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Date and Time: Thursday, February 18, 2021 3:46:00 PM PST

Job Number: 136907487

Document (1)

1. [ARTICLE: Girls Will Be Boys, and Boys Will Be Girls: The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level - for Athletes of Both Genders, 25 Sports Law. J. 57](#)

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ARTICLE: Girls Will Be Boys, and Boys Will Be Girls: The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level - for Athletes of Both Genders

Spring, 2018

Reporter

25 Sports Law. J. 57 *

Length: 18408 words

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* © 2018 **Ray Hacke**. J.D., University of the Pacific McGeorge School of Law 2010; B.A. Magazine/History 1997, Syracuse University. Sports and constitutional law are two of my greatest passions, and the opportunity to write about a subject that encompasses both was thrilling and rewarding. I would like to thank my wife Pauline, my daughter Ava, and my parents, Carl and Wendy Hacke, for their support as I dedicated time and energy to this project. I would also like to thank my friends and mentors at the Pacific Justice Institute - specifically Brad Dacus, Kevin Snider, and Matt McReynold - for helping improve my legal research and writing skills and The Sports Lawyers Journal for giving me a platform to discuss a controversial subject that many other journals shied away from. To avoid confusion, this Article uses the terms "man," "woman," "boy," "girl," "male," and "female" according to their traditional definitions. The author recognizes that transgender males define themselves as female and transgender females define themselves as male, and individuals who consider themselves "allies" of transgender persons honor those self-definitions. The author intends no disrespect to transgender persons by his use of traditional definitions.

Text

[*58]

I. Introduction

In the 1990 film Kindergarten Cop, an impish little boy delights in greeting unsuspecting adults by proudly broadcasting the extent of his carnal knowledge: "Boys have a penis; girls have a vagina." ¹ In one scene, a police detective visits the boy's kindergarten classroom, where the title character - the detective's fellow police officer - has been posing as a teacher while working undercover. ² When the boy incites his classmates' laughter by blindsiding

¹ Kindergarten Cop (Universal Pictures 1990).

² Id.

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the detective with his oft-repeated tidbit about human anatomy, the detective, smirking wryly, tells her fellow officer, "You taught them the basics. That's important." ³

For high school sports programs across the United States, distinguishing boys from girls is no longer so basic. ⁴ This is due to the emergence of the "transgender" athlete, whose "gender identity" - the perception and/or expression of whatever gender the athlete asserts himself or herself to be - may or may not match the athlete's anatomy; this depends on whether the athlete has undergone sex reassignment surgery and/or which gender is listed on the athlete's birth certificate and other legal records. ⁵ As of this writing, sixteen states, either by law or through their high school athletic associations' bylaws, currently require high schools - at least public ones, if not all participating schools - to let **[*59]** students compete on athletic teams or in athletic contests based on their gender identity. ⁶ The transgender community deems these states to be "inclusive": athletes in these states need not undergo gender reassignment surgery, hormone therapy, or any other medical intervention to compete against athletes of the gender with which they identify. ⁷ In these states, to quote The Kinks' hit song Lola, "Girls will be boys, and boys will be girls, it's a mixed-up, muddled-up, shook-up world." ⁸

Among the other thirty-four states, twenty deal with transgender athletes on a case-by-case basis and seven have no policy concerning transgender athletes at all. ⁹ Those states that deal with transgender athletes on a case-by-case basis vary in their approaches:

* Alaska, Connecticut, Georgia, Kansas, Pennsylvania, and Wisconsin let individual schools and school districts decide whether to let transgender athletes compete on teams that match the athletes' gender identity, rather than their biological gender. ¹⁰ In Alaska, if a school or school district has no written policy in place concerning transgender athletes, the gender on the athlete's birth certificate is the determining factor. ¹¹ Schools in Kansas and Wisconsin must notify their respective state athletic associations of their decisions, and Kansas' association may overrule a school's decision if a dispute arises concerning an eligibility determination. ¹² Georgia does not let boys compete on girls' teams and also does not let schools challenge other schools' determinations of an athlete's gender. ¹³

³ Id.

⁴ Although this Article specifically concerns high school sports programs, most of the statutes and legal principles discussed here are also applicable to elementary school, junior high, and college sports.

⁵ Pat Griffin & Helen J. Carroll, On the Team: Equal Opportunity for Transgender Student Athletes 1, 47 (Oct. 4, 2010), <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf> (defining gender identity as "(o)ne's inner concept of self as male or female or both or neither" and noting that some individuals assigned one gender at birth "choose to live socially as the other gender").

⁶ K-12 Policies for Transgender Student Athletes, TransAthlete, <http://www.transathlete.com/#k-12/c4w2> (last visited Mar. 8, 2018) [hereinafter K-12 Policies].

⁷ Id.

⁸ The Kinks, Lola (Morgan Studios 1970).

⁹ K-12 Policies, supra note 6.

¹⁰ Id.

¹¹ Id.

¹² Id.; see also KSASAA Policy for Transgender Student Participation, KSASAA, <http://www.kshsaa.org/Public/PDF/TransgenderPolicyRecommendations.pdf> (last visited Feb. 17, 2018); Transgender Participation Policy, Verona Area Sch. District, [http://www.verona.k12.wi.us/UserFiles/Servers/Server_139685/File/Kloopping, Kelly/Transgender Page/TGPC - Transgender Participation Policy.pdf](http://www.verona.k12.wi.us/UserFiles/Servers/Server_139685/File/Kloopping,Kelly/Transgender%20Page/TGPC-Transgender%20Participation%20Policy.pdf) (last visited Feb. 17, 2018).

¹³ K-12 Policies, supra note 6.

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* Illinois has a more complicated approach. ¹⁴ When an athlete's proclaimed gender identity does not match the gender listed on the athlete's birth certificate or school registration card, the athlete's school must present to the Illinois High School Association (IHSA) information concerning (1) the athlete's birth certificate and/or school records; (2) any medical documentation concerning **["*60"]** hormonal treatments, sex-reassignment surgery, counseling, or other treatment that the athlete has undergone; and (3) any physical advantages the athlete might have if permitted to play for a team associated with the opposite gender. ¹⁵ The IHSA then rules based on the advice of an established group of medical personnel. ¹⁶

* Iowa has separate associations governing girls' and boys' sports. ¹⁷ The boys' association lets girls who identify as male compete on boys' teams "as long as he consistently identifies as a male at school, home and socially." ¹⁸ The girls' association has a virtually identical rule concerning males who identify as female but provides an exception that allows schools to exclude males from participating on girls' teams consistent with state law. ¹⁹

* Maine gives student athletes the freedom to choose which teams they want to play for, subject to an approval process that considers competitive balance and safety for other student athletes. ²⁰ Maine's governing body has a Gender Identity Equity Committee that must approve a transgender athlete's request to compete on a team associated with the athlete's gender identity,

unless it is convinced that the student's claim to be transgender is not bona fide or that allowing the student to compete on a single sex team consistent with his or her gender identity would likely give the student athlete an unfair athletic advantage or pose an unacceptable risk of physical injury to other student athletes. ²¹

* Missouri requires athletes to undergo hormone treatments before participating on teams that do not match their biological gender. ²² Girls seeking to play on boys' teams must obtain treatment to increase their testosterone levels, while boys who wish to play on girls' teams must receive treatments to suppress their testosterone levels. ²³ Oklahoma and Nebraska also have rules and/or guidelines centering around medical therapy or gender reassignment surgery. ²⁴

["*61"] * New Jersey and New Mexico both require that student athletes either provide an official record demonstrating legal recognition of their gender identity or proof that they have transitioned, or are transitioning, to their reassigned sex. ²⁵

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. (quoting Sherry Tegtmeier, Iowa Girls High School Athletic Union Transgender Statement, Iowa Girls High Sch. Athletic Union (Aug. 22, 2014), <http://ighsau.org/2014/08/22/transgender-statement/>).

¹⁹ Tegtmeier, supra note 18.

²⁰ K-12 Policies, supra note 6; see also Me. Principals' Ass'n, 2017-2018 Handbook 1, 21, <https://www.mpa.cc/images/pdfs/handbook1718.pdf> (last visited Mar. 8, 2018) [hereinafter MPA Handbook].

²¹ MPA Handbook, supra note 20.

²² K-12 Policies, supra note 6.

²³ Id.

²⁴ Id.

²⁵ Id.

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* Oregon lets girls who identify as male participate on boys' teams regardless of whether they are taking hormone treatments, but once they decide to do so, they are precluded from competing on girls' teams for the remainder of their high school careers.²⁶ Girls who are receiving testosterone treatments may only compete on boys' teams.²⁷ Boys, meanwhile, are ineligible to compete on girls' teams unless they have completed at least one year of hormone treatments.²⁸ Idaho has rules that are similar, but not identical, to Oregon's.²⁹

* Ohio gives boys who wish to play on girls' teams two options: complete at least one year of hormone treatment related to gender transition or demonstrate, via sound medical evidence, that they do not possess physical advantages over biological females in the same age group.³⁰ Such advantages include, but are not limited to, bone structure, muscle mass, and high testosterone levels.³¹ Girls can compete on boys' teams without undergoing medically prescribed testosterone treatments.³² Girls who have begun such treatments may compete on boys' teams but must submit to regular testing of their hormone levels.³³

Surprisingly, only four states - Alabama, Kentucky, North Carolina, and **Texas** - still restrict participation in sports based on the gender listed on athletes' birth certificates.³⁴ The transgender community considers these states "discriminatory."³⁵

Foremost among the sixteen "inclusive" states is California, which enacted Assembly Bill 1266 into law in July 2013.³⁶ Assembly Bill 1266 amended § 221.5 of California's Education Code to include paragraph (f), which states: "A pupil shall be permitted to participate in sex-segregated [***62**] 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."³⁷

Under [California Education Code § 221.5\(f\)](#), a male claiming to identify as female has "the right to try out for the girls' basketball team, potentially taking away an opportunity from a girl who might otherwise make the team."³⁸ So far, at least two transgender athletes, both biological males who consider themselves female, have taken advantage of § 221.5(f).³⁹ Pat (nee Patrick) Cordova-Goff hit .588 with five home runs and twelve runs batted in

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Assemb. B. 1266, 2013 Reg. Sess. (Ca. 2013).

³⁷ Id. (emphasis added).

