested the University change his gender marker, as well. *Id.* at *4–6. The plaintiff enrolled in a men's weight training class, and consistently used male restrooms and locker rooms. *Id.* at *6–7. Trouble arose when the Health and Wellness Services at the University informed the plaintiff that he would no longer be allowed to use the men's restrooms and locker rooms on campus, but would instead be required to use a unisex room, unless he changed the sex on his birth certificate by undergoing sex reassignment surgery. *Id.* at *7–8. The plaintiff refused to comply, and continued using the men's restrooms and locker rooms until he was eventually expelled and consequentially charged with indecent exposure, criminal trespass, and disorderly conduct by the University. *Id.* at *9–11.

⁶⁰ *Id.* at *21–22.

⁶¹ *Id.* at *24.

⁶² *Id.* at *29–30; Weatherby, *supra* note 32, at 101–03.

⁶³ See *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *30.

⁶⁴ Weatherby, *supra* note 32, at 104; see Skinner-Thompson & Turner, *supra* note 28, at 279–80.

⁶⁵ Skinner-Thompson & Turner, *supra* note 28, at 279–80; David S. Kemp, *Sex Discrimination Claims Under Title VII and the Equal Protection Clause: The Eleventh Circuit Bridges the Gap*,

VII prohibits employers from discriminating against an individual because of that “individual’s race, color, religion, sex, or national origin.”⁶⁶ The plain language of the statute indicates that Congress intended to prohibit discrimination based on *sex*, not gender.⁶⁷ Therefore, because transgender individuals are often discriminated against on the basis of their gender non-conforming behavior, and *not* their sex, they have faced incredible difficulty bringing claims of discrimination in the workplace under Title VII.⁶⁸ Courts have generally refused to extend Title VII to include coverage to those discriminated against because of their transsexuality; doing so would be considered legislating, which is outside the authority of the courts.⁶⁹ Therefore, courts continue on the assumption that if Congress believed transgender individuals should enjoy the protection of Title VII, Congress would have provided such protection within the statute.⁷⁰

In 1989, the Supreme Court expanded Title VII’s protection to prohibit sex-based stereotyping in the workplace, giving transgender individuals some

VERDICT (Mar. 19, 2012), <https://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause> [<https://perma.cc/BTD9-24LA>]. Title VII is enforceable against private employers and Title IX is enforceable against schools. *Id.*

⁶⁶ 42 U.S.C. § 2000e-2(a)(1) (2012).

⁶⁷ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007) (reasoning that “nothing in the record . . . support[ed] the conclusion that the plain meaning of sex encompasses anything more than male and female”).

⁶⁸ *Id.* at 1222; *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that termination of employment was not based on sex discrimination, but rather occurred because the employee was a transsexual, and therefore did not violate Title VII); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that employers had legitimate interests in protecting the privacy of females from sharing restroom facilities with a transgender female, and therefore discrimination and termination of employment did not violate Title VII). In *Etsitty*, the plaintiff was a transgender female who presented as male when hired as a UTA bus operator, but was terminated out of concern that her later expression as female and use of women’s restrooms would create liability for UTA, despite a lack of actual complaints about her performance, appearance, or restroom usage. 502 F.3d at 1218–21. The Tenth Circuit held that the plaintiff was not discriminated against because of her sex, and therefore, was not entitled to Title VII protection. *Id.* at 1221. In *Ulane*, the plaintiff was a transgender female who was hired as a male pilot by Eastern Airlines, and later fired after undergoing sex reassignment surgery, changing her birth certificate to female, and presenting herself as a female pilot because of her status as transgender. 742 F.2d at 1082–84. The Seventh Circuit held that Eastern Airlines did not terminate the plaintiff’s employment because of her sex, but because she was transgender, which did not violate Title VII. *Id.* at 1087. In *Sommers*, the plaintiff was hired as a transgender female to perform clerical duties for Budget, but was terminated two days later after a number of female employees threatened to quit if she was permitted to use the restroom facilities assigned to female personnel. 667 F.2d at 748–49. The Eighth Circuit held that Budget had an interest in protecting the privacy of its female employees, and therefore, termination of the plaintiff’s employment was not sex discrimination in violation of Title VII. *Id.* at 750.

⁶⁹ *Ulane*, 742 F.2d at 1086; *Sommers*, 667 F.2d at 749.

⁷⁰ *Ulane*, 742 F.2d at 1086.

hope for recourse.⁷¹ In *Price Waterhouse v. Hopkins*, the Court held that discrimination based on an individual's inability to fit certain gender and sex norms qualifies as unlawful discrimination under Title VII.⁷² Subsequent courts, interpreting *Price Waterhouse*, have held that transgender individuals deserve protection from discrimination based on their gender-nonconforming behavior.⁷³ Those courts, however, have emphasized that the protection afforded can only stem from stereotypes based on sex, not gender.⁷⁴ Thus, transgender individuals bringing suits based on sex-stereotyping claims under Title VII must prove that they were discriminated against because they failed

⁷¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989). Ann Hopkins, a senior manager of Price Waterhouse brought an action against the company under Title VII of the Civil Rights Act of 1964 alleging that the partners of the company refused to elect her to the partnership on the basis of sex. *Id.* at 231–32. Evidence at trial indicated that several partners refused to elect her because she was too “macho” or was “overcompensate[ing]” for being a woman. *Id.* at 235. In fact, some partners had encouraged her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” to be better considered for partnership. *Id.* The Supreme Court held that once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. *Id.* at 244–45. The Court remanded the case to determine whether Price Waterhouse had acted on a basis other than gender. *Id.* at 258.

⁷² *Id.* The Supreme Court explained that in the 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, for example, has acted on the basis of gender. *Id.* at 250; see also *Etsitty*, 502 F.3d at 1224 (explaining that under *Price Waterhouse*, an employer who discriminates against a woman for not wearing dresses or makeup is engaged in sex discrimination because the discrimination would not occur but for the victim's sex).

⁷³ *Schroer v. Billington*, 577 F. Supp. 2d 293, 304 (D. D.C. 2008) (using *Price Waterhouse* to show that sex stereotyping based on a person's nonconforming behavior is “impermissible discrimination”); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding that Title VII is violated when an employer discriminates against an employee “because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer”).

⁷⁴ *Schroer*, 577 F. Supp. 2d at 304; *Lopez*, 542 F. Supp. 2d at 660. In *Lopez*, the plaintiff, a transgender female, was offered a position at River Oaks after going through an interview process where she expressed herself to be female, but that offer was rescinded after a background check revealed she was biologically male. 542 F. Supp. 2d at 655–56. The U.S. District Court for the Southern District of Texas held that River Oaks discriminated against her because she failed to comport with how they believed a male should look. *Id.* at 668. In *Schroer*, the plaintiff, a transgender female, was unanimously recommended for the position of Specialist in Terrorism and International Crime with the Congressional Research Service at the Library of Congress after demonstrating in an interview impressive qualifications and military connections that far outweighed the other candidates. 577 F. Supp. 2d at 296. During the interview process, the plaintiff had expressed herself as male, but prior to accepting the employment offer, informed the hiring supervisor that she was transitioning to a female, and would be undergoing sex reassignment surgery. *Id.* at 297. The plaintiff's employment offer was rescinded out of concern that as female, she would lose her military contacts, would not be taken seriously in the position, and would be distracted by the transition. *Id.* at 297–98. The U.S. District Court for the District of Columbia held that this was direct evidence of sex discrimination because it indicated that only a very masculine man could succeed at the job and obtain success in the military. *Id.* at 305.

to behave or look the way a male or female behaves and looks, not merely because they are transgender.⁷⁵ This can be exceedingly difficult for transgender individuals to prove, particularly in employment settings where to avoid liability, employers merely have to demonstrate that they had a legitimate interest in discriminating; this can include protecting the privacy of other employees.⁷⁶ Some plaintiffs have found success in the U.S. Court of Appeals for the Eleventh Circuit, but transgender individuals bringing Title VII discrimination claims elsewhere have continued to struggle.⁷⁷

Similarly, individuals who have experienced discrimination in schools find recourse under Title IX, which prohibits certain educational programs from discriminating against individuals on the basis of sex.⁷⁸ To establish a case of discrimination under Title IX, an individual must allege that he or she faced discrimination in an education program that was federally funded, and that the discrimination was based on sex.⁷⁹ Because Title IX explicitly uses the term “sex,” transgender individuals who experience gender-based discrimination in schools have struggled to bring successful Title IX claims.⁸⁰ For instance, school policies that force transgender individuals to either use unisex facilities or facilities that match their assigned birth sex have been upheld because they discriminate on the basis of gender, not sex as is prohibited under Title IX.⁸¹ Transgender individuals who file Title IX claims must therefore demonstrate that the gender-based discrimination they have experienced was really sex-based discrimination, a task that is difficult to accomplish.⁸²

The legal obstacles at the federal level, which prevent transgender individuals from obtaining equal opportunity in settings such as employment and

⁷⁵ *Lopez*, 542 F. Supp. 2d at 659.

⁷⁶ *Etsitty*, 502 F.3d at 1224. The Tenth Circuit refused to extend protection to a plaintiff who claimed she was terminated from employment for wanting to use female restrooms as a transgender female, because the court did not conclude that employers should be required to allow biological males to use women’s restrooms. *Id.*

⁷⁷ *Compare Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding that the sex-stereotyping experienced by a transgender employee was unlawful discrimination under Title VII), with *Etsitty*, 502 F.3d at 1224 (holding that employer prohibition against transgender female use of female restrooms was not unlawful discrimination under Title VII).

⁷⁸ 20 U.S.C. § 1681 (2012). Title IX states, “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 an education program or activity receiving Federal financial assistance.” *Id.*

⁷⁹ *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, No. 3:13-213, 2015 U.S. Dist. LEXIS 41823, at *38 (W.D. Pa. Mar. 31, 2015). Congress’s purpose in enacting Title IX was to establish equal educational opportunities for women and men in education; therefore, Title IX prohibits discrimination on the basis of sex, and sex only. *Id.* at *47.

⁸⁰ *Id.* at *39-43 (holding that a university did not discriminate against a transgender male under Title IX by refusing to allow him to use male restrooms when unisex and female restrooms were available).

⁸¹ *Id.* at *49-50.

⁸² *Id.* at *39. Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic. *Id.*

education, apply in the world of sports, as well.⁸³ Just as there is no federal law that expressly prohibits discrimination on the basis of gender identity in employment or places of public accommodation, there is no federal law that prohibits discrimination on the basis of gender identity in athletics.⁸⁴ If employers and major universities are allowed to discriminate against transgender adults under the current legal system, then there is little hope for transgender youth athletes who face discrimination in athletics.⁸⁵ Although President Barack Obama repeatedly supported legislation to amend the Civil Rights Act of 1964 to ban discrimination on the basis of sexual orientation or gender identity, until such legislation passes, transgender individuals, including transgender youth athletes, will continue to face an uphill battle in obtaining consistent and equal treatment under the law.⁸⁶

B. Inconsistency Among State Participation Policies Restricts Transgender Students' Opportunity to Succeed

Currently, no federal law governs transgender participation in youth sports.⁸⁷ Thus, states are left to determine their own policies and regulations.⁸⁸ States have dealt with this issue in a variety of ways, including: (1) restricting transgender athletes to teams that match their assigned birth sex; (2) matching

⁸³ Skinner-Thompson & Turner, *supra* note 28, at 272–74.

