

# TRANSGENDER AND INTERSEX SPORTS RIGHTS

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## TRANSGENDER AND INTERSEX SPORTS RIGHTS

Catherine Jean Archibald

*Earlier this year, the two-time Olympic Gold Medalist for the women's 800-meter run, Caster Semenya, was told by the Court of Arbitration for Sport (CAS) that she would have to start taking medication to reduce her naturally high levels of testosterone if she wanted to continue to compete in the 800-meter women's run event. This controversial ruling has sparked great public interest and debate about who should be allowed to compete in women's sporting teams and events, given what we know about intersex and transgender individuals. This article discusses how best to include transgender and intersex individuals in school sports, considering the requirements of both Title IX and the Equal Protection Clause. This article shows that schools should allow transgender and intersex students to play on sports teams that correspond with their gender identity, except in cases where there is a bone fide safety or fairness concern based on the specific characteristics of the individual, rather than based on overbroad generalizations about the characteristics of either males or females. Finally, this article discusses the necessity of maintaining the gender binary in sports at all and concludes that all sports teams can and should be divided, if at all, not based on sex, but instead based on sex-neutral characteristics such as skill, weight, height, strength, and/or testosterone level.*

## INTRODUCTION

*No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.*

- Fourteenth Amendment to the United States Constitution, Section 1

*No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.*

- Title IX of the Education Amendments of 1972

*[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.*

- Implementing regulation of Title IX of the Education Amendments of 1972 at 34 C.F.R. § 106.41(b)

**E**ARLIER this year, the Court of Arbitration for Sport (CAS) told two-time Olympic Gold Medalist Caster Semenya that she would have to start taking medication to reduce her naturally high testosterone

levels if she wanted to continue to compete in the 800-meter women's track event.<sup>1</sup> A month later, the Federal Supreme Court of Switzerland stayed the CAS ruling, allowing Ms. Semenya to compete in any women's events without medication to lower her testosterone levels, pending a final decision on appeal.<sup>2</sup> These controversial rulings have generated great debate about who should be permitted to compete in women's sporting events and on women's teams.

Domestically, also earlier this year, three cisgender<sup>3</sup> high school girls who compete in elite track events in Connecticut complained that they were unfairly deprived of track medals and opportunities in violation of Title IX by the participation of two transgender teenage girls.<sup>4</sup> The cisgender girls filed a complaint with the United States Department of Education Office for Civil Rights, after two transgender teenage girls won a number of races, including the top two spots in a girls' track 100-meter state championship in Connecticut. The policy of the Connecticut Interscholastic Athletic Conference is that student athletes compete in the gender category that they identify with. The complaint filed with the Department of Education alleges that the Connecticut policy has caused some cisgender girls lost opportunities for medals, recognition, college scholarships, and placements.

This article examines the current state of the law in the United States regarding the participation of transgender and intersex people in girls' and women's sports.

In the United States, the Constitution's Equal Protection Clause forbids discrimination based on sex,<sup>5</sup> and Title IX forbids sex discrimination in schools that receive federal funding.<sup>6</sup> However, the regulations enforcing Title IX allow sex-segregated sports teams "where selection for such teams is based upon competitive skill or the activity involved is

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<sup>1</sup> *Executive Summary*, CT. ARB. FOR SPORT (May 1, 2019), [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Executive\\_Summary\\_\\_5794\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf) [<https://perma.cc/NK27-T4EQ>].

<sup>2</sup> Sibilla Bondolfi, *Why Swiss Judges Ruled on the Caster Semenya Case*, SWISS BROADCASTING CORPORATION (Jun. 4, 2019), [https://www.swissinfo.ch/eng/international-sports\\_why-swiss-judges-ruled-on-caster-semenya-case/45009992](https://www.swissinfo.ch/eng/international-sports_why-swiss-judges-ruled-on-caster-semenya-case/45009992) [<https://perma.cc/4E5B-VCBS>].

<sup>3</sup> Cisgender is an adjective that describes someone who is not transgender. See *GLAAD Media Reference Guide* (10th Ed.), GLAAD MEDIA INST. at 11, <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/WR4D-8KQV>] (last accessed Nov. 27, 2019).

<sup>4</sup> See Complaint at 20, Soule, [Second Complainant], and Smith v. Conn. Interscholastic Athletic Conference, OCR Case Nos. 01-19-4025 & 01-19-1252 (Dep't of Educ., June 17, 2019), <http://www.adfmedia.org/files/SouleComplaintOCR.pdf> [<https://perma.cc/M5BN-9KBP>] [hereinafter Connecticut Complaint].

<sup>5</sup> U.S. CONST. amend. XIV, § 1; *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>6</sup> 20 U.S.C. § 1681 (1972).

a contact sport.”<sup>7</sup> The Obama administration interpreted Title IX and its implementing regulations to require schools to treat students with a male gender identity as male, and students with a female gender identity as female.<sup>8</sup> This interpretation was rescinded by the Trump administration, leaving it up to individual states and school districts to decide how to treat transgender individuals.<sup>9</sup>

What is the best way to include transgender and intersex individuals in school sports, considering the requirements of both Title IX and the Equal Protection Clause? This article argues that schools should allow transgender and intersex students to play on sports teams that correspond with their gender identity, except in cases where there is a *bone fide* safety or fairness concern that is based on the specific characteristics of the individual and not based on overbroad generalizations about the characteristics of either males or females. Moreover, this article shows that it is not necessary to maintain the gender binary in sports at all: if sports teams must be divided, they should be divided based on sex-neutral characteristics such as skill, weight, height, strength, and/or testosterone level.

## I. BACKGROUND

In recent years, the general public’s knowledge and awareness of the existence of transgender and intersex individuals has greatly increased.<sup>10</sup> A person is intersex if their biological traits do not correspond with what is typically thought of as either male or female.<sup>11</sup> A person is transgender if the gender that they identify with does not match the gender they were assigned at birth.<sup>12</sup> A transgender female is a person who identifies as a female but was assigned the sex of male at birth, while a transgender male is a person who identifies as male but was assigned the sex of fe-

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<sup>7</sup> 34 C.F.R. § 106.41(b) (1972).

<sup>8</sup> U.S. Dep’t of Justice and U.S. Dep’t of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), [www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf](http://www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf) [hereinafter Dear Colleague Letter 2016].

<sup>9</sup> U.S. Dep’t of Justice and U.S. Dep’t of Educ., Dear Colleague Letter (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [hereinafter Dear Colleague Letter 2017].

<sup>10</sup> See, e.g., *Intersex Legislation & Regulation*, INTERACT, <https://interactadvocates.org/intersex-legislation-regulation/>, [https://perma.cc/7G84-VDVA] (last visited Nov. 27, 2019) (discussing recent legislative efforts on behalf of intersex people); *Joint LGBTI Statement: Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender, and Intersex People*, WORLD HEALTH ORGANIZATION [WHO] (2015), [https://www.who.int/hiv/pub/msm/Joint\\_LGBTI\\_Statement\\_ENG.pdf?ua=1](https://www.who.int/hiv/pub/msm/Joint_LGBTI_Statement_ENG.pdf?ua=1) [https://perma.cc/MSR5-9JEY].

<sup>11</sup> See *What is Intersex?*, INTERSEX SOCIETY OF NORTH AMERICA (Sept. 28, 2019), [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) [https://perma.cc/J4VB-ULX8].

<sup>12</sup> See GLAAD MEDIA INST., *supra* note 3, at 10.

male at birth.<sup>13</sup> A person is non-binary if they do not identify as exclusively male or exclusively female.<sup>14</sup>

#### A. Current Knowledge Regarding Transgender and Intersex Students

Up to 1.7% of the population is born intersex,<sup>15</sup> which is “[a]n umbrella term describing people born with reproductive or sexual anatomy and/or a chromosome pattern that can’t be classified as typically male or female.”<sup>16</sup> This means that about 5.6 million people in the United States are intersex.<sup>17</sup> Many intersex people do not realize that they are intersex.<sup>18</sup>

A recent survey shows that about 0.6% of the United States population identifies as transgender, which means that they identify as a different gender than the gender they were assigned at birth.<sup>19</sup> This means that about 2 million people in the United States are transgender.<sup>20</sup> Only about one half of transgender people have ever received hormone treatment therapy related to their transgender status.<sup>21</sup> Transgender people general-

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 11.

<sup>15</sup> See *Intersex Population Figures*, INTERSEX HUMAN RIGHTS AUSTRALIA, (Sept. 28, 2013), <https://ihra.org.au/16601/intersex-numbers/> [<https://perma.cc/7UTN-A7SH>].

<sup>16</sup> See GLAAD MEDIA INST., *supra* note 3 at 6.

<sup>17</sup> See U.S. Census Bureau, *Population Clock*, 2019, <https://www.census.gov/popclock/> (showing U.S. population is approximately 330 million people). 330 million people x .017 = approximately 5.6 million people are intersex in the United States.

<sup>18</sup> See *What is Intersex?*, *supra* note 11.