³⁸ New Bill Would Allow Boys to Play on Girls Teams, Share "Facilities," Pac. Just. Inst. (Jan. 9, 2012), <http://www.pacificjustice.org/press-releases/new-bill-would-allow-boys-to-play-on-girls-teams-share-facilities> (written concerning AB 266, the California Assembly's first attempt to amend Education Code § 221.5).

³⁹ Fred Robledo, Melissa Masatani & Zen Vuong, Transgender Student to Play on Azusa High School Softball Team, San Gabriel Valley Trib. (Feb. 13, 2014), <http://www.sgvtribune.com/sports/20140213/transgender-student-to-play-on-azusa-high-school-softball-team>.

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(RBI), all team highs, in eleven games for Azusa High's softball team in 2014,⁴⁰ according to the high school sports website MaxPreps.com (MaxPreps).⁴¹ Anry (nee Henry) Fuentes played soccer for Denair High during the 2015-2016 season,⁴² scoring at least one goal and assisting on at least one more in three games, according to MaxPreps.⁴³

Cordova-Goff and Fuentes are not the only biologically male transgender high school athletes to have found success competing against biological girls. In 2017, Andraya Yearwood, a sprinter for Connecticut's Cromwell High, placed first in the 100 meters and the 200 meters at Connecticut's state meet for mid-sized schools.⁴⁴ In 2016, Nattaphon Wangyot, a sprinter for Alaska's Haines High, earned all-state honors in girls' track and field by placing third in the 200 meters and fifth in the 100 meters at Alaska's state meet.⁴⁵ Wangyot stated that she took female [*63] hormones and other drugs to suppress her body's testosterone levels.⁴⁶ Yearwood, however, did not undergo any sort of hormonal treatment.⁴⁷ It is worth noting that had Yearwood and Wangyot competed as boys, neither would have placed as high as they did at their respective state meets.⁴⁸

Then there is the unique case of Mack Beggs, a wrestler for Trinity High in Euleus, Texas.⁴⁹ Biologically female, Beggs took testosterone⁵⁰ for two years to become more like the male she identified as.⁵¹ Beggs wanted to

⁴⁰ Id. Hereinafter, unless noted, all sports teams and athletes competed at the high school varsity level.

⁴¹ Azusa 2014 Softball Stats by Player, Max Preps (Aug. 25, 2017, 5:46 PM), [http://www.maxpreps.com/high-schools/azusa-aztecs-\(azusa,ca\)/softball-spring-14/stats.htm](http://www.maxpreps.com/high-schools/azusa-aztecs-(azusa,ca)/softball-spring-14/stats.htm).

⁴² No League of Their Own: Transgender Athletes, Fusion (Aug. 7, 2016), <https://www.youtube.com/watch?v=qZ8axU8POs4> [hereinafter No League].

⁴³ Anry Fuentes' Girls Soccer Stats, Max Preps, <http://www.maxpreps.com/athlete/anry-fuentes/Rc0S8-lvEeW-8KA2nzwbTA/gendersport/girls-soccer-stats.htm#year=15-16> (last visited Mar. 8, 2018). Cordova-Goff and Fuentes' statistical totals on MaxPreps appeared to be incomplete as of this writing, so their statistical totals could be even higher.

⁴⁴ Jeff Jacobs, As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain, Hartford Courant (June 1, 2017, 6:00 AM), <http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html>.

⁴⁵ Rivals Cry Foul After Losing Out to Transgender Athlete, Yahoo! Sports (June 6, 2016), <https://au.sports.yahoo.com/a/31775203/nattaphon-wangyot-rivals-cry-foul-after-losing-out-to-transgender-athlete/#page1> [hereinafter Rivals Cry Foul].

⁴⁶ Ben Rohrbach, Transgender Track Athlete Makes History as Controversy Swirls Around Her, USA Today High Sch. Sports (June 2, 2016), <http://usatodayhss.com/2016/transgender-track-athlete-makes-history-as-controversy-stirs-around-her/>.

⁴⁷ Jacobs, *supra* note 44.

⁴⁸ Id.; Rivals Cry Foul, *supra* note 45.

⁴⁹ Kent Babb, Transgender Wrestler Mack Beggs Identifies as Male. He Just Won the Texas State Girls Title, Wash. Post (Feb. 25, 2017), https://www.washingtonpost.com/sports/highschools/meet-the-texas-wrestler-who-won-a-girls-state-title-his-name-is-mack/2017/02/25/982bd61c-fb6f-11e6-be05-1a3817ac21a5_story.html?utm_term=.35e4697d6b49.

⁵⁰ Testosterone is widely known as a performance-enhancing drug, which is why it is on the World Anti-Doping Association's list of prohibited substances. World Anti-Doping Agency, The World Anti-Doping Code International Standard Prohibited List § 1 (Jan. 2017), https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29_-_wada_prohibited_list_2017_eng_final.pdf.

⁵¹ Babb, *supra* note 49.

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compete as a boy.⁵² However, because Texas classifies athletes strictly according to the gender listed on their birth certificates,⁵³ Beggs was forced to compete as a girl.⁵⁴ Beggs went 56-0 against female competition en route to winning Texas' Class 6A state 110-pound title in 2017 and went undefeated again to win another state title in 2018.⁵⁵ While Beggs did not take testosterone to gain an advantage over her female competitors and provided testing results showing that her testosterone levels were in the range required for her to compete as a girl,⁵⁶ Beggs undeniably had a strength advantage that she might not otherwise have had but for her taking testosterone.⁵⁷

[*64] If transgender advocates succeed in enacting policy change in relation to education, laws requiring states to permit athletes to compete as members of their chosen gender will become the norm nationwide. On May 9, 2016, the U.S. Department of Education's Office of Civil Rights (OCR) issued a controversial national directive (the Obama Directive) ordering every public school in the nation to allow transgender students to use bathrooms, locker rooms, and shower facilities and play on sports teams that are consistent with the students' proclaimed gender identity.⁵⁸ President Obama asserted that Title IX provided the basis for the order.⁵⁹ Title IX is the federal law that, among other things, requires schools that receive federal funding to provide women with the same opportunity to compete in scholastic sports that their male counterparts have.⁶⁰ President Trump rescinded the Obama Directive soon after taking office,⁶¹ and a federal district court in Texas has held that the OCR based the Obama Directive on a complete misreading of Title IX.⁶² The court held that "Title IX 'is not ambiguous' about sex being defined as 'the biological and anatomical differences between male and female students as determined at their

⁵² Mack Beggs: "Change the Laws and Then Watch Me Wrestle the Boys," ESPN.com (Mar. 6, 2017), http://www.espn.com/espn/otl/story/_/id/18802987/mack-beggs-transgender-wrestler-change-laws-watch-wrestle-boys [hereinafter Change the Laws].

⁵³ K-12 Policies, supra note 6.

⁵⁴ See Change the Laws, supra note 52.

⁵⁵ Associated Press, Texas Bill Could Sideline Transgender Wrestler Mack Beggs, USA Today High Sch. Sports (May 12, 2017), <http://usatodayhss.com/2017/mack-beggs-transgender-wrestler-texas-bill-title-defense>; Associated Press, Transgender Boy Wins Girls' State Wrestling Title for Second Time, N.Y. Post (Feb. 25, 2018), <https://nypost.com/2018/02/25/transgender-boy-wins-girls-state-wrestling-title-for-second-time/>.

⁵⁶ Cam Smith, Joe Rogan Lashes Out at Transgender Texas Wrestling Champ Mack Beggs, Foes Offer Support, USA Today High Sch. Sports (Feb. 27, 2017), <http://usatodayhss.com/2017/joe-rogan-lashes-out-at-transgender-texas-wrestling-champ-mack-beggs-while-foes-offer-support>.

⁵⁷ Babb, supra note 49 (noting that "coaches noticed an unmistakable strength advantage that hadn't been there even a year earlier").

⁵⁸ Todd Starnes, Starnes: We Must Defy Obama's Transgender Decree - No Matter the Cost, Fox News (May 13, 2016), <http://www.foxnews.com/opinion/2016/05/13/starnes-must-defy-obamas-transgender-decree-no-matter-cost.html>; see also Letter from Catherine E. Chamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, to Colleagues on Transgender Students 1, 3 (May 13, 2016) [hereinafter Letter from Chamon & Gupta], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁵⁹ Letter from Chamon & Gupta, supra note 58.

⁶⁰ Id. at 2.

⁶¹ Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, Trump Rescinds Rules on Bathrooms for Transgender Students, N.Y. Times (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

⁶² Paul J. Weber, Judge in Texas Temporarily Blocks Obama's Transgender Rules, Associated Press (Aug. 22, 2016), <https://apnews.com/1c9cb3fd45f462957813bdb5f5f1821/texas-judge-temporarily-blocks-obamas-transgender-directive>.

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birth."⁶³ Indeed, the intent of a statute is determined at the time of its enactment,⁶⁴ and when Title IX was enacted in 1972, "virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females."⁶⁵ The Supreme Court itself recognized just one year later that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁶⁶

All of the above begs the question: Does the law really require that schools eliminate sex-segregated sports programs - or at least bend the [*65] time-honored, traditionally accepted definitions of terms like "boy" and "girl" - to accommodate transgender athletes, even in inclusive states? To answer this question, this Article will examine whether the United States Constitution's Equal Protection Clause (EPC), Title IX, and state law require that schools permit transgender athletes to use bathrooms and locker rooms and play on sports teams of their choosing - even when including such athletes denies opportunities to, or endangers, biological females. The purpose of exploring these issues is to provide high schools that wish to maintain separate athletic programs for girls and boys with a legally defensive game plan that lets them do so.

II. The Equal Protection Clause

Section 1 of the Constitution's Fourteenth Amendment, which contains the EPC, prohibits states from denying to anyone within their jurisdiction equal protection of the law.⁶⁷ The EPC applies whenever a state, or one of its agencies, takes any action that treats distinct classes of similarly situated persons differently.⁶⁸ State actors include high school athletic associations - which, while not officially agencies of state governments, are usually so "overborne by the pervasive entwinement of public institutions and public officials in [their] composition and workings [that] there is no substantial reason to claim unfairness in applying constitutional standards to [them]."⁶⁹

The Supreme Court has held that gender-based classifications are permissible under the EPC so long as they (1) serve important governmental objectives, (2) are substantially related to achievement of those objectives,⁷⁰ and (3) reflect reasoned judgments rather than prejudice.⁷¹ Courts generally view gender-based classifications as inherently suspect to some degree due to their potential to "relegate the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."⁷² However, these laws pass muster under the EPC if they are aimed at (1) remedying invidious discrimination, (2) enabling women to receive opportunities that have previously been denied to them, and (3) empowering them to overcome [*66] obstacles

⁶³ Id.