⁸⁴ *Id.*; Weatherby, *supra* note 32, at 104. There is no “overarching rule” governing participation in sports for transgender athletes. Brown, *supra* note 38, at 312.

⁸⁵ *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *47; *see* Skinner-Thompson & Turner, *supra* note 28, at 280–82.

⁸⁶ *See* Equality Act, H.R. 3185, 114th Cong. § 2 (2015); Juliet Eilperin, *Obama Supports Altering Civil Rights Act to Ban LGBT Discrimination*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec_story.html?wpisrc=al_alert-COMBO-politics%252Bnation [<https://perma.cc/B367-YKG7>]. On February 22, 2017, President Donald Trump rescinded protections for transgender students that the Obama administration had previously enacted to allow transgender students to use bathrooms corresponding with gender identity, rather than sex. Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html?_r=0 [<https://perma.cc/Y59G-3J4G>]. The Trump administration stated that the decision to allow transgender students to use bathrooms based on gender identity was the primary role of the states and local school districts, not the federal government; if the federal government were to allow such protections it would be establishing educational policy, which is not a federal matter. *Id.* This action by the Trump administration supports the social conservative agenda of not allowing “potential sexual predators access to bathrooms [that would] create an unsafe environment for children,” and is evidence that legislation banning discrimination on the basis of gender identity is not likely to occur during the Trump presidency. *Id.* Supporters of transgender rights argue that the Trump administration acted “recklessly and cruelly” because the issue of transgender rights is not a states’ rights issue, but rather is a civil rights issue. *Id.*

⁸⁷ Brown, *supra* note 38, at 312.

⁸⁸ *Id.* State policies are often determined by state education departments or high school athletic associations, resulting in inconsistent application amongst schools. *Id.*

policies of the National Collegiate Athletic Association (NCAA) and the International Olympic Committee (IOC); (3) leaving the decision up to each individual school district; and (4) allowing complete inclusion in athletics.⁸⁹ This inconsistent treatment of transgender participation in youth sports has resulted in an unequal opportunity for transgender youth to thrive in their school and athletic communities.⁹⁰

Medical and psychological research has demonstrated how critical it is to the well-being of transgender students to be able to identify with the gender of their choice in all aspects of life.⁹¹ In spite of this wealth of research, many states still restrict transgender participation in youth sports by requiring these students to play for teams that match the sex designated on their birth certificate.⁹² This restriction is representative of the overall lack of inclusion of transgender students, especially in regard to the use of restrooms and locker rooms at their schools.⁹³ For instance, the U.S. District Court for the Eastern District of Virginia recently upheld a policy decision of the Virginia Board of Education that effectively prohibits transgender students from being able to use the restrooms and locker rooms that match their gender identity, but not necessarily their assigned birth-sex, in public schools.⁹⁴ In *G.G. v. Gloucester County School Board*, a high school transgender male was prohibited from using the men's restrooms and locker rooms after members of the

⁸⁹ *Id.* (citing Elizabeth M. Ziegler & Tamara Isadora Huntley, “*It Got Too Tough to Not Be Me*”: Accommodating Transgender Athletes in Sport, 39 J.C. & U.L. 467, 488 (2013)). Only one-quarter of all states have explicitly prohibited discrimination against students based on either sexual orientation or gender identity, which includes participation in athletics. Moffitt, *supra* note 24, at 482.

⁹⁰ Comer, *supra* note 34.

⁹¹ Skinner-Thompson & Turner, *supra* note 28, at 276–77.

⁹² Brown, *supra* note 38, at 315–16. States that have completely discriminatory policies include Kentucky, Virginia, North Carolina, Alabama, Georgia, New Mexico, and Idaho. *K-12 Policies*, TRANSATHLETE, <http://www.transathlete.com/#!k-12/c4w2> [<https://perma.cc/SMW7-WYYE>]. These states require that students play for the teams designated by their birth certificate, or undergo surgery and hormone treatment before being allowed to play for the team of their choice. *Id.* Recently, the North Carolina High School Athletic Association (NCHSAA) adopted a new rule clarifying that students could only compete on the teams denoted by their birth certificate. Comer, *supra* note 34. The NCHSAA expressed the belief that its policy would increase participation in sports and was as least restrictive as possible. *Id.* Advocates for transgender students pointed out, however, that this policy would completely restrict transgender students from participating as their gender identity, which would actually decrease participation in sports. *Id.* In North Carolina, the only way to change the gender marker on your birth certificate is to undergo sex reassignment surgery. *Id.* For many student athletes, this is not an option as most medical professionals strongly discourage direct surgical intervention for minors. *Id.* One North Carolinian high school transgender athlete expressed, “I will never play on a woman’s [sic] team again. If that means that I’ll never play sports again, so be it, but I shouldn’t have to sacrifice my love for athletics or myself just because my sex assigned at birth does not match my gender.” *Id.*

⁹³ *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 U.S. Dist. LEXIS 124905, at *2, *24 (E.D. Va. Sept. 17, 2015).

⁹⁴ *Id.* at *24–25.

community expressed disapproval and concern about the privacy of their cis-gender boys.⁹⁵ Responses from communities like this are not uncommon, and often influence the policy decisions made by school education boards regarding the inclusion of transgender children, particularly in athletics.⁹⁶ Some of

⁹⁵ *Id.* at *6–7. G.G. was born a female, but at a very young age, began to identify as male. *Id.* at *3. By age twelve, G.G. was fully expressing himself as male, which caused him extreme stress, anxiety, and depression, particularly at school. *Id.* at *4. After being diagnosed by a therapist as having gender dysphoria, the condition of feeling one’s emotional and psychological identity as male or female in opposition to biological birth-sex, it was recommended as treatment that he be treated as a boy in all aspects of life, including with respect to his use of a restroom. *Id.* at *5. The school initially allowed G.G. to use the men’s restrooms and locker rooms, however, once community members expressed disapproval, the school principal informed G.G. he would no longer be allowed to use male facilities on campus and would be disciplined if caught doing so. *Id.* at *9. This restriction was based on an education policy that indicated, “it shall be the practice . . . to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.” *Id.* at *7. With gender, despite the fact that G.G. had already begun hormone treatment, and physically and emotionally felt like a male, he was forced to either use female facilities or the isolated unisex facilities. *Id.* at *10. In response to his Title IX claim of sex discrimination, the court held that sex discrimination does not include discrimination based on gender identity. *Id.* at *19–20. The court further held that the school would not be required to separate facilities based on gender, and therefore, because there were equal and available options for G.G. to use based on his sex, there was no violation of Title IX. *Id.* at *24. After the Fourth Circuit overturned the district court’s decision, the Supreme Court stayed the lower court’s ruling in a five-to-three decision, claiming that it wanted to temporarily preserve the “status quo.” Robert Barnes & Moriah Balingit, *Supreme Court Takes Up School Bathroom Rules for Transgender Students*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-takes-up-school-bathroom-rules-for-transgender-students/2016/10/28/0eece4ea-917f-11e6-a6a3-d50061aa9fae_story.html [<https://perma.cc/2G3X-SYBS>]. Although having stated in October 2016 that it would hear G.G.’s case in the subsequent term, in March 2017, the Supreme Court announced that it will not decide whether transgender students are permitted to use bathrooms that align with their gender identity. *G.G. v. Gloucester County School Board*, ACLU (Mar. 6, 2017), <https://www.aclu.org/cases/gg-v-gloucester-county-school-board> [<https://perma.cc/GD2E-U6H2>]; Arlane de Vogue, Steve Vladeck & Theodore Schleifer, *Supreme Court Sends Transgender Case To Lower Court*, CNN (Mar. 6, 2017), <http://www.cnn.com/2017/03/06/politics/gavin-grimm-transgender-case-supreme-court/> [<https://perma.cc/MU9L-AKME>]. Instead, the Supreme Court vacated the Fourth Circuit Court of Appeals’ decision and instructed the court to reconsider G.G.’s case in light of the Departments of Justice and Education rescinding Title IX guidance clarifying protections for transgender students. *G.G. v. Gloucester County School Board*, *supra*; de Vogue, Vladeck & Schleifer, *supra*. The decision of the Supreme Court not to take G.G.’s case means there will be no high court ruling on the issue of transgender rights in 2017, despite hope from transgender rights advocates that such development would occur. Adam Liptak, *Supreme Court Won’t Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html?_r=0 [<https://perma.cc/F4DS-PGNN>].

⁹⁶ See *G.G.*, 2015 U.S. Dist. LEXIS 124905, at *6. Virginia high schools’ updated policy on transgender participation requires a transgender student undergo an extensive process of review by various committees that decide whether to allow participation. See VA. HIGH SCH. LEAGUE, PROPOSED TRANSGENDER POLICY 1–2 (2014), http://media.wix.com/ugd/2bc3fc_d4010e9ceba34d88a64fc20ff8dda548.pdf [<https://perma.cc/T32G-TQBN>]. The only way a transgender student avoids such a process is by undergoing sex reassignment surgery or substantial hormonal treatment prior to puberty. *Id.* at 2.

the most restrictive state policies require transgender students to undergo surgical procedures to change their gender before they will be allowed to participate on the teams of their choice.⁹⁷ Surgical procedures for gender transition, however, are highly discouraged at young ages.⁹⁸ These discriminatory policies reflect distorted societal concerns of privacy and unfair competition, particularly with transgender females playing on female sports teams, and often lead to an overall lack of participation by transgender athletes.⁹⁹

Instead of designing their own transgender participation policies, many states have adopted the NCAA and IOC policies—or have created policies that reflect similar requirements—believing that such policies are equally suited for adult and youth athletes.¹⁰⁰ For instance, the Ohio High School Ath-

⁹⁷ KY. HIGH SCH. ATHLETIC ASS'N, *Policies and Procedures*, in 2014–2015 KHSAA HANDBOOK 26 (2014), <http://khsaa.org/Publications/Handbook/20142015/20142015fullhandbook.pdf> [https://perma.cc/AUT5-G4D2]. The Kentucky Athletic Association's Transgender Participation Policy states that for the purpose of eligibility:

Each student-athlete shall participate according to the gender they were assigned at birth. This may be demonstrated through the use of a birth certificate, driver's license, passport, or other certified medical record A student-athlete who has undergone sex-reassignment is eligible to compete in the reassigned gender when: (a) The student-athlete has undergone sex reassignment before puberty, or (b) The student-athlete has undergone sex reassignment after puberty under all of the following conditions: (1) Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy; and (2) Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages in sports competition.

Id.

⁹⁸ Comer, *supra* note 34.