<sup>19</sup> Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST., June 2016, at 3, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/KYK7-AC86>] (finding .58% of adults in the United States identify as transgender, equaling about 1.4 million adults in the United States in 2016). Another recent survey of high school students in some states and urban districts showed that almost 2% of high school students identify as transgender. See Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017*, 68(3) MORBIDITY AND MORTALITY WEEKLY REPORT 67–71 (2019), [https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm?s\\_cid=mm6803a3\\_w](https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm?s_cid=mm6803a3_w) [<https://perma.cc/C4HR-53K5>] [hereinafter *CDC Report*].

<sup>20</sup> See U.S. Census Bureau, *supra* note 17 (showing that the United States population is approximately 330 million people). 330 million people x .006 = approximately 2 million people identify as or will identify as transgender in the United States.

<sup>21</sup> Sandy E. James., et al. *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY, Dec. 2016, at 99, <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report->

ly know that they are transgender because they know what sex they were assigned at birth and they know they do not identify with that sex. A recent survey and report on transgender individuals shows that this group faces many hardships, such as pervasive discrimination, mistreatment, and a much higher than average rate of mental health issues—including rates of attempted suicide nine times that of the general population.<sup>22</sup>

Therefore, based on the most recent estimates of the numbers of intersex and transgender people, there are approximately 7.6 million transgender and intersex people in the United States, and they make up less than 3% of the population.<sup>23</sup>

### *B. Legal Protections from Discrimination Based on Sex*

The Equal Protection Clause states that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>24</sup> The Supreme Court has interpreted this provision to include the requirement that states may not discriminate on the basis of sex unless there is an important governmental interest substantially related to the discrimination.<sup>25</sup> Title IX of the Education Amendments of 1972 provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>26</sup> Title IX does, however, allow separate sports teams based on sex “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>27</sup>

The Obama and Trump administrations interpreted Title IX very differently. While the Obama Administration interpreted Title IX as requiring schools receiving federal funding to treat transgender girls as girls and transgender boys as boys, the Trump administration has stated that such decisions should be left to individual states and school districts.

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FINAL.PDF [<https://perma.cc/4CPS-ZYK5>] [hereinafter *2015 Transgender Survey*].

<sup>22</sup> *Id.* at 10.

<sup>23</sup> See *supra* notes 17 and 20 and accompanying text. 5.6 million intersex people + 2 million transgender people = 7.6 million people who are transgender or intersex. Note, however, that since some intersex people are also transgender, the number of people who are transgender or intersex is likely to be somewhat less than 7.6 million people. 7.6 million transgender or intersex people ÷ 330 million people = 2.3% of people are transgender or intersex. This number is less than 3% of the total population.

<sup>24</sup> U.S. CONST. amend. XIV, § 1.

<sup>25</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>26</sup> 20 U.S.C. § 1681 (1972).

<sup>27</sup> 34 C.F.R. § 106.41(b) (1972). See also Paul Jones, *Can I Play Too? Transgender Student Athletes’ Inclusion in “Because of Sex,”* 39 HASTINGS COMM. & ENT. L.J. 67, 73–74 (2017) (discussing how these two exceptions have “left Title IX a hollow victory”).

### 1. The Obama Administration's Interpretation of Title IX and the 2016 Dear Colleague Letter

The Obama administration interpreted Title IX as requiring schools to treat transgender boys as boys and transgender girls as girls. In 2013, the United States Department of Education (DOE) and the United States Department of Justice (DOJ) jointly investigated a transgender boy's complaint that his school was violating federal law by not allowing him access to the boys' restrooms, locker rooms, and overnight sleeping accommodations.<sup>28</sup> The resolution reached with the school district required that the district treat the student as a boy in all respects, presumably including in athletics.<sup>29</sup> Similarly, in 2014, the DOE investigated a complaint by a transgender girl that she was harassed and reprimanded by the school for acting as a girl.<sup>30</sup> The resolution reached with the school required the school to treat her as a girl in all respects, including in athletics.<sup>31</sup> In accordance with these cases, the DOE issued an opinion letter in January 2015 stating that when a school has sex-segregated facilities or activities, such as bathrooms, locker rooms, or athletic teams, "a school generally must treat transgender students consistent with their gender identity."<sup>32</sup>

Following this trend, on May 13, 2016, the DOJ and DOE together released joint guidance entitled "Dear Colleague Letter on Transgender Students," (2016 Dear Colleague Letter) stating that in order to remain in compliance with Title IX and its implementing regulations, schools receiving federal funding should treat transgender students in all respects

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<sup>28</sup> See *In re Arcadia Unified School District*, OCR Case No. 09-12-1020 (Dep't of Educ., July 24, 2013), <http://www.justice.gov/crt/about/edu/documents/arcadialetter.pdf> [<https://perma.cc/7XAE-J3SH>] (resolution letter).

<sup>29</sup> See *In re Arcadia Unified School District*, OCR Case No. 09-12-1020 (Dep't of Educ., July 24, 2013), <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf> [<https://perma.cc/DEA5-REYQ>] (resolution agreement) (requiring the school district to treat the transgender male student as "the same as other male students in all respects in the education programs and activities offered by the District").

<sup>30</sup> See *In re Downey Unified School District*, OCR Case No. 09-12-1095 (Dep't of Educ., October 14, 2014), [www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf](http://www2.ed.gov/documents/press-releases/downey-school-district-letter.pdf) [<https://perma.cc/PJC9-4EXB>] (resolution letter) (school agrees to treat transgender girl "as a girl in all respects," including in athletics).

<sup>31</sup> See *id.*

<sup>32</sup> See James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, O.C.R., Dep't of Educ., Letter to Emily T. Prince, Esq. Regarding Transgender Students' Access to Restrooms (Jan. 7, 2015), [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf) [<https://perma.cc/WYN3-MAFF>].

as the gender that they identify with.<sup>33</sup> The 2016 Dear Colleague Letter informed schools receiving federal funding that the federal government interpreted Title IX as requiring schools treat students in accordance with their gender identity rather than their sex identified at birth.<sup>34</sup> In a short paragraph titled “Athletics,” the letter acknowledged that Title IX regulations allow schools to maintain sex-segregated sports teams “when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.”<sup>35</sup> However, the letter went on to state: “A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students. Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.”<sup>36</sup>

The 2016 Dear Colleague Letter encourages schools to consult another document, titled Examples of Policies and Emerging Practices for Supporting Transgender Students (“Examples Document”), for ideas on how to conform to Title IX’s requirements.<sup>37</sup> The Examples Document provides three examples of ideal school policies regarding sports.<sup>38</sup> In the first example, it references a New York State Education Department guidance document providing that when physical education classes are separated by sex, “students should be allowed to participate in a manner consistent with their gender identity.”<sup>39</sup> In the second example, a Los Angeles Unified School District policy is quoted as stating that a student’s participation in sports “shall be facilitated in a manner consistent with the student’s gender identity asserted at school and in accordance with the California Interscholastic Federation bylaws.” The example notes that the California Interscholastic Federation makes eligibility de-

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<sup>33</sup> See Dear Colleague letter 2016, *supra* note 8; Press Release, U.S. Dep’t of Justice, U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016) <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/FCA7-73UZ>]. For an in-depth discussion on why this 2016 Dear Colleague Letter was validly issued and should have been followed, see Catherine J. Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL’Y, 1–31 (2016).

<sup>34</sup> See Dear Colleague Letter 2016, *supra* note 8.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 2 and n.3 (referencing Dep’t of Educ., *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016) <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf> [<https://perma.cc/6W7A-GYKN>] [hereinafter *Examples Document*]).

<sup>38</sup> *Examples Document*, *supra* note 37, at 2.

<sup>39</sup> *Id.* at 8.



cisions using a “panel of professionals, including at least one person with training or expertise in gender identity health care or advocacy.”<sup>40</sup> In the last example, the Rhode Island Interscholastic League’s policy is quoted as providing that “all students should have the opportunity to participate in athletics consistent with their gender identity.”<sup>41</sup>

The Examples Document also includes some general “Additional Practices to Support Transgender Students,” which highlights the practices of a few states as ideal.<sup>42</sup> These ideal practices include a guidance document from the District of Columbia Public School system recommending that, “[w]herever arbitrary gender dividers can be avoided, they should be eliminated,” and a similar guidance from Massachusetts recommending that, in general, “schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose.”<sup>43</sup>

Also referenced in the 2016 Dear Colleague Letter is a report and policy statement of the National Collegiate Athletic Association (NCAA), entitled “On the Team: Equal Opportunity for Transgender Student Athletes” as examples of the type of policies that covered entities could implement.<sup>44</sup>

## 2. Supporting the Obama Policy: On the Team: Equal Opportunity for Transgender Student Athletes

The NCAA policy document “On the Team: Equal Opportunity for Transgender Student Athletes” (“On the Team”) notes that sports are “integral parts” of both the high school and college experience.<sup>45</sup> The document notes that participation in sports at both the high school and college level comes with multiple benefits for “physical, social, and emotional well-being,” and that student athletes learn important life lessons about “self-discipline, teamwork, success, and failure.”<sup>46</sup> On the Team was written in collaboration with medical experts on transgender issues.<sup>47</sup> The policy document recommends that at the high school level, transgender students should be permitted to play sports according to their gender identity, without regard to whether the student is taking hor-

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<sup>40</sup> *Id.* at 8–9.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.*

<sup>44</sup> See Dear Colleague Letter 2016, *supra* note 8, at 3 and n.18 (citing Pat Griffin and Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes*, (Oct. 4, 2010) [https://www.ncaa.org/sites/default/files/NCLR\\_TransStudentAthlete%2B\(2\).pdf](https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf) [<https://perma.cc/ULJ2-TP5Q>] [hereinafter *On the Team*]).