⁶⁴ [*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 \(1994\).](#)

⁶⁵ [*G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 \(4th Cir. 2016\)](#) (Niemayer, J., dissenting).

⁶⁶ [*Frontiero v. Richardson*, 411 U.S. 677, 686 \(1973\).](#)

⁶⁷ U.S. Const. amend. XIV, § 1.

⁶⁸ [*Ross v. Moffitt*, 417 U.S. 600, 609 \(1974\).](#)

⁶⁹ [*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 \(2001\)](#); see also [*Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1128 \(9th Cir. 1982\)](#) (citing cases from multiple jurisdictions asserting that high school athletic associations "are so intertwined with the state that their actions are considered state action").

⁷⁰ [*Craig v. Boren*, 429 U.S. 190, 197 \(1976\).](#)

⁷¹ [*Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 737 \(R.I. 1992\).](#)

⁷² [*Frontiero v. Richardson*, 411 U.S. 677, 686-87 \(1973\).](#)

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they face with regard to advancing their status.⁷³ This is especially true in the context of high school sports, where maintaining separate teams for boys and girls clearly addresses "the goal of redressing past discrimination and providing equal opportunities for women."⁷⁴

A. Physiological and Psychological Differences Between Cisgender and Transgender Athletes Do Exist and Should Be Accounted for in Equal Protection Analyses

The EPC does not require "things which are different in fact ... to be treated in law as though they were the same."⁷⁵ This is especially true where a law was enacted to protect women and girls from harms that they suffer uniquely or disproportionately.⁷⁶ Indeed, the Supreme Court has consistently held that a statute does not violate the EPC when it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."⁷⁷

If one thing is clear about transgender athletes, it is that they are different in fact from their "cisgender" counterparts - i.e., those whose gender identity matches their biological sex.⁷⁸ From a physiological standpoint, a boy who considers himself a girl and wishes to be treated as such is differently situated from an actual girl, and vice versa. In fact, there is a medical term for the cognitive dissonance that occurs when a transgender person's biological sex does not match the person's perception of himself or herself as a member of the opposite sex: "gender dysphoria," formerly known as "gender identity disorder."⁷⁹ Although some medical professionals deny that gender dysphoria is a mental [*67] illness,⁸⁰ at least one prominent psychiatrist, Dr. Paul McHugh of the Johns Hopkins University School of Medicine, has argued that it is.⁸¹ Dr. McHugh, who has studied transgenderism and sex-reassignment

⁷³ [Kahn v. Shevin, 416 U.S. 351, 353-55 \(1974\)](#) (upholding a Florida tax law that was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," due to the fact that while widowed men can typically continue working after the death of a spouse, widowed women often find themselves "suddenly forced into a job market with which [they are] unfamiliar, and in which, because of [their] former economic dependency, [they] will have fewer skills to offer."); see also [Michael M. v. Super. Ct., 450 U.S. 464, 469 \(1981\)](#); [Weinberger v. Wiesenfeld, 420 U.S. 636, 653 \(1975\)](#) (stating that statutes that "provide for the special problems of women" are valid under the EPC).

⁷⁴ [Clark, 695 F.2d at 1131.](#)

⁷⁵ [Michael M., 450 U.S. at 469](#) (quoting [Rinaldi v. Yeager, 384 U.S. 305, 309 \(1966\)](#)).

⁷⁶ *Id.* at 469-70 (holding that a statute making it a crime for males to engage in illicit sexual intercourse with underaged females passed constitutional muster, even though it did not protect underaged males and females equally, because the statute's purpose to protect underage females from illegitimate teenage pregnancies).

⁷⁷ *Id.* at 469 (emphasis in the original); see [Parham v. Hughes, 441 U.S. 347, 354 \(1979\)](#).

⁷⁸ Sunnie Brydum, The True Meaning of the Word "Cisgender," Advocate.com (July 31, 2015, 6:00 AM), <http://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender>.

⁷⁹ When You Don't Feel at Home with Your Gender, WebMD, <http://www.webmd.com/mental-health/gender-dysphoria> (last visited Mar. 8, 2018) [hereinafter Gender Dysphoria].

⁸⁰ *Id.*

⁸¹ Michael W. Chapman, Johns Hopkins Psychiatrist: Transgender Is "Mental Disorder;" Sex Change "Biologically Impossible," CNSNews.com (June 2, 2015, 1:34 PM), <http://www.cnsnews.com/news/article/michael-w-chapman/johns-hopkins-psychiatrist-transgender-mental-disorder-sex-change> [hereinafter Transgender Is Mental Disorder].

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surgery for forty years,⁸² and Dr. Lawrence Mayer, a scholar-in-residence in Johns Hopkins' psychiatry department, have published a report analyzing more than 200 peer-reviewed studies indicating that "the belief that gender identity is an innate, fixed human property independent of biological sex - so that a person might be a "man trapped in a woman's body" or "a woman trapped in a man's body" - is not supported by scientific evidence."⁸³

Dr. McHugh is not alone in his assessment. The American College of Pediatrics (ACP) has stated as follows:

A person's belief that he or she is something they are not is, at best, a sign of confused thinking. When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind [and] not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association⁸⁴

Transgender advocates have accused Dr. McHugh of cherry-picking portions of the studies he has reviewed to support an agenda of hatred toward transgenders.⁸⁵ It should also be noted that some medical professionals believe that the stress, anxiety, and depression associated with gender dysphoria, not the dysphoria itself, are what really need to be treated; bringing the person's body in line with his or her self-perception through hormone therapy, gender reassignment surgery, and/or other [*68] forms of treatment, according to these professionals, will accomplish that.⁸⁶ Still, given that gender dysphoria is a recognized medical disorder,⁸⁷ the now-rescinded Obama Directive required that public schools nationwide acknowledge transgender persons' perceptions, albeit at the possible expense of denying biological girls and boys their rightful places on their respective sports teams.

B. Physiological Differences Between Biological Boys and Girls Place Girls at a Competitive Disadvantage and Put Them in Harm's Way

Courts should remain mindful that physiological differences between the sexes do exist. In fact, several courts have ruled that due to those physiological differences, the EPC does not require that schools let boys compete on

⁸² Michael W. Chapman, Johns Hopkins Psychiatrist: Support of Transgenderism and Sex-Change Surgery Is "Collaborating with Madness," CNSNews.com (June 2, 2016, 3:45 PM), <http://cnsnews.com/blog/michael-w-chapman/johns-hopkins-psychiatrist-support-transgenderism-and-sex-change-surgery>.

⁸³ Louis DeBroux, "Born This Way"? New Study Debunks LGBT Claims, Patriot Post (Aug. 25, 2016), <https://patriotpost.us/articles/44470>.

⁸⁴ Gender Ideology Harms Children, Am. C. Pediatricians, <https://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children> (last updated May 2017).

⁸⁵ Mari Brighe, Clinging to a Dangerous Past: Dr. Paul McHugh's Selective Reading of Transgender Medical Literature, TransAdvocate, http://transadvocate.com/clinging-to-a-dangerous-past-dr-paul-mchughs-selective-reading-of-transgender-medical-literature_n_13842.htm (last visited Oct. 12, 2017).

⁸⁶ Id. (stating that "the opinions of Dr. McHugh fly in the face of currently accepted medical practice" and that "(t)he American Medical Association, the American Psychological Association, the American College of Obstetrics and Gynecology, the American Psychiatric Society, the American Public Health Association, and the World Professional Association for Transgender Health have all adopted positions supporting the medical necessity of transition-related care, including hormonal and surgical interventions"); see also Gender Dysphoria, *supra* note 79 (stating that "the mismatch between body and internal sense of gender is not a mental illness. Instead, what needs to be addressed are the stress, anxiety, and depression that go along with it.").

⁸⁷ Gender Dysphoria, *supra* note 79.

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girls' sports teams even though (1) the boys' schools do not offer comparable teams, and (2) girls have been allowed to compete on boys' teams.⁸⁸

The biggest reason why courts have allowed girls to compete on boys' teams, but not vice versa, is that gender-based classifications "are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls."⁸⁹ Boys generally tend to be bigger, taller, stronger, and faster than girls. Boys can jump higher and strike balls with greater force - giving boys an advantage over girls in sports that schools have traditionally reserved exclusively for girls, such as field hockey and volleyball.⁹⁰

[*69] From a safety standpoint, the only conceivable way to compensate for the strength differential between girls and boys is to create classes of teams where boys' advantages of size and strength would be eliminated.⁹¹ Football, a typically all-male sport, provides the best example of how such classes could work: some colleges - Princeton University, for instance - have had teams for players who weigh 172 pounds or less,⁹² and many high school, elementary school, and youth football programs place players onto teams based on their age or weight.⁹³ However, fielding varsity, junior varsity, and/or freshman teams in multiple classes would be impractical for schools for several reasons, not the least of which is budget concerns.⁹⁴ It would be difficult to devise a system of measurement that would place girls in classes where they are on a physical par with boys, because "any rating of players could only be done on a very subjective basis and would not be practical."⁹⁵ To illustrate, female track and field athletes might be considered elite when compared to other females, but their running times or jumping or throwing marks often pale in comparison to those of their male counterparts.⁹⁶ In sports like basketball or soccer,

⁸⁸ See, e.g., [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 \(9th Cir. 1982\)](#); see also [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#) ("The classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes.").

⁸⁹ [Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 739 \(R.I. 1992\)](#).

⁹⁰ [Petrie, 394 N.E.2d at 862](#); see also [Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 662 \(D.R.I. 1979\)](#) (noting an expert's testimony that "(b)ecause of men's greater muscle bulk, longer limbs and greater height, males generally could propel a volleyball with more force and better control"); Rick Reilly, Not Your Average Skirt Chaser, Sports Illustrated (Nov. 26, 2001), <http://www.si.com/vault/2001/11/26/314458/not-your-average-skirt-chaser> (noting that a six-foot-five, 205-pound male field hockey player "has a slap shot that nearly separated a few girls from their sports bras").

⁹¹ [Petrie, 394 N.E.2d at 862](#).

⁹² Phil Taylor, Losing Isn't Everything, Sports Illustrated (Oct. 1, 2012), <http://www.si.com/vault/2012/10/01/106238749/losing-isnt-everything> (concerning Princeton's "sprint" football team).