⁹⁹ See *Constitution and Bylaws*, 109 GA. HIGH SCH. ASS'N 16 (2015), <http://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2015-16Complete.pdf> [https://perma.cc/W3JM-L7LD]. The Georgia High School Association's transgender participation policy clearly reflects these fears by stating, "Girls may participate on boys' teams when there is no girls' team offered in that sport by the school. Boys are not allowed to play on girls' teams even when there's no corresponding boys' sports. A student's gender is determined by the gender noted on his/her certificate at birth." *Id.*

¹⁰⁰ Brown, *supra* note 38, at 314–15; *K-12 Policies*, *supra* note 92. States that base their own transgender participation policies on the NCAA in particular include Oregon, Arizona, Kansas, Oklahoma, New York, Pennsylvania, Maine, Illinois, Iowa, Missouri, New Jersey, and Ohio. *K-12 Policies*, *supra* note 92. For example, in Missouri, a transgender student must meet the following guidelines in order to participate on the sports team of their choice:

A trans male . . . student-athlete who has undergone treatment with testosterone for gender transition may compete on a boys team but is no longer eligible to compete on a girls team . . . [and] [a] trans female . . . student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a boys team but may not compete on a girls team

MO. STATE HIGH SCH. ACTIVITIES ASS'N, OFFICIAL HANDBOOK 127 (2013), http://media.wix.com/ugd/2bc3fc_feb6053e027b4bcd98007e8ff272c29b.pdf [https://perma.cc/V2SV-CKXH]. The policy explicitly states that it was taken from the approved NCAA Transgender Policy. *Id.*

letic Association's Transgender Policy (the "Policy"), which was adopted in 2014, is based on similar considerations that were taken into account when the NCAA adopted its policy.¹⁰¹ The Policy allows a transgender female, who is taking medically prescribed hormone treatments, to participate on a boys' team at any time, but she must have completed a minimum of one year of treatment in order to participate on a girls' team.¹⁰² In regard to transgender males, the Policy allows students who have yet to undergo testosterone treatment to compete on boys' teams, but requires that they prove their muscle mass has not exceeded that of a genetic boy, that they have not started hormone treatment, and that their hormone levels are regularly monitored by a medical professional.¹⁰³ Other policies that follow those of the NCAA reflect the fear that transgender females will have competitive advantages over cisgender females, and therefore only restrict participation of transgender females, and not transgender males.¹⁰⁴ Not only do these policies result in disparate treatment between transgender males and females, but they are also based on guidelines designed for adults, and do not reflect the inherent differences between adult and youth athletes.¹⁰⁵

Most states have no specific policy regarding transgender participation in youth sports, and as such, the decision on whether and how to include transgender individuals is left up to each school district; this has resulted in a deluge of litigation regarding unfair and unequal opportunities for transgender students nationwide.¹⁰⁶ The policies designed by each district often

¹⁰¹ OHIO HIGH SCH. ATHLETIC ASS'N, TRANSGENER POLICY 2–3 (2014), http://www.ohsaa.org/Portals/0/adam/Content/ouA33QELJEyG0StH3jn_Qg/Link_File_or_Url/TransgenderPolicy.pdf [<https://perma.cc/C9BY-QFFR>]. Such policy considerations include: the value of athletics to the education of all students; that transgender student athletes should have equal opportunity to participate in sports; that the integrity of women's sports should be preserved; that policies on participation should be based on medical knowledge, and should reflect the differences between male and female skill and physical build; and that privacy of all students should be protected. *Id.*

¹⁰² *Id.* The Policy further requires transgender females to demonstrate that they do "not possess physical . . . or physiological advantages over genetic females of the same age group." *Id.*

¹⁰³ *Id.*

¹⁰⁴ Iowa High Sch. Athletic Ass'n, *Transgender Statement*, WIX, http://media.wix.com/ugd/2bc3fc_91f9ff3782524605a4a684e0a669cde0.pdf [<https://perma.cc/PM2K-WENF>]. The Iowa High School Athletic Association's transgender student participation policy allows a female-to-male transgender athlete who is taking hormone treatment to participate on a boys' team, and allows a male-to-female transgender athlete to also play on a boys' team. *Id.* However, for a male-to-female transgender athlete to play on a girls' team, she must complete at least one year of hormone treatment and go through an extensive process of approval before being allowed to participate. *Id.*

¹⁰⁵ Comer, *supra* note 34.

¹⁰⁶ *K-12 Policies*, *supra* note 92; see Kate Abbey-Lambertz, *Transgender Student's Family Sues Michigan School Districts for Discrimination*, HUFFINGTON POST (Dec. 23, 2014, 1:05 PM), http://www.huffingtonpost.com/2014/12/23/transgender-student-lawsuit-michigan_n_6372016.html [<https://perma.cc/L7PE-F4AV>]. States that have no specific policy regarding transgender participation in sports include Arkansas, Texas, Montana, Vermont, North Dakota, Nebraska, Alaska,

reflect the collective feelings of the district's community, students, and faculty towards transgender students.¹⁰⁷ For instance, four different Michigan school districts are currently facing litigation for prohibiting a transgender student from expressing his gender-nonconforming identity while at school.¹⁰⁸ The school districts' restrictive transgender policies reflect the community's overall refusal to recognize transgender individuals.¹⁰⁹ The discrepancies in district policies have, in effect, made opportunities for transgender youth athletes completely conditioned upon geography.¹¹⁰ Therefore, while a transgender male living in school district "x" might be allowed to

Louisiana, Mississippi, Indiana, Tennessee, West Virginia, Michigan, and South Carolina. *K-12 Policies*, *supra* note 92. The governing body for Texas high school sports has proposed a policy that would determine a student's eligibility for participation in sports based on the gender indicated on their birth certificate. John Wright, *Texas Rule Would Effectively Bar Transgender Youth and Teens from Playing Sports*, NEW CIV. RTS. MOVEMENT (Oct. 21, 2015), http://www.thenewcivilrights_movement.com/johnwright/texas_moves_to_bar_trans_youth_from_playing_sports [https://perma.cc/6BHE-X9NR]. According to transgender advocates, this would completely bar transgender kids from participating in sports. *Id.* Those advocates argue that society's concerns regarding differences in speed, skill, and strength are overgeneralized because the fact is that some male athletes are strong, some are small and slight, and the same goes for female athletes. *Id.*

¹⁰⁷ Abbey-Lambertz, *supra* note 106. For example, in Michigan, the majority of LGBT students have been verbally harassed because of their gender identity or sexual orientation. *Id.* This harassment negatively impacts a student's well-being, sense of self, and feelings of safety within his or her community. *Id.* The fact that the state of Michigan does not have a policy regarding transgender participation in sports means that the harassment felt in the classroom is often reflected on the athletic fields, particularly when transgender students are restricted as to which teams they can play for. *Id.*

¹⁰⁸ Complaint and Jury Request at 2, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466-AC-DRG (E.D. Mich. Sept. 5, 2014). The plaintiff in the case is a fourteen-year-old transgender male who experienced harassment and discrimination at school while he transitioned over the years prior to litigation. *Id.* at 3. As a result of the harassment, the plaintiff often returned home having urinated in his pants because faculty members refused to allow him to use the boys' restrooms. *Id.* The plaintiff also felt this harassment in gym class when he was forced to change clothes in front of the girls, despite having started hormonal procedures to transition into a boy. *Id.* at 5. The plaintiff became physically ill as a result of the repeated harassment he faced while attending school. *Id.* When the plaintiff's mother complained to the school's principal, she was told, "If she is going to dress like a boy she needs to toughen up." *Id.* at 6. Even after the plaintiff switched schools, he continued to face harassment when students and faculty refused to acknowledge that he was a boy or call him by his chosen male name. *Id.* As a result, the plaintiff developed severe psychosomatic pain and mental and emotional distress. *Id.* at 8. At yet another new school, the plaintiff and his mother were again told that it would be in his best interest if he identified and expressed himself as his natural feminine self. *Id.* at 12. The plaintiff was not allowed to use the boys' restrooms, but was forced to use the women's staff restroom which was next to the cafeteria, making him an easy target for students who wanted to bully him. *Id.* at 15. At his fourth school, the plaintiff, as a result of being prohibited from using the boys' restrooms, developed kidney infections because he had no safe and comfortable place to use a restroom. *Id.* at 17. The plaintiff alleges that all four schools discriminated against him because of his sex, and thus, he is entitled to money damages. *Id.* at 20.

¹⁰⁹ *See id.* at 2, 6.

¹¹⁰ Griffin, *supra* note 21.

play on his school's boys' soccer team, a transgender male living just one town over could be prohibited from such participation.¹¹¹

To provide transgender students equal opportunity to learn, succeed, and grow as individuals, social science experts have recommended that they be allowed to express their gender identity in all aspects of life, including athletics.¹¹² Only twelve states and the District of Columbia have responded to this recommendation by providing transgender athletes the opportunity to compete on the sports teams of their choosing, regardless of what is indicated on their birth certificates.¹¹³ These inclusive participation policies are often the result of educational policies that prohibit discrimination based on gender in schools.¹¹⁴ California and Massachusetts are most commonly cited for having

¹¹¹ *See id.*

¹¹² CONN. SAFE SCH. COAL., *supra* note 2, at 9.

¹¹³ *K-12 Policies*, *supra* note 92. States with complete inclusive policies include Washington, California, Nevada, Wyoming, Colorado, South Dakota, Minnesota, Florida, Maryland, Vermont, New Hampshire, Massachusetts, Rhode Island, and Connecticut. *Id.* In Maryland for example, the Center of Educational Programming focused on the value of equal opportunity for students in all aspects of learning and development when drafting its policy. Md. Pub. Secondary Sch. Athletic Ass'n, *Transgender Person Guidance for Participation in Interscholastic Athletics*, WIX (2014), http://media.wix.com/ugd/2bc3fc_c27051cd7b4a48759fcc5c77e34f7fab.pdf [<https://perma.cc/3R2H-6Z6A>] (last accessed Oct. 8, 2016). To ensure fairness and equal opportunity to participate without discrimination, the policy indicates:

(A) Transgender students can participate on the interscholastic athletics team of the student's birth gender; (B) Transgender students can participate on interscholastic athletics teams of the gender that the student has transitioned to. This may be supported by medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.) confirming transition of gender; (C) Transgender students may compete on the interscholastic team of the gender the student identifies with, as recognized by the local school system and established in official school system records.

Id.