<sup>45</sup> *On the Team*, *supra* note 44, at 6.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 4.

mones.<sup>48</sup> In contrast, the policy document recommends policies for college sports that account for whether and for how long a transgender athlete has been participating in hormone therapy.<sup>49</sup>

Though some are concerned that transgender girls have an unfair advantage in high school sports if they play against other girls, *On the Team* points out that many transgender youth are undergoing medical hormone treatment, which prevents transgender girls from going through male puberty.<sup>50</sup> In addition, the report points out that there is great variation in physical traits among all high school students, and that in general, transgender students “fall within the spectrum of physical traits found in athletes of their transitioned gender, allowing them to compete fairly and equitably.”<sup>51</sup>

For college athletics, the report has different recommendations.<sup>52</sup> There, the report recommends that transgender men not taking hormones should have the choice of joining the men’s or women’s team.<sup>53</sup> Transgender men who are taking hormones, meanwhile, should be permitted to play on the men’s team only.<sup>54</sup> By contrast, the report recommends that transgender women should be allowed to play on the men’s team at all times, but should only be allowed to play on the women’s team after a year of hormone treatment.<sup>55</sup> The report cites current medical research showing that transgender women who have been taking hormones for one year or more do not have an advantage because they are transgender compared to other women.<sup>56</sup>

The report also notes that by having inclusive policies, high schools and colleges model the importance of non-discrimination and inclusion to all students, their families, and their communities.<sup>57</sup> The report cautions that a lack of inclusive policies for transgender students increases fears and stigma related to gender diversity, negatively impacting all students.<sup>58</sup>

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<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 15.

<sup>51</sup> *Id.* at 16 (quoting Dr. Nick Gorton).

<sup>52</sup> *On the Team*, *supra* note 44, at 28.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 16.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.*

### 3. The Demise of the 2016 Dear Colleague Letter and the Current Legal Landscape

Twenty states challenged the validity of the 2016 Dear Colleague Letter in two separate federal lawsuits,<sup>59</sup> and just three months after it had been issued, a Texas district court enjoined its enforcement nationwide.<sup>60</sup> Subsequently, less than a year after the Obama administration issued the 2016 Dear Colleague Letter, the Trump administration rescinded it with another Dear Colleague Letter.<sup>61</sup> This new 2017 Dear Colleague Letter left it up to individual states and school districts to decide how to treat transgender students.<sup>62</sup>

Thus, the current landscape of transgender and intersex inclusiveness in school sports is a patchwork.<sup>63</sup> Presently, six states require athletes to compete in the category of the gender they were assigned at birth.<sup>64</sup> This resulted in outrage when a transgender boy, Mack Beggs, taking testosterone, competed against girls in a 2018 Texas state wrestling championship, and won.<sup>65</sup> Beggs stated that he would prefer to wrestle with boys, but Texas state law requiring children to compete with others according to the sex listed on their birth certificate prevented him from doing so.<sup>66</sup>

At present, nineteen states and the District of Columbia have laws and/or policies in place permitting transgender athletes to compete as the

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<sup>59</sup> See *Nebraska v. United States*, No. 4:16-cv-03117 (D. Neb. July 8, 2016) (plaintiffs are listed as including: Arkansas, Kansas, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming); *Texas v. United States*, No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016) (plaintiffs are listed as including: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Texas, Tennessee, Utah, West Virginia, and Wisconsin).

<sup>60</sup> See *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), order clarified, 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016) (issuing nation-wide injunction against reliance on the 2016 Dear Colleague Letter).

<sup>61</sup> See Dear Colleague Letter 2017, *supra* note 9.

<sup>62</sup> See *id.*

<sup>63</sup> See *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> [<https://perma.cc/Z77Y-P83S>] (last visited Oct. 25, 2019) (showing some states as permitting transgender students to compete in accordance with their gender identity, and other states requiring transgender students to compete in accordance with the sex listed on their birth certificate).

<sup>64</sup> See *id.* (showing Alabama, Arkansas, and Texas as requiring sports participation in accordance with gender listed on birth certificate; and showing Indiana, Kentucky, and Louisiana as requiring sports participation in accordance with gender listed on birth certificate unless onerous steps such as gender reassignment surgery have been taken).

<sup>65</sup> See *Transgender Wrestler Mack Beggs Wins Texas Girls Title Again*, THE GUARDIAN (Feb. 25, 2018), <https://www.theguardian.com/society/2018/feb/25/transgender-wrestler-mack-beggs-wins-texas-girls-title>, [<https://perma.cc/RF8P-9ABL>].

<sup>66</sup> See *id.*

gender that they identify as.<sup>67</sup> This resulted in outrage when two transgender girls, Terry Miller and Andraya Yearwood, won first and second place in the 2018 Connecticut girls state finals 100-meter track competition.<sup>68</sup> Three students who lost to Terry Miller and Andraya Yearwood have now filed a formal complaint challenging the Connecticut policy with the United States Department of Education.<sup>69</sup>

## II. GENDER IDENTITY SHOULD BE RESPECTED WHEN SPORTS ARE DIVIDED BY GENDER

Where school sports are divided into male and female, and it is not possible or practical to eliminate these gender divisions,<sup>70</sup> the simplest solution, from kindergarten through the end of high school, is to allow transgender and intersex athletes to compete with the gender that they identify as. This provides the ideal solution for the transgender students themselves, given that current medical recommendations suggest that transgender individuals should be accepted as the gender that they identify as.<sup>71</sup> Excluding transgender children from a gendered space that they

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<sup>67</sup> See *K-12 Policies*, *supra* note 63 (showing some states as permitting transgender students to compete in accordance with their gender identity, and other states requiring transgender students to compete in accordance with the sex listed on their birth certificate). For example, in 2013, California passed a law allowing transgender youth to participate in sex-segregated sports, and use sex-segregated locker rooms and bathrooms in accordance with their gender identity, “irrespective of the gender listed on the pupil’s records.” See School Success and Opportunity Act, Assemb. B. 1266 (Cal. 2013), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_bill\\_20130812\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_bill_20130812_chaptered.pdf). This bill was adopted in August 2013 and became law on January 1, 2014. See CAL. EDUC. CODE § 221.5(f) (Deering 2014) (“A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”).

<sup>68</sup> See Karma Allen, *Transgender Teens Outrun Track and Field Competitors but Critics Close Behind*, ABC NEWS (Jun. 13, 2018), <https://abcnews.go.com/US/transgender-teens-outrun-track-field-competitors-critics-close/story?id=55856294> [<https://perma.cc/KA2Z-25VW>].

<sup>69</sup> See Alliance Defending Freedom, *Federal Govt Agrees to Investigate Connecticut Policy That Abolishes Girls-Only Sports* (Aug. 8, 2019), <https://adflegal.org/detailspages/press-release-details/federal-govt-agrees-to-investigate-connecticut-policy-that-abolishes-girls-only-sports> [<https://perma.cc/9JPT-H7CD>]; Connecticut Complaint, *supra* note 4.

<sup>70</sup> See *infra* Part III for a discussion of why gender divisions in sports should be eliminated when possible.

<sup>71</sup> See, e.g., AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) (recommending that for patients with gender dysphoria, that they live and be accepted as the gender that they identify as); WORLD PROF’L ASSOC. FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL,

identify with will exacerbate feelings of exclusion and discrimination, aggravating already-heightened rates of impaired mental health in this group.<sup>72</sup> Additionally, the number of transgender and intersex people is very low, less than three in one hundred, so most sports teams will have at most one transgender or intersex person competing.<sup>73</sup>

However, at elite levels of competition at the high school level, there may be legitimate safety or fairness concerns in girls' competitions when transgender girls who are not undergoing hormone treatment related to being transgender compete against cisgender girls. Related concerns may exist for transgender boys who are not undergoing hormone treatment related to being transgender. States and/or schools should seriously consider the guidelines and rules they have in place for accommodating transgender athletes if they have high-stakes elite competitions. It may be better for the guidance and rules guiding elite competitions and teams to borrow some of the guidance from the NCAA guidelines, as discussed further below.<sup>74</sup>

For college athletics, there are already the NCAA guidelines, which provide recommendations for transgender athletes.<sup>75</sup> As discussed below in further detail, these recommendations should be followed and updated in accordance with the latest medical knowledge about transgender and intersex athletes.<sup>76</sup> There are no guidelines for intersex athletes, and the NCAA should implement guidance for intersex athletes.

