

# “IT GOT TOO TOUGH TO NOT BE ME”<sup>1</sup>: ACCOMMODATING TRANSGENDER ATHLETES IN SPORT

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1. *Got Too Tough to Not Be Me*, ESPN (Nov. 3, 2010), <http://sports.espn.go.com/ncw/news/story?id=5761244> (quoting Kye Allums, a transgender athlete on George Washington University’s women’s basketball team, referring to the difficult decision to start identifying himself as a male in order to match his internal sense of gender identity).

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## I. INTRODUCTION

Starting in elementary school, most children are separated into male and female teams for purposes of organized sport competition.<sup>2</sup> For most participants, this is a perfectly logical division and one that does not even cross their minds. A male plays on the boys' team; a female plays on the girls' team. But for some athletes, such a division is an agonizing process. Athletes who are transgender<sup>3</sup> have an internal sense of gender identity<sup>4</sup> different from their gender assigned at birth.<sup>5</sup> These athletes are forced to choose between what gender their biological anatomy says they are versus what their heart and mind say they are when deciding whether to play on a men's or a women's athletics team. Sometimes, these athletes do not even have a choice: they must play on the team of their biological sex, which can lead to extreme discomfort and psychological pain for the athlete.

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2. There are, of course, exceptions. Physical education programs in many states are co-educational due to a lack in funding for separate teachers or facilities. Furthermore, when very young children begin playing a sport, they may be on mixed-sex teams for a few years. Finally, there are a few sports that are not separated into co-ed teams, such as archery, equestrian and shooting. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, CURRENT NCAA POSITION REGARDING TRANSGENDER STUDENT ATHLETE PARTICIPATION AND RESOURCE LIST 7 (July 30, 2009), *available at* [www.transgenderlaw.org/resources/NCAA\\_Policy.pdf](http://www.transgenderlaw.org/resources/NCAA_Policy.pdf) (hereinafter "2009 NCAA POSITION").

3. The term "transsexual" is not in use anymore. This term is viewed as outdated and was used in the past to describe a person who "underwent a 'sex change' operation." Transgender athletes may or may not have undergone a sex change operation. BRENDA WAGMAN, INCLUDING TRANSITIONING & TRANSITIONED ATHLETES IN SPORT: ISSUES, FACTS & PERSPECTIVES 5 (Feb. 12, 2009). Furthermore, it should be noted that the concept of "sexual orientation" is a completely different concept from being transgender and "refers to a person's attraction to a sexual partner of the opposite physical sex (heterosexual) or same physical sex (homosexual) or both sexes (bisexual)." *Id.* at 6. Since it is a completely separate issue, it has no bearing on the concept of being transgender and will not be addressed in this Article.

4. "Gender identity" is "a person's own internal sense of being female or male, or in between, regardless of his or her physical sex characteristics." *Id.* at 5 *citing* KEVIN B. WAMSLEY, SPORT AND TRANSITIONING/TRANSITIONED ATHLETES: A REVIEW OF THE SOCIAL SCIENCE LITERATURE 3 (Feb. 2008), *available at* [www.caaws.ca/e/resources/pdfs/Wamsley\\_lit\\_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).

5. DR. PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 6, app. A (Oct. 4, 2010). "Transgender" can also "be used as an 'umbrella term' to describe anyone whose identity or behavior falls outside of stereotypical gender norms." *Id.* at app. A.

The idea that gender identity is a fluid concept is different from many people's perception that gender is fixed at birth by one's biological sex. Gender is a core part of our identity, but it "is more complex than our society generally acknowledges."<sup>6</sup> Further complicating the ideas of "gender" and "gender identity" is the fact that people can be "intersexed," meaning they have anatomical characteristics of both men and women.<sup>7</sup> Sex "is determined by the physical presence of particular external genitalia, chromosome structures and hormones."<sup>8</sup> A person's sex can either match their concept of their own gender identity or run counter to their self-perceived gender identity. When a person is intersexed, his or her parents sometimes try to determine the child's gender identity at birth. As the intersexed child grows and matures, he or she can either agree with the chosen gender identity or internally identify with a different gender. The person might not be able to play on a sports team with others of their internally-identified gender, however, because the person possesses the biological characteristics of a different sex.