¹¹⁴ CONN. SAFE SCH. COAL., *supra* note 2, at 1. The Connecticut Public Act No. 11-55, which took effect in October 2011, "prohibits discrimination on the basis of gender identity or expression in all areas and contexts in which the laws already prohibit discrimination on the basis of sex[.]" including employment, public accommodations, housing, education, and law. *Id.* The Act makes it a violation to deprive someone of rights, privileges, or immunities because of the person's gender identity or expression. *Id.* at 2. Public schools are explicitly included in the law as being required "to be open to all children and to give them an equal opportunity to participate in school activities, programs, and courses of study without discrimination on account of gender identity or expression." *Id.* at 3. With regard to restrooms and locker rooms, the Act explains that students should have access to the facilities that correspond to their gender identity asserted at school so that the students are not stigmatized by being forced to use separate, non-integrated space. *Id.* at 8. Based on the general prohibition of discrimination based on gender identity, the Act permits transgendered students to participate in sex-segregated athletic activities based on their gender identity. *Id.* at 9. The Act explicitly states that there is no educationally sound justification for denying transgender students the opportunity to participate based on their gender identity rather than their assigned birth sex. *Id.* at 9.

the most inclusive transgender policies, and as such, many of the other inclusive policies are mirrored after them.¹¹⁵

The inconsistency of current state law in regard to transgender youth athletes' participation in sports directly reflects the inconsistent beliefs and views the public has towards transgender individuals.¹¹⁶ States such as California and Massachusetts, which recognize the important public policy goals of creating a school environment of safety and acceptance for all students, encourage participation of transgender students in sports.¹¹⁷ Most states do not have inclusive policies, but rather discriminate against transgender individuals because of their gender non-conforming identity.¹¹⁸ As a result of this inconsistency, a transgender student's ability to play youth sports, activities which provide substantial educational and social benefits, is fully determined by where he or she resides.¹¹⁹

II. TRANSGENDER STUDENTS STRUGGLE TO FIND EQUAL OPPORTUNITY IN INTERSCHOLASTIC SPORTS

The discriminatory treatment of transgender students in sports has inhibited their ability to receive the physical, educational, and social benefits that sports offer, and has effectively denied them an equal opportunity to education.¹²⁰ Transgender students often face high levels of harassment and victimization in school; sports are sometimes their only outlets through which to

¹¹⁵ Brown, *supra* note 38, at 315; see FLA. HIGH SCH. ATHLETIC ASS'N, 2013–2014 FHSAA HANDBOOK 47–48 (2013), http://media.wix.com/ugd/2bc3fc_1485505e947b43b89bbc9f79beed91b7.pdf [<https://perma.cc/JGW5-VLGE>]; Colo. High Sch. Activities Ass'n, *Policy Statement and School Recommendations Regarding Transgender Participation*, WIX, http://media.wix.com/ugd/2bc3fc_eeb01ddea851116f1c35760e11424e5.pdf [<https://perma.cc/Y6T9-6MXQ>]. Both Florida and Colorado base their participation policies on the guidelines released by California and Massachusetts. FLA. HIGH SCH. ATHLETIC ASS'N, *supra*; Colo. High Sch. Activities Ass'n, *supra*. In Colorado, students are permitted to participate in sports "without unlawful discrimination based on disability, race, creed, color, gender, sexual orientation, religion, age, national origin, or ancestry." Colo. High Sch. Activities Ass'n, *supra*. To participate on teams that do not match their assigned birth sex, transgender students have to provide a current transcript from the school, a written statement from the student affirming the consistent gender identity and expression to which he or she relates, documentation from a friend, family member, or teacher giving support to that identity, written verification from a medical professional, and a list of any medications being taken. *Id.* Florida has a very similar policy, allowing transgender students to participate in sports irrespective of the gender listed on their birth certificate if they provide the same forms of support and proof. FLA. HIGH SCH. ATHLETIC ASS'N, *supra* at 47–48.

¹¹⁶ See Flores, *supra* note 22, at 400–01.

¹¹⁷ Weatherby, *supra* note 32, at 112–14.

¹¹⁸ See *K–12 Policies*, *supra* note 92.

¹¹⁹ Griffin, *supra* note 21; see Comer, *supra* note 34. For example, a transgender female who wishes to play girls' soccer can do so if living in California, but is completely restricted if living in Georgia. See Griffin, *supra* note 21.

¹²⁰ See Griffin, *supra* note 21.

cope.¹²¹ Without a federal law reflecting inclusive transgender participation policies, many transgender students continue to struggle to find the equality and recognition they need to thrive in their communities.¹²²

A. Transgender Students Face a Harsh Climate in Schools

Throughout the past decade, the Gay, Lesbian and Straight Education Network (GLSEN), an advocacy group, has documented the experiences of lesbian, gay, bisexual, and transgender (LGBT) students through its biennial National School Climate Survey.¹²³ The 2006–2007 report on transgender students indicated high levels of victimization, with transgender individuals facing much more severe levels of harassment and violence than their lesbian, gay, and bisexual counterparts.¹²⁴ Key findings of the report indicated transgender students faced daily derogatory and negative remarks regarding their gender expression from peers and faculty.¹²⁵ Along with negative remarks, transgender students experienced high levels of verbal, physical, and sexual harassment, including physical and sexual assault, by their peers because of their gender expression.¹²⁶ A majority of the transgender students also reported being the victim of rumors, lies, and cyberbullying, causing them to feel deliberately excluded from their school communities.¹²⁷ With little to no intervention on the part of school personnel, transgender students felt unsafe

¹²¹ 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, 49 (2011).

¹²² See Brown, *supra* note 38, at 312; Griffin, *supra* note 21.

¹²³ EMILY A. GREYTAK ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS v (2009), <http://www.glsen.org/sites/default/files/Harsh%20Realities.pdf> [<https://perma.cc/S6BD-HW82>]. The Fifth National School Climate Survey conducted during the 2006–2007 school year gathered data, through outreach to community programs and social media internet sites, on 295 transgender students ages thirteen through twenty. *Id.* at x.

¹²⁴ *Id.* at vi. Transgender students missed more school, received lower grades, and had stronger feelings of isolation from their school communities. *Id.*

¹²⁵ *Id.* at x. One-third of the transgender students studied heard school staff make homophobic remarks, including the use of the term “gay” in offensive and negative contexts, sexist remarks, and other negative comments, causing them to feel bothered and stressed while at school. *Id.* at 10.

¹²⁶ *Id.* at 18. Eighty-seven percent of the transgender students studied had been verbally harassed because of their gender expression, fifty-three percent had been physically harassed, twenty-six percent had been physically assaulted, kicked, or severely injured, and seventy-six percent reported being sexually harassed or assaulted by receiving unwanted sexual remarks and inappropriate touching. *Id.* at 18–21.

¹²⁷ *Id.* at 21. Eighty-nine percent of the transgender students studied reported being the target of mean rumors and lies, and ninety-two percent felt deliberately excluded and left out by their peers. *Id.* Sixty-two percent reported being the victim of cyberbullying, or bullying on social media sites, and sixty-seven percent reported that their property was purposefully damaged or stolen while at school. *Id.*

because of how they chose to express their gender identity at school, causing some transgender students to feel “transphobic” themselves.¹²⁸

As a result of the harsh climate faced at school, many transgender students suffer academically, mentally, and socially.¹²⁹ Consequentially, transgender students tend to receive lower grade point averages and are less likely to plan to attend college.¹³⁰ An astonishing ninety percent of the transgender students studied by GLSEN heard derogatory remarks such as “dyke” or “faggot” in school, as well as other negative remarks regarding their gender expression.¹³¹ As a result, those students felt excluded from their communities and had lower feelings of school belonging, making their transitions even harder.¹³² For transgender students who do not feel safe or supported, depression and other serious psychological issues are prevalent.¹³³ Such issues drive many young transgender individuals to suicide in an attempt to escape the threatening environments they live in.¹³⁴ Approximately forty-five percent of young transgender students will attempt to take their lives after facing harassment and extreme physical assault at school.¹³⁵

B. The Importance of Participation in Interscholastic Sports for Transgender Students

Sports provide more than just physical, mental, and social benefits to transgender students; sports also provide a way for transgender students to

¹²⁸ *Id.* at 11–14. Sixty-five percent of the transgender students studied felt unsafe in their school environments because of the lack of protection and intervention by school faculty, or encouragement of such cruel behavior by school personnel. *Id.* Transgender student Keelin Godsey of Massachusetts, born female but identifying as male, explained how his experiences at school made him feel “transphobic,” or antagonistic about his own transsexuality. Pablo S. Torre, *The Transgender Athlete*, SPORTS ILLUSTRATED: VAULT (May 28, 2012), <http://www.si.com/vault/2012/05/28/106195901/the-transgender-athlete> [<https://perma.cc/NM9V-DA4U>]. “There was the time when he came to school and found an explicit, derogatory message waiting at his locker. The time when a group of female students beat him up, breaking several of his ribs The time when a former teammate from the girls’ basketball team gave him a Bible, meticulously annotated, with highlighted passages suggesting that Godsey was going to hell if he didn’t change.” *Id.*

¹²⁹ EMILY A. GREYTAK ET AL., *supra* note 123, at 25. Transgender students studied had increased absenteeism, lower academic performance, and decreased educational aspirations. *Id.* Forty-seven percent reported skipping a class at least once in the month prior to the study, and forty-six percent reported missing at least one day of school. *Id.* at xi.

¹³⁰ *Id.* at 25.

¹³¹ *Id.* at x.

¹³² *Id.* at 29. The transgender students studied felt uneasy about “coming out” to their peers because it would single them out for harassment. *Id.* at 30.

¹³³ Block, *supra* note 1. Approximately fifty percent of transgender people have reported attempting suicide after being bullied or singled out because of their transgender status. *Id.*

¹³⁴ Mary Pilon, “Call Me Matt”—*Life as a Transgender High School Athlete*, VICE: SPORTS (July 16, 2015), https://sports.vice.com/en_us/article/call-me-mattlife-as-a-transgender-high-school-athlete [<https://perma.cc/V4MY-UJBT>].

¹³⁵ *Id.*

feel like they belong in their communities.¹³⁶ Transgender youth often use sports as a way to express their gender identity, which allows them to cope, and, in many circumstances, ignore any harassment and hostility faced in other aspects of their lives.¹³⁷ Because of the inconsistent treatment of transgender individuals in sports, and an overwhelming number of policies that restrict participation, transgender students are denied the immense benefits that accompany playing an organized sport, and are prevented from comfortably transitioning into their desired gender identity.¹³⁸

1. Interscholastic Sports Play a Key Role in Childhood Development

Researchers from various fields, including sports medicine, psychology, human development, and public health, have conducted a significant number of studies examining the role of sports in the development of children.¹³⁹ Participation in sports benefits a child's general health by facilitating efficient functioning of the body, aiding in the development and natural growth of the child, and improving motor learning.¹⁴⁰ In a society where obesity has become a major health issue—especially in young children—the physical advantages to competitive sports are uncontested.¹⁴¹ Participation in sports builds “healthy bones and muscle[, which in turn:] reduce[s] the risks of developing chronic diseases such as heart disease and diabetes; reduce[s] the chance of being overweight and obese; reduce[s] feelings of anxiety; depression, and hopelessness; and promote[s] overall psychological well-being.”¹⁴² Students who play competitive sports are less likely to be regular smokers who abuse cigarettes or marijuana and other narcotics, and are more likely to

¹³⁶ Buzuvis, *supra* note 121, at 48; Alia Wong, *The K–12 Binary: Schools Are Becoming Ground Zero for Clashes over Transgender Rights*, THE ATLANTIC (July 9, 2015), <http://www.theatlantic.com/education/archive/2015/07/the-k-12-binary/398060/> [<https://perma.cc/7BAB-TPME>].