#### *A. Best Practices and Recommendations for K–12 Schools with Gender Segregated Teams*

For kindergarten through twelfth grade, if it is not possible or practical to eliminate the gender division in school sports, the simplest practice is for students to be able to compete in the gender category that they

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TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 15 (2016), [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) [<https://perma.cc/M7VN-B4HL>].

<sup>72</sup> See Tanya A. Henry, *Exclusionary bathroom policies harm transgender students*, AMERICAN MEDICAL ASSOCIATION (April 17, 2019), <https://www.ama-assn.org/delivering-care/population-care/exclusionary-bathroom-policies-harm-transgender-students>, [<https://perma.cc/NRG3-8E8G>] (quoting the American Medical Association as stating that exclusionary policies that “require transgender individuals to live one facet of their lives in contradiction with their gender identity . . . threaten to exacerbate the risk of anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness and eating disorders, among other adverse outcomes”).

<sup>73</sup> See *supra* notes 15–23 and accompanying text (showing that approximately 5.6 million intersex people and 2 million transgender people live in the United States, representing less than 3% of the population).

<sup>74</sup> See *infra* Part II(B).

<sup>75</sup> See *supra* notes 47–58 and accompanying text.

<sup>76</sup> See *infra* Part II(B).

most closely identify with.<sup>77</sup> Before puberty, male and female athletic abilities are very similar and children do not have advantages or disadvantages because of their gender.<sup>78</sup> During and after puberty, cisgender boys generally have higher testosterone levels than cisgender girls, and, as a result, cisgender boys are on average bigger and stronger than cisgender girls.<sup>79</sup> However, many transgender children take puberty blockers to delay the onset of puberty, while many also take hormones that correspond with the gender that they identify with.<sup>80</sup> This means that hormonally and physically, many transgender children are indistinguishable in any relevant way from others that identify as their gender.<sup>81</sup>

However, some older transgender and intersex individuals competing in the girls' category who are not taking hormones are likely to have testosterone levels more similar to those in the boys' category, which could confer an advantage to these individuals in certain instances.<sup>82</sup> Whether this is an unfair advantage is debatable: individuals have many other types of biological advantages which we do not consider unfair, such as the advantages that come with being unusually tall in basketball, or having unusually long limbs for swimming.<sup>83</sup> However, if the purpose

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<sup>77</sup> Cf. LGBT Sports Foundation, "All 50": *The Transgender-Inclusive High School Sports and Activities Policy and Education Project*, <http://www.nclrights.org/wp-content/uploads/2016/05/All-50-Model-High-School-Policy.pdf> [<https://perma.cc/RR4B-MVSG>] (presenting a model policy based on the principle that "[t]ransgender high school students[sic] athletes will compete in the gender in which they identify and have a positive sport experience").

<sup>78</sup> See, e.g., *On the Team*, *supra* note 44, at 16 n.12.

<sup>79</sup> See, e.g., Doriane L. Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, <https://web.law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf> [<https://perma.cc/Y9GZ-WHSZ>] (noting that differences in speed, strength, and endurance between males and females develop during puberty).

<sup>80</sup> See *On the Team*, *supra* note 44, at 15.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Robinson Meyer, *We Thought Female Athletes Were Catching Up to Men but They're Not*, THE ATLANTIC (Aug. 10, 2012), <http://www.theatlantic.com/technology/archive/2012/08/we-thought-femaleathletes-were-catching-up-to-men-but-theyre-not/260927/> [<https://perma.cc/M6WQ-H32S>] (describing a relatively consistent performance gap of 90% between elite men and elite women in six sports: running, kayaking, swimming, cycling, rowing, and skating); Coleman & Shreve, *supra* note 79 (showing top female world records in track events are broken thousands of times each year by boys and men).

<sup>83</sup> See, e.g., Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC'Y 29, 43 (2016) (noting that physical characteristics such as tallness and "unusually high lung capacity" are not used to disqualify athletes from sporting events); Olga Khazan, *Why Hyper-Masculine Women are Scary but Fish-Like Men Aren't*, THE ATLANTIC (Aug.

of separating sport into “male” and “female” categories is to keep out those who have naturally-occurring high levels of testosterone from female sports, then the argument is that allowing transgender or intersex athletes with high levels of naturally-occurring testosterone defeats this purpose and is “unfair” in a way that other biological advantages are not.<sup>84</sup>

Even if different testosterone levels do create an actual disadvantage, the disadvantages to including transgender and intersex student athletes should be weighed against the advantages to including transgender and intersex student athletes, such as advantages to community-building, inclusivity, and character development.<sup>85</sup> Transgender and intersex students, like all students, benefit in myriad ways from participating in school sports, including: benefits to physical health, including reducing the likelihood of chronic diseases such as diabetes and increasing bone and muscle strength, benefits to mental health, such as reducing the risk of depression, anxiety, and suicide, and benefits to academic performance, such as increasing the chance of starting and finishing high school and college and increasing GPA.<sup>86</sup> Furthermore, inclusive policies model acceptance and tolerance for differences, thus decreasing stigma about multiple types of differences within a community, and thus conferring an advantage to the community as a whole.<sup>87</sup>

However, especially at elite levels, it is likely that some transgender girls not taking hormones related to being transgender, and who are going through male puberty, will have an advantage vis-à-vis cisgender girls they compete against in some sports, especially sports where individual athletes compete against each other, like running or swimming, in contrast to sports where groups of athletes compete against each other, like soccer or field hockey.<sup>88</sup> As a result, it is understandable why some

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20, 2016), <https://www.theatlantic.com/health/archive/2016/08/caster-semenya-and-the-abnormal-olympic-body/496724/> [https://perma.cc/4VUL-K7RE] (noting that unusual physical characteristics like Michael Phelps’s very long arms or Usain Bolt’s tall height and fast-twitch muscle-fibers are not considered unfair).

<sup>84</sup> See, e.g., Doriane L. Coleman, *Sex in Sport*, 80 L. & CONTEMP. PROBS. 63 (2017) (arguing that line-drawing on the basis of sex is justified in elite sport).

<sup>85</sup> See, e.g., Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from A Feminist Softball League*, 80 L. & CONTEMP. PROBS. 155, 172 (2017) (discussing values that were supported by including transgender athletes in a women’s softball league).

<sup>86</sup> See, e.g., Scott Skinner-Thompson and Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J. L., GENDER, & SOC’Y 271, 297–98 (2013).

<sup>87</sup> See *On the Team*, supra note 44, at 19.

<sup>88</sup> See, e.g., Zuri Berry, *In Massachusetts, Boys Playing on Girls Teams Causes a Ruckus*, MAXPREPS (Jan. 10, 2012), <http://www.maxpreps.com/news/0JxGMTsgEeGkPgAmVebEWg/in-massachusetts,-boys-playing-on-girls-teams-causes-aruckus.htm>

cisgender girls would feel that competing and losing to those transgender girls is unfair. After all, if they do not compete against boys because boys who are going through male puberty have a particular advantage in their sport, they will understandably feel that similarly it is unfair for them to compete against transgender girls who are going through male puberty. As a result, it would be a good idea for states or sports organizations that govern high-stakes, elite sports for older children who are likely to have started puberty to seriously consider how to include transgender athletes, and perhaps borrow from some of the rules normally reserved for college-level athletes.

For example, a recent legal complaint filed in Connecticut alleges that two transgender girls have together won “15 women’s state championship titles” which in a previous year were held by “ten different Connecticut girls” and have deprived cisgender girls from “more than 40 opportunities to participate in higher level competitions.”<sup>89</sup> Perhaps in a situation like this, the Connecticut rules should require transgender girls who seek to compete in the girls’ competition at elite levels to submit documentation that they have testosterone levels below a certain level, that they have been undergoing hormone treatment related to being transgender for at least a year, and/or limiting their participation once they reach a certain level. For example, the rules could allow transgender girls who are going through male puberty to practice with the girls’ team but not enter competitions, or only compete in a limited number of competitions. This would be similar to the NCAA “redshirt” rules that allow junior members of college teams in a “redshirt” year to practice with teams but not play any or only play a limited number of competitive games.<sup>90</sup>

Perhaps another acceptable solution, at least for some of the transgender girls who are going through male puberty would be to permit them to participate in the boys’ track competition, especially if the name of the boys’ team were changed to “open team” or something similar so that the transgender girls who do join that team do not feel that they are contradicting their gender identity by doing so.

If a school or state is concerned about fairness or safety due to testosterone levels in male-to-female transgender individuals, then the

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[<https://perma.cc/74LB-LTC3>] (“Unlike in field hockey, a girls [sic] sport boys often play in the state, the individual nature of swimming allows for the physical strength and speed of boys to trump girls.”).