⁹³ [Petrie, 394 N.E.2d at 861](#); see also Ages & Weights, Pop Warner Football, <http://www.popwarner.com/default.aspx?tabid=1476162> (last visited Feb. 12, 2018) (concerning ages and weight classes in Pop Warner football).

⁹⁴ [Petrie, 394 N.E.2d at 862](#) ("Public institutions have a limited amount of funds and it is common knowledge that many school districts are extremely pressed to maintain their present programs. The extra expense of having this number of squads is obvious.").

⁹⁵ *Id.*

⁹⁶ [Id. at 861](#) (stating that "in the high school track season previous to the trial, none of the girls' state record holders in track and field "would have qualified in any event for the boys' state track and field meet").

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a tall, strong, fast, athletic girl who dominates against other girls would likely be seriously outclassed when competing against boys.⁹⁷

A class system that groups boys and girls together would also require state athletic associations to revamp their rules to account for variables between boys' and girls' sports that may have impacted individual athletes' success when sports were segregated by sex. For instance, female discus throwers use a smaller discus than boys.⁹⁸ In girls' volleyball, the net is several inches lower than in boys' volleyball,⁹⁹ and dimensions for diamonds in girls' softball are smaller than those in boys' [*70] baseball.¹⁰⁰ Girls' basketball teams use a smaller ball than their male counterparts,¹⁰¹ and although the nets they shoot at are equally high off the ground, at least one prominent college women's coach has suggested that nets should be lower in the girls' game to make the girls' game as high-scoring as the boys'.¹⁰² Boys' and girls' lacrosse are played with slightly different equipment under radically different rules - the chief difference being that the boys' game allows checking (i.e., body-to-body hits), while the girls' game does not.¹⁰³ Any creation of a class system of co-ed sports that would accommodate transgender athletes thus stands to negate any benefits to female athletes that the current system of sex-segregated sports has engendered.¹⁰⁴

From a competitive standpoint, if males were permitted to compete with females for positions on a girls' sports team, "due to average physiological differences, males would displace females to a substantial extent ... Thus, athletic opportunities for women would be diminished."¹⁰⁵ Put another way, "at the high school level, the average male is objectively more physically capable than the average female. Open competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators."¹⁰⁶ It thus stands to reason that letting boys - even ones who identify as girls - compete on girls' teams would violate the EPC because biological girls would be denied athletic opportunities that were created just for them. This is especially true given

⁹⁷ [Hoover v. Meiklejohn, 430 F. Supp. 164, 166 \(D. Colo. 1977\)](#) ("Applying the formula of force equals mass times acceleration, a collision between a male and a female of equal weights, running at full speed, would tend to be to the disadvantage of the female.").

⁹⁸ [Petrie, 394 N.E.2d at 863.](#)

⁹⁹ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 661 \(D.R.I. 1979\).](#)

¹⁰⁰ Zach Schonbrun, Idea to Lower Rim for Women's Basketball Stirs Talk, N.Y. Times (Oct. 25, 2012), <http://www.nytimes.com/2012/10/26/sports/ncaabasketball/geno-auriemma-of-uconn-proposes-lower-rim-for-womens-basketball.html>.

¹⁰¹ See Steve Silverman, Difference Between Men's & Women's Basketball, Livestrong.com, <http://www.livestrong.com/article/122406-difference-between-mens-womens/> (last updated Sept. 11, 2017).

¹⁰² Schonbrun, supra note 100 (describing University of Connecticut women's basketball coach Geno Auriemma's assertion that fans are less interested in women's basketball than men's because women's teams "were not scoring with the ease and regularity that they should").

¹⁰³ Preston Williams, Varsity Letter: For Boys and Girls, Lacrosse Is Two Games with One Ball, Wash. Post (May 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052603359.html>.

¹⁰⁴ [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#) (stating that a class system would be "inconsistent with a system of full competition which boys have had for years and which girls are seeking to achieve").

¹⁰⁵ [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 \(9th Cir. 1982\).](#)

¹⁰⁶ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 654, 662 \(D.R.I. 1979\).](#)

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that such boys would be competing with biological girls, who already have fewer opportunities than boys to compete in sports beyond high school, for prized college athletic scholarships. ¹⁰⁷

[*71] Not every state recognizes physiological differences between boys and girls as a valid reason to keep boys from participating in girls' sports, or vice versa. ¹⁰⁸ In Massachusetts, for instance, preventing boys from joining girls' sports teams violates the state's Equal Rights Amendment. ¹⁰⁹ Furthermore, many transgender athletes would argue that physiological differences are not an issue anyway because athletes, regardless of gender, come in all shapes and sizes, and have various abilities that give one athlete a competitive advantage over the other. ¹¹⁰ Anry Fuentes, the biological boy who played for California's Denair High School's girls' soccer team in 2015, said that "if a girl on an opposing team felt like I [was] stronger because I'm physically a male, I would ... tell them that, "It's not even your gender - it's just body type." ¹¹¹ At least one court, in a case involving a girl seeking to play soccer on a boys' team, has stated that "the range of [physical] differences among individuals in both sexes is greater than the average differences between the sexes." ¹¹² That court also held that "the failure to establish any physical criteria to protect small or weak males ... destroys the credibility of the reasoning urged in support of the sex classification." ¹¹³

Transgender athletes who have undergone hormone therapy treatments - which seek to decrease testosterone levels and increase estrogen levels in males who wish to become female and vice versa in females who wish to become male - argue that such treatments adversely impact their bodies, thereby negating any perceived physical advantages they might have. ¹¹⁴ Dr. Joshua Safer, a Boston-based endocrinologist, asserts that when a male undergoes hormone treatments to become female, his muscle mass shrinks to female proportions. ¹¹⁵ Chloe Anderson, a college volleyball player who transitioned from male to female, says that after she began receiving hormone treatments, her arms became weaker, she hit and served the ball with less power, she could not run as fast, and "[she] struggled a lot to recalibrate [her] body." ¹¹⁶ Joanna Harper, a transgender male-turned-female and former distance runner who is now a gender and sport consultant with the International Olympic **[*72]** Committee (IOC), compares her post-transition body to "a large car with a small engine ... competing against small cars with small engines." ¹¹⁷

Taking Safer, Anderson, and Harper's respective words into account, it remains apparent that even though some states disregard the physiological differences between boys and girls - or at least treat them as trivial - the reality is

¹⁰⁷ Betsey Stevenson, Title IX and the Evolution of High School Sports, 25 Contemp. Econ. Pol'y No. 4 486, 487 (Oct. 2007) (noting that more than 7 million students compete in high school athletics each year, compared to approximately 400,000 at the collegiate level; of that approximately 400,000, less than half (170,526) were female).

¹⁰⁸ K-12 Policies, supra note 6.

¹⁰⁹ Christopher Marquis, An Equal Playing Field: The Potential Conflict Between Title IX and the Massachusetts Equal Rights Amendment, 34 Bos. C. J.L. & Soc. Just. 77, 78 n.6 (2014) (citing Mass. Const. pt. 1, art. I; [Atty. Gen. v. Mass. Interscholastic Athletic Ass'n., 393 N.E.2d 284, 290 \(Mass. 1979\)](#)); see also Reilly, supra note 90.

¹¹⁰ No League, supra note 42.

¹¹¹ Id.

¹¹² [Hoover v. Meiklejohn, 430 F. Supp. 164, 169 \(D. Colo. 1977\)](#).

¹¹³ Id.

¹¹⁴ No League, supra note 42.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

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that such differences can, and often do, disadvantage and endanger girls on the athletic field.¹¹⁸ Boys cannot reasonably be expected to restrain themselves, or give less than full effort, when facing girls in athletic competition, any more than they can when facing other boys.¹¹⁹ This may understandably render girls fearful of facing boys who are significantly taller, heavier, and stronger than they are, strike balls with more force than they do, and in some cases, have played more violent contact sports with other boys.¹²⁰ While such fears are not entirely unfounded,¹²¹ they would not tip the EPC's scales in favor of schools that wish to maintain separate athletic programs for boys and girls: transgender athletes would argue that such fears constitute prejudice, and though "private biases may be outside the reach of the law[;] ... the law cannot, directly or indirectly, give them effect."¹²² What would tip the scales in schools' favor is that sex-segregated athletic programs do not violate the EPC because they account for and eliminate the very real dangers that biological female athletes would face if required to compete against biological males.¹²³

Having boys on a girls' team can rob girls of the satisfaction that comes with victory: "When you win, people think it's only because of the boys on your team," a female field hockey player told sportswriter Rick [*73] Reilly in 2001.¹²⁴ "It's so defeating."¹²⁵ It is worth noting that some female athletes can defeat, and have defeated, biological males in certain sports.¹²⁶ Still, this does not mean that female athletes should have to compete against males, especially when the presence of biological males in girls' high school sports undermines the "legitimate and substantial state interest" in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."¹²⁷ This is especially true given that "mixed-sex teams would probably be dominated by males."¹²⁸

¹¹⁸ Id.

¹¹⁹ See [Knight v. Jewett, 3 Cal. 4th 296, 318 \(Cal. 1992\)](#) (a case involving a female touch football player who was injured in a collision with a male opponent while battling to catch a pass; specifically: "In the heat of an active sporting event ... a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct.").

¹²⁰ Reilly, *supra* note 90.

¹²¹ Id. (concerning a female field hockey player who doubled over after being struck in the pelvic region by a male player's slap shot); see also Marquis, *supra* note 109, at 77-78 (concerning a female goalkeeper who suffered a concussion after colliding with a male forward in a 2010 Massachusetts field hockey match).

¹²² [Palmore v. Sidoti, 466 U.S. 429, 433 \(1981\)](#) (holding that no matter how prevalent racial prejudice may be in mainstream U.S. society, it could not serve as justification for a court prohibiting an African-American man from adopting his white stepdaughter).

¹²³ [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1130 \(9th Cir. 1982\)](#) (citing [Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#)); [Schlesinger v. Ballard, 419 U.S. 498, 505 \(1975\)](#); [Frontiero v. Richardson, 411 U.S. 677, 683-84 \(1973\)](#) (supporting the proposition that segregating sports programs based on innate differences between the sexes did not violate the EPC as long as such classifications are not based on archaic generalizations or paternalistic attitudes).

¹²⁴ Reilly, *supra* note 90.

¹²⁵ Id.