¹³⁷ Buzuvis, *supra* note 121, at 49.

¹³⁸ Pilon, *supra* note 134.

¹³⁹ Suzanne Le Menestrel & Daniel F. Perkins, *An Overview of How Sports, Out-of-School Time, and Youth Well-Being Can and Do Intersect*, 115 NEW DIRECTIONS FOR YOUTH DEV. 13, 13–14 (2007).

¹⁴⁰ Richard Bailey et al., *The Educational Benefits Claimed for Physical Education and School Sport: An Academic Review*, RES. PAPERS EDUC. 1, 3–4 (2009). Consistent participation in sports throughout the high school years is positively associated with attending college, voting, and volunteering. Menestrel & Perkins, *supra* note 139, at 14.

¹⁴¹ Kirk Mango, *The Benefits of Competitive Athletic Sports Participation in Today's Sports Climate*, CHI. NOW (Feb. 16, 2010, 7:30 PM), <http://www.chicagonow.com/the-athletes-sports-experience-making-a-difference/2010/02/the-benefits-of-competitive-athletic-sports-participation-in-todays-sports-climate/> [<https://perma.cc/XUT8-CZP7>]. Childhood obesity has become an epidemic in the United States in recent years. Menestrel & Perkins, *supra* note 139, at 14. To combat it, children should be involved in at least sixty minutes of physical activity on all or most days of the week. *Id.* Competitive sports are an encouraging way to get kids active and help them remain active through their high school years. *See id.*

¹⁴² Menestrel & Perkins, *supra* note 139, at 15.

follow healthy, well-balanced dietary behaviors.¹⁴³ Moreover, the physical benefits students receive by playing competitive sports during development are reflected in their behavior and health choices as adults.¹⁴⁴

The benefits of participation in competitive sports can also be seen in a student's emotional and cognitive development.¹⁴⁵ Sports provide students with a healthy mental state, "positive self-regard, coping skills, conflict resolution skills, mastery motivation, a sense of autonomy, moral character, and confidence."¹⁴⁶ Participation in sports has been positively associated with enhancing a student's self-esteem and intrinsic motivation, too.¹⁴⁷ Students involved in competitive sports while in school have a much happier and subjective well-being, making their school experience much more enjoyable.¹⁴⁸

In an educational context, participation in sports helps improve academic performance by increasing blood flow in the brain, increasing levels of arousal, and stimulating brain development.¹⁴⁹ Students have increased concentration and motivation to study and succeed in the classroom when they are succeeding in sports.¹⁵⁰ Character and integrity are not only exhibited, but are also positively developed through sports and competition.¹⁵¹ Athletic participation helps students create and set goals, giving them direction in both athletic and academic achievement.¹⁵² In a desire to succeed on and off the field, students participating in competitive sports create strategies for improving both their athletic and academic skill sets.¹⁵³ During these pivotal devel-

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Bailey et al., *supra* note 140, at 11. Sports positively affect the psychological and emotional well-being of a student, by fostering "a joyous spirit" and a healthy outlet for emotions, and providing immense educational benefits such as the inculcation of habits of self-discipline and order, concentration, and determination. *Id.* at 3.

¹⁴⁶ *Id.* at 11. Participation in sports helps reduce stress, anxiety, and depression. *Id.* at 12.

¹⁴⁷ *Id.* The development of a child's self-esteem has been found to be directly correlated with the child's experience in school and sports. *Id.* If a student has a bad experience and is often bullied and demoralized, he or she will develop a low self-esteem; conversely, if a student has a positive and encouraging experience, he or she will develop a high self-esteem that will be maintained through adulthood. *Id.*

¹⁴⁸ *See id.*

¹⁴⁹ Bailey et al., *supra* note 140, at 15. Sports participation leads to higher levels of learning gains, greater levels of attention and working memory, and has been associated with completion of higher levels of education. Menestrel & Perkins, *supra* note 139, at 17.

¹⁵⁰ Bailey et al., *supra* note 140, at 15. It has been argued that sports generate empowering and relaxing contexts for learning, making it more enjoyable for students to study. *Id.*

¹⁵¹ Mango, *supra* note 141. Students are able to develop a sense of commitment, sacrifice, and heart through their participation in sports. *Id.* Students also learn to be disciplined and develop and maintain priorities in all aspects of their life. *Id.*

¹⁵² *Id.* As they progress through sports, students develop desires and an inner will to succeed. *Id.* As a result, students set athletic and academic goals they become determined to achieve, which helps them develop perseverance and a sense of calculated risk-taking. *Id.*

¹⁵³ *Id.* Such skills include time management and internal skills for handling pressure and adversity. *Id.*

ompenal years, students also develop moral and ethical standards, which are often a reflection of the standards demanded of them in sports and competition.¹⁵⁴

Sports participation also facilitates the acquisition of personal and social skills, which, in turn, can act as “social capital” to enable young students to function in a range of social situations.¹⁵⁵ Sports require students to work collaboratively, cohesively, and constructively, which is believed to encourage the development of skills such as trust, responsibility, cooperation, and a sense of community.¹⁵⁶ Students involved in sports learn important leadership skills and develop a solid understanding of group dynamics and how to cooperate in a way that enhances the chances of accomplishment for all members of the group.¹⁵⁷ Participation in sports not only promotes obedience, self-sacrifice, and sportsmanship, but also offers students protection from social isolation.¹⁵⁸

2. Interscholastic Sports Offer a Safe Haven for Transgender Students to Express Their True Self-Identity

Participation in sports is recognized as a crucial component to developing a positive self-esteem and a connection to school and community.¹⁵⁹ The physical, mental, and social benefits of sports are particularly great for the more vulnerable students, namely, transgender youth.¹⁶⁰ Sports help minimize the feelings of isolation transgender students often experience, and allow those students to develop positive self-images.¹⁶¹ Through sports, transgender students find a network of individuals to support and encourage their transition, providing them an opportunity to safely and positively develop their true identities.¹⁶²

By forbidding transgender students from fully participating in interscholastic sports in a manner that is consistent with their gender identity and expression, many states and school districts are undermining those students’ full integration into society.¹⁶³ The trauma faced by transgender students is amplified when the individuals rejecting them are their parents, teachers, and

¹⁵⁴ *See id.*

¹⁵⁵ Bailey et al., *supra* note 140, at 9. These social skills include the promotion of personal and social responsibility, and resiliency to difficult life situations. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Mango, *supra* note 141.

¹⁵⁸ Buzuvis, *supra* note 121, at 44–45.

¹⁵⁹ Griffin, *supra* note 120.

¹⁶⁰ Buzuvis, *supra* note 121, at 48.

¹⁶¹ *Id.*

¹⁶² *See* Block, *supra* note 1. Through her participation in girls’ volleyball, Alex Trujillo was able to find a comfortable and safe space to express herself as female. *Id.*

¹⁶³ Wong, *supra* note 136.

school administrators—the very adults who are supposed to protect and encourage these students.¹⁶⁴ Excluding transgender students from participating on teams that match their expressed gender identity isolates those students from their peers, thereby encouraging society’s “trans panic.”¹⁶⁵ Such exclusion also teaches that competition and winning are more important than recreation and participation, which not only impacts transgender athletes, but also other vulnerable students looking to sports as a social outlet, as well.¹⁶⁶

Educators recognize that athletics enhance the education of students and provide benefits to schools and communities; to this end, they are “co-curricular.”¹⁶⁷ As philosopher John Dewey noted, “[t]he role of education [is] not merely to deliver knowledge, but to integrate students into the social environment and cultivate their participation in a democratic society.”¹⁶⁸ Interscholastic sports programs are an integral part of a student’s development and integration into society.¹⁶⁹ By denying transgender students the opportunity to participate in interscholastic sports, educators are denying them an equal opportunity to education.¹⁷⁰ Education through sports is vital to the success of any student.¹⁷¹ Denying transgender students an equal opportunity to education thereby denies them an equal opportunity to succeed in their communities.¹⁷²

C. Current Interscholastic Transgender Participation Policies Are Insufficient and Impractical

In response to the push to allow transgender students to participate freely and without restriction in interscholastic sports, many states and school districts have enacted policies that mirror those of the National Collegiate Athletic Association (NCAA) and the previous version of the International

¹⁶⁴ *Id.* Transgender students restricted from expressing their true gender identity experience slower brain development, particularly in areas that control memory and verbal ability to control emotions such as anxiety and depression. *Id.*

¹⁶⁵ *Id.* “[T]rans panic” is an attempt to create a fear of transgender people and a false label of transgender individuals as sexual predators. *Id.*

¹⁶⁶ Buzuvis, *supra* note 121, at 55.

¹⁶⁷ *Id.* at 43; Joseph Kennedy, *Interscholastic Sports: A Balanced Viewpoint*, 43 CLEARING HOUSE 471, 471–72 (1969). Coaches and administrators who view school sports as extracurricular are “out-of-date with modern educational thinking.” Kennedy, *supra* at 471.

¹⁶⁸ Buzuvis, *supra* note 121, at 44.

¹⁶⁹ *Id.* at 43–44.

¹⁷⁰ *See id.*

¹⁷¹ Kennedy, *supra* note 167, at 471–72.

¹⁷² *See id.* In the 1930s and 40s, sports played a strong role in encouraging the sons of first and second generation immigrants to remain in school. *Id.* In doing so, sports helped develop those sons into future leaders of America. *Id.* Similarly, success in sports has improved the self-image of African Americans, and allowed them to break down barriers in all aspects of life. *Id.*

Olympic Committee (IOC).¹⁷³ The NCAA requires transgender student-athletes to undergo hormonal treatment for a period of time before they are allowed to compete on the gendered team of their choice.¹⁷⁴ Until recently, the IOC required that transgender athletes undergo surgical anatomical changes, along with hormonal treatment, before allowing them to compete on the gendered-team with which they identified.¹⁷⁵ By applying such policies to interscholastic participation, a majority of states and school districts are forcing medical treatment upon young transgender athletes, effectively ignoring

¹⁷³ *K-12 Policies*, *supra* note 92.

¹⁷⁴ NCAA: OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT ATHLETES 13 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf [<https://perma.cc/FER6-PNAP>].

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

1. A trans male (FTM) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.

2. A trans female (MTF) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.

Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.

Id.

¹⁷⁵ *Statement of the Stockholm Consensus on Sex Reassignment in Sports*, OLYMPIC.ORG (Oct. 28, 2003), https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf [<https://perma.cc/XVR3-34LY>]. Under the old IOC guidelines, transgender athletes were allowed to participate on their gender-preferred team under the following conditions:

Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy[;] Legal recognition of their assigned sex has been conferred by the appropriate official authorities[;] Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages in sport competitions [E]ligibility should begin no sooner than two years after gonadectomy.