<sup>89</sup> See Connecticut Complaint, *supra* note 4, at 12.

<sup>90</sup> See, e.g., *As a Division II Student-Athlete . . . Do You Know?*, NCAA, <http://www.ncaa.org/governance/committees/division-ii-student-athletedo-you-know> [<https://perma.cc/DXJ8-VS4X>] (explaining what a redshirt is); Alex Kirshner, *College Football Players Can Now Play Up to 4 Games Without Burning a Redshirt*, SBNATION (June 13, 2018), <https://www.sbnation.com/college-football/2018/6/13/17460076/ncaa-redshirt-rule-change-2018> [<https://perma.cc/Q78R-7ECV>].



school could institute hormone requirements/testing for those individuals competing on the girls' teams, permitting individuals who exceed those requirements to play on the boys' teams if they exceed or do not meet the hormone requirements. However, if a state or school does choose this option, then the state or school should require the hormone testing for all competitors on the girls' sports team, not just the transgender and intersex competitors. This would avoid singling out and potentially increasing the stigma against transgender and intersex people. Additionally, the state or school should then change the names of the teams to "low testosterone" and "open" or something similar as the teams would now not be divided by gender, but instead by hormone levels.

Moreover, many intersex women do not know they are intersex, as was reportedly the case with Caster Semenya before she was required to undergo gender testing.<sup>91</sup> Even some cisgender women have unusually high testosterone levels and may be found ineligible to compete on the girls' team. In this scenario, a school should allow those individuals who do not qualify for the girls' team based on hormone levels to compete on the boys' team, regardless of whether they are boys or not. For this reason, if the school does go for this option, it is recommended that instead of having a "boys' team," the school should have an "open" team or something similar. That team should be available to anyone who would like to compete on it, regardless of gender identity or hormone level.

One possible downside of this solution is that in practice it may result in one team in effect being a hormone-protected girls' team and another team that will still mostly end up being boys, because the coaches are allowed to pick who makes the team, and having people on the team with lower testosterone levels and/or smaller bodies or strength may be considered to be a disadvantage. However, even in this scenario, transgender and intersex people will not be left out. First of all, boys often do not start puberty until after they have started high school,<sup>92</sup> which means that the low testosterone team is likely to have some younger boys participating. Second, it is likely that at least some girls will choose to participate on the open team, especially if the open team competes at a

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<sup>91</sup> See *What is Intersex?*, *supra* note 11. Semenya, then 18, was "born as a woman and . . . has grown up all her life as a woman but [] is now in a position where this is being questioned." Anna Kessel, *Caster Semenya Wins Gold but Cannot Escape Gender Controversy*, THE GUARDIAN (Aug. 19, 2009), <https://www.theguardian.com/sport/2009/aug/19/castersemenya-800m-world-athletics-championships-gender> [<https://perma.cc/3KNT-JC45>].

<sup>92</sup> See Peter A. Lee, *Normal Ages of Pubertal Events Among American Males and Females*, 1 J. ADOLESCENT HEALTH CARE 26 (Sept. 1980), <https://www.ncbi.nlm.nih.gov/pubmed/6458588> [<https://perma.cc/DH8N-YVZV>] (showing normal age of puberty starting for boys is between 9.7 and 14.1 years).

higher level and those girls want to participate at a higher level.<sup>93</sup> Therefore, when teams are organized into “open” and “low testosterone” teams, it is likely that each team will have some boys and some girls, even though each team may have more children of one sex than another. Thus, by their nature, these teams will be more inclusive for transgender and intersex children because the teams will be more gender diverse than a boys’ team or a girls’ team, and will not have the word “boys” or “girls” in the name of the team, which tends to exclude at least some transgender and intersex children.

However, one of the many downsides to a hormone testing-based policy is that it would penalize older transgender girls who are not taking puberty blockers and/or hormones. At present, transgender minors are not able to access hormone treatment unless they have their parents’ consent to the treatment.<sup>94</sup> Therefore, it is easy to imagine a scenario in which a minor child would like to play on the girls’ team, and would like to take puberty blockers and/or hormones under medical supervision, but the minor’s parents are not supportive of their child being transgender and do not consent for their child to receive puberty blockers and hormone treatment. When a transgender child’s family is not supportive of their transgender status, that child is at much higher risk for adverse mental health outcomes,<sup>95</sup> and playing on a sports team is likely even more critical for that child’s wellbeing and mental health. If that sports team then also rejects the child because of their transgender status, it is easy to imagine a downward spiral and worsening mental health for that child.<sup>96</sup> Conversely, if the girls’ sports team welcomes the transgender girl with open arms, regardless of her hormonal status, it is easy to see how that very act would be life-affirming and positive for that transgender girl, and how being able to participate and compete as the girl that she knows she is could be overwhelmingly positive for her overall wellness and feelings of self-worth.

*B. Best Practices and Recommendations for College Athletics with Gender-Segregated Teams*

For college sports, the current recommendations of the NCAA are largely fair, but should be reviewed regularly to ensure that the requirements continue to comport with science. The current requirements are complex and address each individual’s scenario in detail. The NCAA

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<sup>93</sup> See, e.g., *O’Connor v. Bd. of Educ.*, 449 U.S. 1301, 1307–08 (1980) (discussing case where girl wanted to play on boys’ basketball team even when there was a girls’ basketball team she could play on).

<sup>94</sup> See, e.g., Federica Vergani, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FL. INT’L UNIV. L. REV. 903 (2019) (noting that transgender children cannot take medically prescribed puberty blockers without their parents’ consent).

<sup>95</sup> See *2015 Transgender Survey*, *supra* note 21, at 8.

<sup>96</sup> See *id.* at 103.

rules state that a transgender male athlete not taking hormones can compete on either the men's or the women's team,<sup>97</sup> while a transgender male athlete taking hormones can only compete on the men's team.<sup>98</sup> A transgender female athlete not taking hormones can compete only on the men's team,<sup>99</sup> while a transgender female athlete taking hormones may compete on either team—though she may join the women's team only after a full year of hormone treatment.<sup>100</sup>

The guidelines are largely fair, but should be modified slightly to be even more inclusive of transgender student-athletes. For example, the guidelines should permit a transgender female student who has started taking hormones, but has not yet completed a year of treatment, to at least practice on the women's team, so long as there are minimal safety concerns, even if she may not compete until she has completed a year of treatment.<sup>101</sup> In addition, the guidelines should address whether and when it would be appropriate for a transgender male student who started hormone treatment but then decided to discontinue hormone treatment to play on the women's team. Currently, a transgender male who has taken even one dose of testosterone is prohibited from playing on the women's team. Perhaps a fairer and more inclusive rule would be that if the transgender male has stopped taking hormones for one year, then he should be permitted to play on the women's team.

Additionally, the NCAA has no guidelines for intersex athletes. The NCAA should consider developing such guidelines, especially in light of the recent controversy involving Caster Semenya. Perhaps the best policy would simply be that intersex athletes may play on the team of their gender identified at birth, regardless of any naturally occurring hormonal levels they may have.<sup>102</sup> If an intersex athlete is also transgender, then that athlete would follow the rules for transgender athletes. This may be the best policy when teams are divided by gender, especially keeping in mind that many intersex athletes do not know that they are intersex.<sup>103</sup> If the NCAA does develop guidelines for intersex individuals, these guidelines should be based on medical science and should not single out

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<sup>97</sup> *On the Team*, *supra* note 44, at 28.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See supra* note 90 and accompanying text discussing NCAA “redshirt-ing” policies that allow student athletes to participate in team practices but not competitions.

<sup>102</sup> *See Buzuvis, supra* note 83, at 53–55 (discussing the advantages to a “hybrid” approach to hormone testing, where intersex women are not required to meet certain hormonal levels because of their reliance on and expectation of being able to compete in women's sports, but transgender women are required to meet certain hormone levels because they do not have this same reliance or expectation).

<sup>103</sup> *See id.*

women who “appear masculine” for testing.<sup>104</sup> Rather, if certain hormone levels are required in order for an athlete to compete on the women’s team, then all athletes seeking to compete on the women’s team should have to complete the same testing requirements. If any athlete did not want to be tested for whatever reason, they could seek to join the “open” team.

However, maintaining the gender binary in sports will continue to be problematic, even if the above recommendations are followed. For approximately one third of transgender people—those that identify as non-binary—no policy based on gender-binary divided teams will yield a favorable solution.<sup>105</sup> As more states are allowing a non-binary gender marker on birth certificates and driver’s license,<sup>106</sup> increasing numbers of people will not have a sex of male or female marked on their birth certificates.