There is currently a need for standards governing the inclusion of transgender athletes. High school and college are formative years in a young person's life, and the time during which some may begin to question their own concepts of their gender identity. For student-athletes, implementation of such policies will give those questioning their gender identity the opportunity to do so in a safe space. Furthermore, ignoring the issue can have significant legal consequences. Most professional sports leagues and school athletic programs have no policy governing the inclusion of transgender athletes.<sup>9</sup> The National Collegiate Athletic Association ("NCAA") took a major step forward in September of 2011, when it announced its formal policy on the issue.<sup>10</sup> However, there is still a great need for standards and policies at the interscholastic level, and the NCAA needs to work hard to implement its new policy. It is important to strive for these goals as a young athlete may begin to question their own

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6. *Id.* at 11.

7. WAGMAN, *supra* note 3, at 4. The term "intersexed" has replaced the term "hermaphrodite," which was commonly used in the past and is used to refer to a variety of biological conditions. *Id.* One example of such a condition is "Androgen Insensitivity Syndrome." People with this abnormality have sex organs that appear to be "female" at birth and early in life, but "develop into male genitalia during puberty." *Id.* at 5. Thus, they appear to have XX chromosomes at birth, but really have XY chromosomes, which does not become apparent until many years later. *Id.* This can obviously be a very traumatic discovery for both the individual and the family.

8. *Id.* at 4.

9. GRIFFIN & CARROLL, *supra* note 5, at 7.

10. National Collegiate Athletic Association, *Transgender policy approved*, Marta Lawrence (Sept. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved> (hereinafter CURRENT NCAA POSITION.)

concept of their gender identity during the formative years they spend participating in athletics at the intercollegiate level. Implementation of the policy will give those questioning their gender identity the opportunity to do so in a safe space. Furthermore, ignoring the issue and not working toward the inclusion of transgender athletes in sports participation may have significant legal consequences.

This Article will argue that there is a need for standards to ensure that the transgender student-athlete does not encounter problems with participation due to inconsistent rules for state eligibility, conference and tournament eligibility, and national competitive tournaments.<sup>11</sup> Furthermore, inclusion,<sup>12</sup> equal opportunity, and acceptance should be the goals<sup>13</sup> when establishing such standards. It was not too long ago that African Americans were not allowed to compete with whites in sports, and women were not allowed to compete in sports at all. Just as there was a fundamental moral argument and movement to allow different groups of people to compete, it should be the same for transgender athletes.<sup>14</sup> Finally, such standards should be the goal because of the numerous positive effects of athletic participation, including, physical, social and emotional well-

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11. GRIFFIN & CARROLL, *supra* note 5, at 7, 22.

12. While it is important to be inclusive in sports in order to have a level playing field, sports must be *exclusive* in some aspects as well in order to have level playing fields. Weight classes, age categories and qualifying trials are all exclusive criteria that “are integral to an equitable system for judging ability in the realm of sport.” WAGMAN, *supra* note 3, at 7. The key is to strike the delicate balance between the exclusive factors that equalize the playing field and the inclusive factors that also lead to equality of participation for all.

13. GRIFFIN & CARROLL, *supra* note 5, at 10; WAGMAN, *supra* note 3, at 6. Many entities have recognized these goals. The Canadian Sport Policy “upholds the principle that “[s]port is welcoming and inclusive offering an opportunity to participate without regard to age, gender, race, language, sexual orientation, disability, geography, or economic circumstances.” WAGMAN, *supra* note 3, at 6 *citing* Sport Canada, “*The Canadian Sport Policy*,” Sport Canada (May 24, 2002) available at <http://www.pch.gc.ca/pgm/sc/pol/pccs-csp/2003/polsport-eng.pdf>. The International Olympic Committee states in reference to the harassment and discrimination that occurs in regards to transgender athletes that “[e]veryone in sport shares the responsibility to identify and prevent sexual harassment and abuse and to develop a culture of dignity, respect and safety in sport.” INTERNATIONAL OLYMPIC COMMITTEE, IOC ADOPTS CONSENSUS STATEMENT ON SEXUAL HARASSMENT AND ABUSE IN SPORT (Feb. 8, 2007), available at [http://multimedia.olympic.org/pdf/en\\_report\\_1125.pdf](http://multimedia.olympic.org/pdf/en_report_1125.pdf) (hereinafter IOC CONSENSUS STATEMENT). Finally, the NCAA has stated that the “NCAA core values include a commitment to creating and supporting an inclusive culture that fosters equitable participation for student athletes [sic] and career opportunities for coaches and administrators from diverse backgrounds.” 2009 NCAA POSITION, *supra* note 2, at 1.