¹²⁶ Rivals Cry Foul, *supra* note 45 (noting that although Nattaphon Wangyot did place in his events at the Alaska state girls' track and field championships, he did not place first).

¹²⁷ [Clark, 695 F.2d at 1131](#); [Petrie, 394 N.E.2d at 862](#).

¹²⁸ [Hoover v. Meiklejohn, 430 F. Supp. 164, 170 \(D. Colo. 1977\)](#).

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Based on the foregoing, when deciding EPC cases concerning transgender athletes, courts should continue to factor physiological differences between the sexes into their analyses.

C. Allowing Transgender Athletes to Use Opposite-Sex Locker Rooms Might Protect Transgender Athletes, but Not Their Cisgender Counterparts

As important as on-field issues are to EPC analyses, off-field issues are equally important - particularly those involving locker rooms and other places where athletes undress and shower before and after games. Place even the most effeminate boy in a girls' locker room, and girls will be keenly aware that a boy is in their midst - if not because they are unwillingly exposed to his genitals, then because they are uncomfortable being in a state of undress in the boy's presence, especially when they have not consented to undress in front of him.¹²⁹ High school girls are insecure enough about other girls seeing them fully or partially naked.¹³⁰ Forcing girls to be naked in front of a boy, even one who claims to be and acts like a girl, could expose them to serious psychological harm - especially in a world where boys are increasingly objectifying girls' bodies and subjecting girls to sexual bullying and harassment at an alarming rate.¹³¹ Allowing an "intact" biological boy - one who has not undergone gender reassignment surgery, and thus still has a penis - to **[*74]** undress in a girls' locker room actually undermines the concept of equal protection: The boy may be protected, but the girls are not.¹³²

The same is true of allowing even the most masculine-looking biologically female athlete to dress and shower in a boys' locker room. Never mind that the girl will be in a room full of hormonal teenage boys who will find it nearly impossible to ignore her distinctively female anatomy. Even boys who accept her presence among them and try to respect her privacy would find it difficult to think of her as "just one of the guys."¹³³ Like their female counterparts, teenage boys going through puberty can struggle to feel comfortable with their changing bodies, and changing in front of girls can heighten their insecurities.¹³⁴ Furthermore, a boy may not wish to pull down his pants in front of a girl for fear she may accuse him of rape, sexual assault, or sexual harassment.¹³⁵ "Males' privacy rights in single-sex spaces should be upheld just as the same rights for women should be upheld in situations where women have complained of male transgendered exhibitionists."¹³⁶

"Superficially, the maintenance of separate sports teams suggests the possibility of a denial of equal protection of the laws, but sound reason dictates that "separate but equal" in the realm of sports competition, unlike that of racial

¹²⁹ Kelsey Harkness, Why These High School Girls Don't Want Transgender "Student A' in Their Locker Room, Stream (Dec. 21, 2015), <https://stream.org/high-school-girls-dont-want-transgender-student-locker-room/>.

¹³⁰ Id.

¹³¹ Melinda Tankard Reist, Sex Before Kissing: How 15-Year-Old Girls Are Dealing with Porn-Addicted Boys, Fight New Drug (April 1, 2016), <http://fightthenewdrug.org/sex-before-kissing-15-year-old-girls-dealing-with-boys/>.

¹³² Michael E. Miller, A Transgender Teen Used the Girls' Locker Room. Now Her Community Is Up in Arms, Wash. Post (Sept. 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/a-transgender-teen-used-the-girls-locker-room-now-her-community-is-up-in-arms/>.

¹³³ See generally *Just One of the Guys* (Columbia Pictures 1985) (telling the story of a high school girl who poses as a boy at a rival school to win a journalism competition; the girl gains access to boys' restrooms and locker rooms and has to keep her anatomy concealed in order to not blow her cover).

¹³⁴ Keith Ablow, All Wrong - in California, Girls Can Use Urinals in the Boys' Restroom, FoxNews.com (Jan. 14, 2014), <http://www.foxnews.com/opinion/2014/01/14/all-wrong-in-california-girls-can-use-urinals-in-boys-restroom.html>.

¹³⁵ Chris Ricketts, The Transgender Threat to Boys and Men, Am. Thinker (Apr. 29, 2016), http://www.americanthinker.com/articles/2016/04/the_transgender_threat_to_boys_and_men_.html.

¹³⁶ Id.

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discrimination, is justifiable and should be allowed to stand" ¹³⁷ Ultimately, if the dangers and competitive disadvantages that biological girls typically face when they must compete against biological boys are not enough to convince courts that public high schools should continue to maintain separate teams for boys and girls, the lack of equal opportunities for biological girls should. ¹³⁸

[*75]

III. Title IX

"The statute known as Title IX, [20 U.S.C. § 1681](#), is widely recognized as a source of a vast expansion of athletic opportunities for women in the nation's schools and universities" ¹³⁹ Although Title IX does not mention interscholastic sports specifically, the statute does state that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." ¹⁴⁰ "Regulations promulgated under the statute assure that Title IX covers such educational activities as high school athletics." ¹⁴¹

When a statute does not define a term, courts typically "construe [the] term in accordance with its ordinary and natural meaning." ¹⁴² Title IX provides no definition of the term "women" - in fact, the statute does not even mention the word "women." ¹⁴³ The statute merely states that no educational institution receiving federal funding shall discriminate against any "person in the United States on ... the basis of sex." ¹⁴⁴ Title IX provides no definition of the word "sex," either. ¹⁴⁵ This was especially problematic in *G.G. v. Gloucester County School Board*, in which the Fourth Circuit ruled that a Virginia school district's exclusion of a biologically female transgender student from a boys' locker room violated Title IX. ¹⁴⁶ *G.G.*, it should be noted, is no longer valid law in the Fourth Circuit, as the appellate court vacated the preliminary injunction entered for the plaintiff after the Supreme Court

¹³⁷ [Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930, 932 \(W.D. Pa. 1973\)](#).

¹³⁸ See [Gomes v. R.I. Interscholastic, 469 F. Supp. 654, 664 \(D.R.I. 1979\)](#) ("Providing women with separate and exclusive [athletic] teams in sports previously dominated by men appears a legitimate and narrowly drawn attempt to rectify past discrimination."); see also Carly Holtzman, Mother of Girl Who Lost Race to Transgender Athlete Speaks Out - and She's Furious, TheBlaze (June 7, 2016, 12:46 PM), <http://www.theblaze.com/stories/2016/06/07/mother-of-girl-who-lost-race-to-transgender-athlete-speaks-out-and-shes-furious/> ("Today it's one transgender athlete. Tomorrow it could be half the field." (quoting Jennifer VanPelt, the mother of a runner who lost to Nattaphon Wangyot at Alaska's state track and field meet)).

¹³⁹ [Mansourian v. Regents of the Univ. of Cal., 594 F.3d 1095, 1099 \(9th Cir. 2010\)](#), overruled by ***Mansorian v. Regents of Univ. of Cal., 602 F.3d 957, 974 (9th Cir. 2010)***.

¹⁴⁰ *Id.* at 1101 (emphasis added) (quoting [20 U.S.C. § 1681\(a\)](#) (2012)).

¹⁴¹ [Gomes, 469 F. Supp. at 660](#) (citing [45 C.F.R. § 86.41 \(1979\)](#)).

¹⁴² [FDIC v. Meyer, 510 U.S. 471, 476 \(1994\)](#).

¹⁴³ See generally [20 U.S.C. § 1681](#).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also Jae Alexis Lee, How Does Title IX Define Gender?, Quora.com (May 13, 2016), <https://www.quora.com/How-does-title-IX-define-gender>.

¹⁴⁶ Frances Hubbard, Gloucester School Board to Seek Supreme Court Review in Transgender Lawsuit, Daily press (June 7, 2016, 3:30 PM), <http://www.dailypress.com/news/gloucester-county/dp-nws-mid-grimm-supreme-court-20160607-story.html>; see also [822 F.3d 709, 714-27 \(4th Cir. 2016\)](#), vacated, **137 S. Ct. 1239**.

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denied certiorari in 2017 in light of the Trump Administration's rescission of the Obama Directive. ¹⁴⁷ While transgenders and other individuals "do currently **[*76]** discuss sex and gender as decoupled concepts relatively frequently ... it's fairly obvious that" in 1972, when Congress enacted Title IX, "the lawmakers of the time were not thinking of sex and gender as decoupled concepts in need of explicit definitions." ¹⁴⁸

Courts thus interpret Title IX's provisions "through relevant law interpreting parallel language in Title VII ... [which] prohibits discrimination by an employer" based on sex, among other factors. ¹⁴⁹ "Courts have interpreted the word 'sex' [in Title VII] narrowly to typically mean biological sex." ¹⁵⁰ "Based on this interpretation of Title VII, courts also interpret the meaning of 'sex' within Title IX to mean biological sex, not sexual orientation or gender identity." ¹⁵¹

A. Title IX Was Created to Advance Opportunities for Women, Not Biological Men Who Claim to Be Women

To ascertain Congress's intent with regard to the construction of Title IX, courts must look to Title IX's legislative history. ¹⁵² Title IX's legislative history indicates that Congress enacted the statute as a "response to significant concerns about discrimination against women in education." ¹⁵³ Title IX's primary sponsor, Senator Birch Bayh of Indiana, stated:

Title IX was enacted to "provide for the women of America something that [was] rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." ¹⁵⁴

"Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction" ¹⁵⁵ Furthermore, while words, and combinations thereof, may reasonably be interpreted multiple ways, "particularly in **[*77]** matters as complex as legislative enactments," ¹⁵⁶ "multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." ¹⁵⁷ In other words,

¹⁴⁷ [G.G., 822 F.3d at 729-30](#); see also Amy Howe, Justices Send Transgender Bathroom Case Back to Lower Courts, No Action on Same-Sex Marriage Cake Case, SCOTUSblog (Mar. 6, 2017, 12:03 PM), <http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/>.

¹⁴⁸ Lee, supra note 145.

¹⁴⁹ Leena D. Phadke, When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX, [54 Kan. L. Rev. 837, 839 \(Apr. 2006\)](#) (quoting [42 U.S.C. § 2000e-2\(a\)](#) (2012)).

¹⁵⁰ Id. (citing [Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 \(9th Cir. 1977\)](#), overruled by [Schwank v. Hartford, 204 F.3d 1187 \(9th Cir. 2000\)](#)); Patricia A. Cain, Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law, [75 Denv. U. L. Rev. 1321, 1355 \(1998\)](#) (stating that "the court[']s holding in Holloway] declared, without serious question, that there can only be two sexes - male and female").