Id. In a recent committee meeting, the IOC decided to amend its transgender participation policy to allow both male-to-female and female-to-male transgender athletes to compete in the Olympic Games without having had surgery, so long as they have had at least one year of hormone replacement therapy. Christina Kahrl, *IOC Opening Field of Competition to Trans Athletes with New Policy*, ESPN (Jan. 28, 2016), http://www.espn.com/olympics/story/_/id/14626858/olympics-opening-field-competition-transgender-athletes-updated-policy [<https://perma.cc/M3S8-U85Y>]. Olympics officials must formally adopt the new policy. *Id.* States that drafted their own participation policies based on the IOC's old policy have not yet recognized the amendment. *See id.*

the clear and scientifically proven differences between adults and children.¹⁷⁶ As medical and psychological experts have repeatedly expressed, hormonal and surgical treatment for transitioning transgender students may serve as a potential option for some, but should not, for the reasons that follow, be a requirement for participation.¹⁷⁷

Hormonal treatment for transgender children is controversial due to the neurological and physical development that is effected by the administration of treatment during early childhood.¹⁷⁸ Psychological therapy is typically preferred for young transgender children because there is the strong possibility that the child may change his or her mind before the hormonal treatment is complete.¹⁷⁹ This is especially concerning given that many of the hormonal and surgical treatment options are physically irreversible.¹⁸⁰ For instance, because hormonal treatment for transgender children begins when the child hits puberty, the child's opportunity to develop important sex characteristics is eliminated.¹⁸¹

Medical experts often refer to hormonal treatment for transgender children as an "experimental treatment" because the medical community's understanding of the long-term effects of hormone suppression during puberty is so underdeveloped.¹⁸² Some medical experts go so far as to call the use of such experimental treatment on children abuse, equating it to human experimentation.¹⁸³ In addition to their effect on the body's hormones, medical experts are concerned about the dangerous side effects these treatments carry with

¹⁷⁶ See *Transgender*, ASS'N GAY & LESBIAN PSYCHIATRISTS, http://www.aglp.org/gap/6_transgender [<https://perma.cc/RHJ4-CL8R>]. The long-term biological effects of hormonal treatment and surgical anatomical changes are not yet fully understood in regard to children. Susan Scutti, *Transgender Youth: Are Puberty-Blocking Drugs an Appropriate Medical Intervention?*, MED. DAILY (June 24, 2013, 2:17 PM), <http://www.medicaldaily.com/transgender-youth-are-puberty-blocking-drugs-appropriate-medical-intervention-247082> [<https://perma.cc/Z29D-NG5Q>]. Requiring transgender children to undergo such treatment as a condition of participation in sports is forcing children to take serious and potentially dangerous risks with their bodies. See *id.*

¹⁷⁷ Dale O'Leary, *Suppressing Puberty with a View to Sex-Change Surgery*, MERCATORNET (Feb. 2, 2009), http://www.mercatornet.com/articles/view/suppressing_puberty_with_a_view_to_sex_change_surgery/ [<https://perma.cc/Q9VV-9CTJJ>].

¹⁷⁸ *Transgender*, *supra* note 176.

¹⁷⁹ *Id.*

¹⁸⁰ Buzuvis, *supra* note 121, at 13.

¹⁸¹ *Id.* Sex characteristics only develop during puberty. *Id.*

¹⁸² Jason Lambrese, *Journal Discussion, Suppression of Puberty in Transgender Children*, 12 AM. MED. ASS'N J. ETHICS 645, 647 (2010). Medical experts are unclear about the effects on the health of children who undergo such treatment twenty years out. O'Leary, *supra* note 177.

¹⁸³ O'Leary, *supra* note 177. A serious concern is the risk of suppressing puberty in an otherwise healthy child, and what other unavoidable puberty effects will result. Lambrese, *supra* note 182, at 647.

them.¹⁸⁴ The use of puberty suppression in adults has been linked to pulmonary embolisms, strokes, heart attacks, and breast cancer.¹⁸⁵ In young adults, side effects have included depressive mood changes, weight increases, and severe cases of acne.¹⁸⁶ Most notably, prepubescent female-born children may run the risk of becoming irreversibly infertile.¹⁸⁷

The dangers behind these risks are compounded by the fact that young transgender children do not have the maturity to knowledgably consent to treatment.¹⁸⁸ In fact, many health professionals hesitate to administer hormonal treatment to children and young adults because of the higher likelihood the patient will regret the decision.¹⁸⁹ This fear is not unfounded; seventy-five percent of children who express gender dysphoria do not go on to be transgender adults.¹⁹⁰ It is therefore unreasonable and impractical for high school athletic associations to require interscholastic-aged transgender students to undergo puberty suppression, and ultimately gender reassignment surgery, before being allowed to fully participate in sports with their gender-preferred team.¹⁹¹ Rather than restrict transgender participation in interscholastic sports, or require extensive medical treatment, states and school districts should instead encourage open participation that facilitates the important physical, mental, and social learning that takes place when playing sports.¹⁹²

¹⁸⁴ Hank Asscheman & Louis J.G. Gooren, *Hormone Treatment in Transsexuals*, SARA BECKER, <http://www.sarabecker.com/t/Hormone%20therapy%20by%20Gooren.htm> [https://perma.cc/9LR8-DK68].

¹⁸⁵ *Id.* “Pulmonary embolus (PE) refers to obstruction of the pulmonary artery or one of its branches by material . . . that originated elsewhere in the body.” B. Taylor Thompson, *Overview of Acute Pulmonary Embolism in Adults*, UPToDate (Feb. 25, 2016, 11:21 AM), http://www.uptodate.com/contents/overview-of-acute-pulmonary-embolism-in-adults?source=search_result&search=pulmonary+embolisms&selectedTitle=1~150 [https://perma.cc/5AHM-PG2K].

¹⁸⁶ Asscheman & Gooren, *supra* note 184.

¹⁸⁷ Martha Bebinger, *Uncertainty Surrounds Medical Treatments for Transgender Youth*, WBUR: COMMONHEALTH (Jan. 24, 2014), <http://www.wbur.org/commonhealth/2014/01/24/transgender-teenagers-medical-transition> [https://perma.cc/A88W-KFBU]. There is hesitation over the use of puberty suppression in young transgender children because of the very real possibility that transsexualism for some is just a fad. *Id.*

¹⁸⁸ Lambrese, *supra* note 182, at 647. A person’s sex is “written on every cell in our body,” and is impossible to change. O’Leary, *supra* note 177. As Dr. George Burou indicated, “I don’t change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient’s mind.” *Id.*

¹⁸⁹ Bebinger, *supra* note 187. The limited research shows that most “gender variant natal boys” will go on to be gay adolescents and adults, and only fifty percent of “natal girls” will actually go on to be transgender men. Scutti, *supra* note 176.

¹⁹⁰ Scutti, *supra* note 176.

¹⁹¹ Brown, *supra* note 122, at 326. Whether an individual has genital reconstructive surgery has no bearing on their athletic ability. Skinner-Thompson & Turner, *supra* note 28, at 291.

¹⁹² See Menestrel & Perkins, *supra* note 139, at 16; *Statement of the Stockholm Consensus on Sex Reassignment in Sports*, *supra* note 175. Parents, coaches, sports organizations, communities and players are all responsible for creating a context that promotes character or moral behavior in sports. Menestrel & Perkins, *supra* note 139, at 16. Having a positive team sports experience helps

III. PROPOSED SOLUTIONS FOR TRANSGENDER YOUTH PARTICIPATION IN INTERSCHOLASTIC SPORTS

In order for transgender students to achieve equal opportunity to participate in interscholastic sports, assistance at the federal level is crucial.¹⁹³ Most notably, Congress must amend the Civil Rights Act of 1964 to include transgender individuals as a protected class.¹⁹⁴ Regrettably, the current legal climate has made the success of such an amendment incredibly difficult.¹⁹⁵ Therefore, as a short-term supplementary solution, the U.S. Department of Education should recommend Congress pass a bill that conditions federal funding of state after-school competitive sports programs on the complete inclusion of *all* students.¹⁹⁶ That bill should clearly outline an inclusive transgender participation policy, granting transgender students the right to play interscholastic sports regardless of where they reside.¹⁹⁷

A. Change at the Federal Level Is Crucial to Achieve Equal Opportunity for Transgender Youth in Interscholastic Sports

To achieve equal opportunity for transgender youth in interscholastic sports, transgender individuals in general must receive protection under federal law.¹⁹⁸ Because the Supreme Court has yet to recognize transgender individuals as a protected class under the Equal Protection Clause of the Fourteenth Amendment, Congress must once again amend the Civil Rights Act of 1964 (the “Act”) to prohibit gender-based discrimination.¹⁹⁹ Courts often look at the statutory construction of an act to determine the scope of its application.²⁰⁰ This means that Congress will need to amend the Act to explicitly

reduce the risks of social isolation and dissatisfaction with one’s body and reduces depression in transgender children. *Id.* at 18.

¹⁹³ See Moffitt, *supra* note 24, at 481; Eilperin, *supra* note 86.

¹⁹⁴ See Eilperin, *supra* note 86.

¹⁹⁵ See *id.*

¹⁹⁶ See 20 U.S.C. § 1681 (2012); Moffitt, *supra* note 24, at 481; Eilperin, *supra* note 86.

¹⁹⁷ See Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, in *SEXUAL ORIENTATION AND GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS* 23, 30–31 (George B. Cunningham ed., 2012).

¹⁹⁸ See Eilperin, *supra* note 86.

¹⁹⁹ See 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a)(1) (2012); Moffitt, *supra* note 193, at 495; Eilperin, *supra* note 86. Despite the Supreme Court’s recent ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), discrimination on the basis of gender identity and sexual orientation is still only subject to the deferential standard of rational basis review. Brian Frye, Eldred & the New Rationality, 104 KY. L. J. ONLINE 1 (2015), <http://www.kentuckylawjournal.org/index.php/2015/07/17/eldred-new-rationality/#more-177> [https://perma.cc/TV4N-HVYC]. Until the Court applies a strict scrutiny standard to gender-based discrimination, the Fourteenth Amendment will not protect transgender individuals. Moffitt, *supra* note 193, at 495.