14. See generally Donna Ross, *Transsexual Athletes Treated Unfairly*, CNN Opinion (Oct. 20, 2010), <http://www.cnn.com/2010/OPINION/10/18/rose.transsexuals.sports/index.html?iref=allsearch>.

being, self-discipline, teamwork, and learning how to deal with success and failure.<sup>15</sup>

In arguing for such inclusive standards, Part III will answer the question of whether transgender athletes truly have an advantage in competition or whether this is an outdated stereotype by reviewing scientific evidence. Part IV will examine the regulations currently in place in different levels of sport: the professional and Olympic levels, the intercollegiate level, and the high-school, or interscholastic, level. In addition, guidance from a report co-sponsored by the National Center for Lesbian Rights, the Women's Sports Foundation, and It Takes a Team! will be examined.<sup>16</sup> Part V will discuss the current legal protections available to transgender individuals under Title VII of the Civil Rights Act, the Equal Protection Clause of the United States Constitution, Title IX of the Education Amendments of 1972, and applicable state statutes. Finally, in Part VI, a "best practice" solution based on these different models and statutes will be proposed for the interscholastic and intercollegiate levels, which, as previously stated, are crucial times during which young people may begin to question their gender identity. Transgender athletes should be able to see exactly how they will be supported in their athletic endeavors during these times.

## II. RECENT EXAMPLES OF TRANSGENDER OR INTERSEXED ATHLETES

Several examples of transgender or intersexed athletes have become prominent in the national news media. In 2009, Caster Semenya of South Africa won the 800 meter race at the Track and Field World Championships through a stunning performance where she took the lead halfway through the race, never relinquished it, and won by 2.45 seconds.<sup>17</sup> The World Track and Field Federation subsequently requested a gender test, requiring a "physical medical evaluation, and . . . reports from a gynecologist, endocrinologist, psychologist, an internal medicine specialist and an expert on gender."<sup>18</sup>

More recently, Fallon Fox, a mixed martial arts ("MMA") fighter revealed that she was born a male and had undergone a sex change surgery in 2006.<sup>19</sup> Fox now competes against other females in MMA. Of her

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15. GRIFFIN & CARROLL, *supra* note 5, at 6.

16. *See generally* GRIFFIN & CARROLL, *supra* note 5.

17. ESPN.com news services, *Semenya wins 800 meters*, ESPN OLYMPIC SPORTS (Aug. 20, 2009), <http://sports.espn.go.com/oly/news/story?id=4409318>.

18. *Id.* The results of the test eventually cleared Semenya to compete as a woman, nearly a year after her win in the 800 meters at the World Championships. Aina Hunter, *Caster Semenya Can Run With the Women; It's Official*, CBS NEWS HEALTH WATCH (July 6, 2010), [http://www.cbsnews.com/8301-504763\\_162-20009781-10391704.html](http://www.cbsnews.com/8301-504763_162-20009781-10391704.html).

19. *How Fallon Fox became the first known transgender athlete in MMA*, SPORTS ILLUSTRATED (March 7, 2013), <http://sportsillustrated.cn..com/mma/news/20130307/fallon-fox-profile/>.

difficult decision to reveal her sex-change surgery Fox has said, “This wasn’t something that I wanted to come out . . . . It’s not something I like to discuss with people, but I’ve been bracing for this for years, thinking when was the phone call going to come?”<sup>20</sup> In 2012, the Association of Boxing Commissions adopted a policy on transgender fighters,<sup>21</sup> however Fox is currently battling licensure issues in Florida and California unrelated to her failure to identify herself as a transsexual prior to her MMA fights.<sup>22</sup>

Lana Lawless is an example of a transgender athlete in professional sports, namely the Ladies Professional Golf Association (“LPGA”). Lana is a transgender athlete who had sex-reassignment surgery and is “legally, socially [and] physically . . . female.”<sup>23</sup> However, the LPGA passed a bylaw that required that participants be “female-born” to compete.<sup>24</sup> Lawless sued the LPGA over the bylaw, claiming it violated California state civil rights laws.<sup>25</sup> As a result of the suit, the LPGA players voted to allow transgender players to compete.<sup>26</sup>