¹⁵¹ Phadke, supra note 149, at 840.

¹⁵² [North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 n. 26 \(1982\)](#).

¹⁵³ [Neal v. Bd. of Trustees, 198 F.3d 763, 766 \(9th Cir. 1999\)](#).

¹⁵⁴ Id. (quoting 118 Cong. Rec. 5808 (1972)).

¹⁵⁵ Id. (emphasis added) (quoting [Bell, 456 U.S. at 526-27](#)).

¹⁵⁶ [United States v. Sherbondy, 865 F.2d 996, 1000 \(9th Cir. 1988\)](#).

¹⁵⁷ [Calix v. Lynch, 784 F.3d 1000, 1005 \(5th Cir. 2015\)](#) (emphasis added) (quoting [Moore v. Hannon Food Servs., Inc., 317 F.3d 489, 497 \(5th Cir. 2003\)](#)).

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courts should not interpret Title IX in a way that would undermine its purpose of advancing educational opportunities for women and girls - or, to be more accurate, biological women and girls - including athletic opportunities.¹⁵⁸

1. For Title IX's Purposes, "Sex" Means "Biological Sex"

How should schools classify transgender athletes for purposes of Title IX then? Should they treat males who claim to be female as female, and vice versa, regardless of whether they have undergone hormone treatments or sex reassignment surgery? Transgender advocates would argue that they should.¹⁵⁹ The best known case specifically involving a transgender athlete suing for the right to compete as a member of the athlete's chosen gender, *Richards v. United States Tennis Association*, was not brought under Title IX, but under New York's State Human Rights Law.¹⁶⁰ In *Richards*, a tennis player who was born male but had undergone sex reassignment surgery to become female sued for, and won, the right to compete in the U.S. Open's thirty-five-and-over women's singles bracket.¹⁶¹ In granting an injunction allowing the player to compete as a woman, the court found the U.S. Tennis Association's demand that the player take a sex determination test to be "grossly unfair, discriminatory and inequitable."¹⁶² The court also held that "the only justification for using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing against women."¹⁶³

While some courts might find *Richards* instructive, justice for high school athletes would be better served by analyzing the transgender issue through the lens of Title VII, which, as stated above, serves as a guideline **[*78]** for Title IX cases.¹⁶⁴ "The dominant interpretation of Title VII examines its legislative history, which suggests that Congress did not intend for its prohibition of sex discrimination to include a prohibition of transgender sex discrimination."¹⁶⁵ In a seminal case concerning Title VII's applicability to individuals who have undergone sex reassignment surgery, the Ninth Circuit held that "a transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."¹⁶⁶ This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate."¹⁶⁷ Another federal appellate court held as follows:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male

¹⁵⁸ [Neal, 198 F.3d at 767-68](#) (noting that Title IX's drafters understood that "male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field").

¹⁵⁹ See K-12 Policies, *supra* note 6 (defining "inclusive" to mean "no medical hormones or surgery required" and "discriminatory" to mean "requires birth certificate or surgery" and a hormone wait period).

¹⁶⁰ [Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 268 \(N.Y. Sup. Ct. 1977\)](#).

¹⁶¹ [Id. at 273](#).

¹⁶² [Id. at 272](#).

¹⁶³ *Id.*

¹⁶⁴ Phadke, *supra* note 149, at 842.

¹⁶⁵ *Id.* at 842-43.

¹⁶⁶ *Id.*

¹⁶⁷ [Holloway v. Arthur Anderson & Co., 566 F.2d 659, 664 \(9th Cir. 1977\)](#), overruled by [Schwank v. Hartford, 204 F.3d 1187 \(9th Cir. 2000\)](#).

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body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.¹⁶⁸

At least one court has held "that discrimination based on a claimant's failure to meet sex stereotypes violates Title VII even when it involves transgender individuals."¹⁶⁹ Under this lone court's view, if an employer discriminates against an individual because he or she refuses to dress, talk, or otherwise behave in a manner that conforms to expectations of the individual's biological gender, the individual may sue the employer under Title VII for sex stereotyping and gender discrimination.¹⁷⁰ However, as stated above, "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."¹⁷¹ "Courts have [thus] interpreted the word 'sex' narrowly to typically mean biological sex."¹⁷² Under this construction of the word "sex," "any discrimination based on an [*79] individual's sexual orientation or gender identity would not violate Title VII because as such, it would not constitute discrimination based on a person's biological sex, but rather because of a quality related to sex."¹⁷³ Applying this principle to Title IX, a school does not unlawfully discriminate against a boy who claims to be a girl by treating him as a boy, and vice versa.

2. Forcing Girls to Compete Against Boys for Athletic Opportunities Violates Title IX

The Ninth Circuit has held that forcing women to compete against men for spots on the same athletic team undermines Title IX's purpose.¹⁷⁴ In *Mansourian v. Regents of the University of California*, four female wrestlers sued the University of California at Davis (UCD) for kicking them off the university wrestling team, then giving them a chance to rejoin if they defeated male counterparts in their respective weight classes using men's collegiate wrestling rules.¹⁷⁵ Before their dismissal, the female wrestlers had only wrestled against other women using international freestyle rules.¹⁷⁶ Whether they proved unable to physically compete with the men or simply refused to out of discomfort, lack of knowledge and/or practice of men's collegiate rules, etc., the female wrestlers lost scholarships and academic credit due to their inability to participate.¹⁷⁷ In holding that UCD's exclusion of the female wrestlers violated Title IX, the Ninth Circuit stated that "by requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future participation."¹⁷⁸

¹⁶⁸ [Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 \(7th Cir. 1984\).](#)

¹⁶⁹ Phadke, supra note 149 (citing [Smith v. City of Salem, 378 F.3d 566, 578 \(6th Cir. 2004\)](#)).

¹⁷⁰ [Smith, 378 F.3d at 571-72](#) (citing [Price Waterhouse v. Hopkins, 490 U.S. 228, 235 \(1989\)](#)), superseded by statute, Civil Rights Act of 1991, 42 U.S.C.A. § 2000 (2012).

¹⁷¹ [Ulane, 742 F.2d at 1085.](#)

¹⁷² Phadke, supra note 149, at 839.

¹⁷³ Id. at 840.

¹⁷⁴ [Mansourian v. Regents of the Univ. of Cal., 594 F.3d 1095, 1102 \(9th Cir. 2010\)](#), overruled by *Mansorian v. Regents of Univ. of Cal., 602 F.3d 957, 974 (9th Cir. 2010)*.

¹⁷⁵ Id. at 1099.

¹⁷⁶ Id. at 1099-1100.

¹⁷⁷ Id.

¹⁷⁸ Id. at 1111 n.16.

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B. Denying Transgender Athletes the Chance to Compete on Teams that Match Their Gender Identity Would Not Deny Them an Equal Opportunity to Compete

In *O'Connor v. Board of Education*, the Supreme Court held that "without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny [girls] an equal opportunity to [participate] in [*80] interscholastic events."¹⁷⁹ "Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact."¹⁸⁰ *O'Connor* involved a female junior high basketball player whose basketball skills greatly exceeded those of other girls her age or older and were at least equal to those of many boys her age or older.¹⁸¹ Because of this, the player sought and won an injunction from her local federal district court permitting her to try out for one of her school's boys' teams and to compete against boys in interscholastic competition if she made the team.¹⁸² The player's school district successfully appealed the lower court's ruling and was granted a stay of the injunction.¹⁸³

In denying the player's motion to vacate the stay, the Supreme Court held that only where (1) a school "operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex," and (2) "athletic opportunities for members of [the excluded] sex have previously been limited," must the school permit members of the excluded sex to try out for the team offered.¹⁸⁴ Because the school district had offered the female basketball player an equal opportunity to participate in interscholastic athletic competition not only by fielding girls' basketball teams, but also by devoting equal time, money, personnel, and facilities to the girls' teams at the player's school, the district had complied with Title IX.¹⁸⁵ *O'Connor* thus illustrates that schools do not deny equal opportunities to athletes of either gender - and thus do not violate Title IX - by requiring them to compete on teams set apart based on biological gender.¹⁸⁶

[*81]

C. Courts Should Not Interpret Title IX in a Way That Undermines Its Purpose

It should be noted here that the OCR was created to regulate federally funded schools with respect to athletic opportunities under Title IX.¹⁸⁷ It was the OCR that issued the now-rescinded Obama Directive.¹⁸⁸ "It is well-

¹⁷⁹ [449 U.S. 1301, 1307 \(1980\)](#) (emphasis added).

¹⁸⁰ [Id. at 1302](#) (quoting [45 C.F.R. § 86.41\(b\) \(1979\)](#)).

¹⁸¹ [Id. at 1302-03](#).

¹⁸² *Id.*

¹⁸³ [Id. at 1303-04](#).

¹⁸⁴ [Id. at 1308 n.5](#) (quoting [45 C.F.R. § 86.41\(b\)](#)).

¹⁸⁵ [Id. at 1306](#) (stating that if a gender-based "classification is reasonable in substantially all of its applications ... the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case"); see also [Hoover v. Meiklejohn, 430 F. Supp. 164, 170 \(D. Colo. 1977\)](#) ("The standard should be one of comparability, not absolute equality.").

¹⁸⁶ [O'Connor, 449 U.S. at 1306](#) ("The question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer (the player) opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the (school district) to structure (its) athletic programs by using sex as one criterion for eligibility.").

¹⁸⁷ [Neal v. Bd. of Trustees, 198 F.3d 765, 770 \(9th Cir. 1999\)](#) (citing [Cohen v. Brown Univ., 991 F.2d 888, 895 \(1st Cir. 1993\)](#)).