²⁰⁰ See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (determining what Congress intended when it decided to outlaw discrimination based on sex); *Johnston v. Univ. of*

include the term “gender” in the list of protected characteristics already enumerated in the Act.²⁰¹ For transgender individuals, the most impactful amendments would be to Title VII (“Title VII”) and Title IX (“Title IX”) of the Act because such amendments would prohibit gender-based discrimination in workplace and school settings.²⁰²

An amendment to Title VII of the Act would prohibit employers from discriminating against transgender individuals for their gender non-conforming behavior in the workplace.²⁰³ Transgender employees would no longer be subject to termination for refusal to wear certain gender-conforming dress, or for refusing to use unisex facilities.²⁰⁴ As a result, transgender individuals would have more freedom to express their true identity while at work.²⁰⁵ This would not only encourage transgender individuals to openly express themselves, but would also encourage society to accept them in their true form.²⁰⁶ If society becomes more accepting of transgender individuals in the workplace, then communities will become more accepting of transgender youth athletes playing on the gendered-team of their choice.²⁰⁷

In addition, an amendment to Title IX of the Act would prohibit federally funded schools from discriminating against transgender individuals on the basis of their gender.²⁰⁸ The current struggle under Title IX is that the statute explicitly uses the term “sex”; courts, more often than not, refuse to extend the meaning of “sex” to include gender.²⁰⁹ An amendment to Title IX that specifically adds the word “gender” to the provision would force courts

Pittsburgh of the Commonwealth Sys. of Higher Educ., No. 3:13-213, 2015 U.S. Dist. LEXIS 41823, at *40 (W.D. Pa. Mar. 31, 2015) (holding that because Congress explicitly only used the term “sex,” Congress only meant for sex-based discrimination to be grounds for a Title IX claim).

²⁰¹ See 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a)(1); Eilperin, *supra* note 86. By including “gender” in the language of the Act, Congress will be explicitly stating that discrimination that is based on either sex or gender is prohibited. See 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a)(1); Eilperin, *supra* note 86. Courts that conduct a statutory interpretation of the Act will be forced to recognize discrimination based on sex and gender as equally offensive to an individual’s civil rights. See *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *43; Eilperin, *supra* note 86.

²⁰² See 20 U.S.C. § 1681; 42 U.S.C. § 2000e-2(a)(1). An amendment to Title VII would include “gender” among the list of characteristics employers cannot discriminate against. See 42 U.S.C. § 2000e-2(a)(1). An amendment to Title IX would make discrimination in schools on the basis of sex and gender grounds for civil rights violations. See 20 U.S.C. § 1681. A Supreme Court decision to extend Title IX to permit transgender students to use bathrooms that align with their gender identity would indicate huge strides for transgender youth athletes, as well. Barnes & Balagit, *supra* note 95.

²⁰³ See 42 U.S.C. § 2000e-2(a)(1); *Ulane*, 742 F.2d at 1085–86.

²⁰⁴ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007); *Ulane*, 742 F.2d at 1085; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

²⁰⁵ See *Etsitty*, 502 F.3d at 1222; *Ulane*, 742 F.2d at 1085; *Sommers*, 667 F.2d at 750.

²⁰⁶ See Flores, *supra* note 22, at 401.

²⁰⁷ See *id.*; *Skinner-Thompson & Turner*, *supra* note 28, at 272.

²⁰⁸ See 20 U.S.C. § 1681.

²⁰⁹ See *Etsitty*, 502 F.3d at 1222; *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *47.

to hold school policies that discriminate on the basis of gender as violative of an individual's civil rights.²¹⁰ For instance, policies that force transgender individuals to use unisex facilities but do not require cisgender individuals to use such facilities would be prohibited.²¹¹ An amendment to Title IX is the most crucial amendment for transgender youth athletes because it would prohibit schools from establishing discriminatory participation policies.²¹² Doing so would be grounds for litigation that schools cannot afford.²¹³ Participation policies would no longer be able to require additional medical procedures for transgender students to participate, unless those procedures were required for *all* student-athletes.²¹⁴ The effect of an amendment to Title IX would be the complete inclusion of transgender youth athletes in interscholastic sports.²¹⁵

Regrettably, an amendment to the Civil Rights Act of 1964 is not realistic under the nation's current political atmosphere, as is evidenced by President Barack Obama's recent failed attempts to pass legislation that would prohibit discrimination of transgender and homosexual individuals.²¹⁶ In 2015, President Obama proposed the Equality Act, which included provisions establishing gender reassignment and sexual orientation as protected characteristics under the Civil Rights Act of 1964.²¹⁷ Unfortunately, the Act faced major challenges from both chambers of a Republican-

²¹⁰ See *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *47; Skinner-Thompson & Turner, *supra* note 207, at 273–74.

²¹¹ See *Johnston*, 2015 U.S. Dist. LEXIS 41823, at *49.

²¹² See Skinner-Thompson & Turner, *supra* note 28, at 273–74. Transgender students would be more likely to bring a Title IX claim against their school district if the chances of success were much higher. See *id.*

²¹³ See Skinner-Thompson & Turner, *supra* note 28, at 272–74.

²¹⁴ See *id.* at 276–77. States, such as Oregon, Arizona, Kansas, Oklahoma, New York, Pennsylvania, Maine, Illinois, Iowa, Missouri, New Jersey, and Ohio, which have participation policies based on that of the NCAA will have to redraft to avoid litigation. *K–12 Policies*, *supra* note 92. States, such as Kentucky, Virginia, North Carolina, Alabama, Georgia, New Mexico, and Idaho, that completely restrict transgender participation will be forced to include transgender student-athletes equally in school sports programs. See *id.*

²¹⁵ See Skinner-Thompson & Turner, *supra* note 28, at 272–74; Eilperin, *supra* note 86.

²¹⁶ See Eilperin, *supra* note 86.

²¹⁷ Equality Act, H.R. 3185, 114th Cong. § 2 (2015). To pass, the Equality Act, and any other amendment to the Civil Rights Act of 1964, would need to survive a vote in both the House and the Senate. *Government 101: How a Bill Becomes a Law*, VOTE SMART, <http://votesmart.org/education/how-a-bill-becomes-law#>. VumEAuIrLIU [<https://perma.cc/J3HY-4UQL>]. Once a bill or amendment is approved by both chambers, it goes on to the President who signs it into law. *Id.* A bill can be supported if any member of the House or Senate co-sponsors it. *Id.* The number of co-sponsors a bill receives is often indicative of its likelihood of success. *Id.* In July 2015, when the Congressional Democrats officially introduced the Equality Act, the bill had 40 co-sponsors in the Senate and 155 in the House, but all were Democrats. Jon Green, *Equality Act Introduced with 195 Democratic and 0 Republican Co-Sponsors*, AM. BLOG (July 23, 2015, 2:35 PM), <http://americablog.com/2015/07/equality-act-introduced-with-195-democratic-and-0-republican-co-sponsors.html> [<https://perma.cc/L22W-KGM5>]. This is indicative of the lack of support the Republican majority had for the Act. *Id.*

controlled Congress, and was never passed.²¹⁸ The current Republican majority in Congress, which expresses the view that approving an amendment to prohibit discrimination on the basis of gender identity and sexual orientation would “further erode religious liberty, transform public opinion on sexuality, and harm the public perception of those who believe in traditional or biblical sexual morality,” is unlikely to support any attempt to include gender identity and expression as protected characteristics under the Civil Rights Act of 1964.²¹⁹ Until both houses of Congress become more open to equality for lesbian, gay, bisexual, and transgender individuals, an amendment to the Civil Rights Act of 1964 is unlikely to occur.²²⁰ As such, transgender students will continue to struggle in their fight for equal participation in interscholastic sports.²²¹

B. Proposing a Nationwide Inclusive Participation Policy for Transgender Students in Interscholastic Sports

Considering the obstacles preventing the passage of an amendment to the Civil Rights Act of 1964, there are other critical steps that must be taken today, particularly in the field of education, to encourage equal treatment of transgender students in interscholastic sports.²²² Education is primarily a state and local responsibility in the United States, but because of the inconsistency among state transgender participation policies, the federal government needs to get involved.²²³ As a supplementary solution, the U.S. Department of Education (“ED”) should recommend Congress pass an after-school athletics bill that conditions additional federal funding of state after-school competitive

²¹⁸ See Eilperin, *supra* note 86; Green, *supra* note 217.

²¹⁹ Eilperin, *supra* note 86 (quoting Andrew T. Walker, a conservative).

²²⁰ See *id.*; Green, *supra* note 217.

²²¹ See Skinner-Thompson & Turner, *supra* note 28, at 299–300; Eilperin, *supra* note 86; Peters, Becker & Davis, *supra* note 86.

²²² Buzuvis, *supra* note 197, at 25; Eilperin, *supra* note 86.

²²³ See Buzuvis, *supra* note 197, at 25; *The Federal Role in Education*, U.S. DEP’T EDUC., <http://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/P6RE-YDM9>]. The Trump administration’s declaration that the issue of transgender rights in schools is a state and local level issue, and not a federal matter, is discouraging for the success of this Note’s secondary solution. Peters, Becker & Davis, *supra* note 86. Although Secretary of Education Betsy DeVos initially resisted the actions taken by the Trump administration because of the harms that will result for transgender students in schools, pressure from Attorney General Jeff Sessions and President Trump caused her to rescind her opposition. *Id.* Upon appointment, Secretary DeVos had directed the ED for Civil Rights to investigate all claims of maltreatment “against those who are most vulnerable in our schools,” which indicated some federal support for LGBT students. *Id.* However, the actions of the Trump administration, including those of Secretary DeVos, to rescind protection to transgender students in schools is evidence that social conservative views on these issues will continue to control throughout the Trump presidency. See *id.* This reality makes the success of this Note’s proposed secondary solution unlikely; under the authority of a conservative executive office, the ED most likely will not support this Note’s proposed bill. See *id.*

sports programs on the complete inclusion of *all* students.²²⁴ This bill should be structured similarly to Title IX, which, by conditioning federal funding of state education programs on the complete inclusion of all sexes, has been effective in reducing sex-based discrimination in school programs.²²⁵ Most importantly, the bill should outline an inclusive transgender participation policy, which must be implemented by states receiving federal funding of interscholastic sports programs.²²⁶

For instance, the bill should implement an inclusive participation policy that is reflective of the commonalities and strengths of the participation policies of Massachusetts, Washington, and California.²²⁷ Similar to the policies implemented by these states, the bill should open with a provision stating that no student shall be excluded from, or discriminated against in, participation in interscholastic sports on account of gender identity.²²⁸ For it to be fully effective and explicit, this policy needs to expressly define the terms “transgender” and “gender identity.”²²⁹ These definitions should reflect a clear, up-to-date

²²⁴ See 20 U.S.C. § 1681 (2012); Buzuvis, *supra* note 197, at 29. The ED is a cabinet-level agency whose programs and legislation is enforceable among the states. *The Federal Role in Education*, *supra* note 223. The ED’s mission is to “promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.” *Id.* This should include equal access to interscholastic sports for transgender children. See Buzuvis, *supra* note 197, at 32. The ED is careful about how far it encroaches on state authority in education. *The Federal Role in Education*, *supra* note 223. Therefore, by conditioning additional funding for after-school competitive sports programs, which many school districts are currently struggling to fund, the ED would be promoting its mission without impeding upon the authority of the states. See *id.* It should be noted that the President would need to include the additional funding for after-school competitive sports programs in the Education Budget in order for the states to receive funding. *Id.*

²²⁵ 20 U.S.C. § 1681; *Title IX and Sex Discrimination*, U.S. DEP’T EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/2ZJ3-LD8U>].