Keelin Godsey is an example of a transgender athlete in the NCAA realm. Keelin was a member of the Bates College women’s track team and threw the hammer, weight, and discus.<sup>27</sup> Keelin, who graduated in 2006,

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20. *Id.*

21. *See* The ABC Medical Committee’s Suggested Guidelines to Commissioners Concerning the Health and Safety of Combat Sports Participants, July 2012, at <http://www.mixedmartialarts.com/files/transgen.pdf> (the “ABC Guidelines”). The ABC Guidelines state that “individuals undergoing sex reassignment from male to female prior to puberty” should be regarded as female. *Id.* However, “individuals undergoing sex reassignment from male to female after puberty” are eligible to participate as females after sex reassignment surgery has been completed, including “external genitalia and gonadectomy,” and the fighter has received hormone therapy for a minimum of two years after the surgery. *Id.* Individuals having sex reassignment surgery from female to male after puberty are eligible to participate in MMA fights as males after they have received “hormone therapy appropriate for the assigned sex.” *Id.* The ABC Guidelines do not apply a specific time period for such hormone therapy for female-to-male transsexuals.

22. *How Fallon Fox became the first known transgender athlete in MMA*, SPORTS ILLUSTRATED (March 7, 2013), <http://sportsillustrated.cn..com/mma/news/20130307/fallon-fox-profile/>.

23. Ross, *supra* note 14.

24. *Id.*

25. Associated Press, *Suit challenges “female at birth” rule*, ESPN (Oct. 13, 2010), <http://sports.espn.go.com/golf/news/story?id=5682065>. Lawless said in a statement, “I am, in all respects, legally, and physically female. The state of California recognizes me as such and the LPGA should not be permitted to come into California and blatantly violate my rights. I just want to have the same opportunity to play professional golf as any other woman.” *Id.*

26. Associated Press, *LPGA scraps “female at birth” policy*, ESPN (Dec. 1, 2010), <http://sports.espn.go.com/golf/news/story?id=5869693>.

27. *Transgender Athletes, College Teams*, INSIDE HIGHER ED (Oct. 5, 2010), <http://www.insidehighered.com/news/2010/10/05/trans>.

identifies as a man.<sup>28</sup> Keelin wanted to transition from a woman to a man, but did not want to let down his team.<sup>29</sup> During his senior year, however, he made the decision to start identifying as a man, changed his first name, and started having others (including his teammates) refer to him with male pronouns.<sup>30</sup> He did not take medications to aid in his transition or have surgery and thus, continued to compete for the women's team.<sup>31</sup>

Similarly, Kye Allums, a former member of George Washington University's women's basketball team, was born a female, but identifies as a male.<sup>32</sup> Kye could not have surgery or start taking testosterone as long as he wanted to play on the women's team. However, he started taking steps to change his name and have people refer to him using male pronouns during his playing career at George Washington University.<sup>33</sup> Kye has been referred to as the "first publicly transgender person" to play NCAA Division I college basketball.<sup>34</sup> Kye wanted to finish his basketball career before he came out as a transgender athlete, but explained, "It got too tough. It got too tough to not be me. People would call me a girl and say, 'she' and refer to me as someone I knew I wasn't."<sup>35</sup> During his time at George Washington University, Kye said he found a lot of support from his coach and teammates.<sup>36</sup> This is, however, not always the case; athletes can struggle for years with whether to come out as transgender or whether to continue to silently suffer.

Why is this issue such a point of contention? First, many contend that allowing a biological male who identifies as a female or a biological female who is taking hormonal medications to transition to a male to participate on a women's team affords an unfair competitive advantage. The question

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Associated Press, *supra* note 1. Kye says, "I didn't choose to be born in this body and feel the way I do. I decided to transition . . . I am trying to help myself and others to be who they are." Associated Press, *Transgender Kye Allums to play for GW*, ESPN (Nov. 5, 2010), <http://sports.espn.go.com/ncw/news/story?id=5758450>.