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established that the federal courts are to defer substantially to an agency's interpretation of its own regulations." ¹⁸⁹ However, a court has no obligation to show substantial deference to an agency's interpretation of a statute or regulation when it conflicts with a prior, consistently held interpretation. ¹⁹⁰ Courts should thus treat as invalid any agency's interpretation of Title IX that disadvantages biological girls and undermines the statute's remedial purposes. ¹⁹¹ OCR's interpretation of Title IX, as set forth in the Obama Directive, did just that: whereas the term "sex" in Title IX is to be construed consistently with the meaning prescribed in Title VII, and courts have consistently determined that term to mean "biological sex," ¹⁹² the Obama Directive asserted that the term also includes "gender identity." ¹⁹³ If a male athlete's mere claim that he is female, or vice versa, is to take precedent over - or at least be given equal weight with - biology, then there are no such things as males or females for Title IX's purposes, and the term "sex" is rendered meaningless. ¹⁹⁴

Taken together, Mansourian and O'Connor show that interpreting Title IX to require that high schools permit transgender athletes to compete on whichever athletic teams match their self-proclaimed gender identity would, in fact, disadvantage biological women and undermine Title IX's remedial purposes. As Mansourian illustrates, high schools may violate Title IX by requiring biological girls to compete with biological boys for spots on an athletic team that were once reserved exclusively for girls: "By requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future [*82] participation." ¹⁹⁵ As long as a school provides athletic teams for persons of both genders that are roughly equal in terms of the time, money, personnel, and facilities devoted to each team, the equal opportunity requirement is met. ¹⁹⁶

Requiring sex-segregated teams to include persons whose self-proclaimed "gender identity" does not match their biological gender "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." ¹⁹⁷ Courts should thus uphold Title IX's purpose of expanding athletic opportunities for women by not letting men who identify as women deny them such opportunities. ¹⁹⁸

IV. State Laws Concerning Transgender Athletes

¹⁸⁸ See Letter from Chamon & Gupta, supra note 58.

¹⁸⁹ [Neal, 198 F.3d at 770.](#)

¹⁹⁰ [Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 \(1994\).](#)

¹⁹¹ [Neal, 198 F.3d at 768](#) (quoting [Cohen v. Brown, 101 F.3d 155, 174 \(1st Cir. 1996\)](#)).

¹⁹² Phadke, supra note 149, at 842-43.

¹⁹³ Emma Margolin, Transgender Students Protected Under Title IX, DOE Says, MSNBC.com, <http://www.msnbc.com/msnbc/transgender-students-protected-under-title-ix> (last updated Apr. 30, 2014, 4:15 PM) ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity" (quoting the Obama Directive's statement)).

¹⁹⁴ Letter from Chamon & Gupta, supra note 58, at 1-2.

¹⁹⁵ [Mansourian v. Regents of Univ. of Cal., 594 F.3d 1095, 1111 \(9th Cir. 2010\)](#), overruled by [Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 974 \(9th Cir. 2010\)](#).

¹⁹⁶ Id. at 1102; see also [Hoover v. Meiklejohn, 430 F. Supp. 164, 172 \(D. Colo. 1977\)](#).

¹⁹⁷ [Neal v. Bd. of Trustees, 198 F.3d 765, 769 \(9th Cir. 1999\)](#).

¹⁹⁸ [Id. at 766.](#)

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Since the Supreme Court issued its landmark decision in *McCulloch v. Maryland* in 1819, "it has been settled that state law that conflicts with federal law is "without effect."¹⁹⁹ Under the U.S. Constitution's Supremacy Clause, "Congress has the power to preempt state law."²⁰⁰ "Even without an express provision for preemption, ... state law must yield to a congressional Act in at least two circumstances."²⁰¹ "When Congress intends federal law to 'occupy the field,' state law in that area is preempted."²⁰² "And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."²⁰³

California actually has two laws requiring public high schools to let transgender athletes compete on teams or in events based on their self-proclaimed gender identity.²⁰⁴ Besides Education Code § 221.5(f), cited supra, there is the Unruh Civil Rights Act (the Unruh Act), which prohibits business establishments from discriminating based on "gender identity and ... gender related appearance and behavior whether or not **[*83]** stereotypically associated with the person's assigned sex at birth."²⁰⁵ The term "business establishment" is to be construed broadly:

The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization"²⁰⁶

Public schools qualify as business establishments under the Unruh Act.²⁰⁷ The California Interscholastic Federation and the regional sections that oversee high school sports on its behalf (collectively the CIF) also qualify.²⁰⁸ Though no court has declared the CIF to be a business establishment, the CIF organizes and conducts high school sporting events throughout the state on an annual basis and generates revenue from the sale of tickets, event programs, T-shirts, and concessions, all of which would almost certainly qualify the CIF as a "business establishment."²⁰⁹ The CIF's status as a nonprofit organization would not exempt it from the Unruh Act's

¹⁹⁹ [Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 \(1992\)](#) (quoting [Maryland v. Louisiana, 451 U.S. 725, 746 \(1981\)](#)) (citing [McCulloch v. Maryland, 17 U.S. 316, 427 \(1819\)](#)).

²⁰⁰ [Crosby v. Nat'l. Foreign Trade Council, 530 U.S. 363, 372 \(2000\)](#) (citing [U.S. Const. art. VI, cl. 2](#)).

²⁰¹ Id.

²⁰² Id.

²⁰³ Id. (emphasis added).

²⁰⁴ Although this portion of the Article specifically discusses laws in California, the legal principles discussed apply in all other U.S. states, districts, and territories that have similar laws, rules, and regulations concerning transgender student-athletes. See, e.g., K-12 Policies, supra note 6.

²⁰⁵ See Unruh Civil Rights Act, Cal. [Civ. Code § 51\(e\)\(5\)](#) (1872) (incorporating by reference Cal. Gov't Code § 12926(o) (1943) and, by extension, [Cal. Pen. Code § 422.56\(c\)](#) (1987), which is incorporated by reference into Cal. Gov't Code § 12926(p) (2017) and whose language is quoted in the sentence preceding this note); see also Cal. Gov't Code § 11135(a) (2017); [Cal. Educ. Code §§200, 201](#) (1982), § 220 (1998).

²⁰⁶ [Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 709 \(Cal. Ct. App. 2nd Dist. 1982\)](#) (emphasis added) (quoting [Burks v. Poppy Constr. Co., 20 Cal. Rptr. 609, 612 \(Cal. 1962\)](#)).

²⁰⁷ [Sullivan v. Vallejo City Sch. Dist., 731 F. Supp. 947, 952 \(E.D. Cal. 1990\)](#).

²⁰⁸ Id.

²⁰⁹ Id. (quoting [Isbister v. Boys Club, Inc., 707 P.2d 212, 216 \(Cal. 1985\)](#)) (stating that in enacting the Unruh Act, the California Legislature intended for the statute to apply to "all private and public organizations ... that may reasonably be found to constitute business establishments of every type (sic) whatsoever" (emphasis in the original; internal quotations omitted)); see also Doe v. Cal. Lutheran High Sch. Ass'n, [88 Cal. Rptr. 3d 475, 478 \(Cal. Ct. App. 2009\)](#).

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provisions.²¹⁰ Private religious schools, however, are not subject to the Unruh Act,²¹¹ which is inapplicable where it conflicts with the First Amendment.²¹² In other words, private schools that wish to adhere to the biblical teaching "that at [*84] the beginning the Creator "made them male and female"²¹³ are free to do so.

The state laws discussed supra have put California's public high schools in a legal bind.²¹⁴ If they do not let transgender athletes compete for spots on teams that match their gender identity, they could be sued for violating Education Code § 221.5(f), the Unruh Act, the Equal Protection Clause, and Title IX.²¹⁵ If they do let transgender athletes compete on teams that match their gender identity, and thus displace biological boys or girls who would otherwise have earned spots on those teams, they could be subject to lawsuits on the same grounds.

V. High Schools' Defensive Game Plan

Other than lobbying their federal and state legislators for changes in existing law, there does not seem to be much that high schools can do to wriggle out of the proverbial "rock and a hard place" that they now find themselves between. However, schools need not sit back and wait to be sued to assert their right to maintain a level playing field for all of their athletes by maintaining separate athletic programs for boys and girls.

For starters, high schools can maintain the status quo. As stated supra, Title IX was enacted to advance educational opportunities for girls.²¹⁶ By ensuring that spots on athletic teams established for girls actually go to girls, schools can do just that. A boy who wants to play on a girls' team, or vice versa, is not "excluded from participation in [or] denied the benefits of ... [an] education program or activity receiving Federal financial assistance" if the school has teams available for persons of his biological gender,²¹⁷ especially given Title IX's purpose of remedying discrimination toward girls.²¹⁸

High schools with the resources to do so can also bring suit against an appropriate state official on behalf of their athletic teams. An organization "has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' [*85] participation in the lawsuit."²¹⁹ A girl who loses a spot on a school athletic team to a biological male would certainly have standing to bring suit against

²¹⁰ [Sullivan, 731 F. Supp. at 952](#) (citing [Isbister, 707 P.2d at 216-17](#); [O'Connor v. Vill. Green Owners Ass'n, 662 P.2d 427, 429 \(1983\)](#)).

²¹¹ Doe, [88 Cal. Rptr. 3d at 483-84](#) ("[A] private nonprofit religious school has as its 'overall purpose and function' the education of children in keeping with its religious beliefs. The 'inculcation of a specific set of values,' with programs 'designed to teach the moral principles to which the [school] subscribes,' prevents such a school from being considered a 'business establishment' whose ... practices would be subject to the [Unruh] Act." (quoting [81 Ops. Cal. Atty. Gen. 189 \(1998\)](#))).

²¹² [Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 713 \(Cal. Ct. App. 2nd Dist. 1982\)](#)

²¹³ Matthew 19:4; see also Genesis 1:27, 5:2.

²¹⁴ [Cal. Educ. Code § 200](#) (2012).

²¹⁵ Id.

²¹⁶ [Neal v. Bd. of Trustees, 198 F.3d 765, 766 \(9th Cir. 1999\)](#).

²¹⁷ [20 U.S.C. § 1681](#) (2012).

²¹⁸ [Neal, 198 F.3d at 766](#).

²¹⁹ [Ala. Legislature Black Caucus v. Alabama, 135 S. Ct. 1257, 1268 \(2015\)](#) (emphasis in the original) (quoting [Friends of the Earth, Inc. v. Laidlaw Env. Serv. \(TOC\), Inc., 528 U.S. 167, 181 \(2000\)](#)).

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her school and/or its district for discriminating against her under Title IX, and a school that has been put in a position whereby it is forced to violate Title IX should be able to bring such a suit on the girl's behalf. ²²⁰ In such a circumstance, the best defense might be a good offense.