### III. THE GENDER BINARY IN SPORTS SHOULD BE ELIMINATED WHEN POSSIBLE

The gender binary in sports is problematic not just because many transgender and intersex individuals do not clearly fit into the gender binary. When boys are separated from girls in school sports, other problems include: 1) an increase in stereotyping about the capabilities of men and women, such as the stereotype that girls and women are weak and poor athletes (hence the commonly heard insult from one boy to another: “you throw like a girl”),<sup>107</sup> and 2) individuals get excluded from specific sports teams they would like to participate in, solely because of their

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<sup>104</sup> See, e.g., LINDSAY P. PIEPER, *SEX TESTING: GENDER POLICING IN WOMEN’S SPORTS* 176 (2016) (noting that when sex testing is done only on “suspicious” looking women, then women are often tested simply because they appear to others as masculine or non-feminine); Buzuvis, *supra* note 83, at 36–37 (discussing “suspicion-based” sex testing that required anyone suspected of having unusual testosterone levels to undergo gender testing).

<sup>105</sup> See *2015 Transgender Survey*, *supra* note 21, at 8 (finding that one third of transgender people identify as non-binary).

<sup>106</sup> See Rachel Savage, *Nonbinary? Intersex? 11 U.S. States Issuing Third Gender IDs*, REUTERS (Jan. 31, 2019), <https://www.reuters.com/article/us-us-lgbt-lawmaking/nonbinary-intersex-11-us-states-issuing-third-gender-ids-idUSKCN1PP2N7> [<https://perma.cc/6FP2-W78P>]. See also KC Clements, *Legally Nonbinary: What It Means to Change Your Gender Marker from M or F to X*, THEM. (May 10, 2018), <https://www.them.us/story/legally-nonbinary-third-gender-markers> [<https://perma.cc/JF3K-87RJ>] (noting that the province of Ontario, Canada, as well as several U.S. states allow for nonbinary gender markers on government IDs).

<sup>107</sup> See Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 18–19 (2009) (noting that sex-segregated sports teams increase sex-stereotyping).

sex.<sup>108</sup> Although Title IX has been credited with vastly increasing the participation of girls and women in school sports, there are other ways to ensure that boys and girls have equal athletic opportunity. First, whenever separating children by gender on sports teams is unnecessary, the practice should end. For example, before puberty, when there is very little average relevant physical difference between boys and girls, it simply does not make sense to separate the sexes for sports. However, even during and after puberty, separating children and adults by gender on sports teams is often unnecessary, as discussed below.

During and after puberty, when there may be relevant differences between average boys and girls, other ways of dividing teams can often be devised so that girls and women are still given equal opportunity to boys and men, but the gender binary does not have to be maintained. For example, on an ice hockey team where the primary safety concern is children of different weights colliding with each other, perhaps teams would be divided by weight class rather than gender. In another sport, where a fairness concern might involve high levels of testosterone that lead to stronger leg muscles and faster times, perhaps teams could be divided into “open” and “low testosterone” teams. On the open team, anyone can compete or try out for the team. On the low testosterone team, everyone who wanted to compete or try out for that team would need to take a blood test to determine their testosterone levels. Other non-gendered ways of dividing people for sports teams, if necessary, include skill, height, weight, speed, and strength.

There may be cultural difficulties with integrating the sexes. Ingrained attitudes about women and girls being inferior to men and boys in sports may manifest in insults or some boys refusing to pass the ball to girls, or may make women and girls feel a “stereotype threat” when they play with boys and men.<sup>109</sup> This may lead some girls and women to

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<sup>108</sup> See *id.* at 33–34 (noting many instances where an individual has been, or may be, excluded from a particular sport because of their sex). See also Julia Duffy, Note, *You Throw Like A Boy: An Analysis of Sex-Integrated Youth and Teen Sports*, 39 WOMEN’S RIGHTS L. REP. 122, 136 (2018) (noting the unfairness that results when more individual boys are excluded from girls’ sports teams than individual girls are excluded from boys’ sports teams).

<sup>109</sup> See, e.g., Sian L. Beilock & Allen R. McConnell, *Stereotype Threat in Sport: Can Athletic Performance Be Threatened?*, 26 J. SPORT & EXERCISE PSYCHOL. 597–609 (2004), [https://pdfs.semanticscholar.org/5113/1b8ba648a1ef2be7306c2f25568294859c73.pdf?\\_ga=2.35005030.654286049.1573498537-2095985719.1573498537](https://pdfs.semanticscholar.org/5113/1b8ba648a1ef2be7306c2f25568294859c73.pdf?_ga=2.35005030.654286049.1573498537-2095985719.1573498537) [https://perma.cc/Y2YH-JZR4]; Daniel Smith & Sarah Martiny, *Stereotype Threat in Sport: Recommendations for Applied Practice and Research*, 32(4) SPORT PSYCHOLOGIST 10, 2 (2018), <https://munin.uit.no/bitstream/handle/10037/14615/article.pdf?sequence=2&isAllowed=y> [https://perma.cc/HV83-LE4P].

underperform, feel discouraged, and/or to quit.<sup>110</sup> The solution to this problem, however, is not to continue separating the sexes. Training or programming at the beginning of the sports season could help children of different genders play well together: for example, perhaps the whole team could be told by the coach about some famous or high-performing girls or women in the sport, or the coach could remind the athletes that both boys and girls have natural athletic ability.<sup>111</sup> Additionally, emphasizing effort and process over innate ability can help all athletes have confidence in their ability to improve.<sup>112</sup> Specific discussion of the stereotype threat phenomenon among coaches and athletes can help counter stereotype threat negative effects.<sup>113</sup> Other ways of reducing stereotype threat include having significant female and transgender representation among coaches and other personnel.<sup>114</sup> Additionally, creating a sense of belonging among all team-members can help minimize stereotype threat that any particular team-members may be feeling.<sup>115</sup> Teamwork-building exercises or drills done with mixed-gender groups could help athletes of different genders trust each other's skills more for competitions and events.

#### IV. LEGAL CHALLENGES

As mentioned above, the country is currently a patchwork on whether transgender students can play sports according to the gender that they identify with.<sup>116</sup> The Trump Administration policy delegates the decision to individual schools, school districts, and/or states.<sup>117</sup> Several courts have required schools to allow transgender students to use bathrooms in accordance with their gender identity.<sup>118</sup> However, although it has been requested, no court has required a school with a transgender-inclusive policy to instead treat transgender students in accordance with the sex they were assigned at birth. For example, the Supreme Court recently declined to hear a case brought by parents and students challenging their

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<sup>110</sup> See Beilock & McConnell, *supra* note 109, at 607; Smith & Martiny, *supra* note 109, at 10.

<sup>111</sup> See, e.g., Smith & Martiny, *supra* note 109, at 18 (noting that this type of stereotype and attitude retraining can increase performance when stereotype threat is present).

<sup>112</sup> *Id.* at 20–21.

<sup>113</sup> *Id.* at 21–22.

<sup>114</sup> See *id.* at 24–25.

<sup>115</sup> *Id.* at 24.

<sup>116</sup> See *supra* notes 63–69 and accompanying text.

<sup>117</sup> See *supra* note 9 and accompanying text.

<sup>118</sup> See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (affirming a grant of preliminary injunction requiring school to allow transgender boy access to boys' bathrooms); *Adams v. Sch. Bd. of St. Johns County, Fla.*, 318 F. Supp. 3d 1293, 1327 (M.D. Fla. 2018) (requiring school to allow transgender boy the use of boys' restrooms).

school's inclusive policy on transgender students, leaving in place the lower court's finding in favor of the transgender students and the school district.<sup>119</sup> Although the case focused on cisgender students' discomfort about sharing a locker room with a transgender boy, the school was allowing the transgender boy not just to use boys' bathrooms and locker rooms, but also to train with and compete on the boys' high school track team.<sup>120</sup>

Currently, the Supreme Court is considering a case about whether Title VII's prohibition on sex discrimination in employment necessarily includes a prohibition on gender identity and sexual orientation discrimination.<sup>121</sup> If the Supreme Court does decide that Title VII prohibits gender identity discrimination, it becomes more likely that the same Court would rule Title IX also requires schools to implement fair and inclusive policies for transgender children and young adults playing sports at school.<sup>122</sup> Conversely, if the Supreme Court decides that Title VII does not prohibit gender identity discrimination, the same Court may be more likely to decide that Title IX does *not* require schools to implement those inclusive policies.<sup>123</sup> However, even if the Supreme Court finds that Title VII and Title IX allow discrimination against transgender individuals, such a finding would not prohibit individual schools, school districts, and states from having transgender-inclusive rules, policies, and laws by choice.

Even though no court has found that a transgender-inclusive policy violates the law, the pending Connecticut Complaint seeks to prohibit the state from requiring schools to implement transgender-inclusive sports policies. Three cisgender female students and their parents filed a formal complaint with the United States Department of Education, challenging the Connecticut policy that has cisgender girls playing on the same teams as and competing with transgender girls.<sup>124</sup> The Complaint requests "an order requiring [the Connecticut Athletic body] to revise its

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<sup>119</sup> See *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019).

<sup>120</sup> *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 373 (E.D. Pa. 2017), *aff'd*, 890 F.3d 1124 (3d Cir. 2018), *aff'd*, 897 F.3d 518 (3d Cir. 2018) (noting that while in the tenth grade the student "played on the girls' cross-country and track and field teams, . . . [d]uring his senior year [the student] ran as a member of the boys' cross-country team").