²²⁶ See Buzuvis, *supra* note 197, at 30–31; *Title IX and Sex Discrimination*, *supra* note 225. Certain core values justify an inclusive transgender participation policy, including: (1) the value of extra-curricular activities, including athletics, for all students; (2) creating an equal playing-field for all students to participate in athletics; (3) providing an environment for transgender students to thrive; and (4) reducing the harassment that transgender students experience in school. Ziegler & Huntley, *supra* note 89, at 489.

²²⁷ Buzuvis, *supra* note 197, at 29–30; see CAL. INTERSCHOLASTIC FED’N, *Guidelines for Gender Identity Participation*, in 2016–2017 CALIFORNIA INTERSCHOLASTIC FEDERATION CONSTITUTION & BYLAWS 1, 90 (2016–2017), http://cifstate.org/governance/constitution/Guidelines_for_Gender_Identity_Participation.pdf [<https://perma.cc/3UCB-JUCH>]; WASH. INTERSCHOLASTIC ACTIVITIES ASS’N, 2015–2016 WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION HANDBOOK 74 (2015), <http://www.wiaa.com/ConDocs/Con1544/Handbook%20201516.pdf> [<https://perma.cc/53VR-PKZ5>]; *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC., http://media.wix.com/ugd/2bc3fc_447f7b8e8a44c835e855c51087a5a6d9.pdf [<https://perma.cc/WT86-NKDB>] [hereinafter *Guidance for Massachusetts Public Schools*].

²²⁸ See *Guidance for Massachusetts Public Schools*, *supra* note 227.

²²⁹ Pat Griffin & Helen J. Carroll, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 2, 23 (2010), <http://www.nclrights.org/wp-content/uploads/2013/07/Trans>

medical understanding of what it means to be transgender.²³⁰ Additionally, a provision must be included that explains how a transgender student's gender identity may be demonstrated for purposes of participation.²³¹ The policy should clearly state that the responsibility for determining a student's gender identity rests with the student or parents of the student, and not with school administration.²³²

As demonstrated by both Washington and California's transgender participation policies, the bill should outline the process by which a transgender student is to be fully included on the gendered-team of his or her choice.²³³ The process of the policy could be a variation of the following: (1) A transgender student who seeks to play on a gendered-team that does not align with his or her birth-sex must contact the school indicating such desire; (2) The school must then notify the appropriate state athletic association which will review the request; (3) Each state athletic association will have a Gender Identity Eligibility Committee which will review documentation from the student, peers, parents, and medical professionals to confirm the gender identity expressed by the student; (4) If participation is granted, it is automatically renewed each season; and (5) All documentation shall be kept confidential.²³⁴

genderStudentAthleteReport.pdf [https://perma.cc/CX8T-BTTQ]. By providing definitions of key terms regarding the meaning of "transgender," the participation policies of Massachusetts, Washington, and California assist educators implementing the policies to clearly understand why and how transgender student-athletes should be included in interscholastic sports. *See id.*

²³⁰ *Id.* at 21. Washington's definitions of "transgender" and "gender identity" are particularly detailed. WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 227. The policy defines "transgender" as,

A person whose gender identity does not match the sex assigned to him or her at birth A transgender person who is born female-bodied but identifies as male is referred to as a transgender man or a female-to-male transsexual. A transgender person who is born male-bodied but identifies as female is referred to as a transgender woman or a male-to-female transsexual.

Id. The policy defines "gender identity" as "[a] person's deeply-felt internal sense of being male or female," and gender expression as "[a] person's external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions." *Id.*

²³¹ *See Guidance for Massachusetts Public Schools, supra* note 227. For instance, Massachusetts allows for an individual's gender identity to "be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity[.]" *Id.*

²³² *See id.*; Ziegler & Huntley, *supra* note 89, at 489. This responsibility is based on the assertion that being transgender is a largely inflexible characteristic that often is established by the time the student is four years old. *Guidance for Massachusetts Public Schools, supra* note 227.

²³³ *See* CAL. INTERSCHOLASTIC FED'N, *supra* note 227; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 230, at 32; Ziegler & Huntley, *supra* note 89, at 489.

²³⁴ CAL. INTERSCHOLASTIC FED'N, *supra* note 233, at 90; WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, *supra* note 227; *see* Ziegler & Huntley, *supra* note 89, at 489.

The policy must also explicitly state that no form of medical treatment, such as surgical or hormonal treatment, or legal documentation to verify one's gender identity shall be required for participation.²³⁵ Finally, to make transgender students most comfortable while playing interscholastic sports, the policy should include a provision requiring all schools and sports programs to provide transgender students with equal access to facilities, including restrooms and locker rooms, based on their proclaimed gender identity.²³⁶

Federal funding for this proposed bill will come primarily from taxpayer investments in education.²³⁷ That funding, once approved through the President's fiscal year budget, will be sent directly to the states and their local school districts to be used for the purposes defined in the bill.²³⁸ There are no unfunded federal education mandates; every federal education law—including the bill proposed in this Note—is conditioned on a state's decision to accept the federal program funds.²³⁹ Any state that does not want to comply with the proposed bill can simply choose not to accept the federal funds associated with the bill.²⁴⁰ Although there will be costs for schools to implement more inclusive programs, states will most likely accept the additional funding and comply with the requirements of the bill.²⁴¹ Today, many school districts are forced to cut after-school programs, including competitive sports pro-

²³⁵ See *Guidance for Massachusetts Public Schools*, *supra* note 227.

²³⁶ See Parker Marie Molloy, *California's School Success and Opportunity Act (AB1266) Will Save Lives*, HUFFINGTON POST (Aug. 21, 2013, 4:00 PM), http://www.huffingtonpost.com/parker-marie-molloy/californias-school-success-and-opportunity-act-_b_3786798.html [https://perma.cc/W7TT-B5XX].

²³⁷ See *10 Facts About K–12 Education Funding*, U.S. DEP'T EDUC., <http://www2.ed.gov/about/overview/fed/10facts/index.html> [https://perma.cc/6ANZ-X58T]. Taxpayer investment in education has been steadily increasing as the United States has become a world leader in education investment. *Id.* This investment comes primarily from state and local taxes. *Id.* In recent years, however, the federal government's share has been increasing; the federal government contributes roughly 8.3% of education investment. *Id.*

²³⁸ See *id.* Funding for K–12 education programs has continued to increase because of the accountability for results, which ensures taxpayers get their money's worth. *Id.* Therefore, the President has incentive to include funding for this bill in the next fiscal year, because trends in education show positive results are likely to occur. See *id.* Within the budget, the President will allocate funding to each education program. *Id.* For instance, in 2006 \$13.3 billion went to help schools with economically disadvantaged students, and \$11.1 billion went to support children with disabilities. *Id.* Under the proposed bill, the President will allocate a certain amount of money to be sent to schools that provide inclusive after-school competitive sports programs. See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.* In the past, most states have chosen to accept and use federal program funds. *Id.*

²⁴¹ See *Model School District Policy on Transgender and Gender Non-Conforming Students*, NAT'L CTR. FOR TRANSGENDER EQUAL. (June 1, 2013), <http://www.transequality.org/issues/resources/model-school-district-policy-transgender-and-gender-non-conforming-students> [https://perma.cc/4J55-U6PN]. These costs could include: equipment costs to make uniforms more gender-neutral; costs of educating coaches, staff, and other sports personnel on the proper inclusion of transgender student-athletes, namely in the form of professional development programs; and costs of establishing a Gender Identity Committee. See *id.*

grams, because of a lack of funding.²⁴² Therefore, schools that recognize the importance of after-school sports programs will be incentivized to accept the federal funds and comply with the requirements of the bill, resulting in the complete inclusion of transgender student athletes in interscholastic sports.²⁴³

CONCLUSION

Under current law, transgender youth athletes are often restricted from participating in interscholastic sports on the gendered-team with which they identify. States whose participation policies were drafted based on misguided fears regarding privacy of cisgender students and unfair competition either restrict participation to the team that aligns with a student's birth-sex, or require medical treatment for participation. These participation policies are clear indications of a lack of understanding and acceptance of transgender individuals. As a result, many transgender students are prevented from receiving the academic, emotional, physical, and social benefits that come from playing school sports.

Few states have implemented completely inclusive transgender participation policies at the youth level. In these states, transgender students are able to find acceptance, inclusion within their community, and an outlet for coping with the stress of transitioning. Transgender student athletes who are encouraged to participate on the gendered-team with which they truly identify find success not only on the playing field, but also in other aspects of their life, as well. Unfortunately, because there is no federal law governing transgender participation in interscholastic sports, whether or not a transgender student can participate on his or her team of choice is determined by where he or she resides. The inconsistency of state participation policies denies transgender students an equal opportunity to succeed both academically and socially.

To achieve equal opportunity for transgender students in interscholastic sports, the federal government must get involved. Congress must amend the Civil Rights Act of 1964 to include transgender individuals as a protected

²⁴² Emma Brown, *School Sports' Cuts Have Drastic Consequences, Group Says*, WASH. POST (Oct. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/24/AR2009102402185.html> [<https://perma.cc/S5H2-HK6V>]. In 2009, more than \$2 billion dollars across twenty-three school districts was cut from after-school sports programs. *Id.* Lower socio-economic schools have experienced complete cuts in after-school programs; wealthy school districts have seen cuts at the elementary and middle school levels, but have been able to maintain high school programs. *Id.* There has been an increase in obesity, violence, and academic failure in schools that no longer have after-school sports programs. *Id.*

²⁴³ See Bob Hafemeister, *Cutting Middle School Sports: Middle School Sports Are Essential to Adolescents' Health*, MY SCH. FOLDERS (June 10, 2013), <https://www.myschoolfolders.com/cutting-middle-school-sports/> [<https://perma.cc/Z5VY-5J4R>]. Because school-sponsored sports are often the only team sports available to the majority of K-12 students, finding ways to maintain those programs is crucial to the success of all students. *Id.*

class. By protecting the entire class from gender-based discrimination, the amendment would also protect transgender youth athletes from discriminatory participation policies. Regrettably, the current legal climate leaves little hope for success on such an amendment. In the short-term, as a supplementary solution, the U.S. Department of Education should recommend Congress pass a bill which conditions federal funding of state after-school competitive sports programs on the complete inclusion of *all* students. Just as Title IX has reduced sex-based discrimination in schools, this bill would reduce gender-based discrimination in sports participation policies. To be most effective for transgender student-athletes, the bill must outline an inclusive transgender participation policy to be enforced by the states. In states that receive federal funding for after-school sports programs, transgender students would be given the opportunity to thrive on the field, granting them more success in other aspects of their lives, as well. In the words of Kyle Allums, a transgender NCAA Division 1 athlete, “Sports is about winning. It’s about competing. It’s about respect. It’s about heart. It’s about teamwork. And it’s about playing the game. It’s not about what’s underneath your jersey.”²⁴⁴

²⁴⁴ Katy Steinmetz, *The Case for Allowing Transgender Athletes in Youth Sports*, TIME (July 16, 2015), <http://time.com/3961696/transgender-athletes-school-sports/> [<https://perma.cc/PKK2-EWYJ>].