Should a high school be sued by a transgender athlete, however, a school seeking to preserve its sex-segregated sports programs can and should assert the following defenses:

Equal Protection Clause: As stated above, the EPC does not require "things which are different in fact ... to be treated in law as though they are the same." ²²¹ Psychologically and biologically, transgender athletes are distinguishable from their cisgender counterparts. ²²² Cisgenderers are what they claim to be and come by their body parts naturally, ²²³ whereas transgenders claim to be the opposite of what they are and must medically alter their bodies if they wish, at least externally, to look like the gender to which they identify. ²²⁴ Scientifically, males who claim to be female are still male, and vice versa. ²²⁵ Accordingly, schools, as state actors subject to the EPC, are free to treat transgender males - i.e., girls who claim to be boys - as female and vice versa for purposes of team placement and determining which locker rooms they should use.

Given that "distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls," ²²⁶ schools can assert the government interest in achieving those goals. For one thing, the presence of transgender athletes on sports teams that do not match their biological gender poses physical and/or **[*86]** psychological dangers to their cisgender teammates, both in the locker room and on the field; schools should not be forced to harm one group to accommodate the other. Remember, the EPC entitles both boys and girls to "equal protection," not "special protection." ²²⁷ Furthermore, it is theoretically possible for a girls' team to be populated largely with boys who claim to be transgender, ²²⁸ which would deny equal athletic opportunities to biological girls and thus undermine the goal of "redressing past discrimination and providing equal opportunities for women." ²²⁹ Even if maintaining sex-segregated sports programs is not the only way to achieve that goal, it is almost certainly the best way:

²²⁰ [20 U.S.C. § 1681; Ala. Legislature, 135 S. Ct. at 1268.](#)

²²¹ [Michael M. v. Superior Ct., 450 U.S. 464, 469 \(1981\)](#) (emphasis in the original).

²²² [Frontiero v. Richardson, 411 U.S. 677, 686 \(1973\).](#)

²²³ Id.

²²⁴ Transgender Is Mental Disorder, *supra* note 81 ("'Sex change' is biologically impossible... . People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather, they become feminized men or masculinized women." (quoting Dr. McHugh)).

²²⁵ Id.; see also Matt Walsh, You Are Born a Man or a Woman. You Don't Get to Choose, TheMattWalshBlog.com (Sept. 24, 2014), <http://themattwalshblog.com/2014/09/24/man-or-woman/> (describing transgender mixed martial arts fighter Fallon Fox - who was born male but fights against women - as "a grown adult male who ... beat a woman to a bloody pulp in front of a cheering crowd").

²²⁶ [Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 739 \(R.I. 1992\).](#)

²²⁷ See *supra* Part II.

²²⁸ [O'Connor v. Bd. of Educ., 449 U.S. 1301, 1307 \(1980\).](#)

²²⁹ [Clark v. Ariz. Interscholastic Ass'n, 449 U.S. 1126, 1131 \(9th Cir. 1982\), 695 F.2d at 1131](#) (citing [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E. 2nd 855 862 \(Ill. App. Ct. 1979\)](#)).

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We deem the preservation, fostering and promotion of interscholastic athletic competition for both boys and girls to be a matter of compelling governmental interest. Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors. Although classification of teams based on gender is not an absolute necessity in attempting to achieve those governmental interests, we are persuaded that the combination of problems which we believe to be likely to arise from attempts to do so through other classifications, creates a substantial element of necessity.²³⁰

Schools that wish to accommodate athletes who claim to be transgender are also within their rights to require proof of the athletes' transgender bona fides so as to prevent fraud - i.e., athletes, males in particular, claiming to be transgender in order to gain a competitive advantage.²³¹ Most, if not all, transgender athletes deny that anyone would claim to be transgender to obtain an easier path to athletic glory due to the bullying, harassment, and other persecution the person would face for doing so.²³² However, an athlete who is desperate enough could be willing to pay that price, especially if it means potentially being hailed as a groundbreaker and the possibility of being offered a coveted college [*87] scholarship for doing so.²³³ Schools are thus permitted under the EPC to condition participation on an opposite-gender team by requiring that a transgender athlete (1) provide legal and/or medical evidence of his or her transgender status, (2) undergo hormone treatments or sex reassignment surgery before permitting them to compete on an opposite-gender team, and/or (3) compete as a member of his or her approved gender for the remainder of his or her high school career - all of which are approaches taken in various states.²³⁴

Transgender athletes may argue that conditioning participation on opposite-gender teams is discriminatory²³⁵ and furthermore, that requesting proof of their transgender bona fides violates privacy interests protected by their federal and state constitutions.²³⁶ However,

unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.²³⁷

²³⁰ [Petrie, 394 N.E.2d at 863](#); see also [O'Connor, 449 U.S. at 1307](#) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in scholastic events.").

²³¹ [Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 272 \(NY. App. Div. 1977\)](#).

²³² No League, supra note 42 (featuring Caitlyn Jenner - who, as Bruce Jenner, won the men's decathlon at the 1976 Olympic Games in Montreal and is the most prominent current or former athlete who identifies as transgender - and transgender duathlete Chris Mosier, a biological female, who denies that men would seek to compete as women in order to gain a competitive advantage).

²³³ Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships, CBS N.Y. (June 8, 2016, 3:40 PM), <http://newyork.cbslocal.com/2016/06/08/transgender-nattaphon-wangyot-alaska-track/>; see also Walsh, supra note 225 (stating that as Fallon Fox "gloated about his physical dominance over (his) outmatched female" opponent in a mixed martial arts bout, "media outlets and advocacy groups hailed him as a pioneer").

²³⁴ K-12 Policies, supra note 6.

²³⁵ Id.

²³⁶ See, e.g., [Nguon v. Wolf, 517 F. Supp. 2d 1177, 1190-91 \(C.D. Cal. 2007\)](#) (noting that minor students in California have privacy rights concerning their sexual orientation that are protected under both the federal and state constitutions; the same would likely be equally applicable to one's gender identity).

²³⁷ [Hill v. Nat'l Collegiate Athletic Ass'n., 865 P.2d 633, 637 \(Cal. 1994\)](#).

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In other words, transgender athletes give up their reasonable expectation of privacy by voluntarily participating in interscholastic athletics.²³⁸ This is especially true since disclosure of their transgender status is necessary from a practical standpoint in order to gain approval to compete for an opposite-sex team. Other legitimate legal objectives, such as ensuring equality of opportunity for both boys and girls and ensuring the physical and psychological safety of other athletes, also outweigh the transgender athlete's already diminished expectation of privacy.²³⁹

The bottom line: All the EPC requires is that whatever opportunities schools provide for their students to compete in interscholastic athletics must "be open to all on equal terms."²⁴⁰ Maintaining sex-segregated [*88] sports programs, and limiting participation in those programs to persons of a specific biological gender, accomplishes that goal.²⁴¹

Title IX: By ensuring that as many biological girls and boys as possible have the chance to compete in interscholastic athletic competition, schools comply with the letter, spirit, and intent of Title IX.²⁴² Neither boys nor girls are denied equal athletic opportunities under Title IX by being required to try out for, and participate on, teams set apart exclusively for persons of their gender.²⁴³ However, by permitting transgender males to compete on teams set apart for biological girls, schools change the conditions under which girls may participate in a manner that effectively denies biological girls the opportunity to participate in interscholastic athletics.²⁴⁴ In other words, a girl who loses a spot on a girls' team to a transgender male loses out on the very type of educational opportunity that Title IX was enacted to provide to her.²⁴⁵ This would not only undermine Title IX's purpose, it "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment."²⁴⁶ To ensure true equality of athletic opportunities under Title IX, then, a school should continue to maintain separate athletic programs for boys and girls and limit participation in those programs to persons of the gender specified.

State Law: Where state law forces schools to violate federal law, state law must yield.²⁴⁷ Title IX is a federal law enacted for the purpose of "eliminating discrimination on the basis of sex in education programs and activities receiving federal financial assistance."²⁴⁸ If a school has to violate Title IX, a federal law, to accommodate a

²³⁸ *Id.*

²³⁹ [*Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 739 \(R.I. 1992\).](#)

²⁴⁰ [*Hoover v. Meiklejohn*, 430 F. Supp. 164, 171 \(D. Colo. 1977\).](#)

²⁴¹ [*Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 \(9th Cir. 1982\).](#)

²⁴² [*O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1306 \(1980\); *Neal v. Bd. of Trustees*, 198 F.3d 765, 767 \(9th Cir. 1999\).](#)

²⁴³ [*O'Connor*, 449 U.S. at 1306.](#)

²⁴⁴ [*Mansourian v. Regents of Univ. of Cal.*, 594 F.3d 1095, 1108 n.16 \(9th Cir. 2010\)](#), overruled by ***Mansourian v. Regents of Univ. of Cal.*, 602 F.3d. 957, 974 (9th Cir. 2010).**

²⁴⁵ [*Neal*, 198 F.3d at 767.](#)

²⁴⁶ [*Id.* at 769.](#)

²⁴⁷ [*Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 \(2002\)](#) ("State law is naturally preempted to the extent of any conflict with a federal statute.").

²⁴⁸ [*O'Connor*, 449 U.S. at 1307 n.5.](#)

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transgender athlete under state law, then Title IX's very language and purpose would be rendered meaningless. Schools are thus free to disregard state law in such circumstances. ²⁴⁹

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VI. Conclusion

Public high schools do not deny transgender athletes the opportunity to compete in interscholastic athletics - and thereby do not violate the law - by requiring transgender athletes to compete on teams associated with their biological gender or placing conditions on their participation on an opposite-gender team, such as obtaining hormone treatments or sex reassignment surgery. ²⁵⁰ There are valid, legally recognized reasons to classify transgender athletes according to their anatomy, rather than the gender they identify as, for purposes of their placement on teams. Ultimately, schools can take comfort in the knowledge that the world of high school athletics is not as "mixed-up, muddled-up, [or] shook-up" as transgender advocates make it out to be. ²⁵¹ "The basics" of human anatomy have not changed, and schools can thus treat transgender athletes accordingly. ²⁵²

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²⁴⁹ See, e.g., Cal. [Civ. Code § 51\(c\)](#) (2016) (stating that the Unruh Act "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation ... or to persons regardless of their genetic information" (emphasis added)).

²⁵⁰ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 2d 659, 665 \(D.R.I. 1979\)](#) (stating that just because a public high school denied a boy the opportunity to play volleyball for the school's girls' volleyball team, and did not have a boys' team for him to compete on, did not mean that the school had denied him the opportunity to compete in interscholastic athletics).

²⁵¹ The Kinks, *supra* note 8.

²⁵² Kindergarten Cop, *supra* note 1.