<sup>121</sup> *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S.Ct. 1599 (2019).

<sup>122</sup> *Cf.* Brief for Independent Women's Forum and 1013 Athletes and Parents as Amici Curiae Supporting Petitioner, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 2019 U.S. S. Ct. BRIEFS LEXIS 3640 (2019) (No. 18-107), (arguing that the Supreme Court should find that employers may discriminate against transgender employees so that women's sports teams may exclude transgender athletes).

<sup>123</sup> See *id.*

<sup>124</sup> Connecticut Complaint, *supra* note 4.

rules to exclude individuals who are in all physiological and hormonal respects males from participating in girls' or women's athletic competitions."<sup>125</sup> The requested order would be a huge step backward for transgender students, as it would exclude all transgender girls from girls' teams unless they have started hormone treatment. The Connecticut policy could certainly be tweaked, and perhaps should be tweaked, as discussed below.<sup>126</sup> However, even as it stands, the policy should still be found in compliance with Title IX.<sup>127</sup>

The Connecticut Complaint only alleges a violation of Title IX, not the Equal Protection Clause.<sup>128</sup> However, because this complaint or a similar future complaint could be brought under both the Equal Protection Clause and Title IX, both are discussed below. A court should not find a violation of either provision if a sports team or league allows transgender students to play on male or female teams matching their gender identity.<sup>129</sup>

#### A. *The Equal Protection Clause*

The Equal Protection Clause states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>130</sup> The Supreme Court has interpreted this provision to include the requirement that states may not discriminate on the basis of sex unless there is an important governmental interest substantially related to the discrimination.<sup>131</sup> While several courts have considered (and reached different results) regarding challenges under the Equal Protection Clause to the exclusion of an individual from a sports team based on sex,<sup>132</sup> no court has thus far considered a challenge to the inclusion of an individual on a sports team based on sex. The prohibition on discrimination based on sex contained in the Equal Protection Clause should be interpreted as prohib-

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<sup>125</sup> *Id.* at 25.

<sup>126</sup> *See infra* notes 159–62 and accompanying text.

<sup>127</sup> *See infra* notes 149–58 and accompanying text.

<sup>128</sup> *See* Connecticut Complaint, *supra* note 4.

<sup>129</sup> However, a court should find a violation of both the Equal Protection Clause and Title IX if any individual is excluded from a sports team simply because of their sex. *See* Archibald, *supra* note 107 at 33–37 (arguing that sports teams should be integrated under the Equal Protection Clause). This argument is outside the scope of this article, however.

<sup>130</sup> U.S. CONST. amend. XIV, § 1.

<sup>131</sup> *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

<sup>132</sup> *See, e.g.,* O'Connor v. Bd. of Educ., 449 U.S. 1301, 1307–08 (1980) (permitting a girl to be excluded from a boys' basketball team); Lafler v. Athletic Bd. of Control, 536 F. Supp. 104, 108 (W.D. Mich. 1982) (permitting the exclusion of a female from a male boxing competition); Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1031–32 (W.D. Mo. 1983) (finding that girls must be allowed to play on boys' football team); Adams v. Baker, 919 F. Supp. 1496, 1497 (D. Kan. 1996) (granting preliminary injunction allowing girls to wrestle on boys' wrestling team).



iting both discrimination based on biological sex and discrimination based on gender identity.<sup>133</sup>

The Connecticut Complaint claims that cisgender girls have had fewer opportunities to advance in track competitions than cisgender boys because cisgender girls are competing against transgender girls.<sup>134</sup> Two transgender girls have won a number of medals and advanced in the state track competitions in the past few years, allegedly resulting in fewer cisgender girls getting medals and advancing.<sup>135</sup> However, even if cisgender girls have been discriminated against vis-à-vis cisgender boys in this type of circumstance, there are certainly important governmental interests that are substantially related to the discrimination.

We know that transgender students in general are at high risk of experiencing violence, bullying, substance abuse, and serious mental health issues, including much-elevated risks of attempted suicide.<sup>136</sup> We also know that participation in team sports increases physical and mental well-being for students.<sup>137</sup> Finally, we know that many transgender students are likely to forgo participating in sports if their only option is to play on a team that does not match their gender identity.<sup>138</sup> Increasing the physical and mental well-being of transgender students, a vulnerable population, is an important governmental interest. Further, this interest is substantially related to allowing transgender students to play on sports teams that correspond to their gender identity. Therefore, courts should not find an Equal Protection violation if a school, district, or state, like Connecticut, has a transgender-inclusive policy for student athletics.

### B. Title IX

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of,

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<sup>133</sup> Cf. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (explaining that the prohibition on sex discrimination contained in Title VII had been understood to protect against discrimination based “both [on] the biological differences between men and women, and gender . . . [that is] a failure to conform to stereotypical gender norms”).

<sup>134</sup> Connecticut Complaint, *supra* note 4, at 17 (stating that “males [and transgender females] took first place in 13 out of 14 events, while [cisgender] girls received only one first place recognition . . . Males [and transgender females] took 23 out of 28 first and second place awards in those seven state-level competitive events”).

<sup>135</sup> *Id.*

<sup>136</sup> See, e.g., *2015 Transgender Survey*, *supra* note 21; *CDC Report*, *supra* note 19.

<sup>137</sup> See, e.g., *On the Team*, *supra* note 44, at 6.

<sup>138</sup> Current medical recommendations state that transgender individuals should live and be accepted in all facets of their lives as the gender that they identify as. See *supra* notes 71–72. In addition, some transgender students are not “out” about being transgender, and for those students, playing on a team not in accordance with their gender identity would “out” them.

or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>139</sup> Title IX regulations provide that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”<sup>140</sup> However, Title IX regulations also provide that, “[n]otwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>141</sup> Title IX regulations also provide that “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”<sup>142</sup> Here again, the word “sex” in Title IX should include both biological sex and gender identity, so that individuals are protected from discrimination based on both biological sex and gender identity.<sup>143</sup> Therefore, cisgender and transgender boys and girls should all have equal athletic opportunity under Title IX.

Notably, under Title IX and its regulations, schools are not required to separate sports teams based on sex, although they must make sure that equal opportunities are provided to “members of both sexes.”<sup>144</sup> Regulations promulgated under Title IX require schools to consider factors such as “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” “scheduling of games and practice time,” and “[p]ublicity” in order to determine whether equal opportunities for “members of both sexes” exist.<sup>145</sup>

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<sup>139</sup> 20 U.S.C. § 1681(a) (1972).

<sup>140</sup> 34 C.F.R. § 106.41(a) (1972).

<sup>141</sup> 34 C.F.R. § 106.41(b) (1972).

<sup>142</sup> 34 C.F.R. § 106.41(c) (1972).

<sup>143</sup> *Cf. Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (explaining that the prohibition on sex discrimination contained in Title VII had been understood to protect against discrimination based “both [on] the biological differences between men and women, and gender . . . [that is] a failure to conform to stereotypical gender norms”).

<sup>144</sup> *Id.* Despite this requirement of equal opportunity, it is interesting to note that substantially fewer girls participate in school sports than boys. See *The State of High School Sports in America: An Evaluation of the Nation’s Most Popular Extracurricular Activity*, WOMEN’S SPORTS FOUND. 1, 3 (July 2019), <https://www.womenssportsfoundation.org/wp-content/uploads/2019/10/state-of-high-school-sports-report-final.pdf> [<https://perma.cc/WC6L-9W9H>] (showing male participation in high school sports at 52.3%, while female participation in high school sports at 43.6% in 2015–2016).

<sup>145</sup> 34 C.F.R. § 106.41(c) (1972).

The Connecticut Complaint emphasizes the “publicity” factor, arguing that cisgender girls are receiving less publicity because fewer are able to advance to state and regional championships than otherwise would have absent the two transgender girls who have won top medals in the girls’ track competitions.<sup>146</sup> The complaint alleges that, because of the transgender girls competing and winning in seven track events the past few years, significantly fewer cisgender girls have won top medals in those events than cisgender boys, and significantly fewer cisgender girls have advanced to state competitions for those events than cisgender boys.<sup>147</sup>

The Connecticut Complaint makes much of the case of *McCormick v. School District of Mamaroneck*, which stated that “[t]reating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX’s mandate of equal opportunity for both sexes.”<sup>148</sup> In *McCormick*, the school districts had the boys’ soccer teams practicing in a season where they were able to qualify for state championships, whereas the girls’ soccer teams were practicing in a season where they were not able to qualify.<sup>149</sup> The *McCormick* court found a violation of Title IX because of this difference.<sup>150</sup> It noted that although only one factor of the ten listed factors in the regulations, “scheduling of games and practice times,” was at issue, “a disparity in one [factor] can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school.”<sup>151</sup> Finally, it also found that even where a disparity in one factor disadvantages students of one sex in one sport, this disparity can be compensated by advantages to students of that sex in a different factor and/or sport because Title IX is concerned with “program-wide benefits and opportunities.”<sup>152</sup> In finding that there was a Title IX violation, the *McCormick* court reasoned that the disadvantage faced by girls playing soccer in the school districts was significant compared to boys playing soccer, and the districts had not provided any evidence that this significant disparity was compensated by girls having a comparative advantage to boys in another area of athletics.<sup>153</sup>

The situation in *McCormick* was fundamentally different from the situation at issue in the Connecticut Complaint. In the *McCormick* case,

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<sup>146</sup> Connecticut Complaint, *supra* note 4, at 13–19.

<sup>147</sup> *Id.* at 17. The Connecticut Complaint refers to transgender girls as “males” in the complaint. I have referred to transgender girls throughout this article as transgender girls or girls.

<sup>148</sup> *Id.* at 2 (quoting *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004)).

<sup>149</sup> *McCormick*, 370 F.3d at 280.

<sup>150</sup> *Id.* at 302.

<sup>151</sup> *Id.* at 293.

<sup>152</sup> *Id.* (citations omitted).

<sup>153</sup> *Id.* at 294–95.

no girls playing soccer could become state champions, whereas all boys playing soccer had the chance to become state champions.<sup>154</sup> By contrast, when transgender girls participate alongside cisgender girls, cisgender girls still have the chance to, and still do, win medals and become champions.<sup>155</sup> Furthermore, because there are few transgender and intersex girls, a court should find that opportunities for cisgender girls are not significantly less equal than opportunities for cisgender boys because of the inclusion of transgender girls on girls' teams. It is likely that it is only a very small percentage of cisgender girls competing in athletics in Connecticut overall have lost opportunities for top medals and advancements because of the inclusion of transgender girls. Thus, any court considering the matter should distinguish the situation in *McCormick* from the situation at issue in the Connecticut Complaint and find that the Connecticut policy does not violate Title IX.

However, the Department of Education and/or a court may be convinced by the arguments made in the Connecticut Complaint and find that cisgender girls are at a significant disadvantage compared with cisgender boys due to the Connecticut policy.<sup>156</sup> The Connecticut Complaint does show that a number of individual cisgender girls have missed out on opportunities to receive medals and/or advance in track competition due to the participation of transgender girls.<sup>157</sup> It is likely that cisgender boys have not similarly missed out on opportunities to receive medals and/or advance in track competition due to the participation of transgender boys.<sup>158</sup>

If the Court finds that cisgender girls have been significantly disadvantaged, Connecticut could remedy any Title IX violation by: 1) increasing opportunities for cisgender girls to win medals and advance in track competitions, 2) increasing opportunities for cisgender girls in other areas of athletics, or 3) demonstrating that there are already increased opportunities for cisgender girls in other areas of athletics in the state which compensate for the disadvantage that cisgender girls have in this one area.<sup>159</sup> Increasing opportunities for cisgender girls to win medals

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<sup>154</sup> *Id.* at 279.

<sup>155</sup> *See, e.g.*, Connecticut Complaint, *supra* note 4 at 13–17 (showing many cisgender girls winning medals and advancing to state and regional championships).

<sup>156</sup> It is particularly possible that the current administration's Department of Education would make this finding in light of the fact that the Trump Administration has withdrawn protections for transgender students in the past. *See, e.g.*, Tracy E. Gilchrist, *DeVos's Education Dept. Officially Abandons Trans Students*, THE ADVOCATE (Feb. 12, 2018), <https://www.advocate.com/transgender/2018/2/12/devoss-education-dept-officially-abandons-trans-students> [<https://perma.cc/MZ5T-WEAV>].

<sup>157</sup> Connecticut Complaint, *supra* note 4, at 18–19.

<sup>158</sup> *See id.* at 22.

<sup>159</sup> *See Neal v. Bd. of Trustees of Cal. State U.*, 198 F.3d 763, 769–70 (9th Cir. 1999) (noting that Title IX requirements are satisfied if numbers of males

and advance in track competitions would probably be the best way to alleviate any sense of injustice that the Connecticut Complaint complainants and others may have, and can perhaps be achieved by something as simple as awarding more medals in the girls' track competitions and allowing more girls to advance to higher levels, while keeping the number of medals and advancement opportunities the same as it already is in the boys' competition. Other possible solutions include putting limitations on transgender girls who are not receiving hormone therapy and are going through male puberty, such as reducing the number of medals they can receive and/or their ability to advance to high levels in girls' competitions, allowing them to compete in boys' teams and/or competitions if they would like,<sup>160</sup> or finding some other solution to increase opportunities for cisgender girls, while keeping opportunities for transgender students equal and fair.<sup>161</sup>

As the father of one of the transgender teenage girls complained about in the Connecticut Complaint stated, "This is not about winning and losing races. This is about the health of my teenage daughter . . . . I only think about, is my daughter happy, healthy and able to participate in what she wants to do? I don't care if she wins or loses. *I don't care if she*

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and females participating in sports are "substantially proportionate to their respective enrollments" and allowing the school to cut male spots in order to achieve greater proportionality between male and female athletes) (citation omitted).

<sup>160</sup> The Connecticut policy currently allows transgender students to try out for and compete on gender-specific sports teams according to their gender identity, but makes it difficult for them to try out for and compete on gender-specific sports teams that do not match their gender identity. See Connecticut Interscholastic Athletic Conference, *2019–2020 Handbook*, at 55, [http://www.casciac.org/pdfs/ciachandbook\\_1920.pdf](http://www.casciac.org/pdfs/ciachandbook_1920.pdf) [<https://perma.cc/DZP7-R98X>]. This rule should change to at least allow transgender girls to try out and compete with boys if they would like, and transgender boys not undergoing hormone therapy to try out and compete with girls if they would like. Cf. Buzuvis, *supra* note 85, at 168–70 (explaining why one women's softball league decided to include both transgender women and transgender men); *On the Team*, *supra* note 44, at 28 (describing NCAA policies that permit transgender women to play on men's teams at any time, and transgender men to play on women's teams if they are not undergoing hormone treatment). The Connecticut policy should also address students who have a non-binary identity, as there is currently no mention of non-binary identity in the policy.

<sup>161</sup> For example, if a transgender girl who is not undergoing hormone therapy and is going through male puberty is competing in individual events at a high level, perhaps she can be allowed to practice with the girls' team, but only compete in a limited number of competitions, or compete but not have her win counted. Cf. Cameron Smith, *Mass. Girls Swimming Championship Bizarrely Features One Boys Race . . . With One Boys Swimmer*, YAHOO! SPORTS (Nov. 26, 2012), <https://sports.yahoo.com/blogs/highschool-prep-rally/mass-girls-swimming-championship-bizarrely-features-one-boys-175129848.html> [<https://perma.cc/4JML-KPTW>].

wins and gives the medals back. She got to compete as a girl where she feels she should compete. That's all that matters to me."<sup>162</sup> Excluding transgender girls from the girls' teams simply because they are transgender is not the answer. In fact, if transgender girls are excluded from sports participation on girls' teams for the sole reason that they are transgender girls, that is likely a violation of their Title IX rights.<sup>163</sup>

### CONCLUSION

There is currently substantial debate about what sports teams transgender and intersex individuals should be allowed to participate in. In the K-12 context, the country is a patchwork of different laws and rules: some states and schools require children to play on teams that accord with the sex on their birth certificate, while other states and schools allow children to participate in sports in a way that accords with their gender identity. At the college level, the NCAA has strict requirements about what teams and competitions transgender athletes may compete in, but remains silent as to the status of intersex athletes. When sports are divided into male and female categories in the K-12 context, schools should allow students to play sports consistent with their gender identity, except perhaps in some individual high-stakes elite competitions at the high-school level, or in other situations where the specific characteristics of an individual athlete raises *bona fide* fairness or safety concerns, in which case it may be beneficial to adopt NCAA-like rules. At the college level, the NCAA should continue to consult medical specialists and update its policies in accordance with medical science. Ultimately, in all cases, the gender binary for sports should be eliminated whenever possible. When some division is necessary to ensure equal opportunity and participation for males and females, divisions based on the gender binary can be replaced by divisions based on other characteristics, such as skill, height, weight, strength, or testosterone levels.

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<sup>162</sup> See Jeff Jacobs, *As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain*, HARTFORD COURANT (June 1, 2017), <https://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html> [<https://perma.cc/56ZD-FFUL>] (emphasis added).

<sup>163</sup> See, e.g., Skinner-Thompson & Turner, *supra* note 86 (arguing that Title IX requires that transgender youth be permitted to play on sports teams in accordance with their gender identity). Cf. Catherine J. Archibald, *Transgender Bathroom Rights in the Time of Trump*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 241, 272 (2017) (noting that "discriminating against transgender individuals by not permitting them to access the bathrooms that correspond to their gender identity, when all other students may access bathrooms that correspond to their gender identity, is sex discrimination").

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