33. Associated Press, *supra* note 1.

34. *Id.*

35. *Id.* During high school, Kye thought perhaps he was a lesbian, but during an argument when his mother texted him the message: "Who do you think you are, young lady?" Kye thought that "[m]aybe . . . he wasn't a young lady after all." *Id.*

36. *Id.* Kye's coach, Mike Bozeman, says, "My initial reaction was that I support Kye to make that decision. I'm a basketball coach, that's what I do. My players are a basketball family, and I just immediately felt I needed to support Kye in any way possible—as I would any other student athlete [sic] under my watch." *Id.* In regards to the support Kye has received, he states, "[George Washington University] has been supportive during this transition. This means a lot." Associated Press, *Transgender Kye Allums to play for GW*, ESPN (Nov. 5, 2010), <http://sports.espn.go.com/new/news/story?id=5758450>.

becomes: at what point should a transitioning or transitioned athlete be allowed to compete on the team with which they identify?

### III. DO TRANSGENDER ATHLETES HAVE AN ADVANTAGE IN COMPETITION?

There have long been stereotypes that men are bigger, faster, and stronger than women. Beyond what can be seen with the naked eye, is this assumption supported by scientific evidence? Answering this question is key when determining how to best accommodate transgender athletes.

A biological male athlete who identifies as a woman and wants to play on a women's team may have a competitive advantage over her fellow female competitors due to her naturally higher levels of testosterone. Some critics also argue that some men may pretend to be transgendered just to gain a competitive advantage in sport. Further, at what point should a biological male who is actively medically transitioning to become a female be allowed to compete on women's teams? Similarly, at what point must a biological female who is transitioning to become a male be forced to leave the women's team he has been competing on, for perhaps years, and compete on the men's team?<sup>37</sup> Some may argue that a woman who is transitioning to become a man and is taking testosterone may have a competitive advantage due to the fact that he will have higher levels of testosterone than naturally-born males. Finally, what happens when an intersexed athlete who identifies as a female has higher levels of testosterone than biological females due to a biological abnormality?<sup>38</sup>

Differences in testosterone and estrogen levels lead to men outperforming women in athletic events by approximately eleven to eighteen percent.<sup>39</sup> Men are taller, have greater muscle mass, less body fat, greater aerobic and anaerobic capacity, greater lung capacity, and greater strength than women.<sup>40</sup> However, even though some of the stereotypes are

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37. This was the issue faced by Keelin Godsey and Kye Allums who postponed taking hormones and beginning medical transition to become males in order to continue to compete on their respective women's teams.

38. This was the issue in the case of Caster Semenya who was eventually cleared to continue competing as a woman. *See supra* note 18.

39. MICHAELA C. DEVRIES, PHD, DO TRANSITIONED ATHLETES COMPETE AT AN ADVANTAGE OR DISADVANTAGE AS COMPARED WITH PHYSICALLY BORN MEN AND WOMEN: A REVIEW OF THE SCIENTIFIC LITERATURE 4–7 (May 18, 2008) available at [www.caaws.ca/e/resources/pdfs/Devries\\_lit\\_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Devries_lit_review(2).pdf) citing Combon, 1996.

40. *Id.* Not all physiological factors favor men. Some favor women or are neutral. Women benefit from a better ability to fuel moderate or high intensity exercise for longer periods of time because they use less carbohydrate stores and more fat due to the fact that they have more fat stores and intramyocellular lipids, which are a more readily available energy source stored within muscle. Cardiac output is a neutral factor as it is similar for men and women. WAGMAN, *supra* note 3, at 13.

confirmed, given the fact that “there is a vast range of . . . physiological variation”<sup>41</sup> between all people, should society be all that concerned when looking at the human population as a whole and comparing the sexes? The answer is yes. In 2008, there was a 17.2% difference between the world records<sup>42</sup> for men and women in the high jump, a 22.6% difference in the pole vault, and a 37.4% difference in the javelin.<sup>43</sup>

Most of the general public is aware that one of the main differences between men and women is the difference in hormones between the sexes. While both sexes have *some* levels of testosterone and estrogen, men have much higher levels of testosterone while women have much higher levels of estrogen.<sup>44</sup> Testosterone regulates muscle mass, and “testosterone supplementation can increase strength by [approximately five to twenty percent].”<sup>45</sup> Thus, biological males who identify as female, biological females who are taking hormone therapies but still competing with other females, or intersexed athletes who identify as female but have higher levels of testosterone than biological females may have competitive advantages over other biological females. Similarly, biological females who are taking testosterone may have higher levels of the hormone than biological males and, thus, may have a competitive advantage over biological males.

If a transgender athlete takes hormones, or if the athlete is intersexed and naturally has higher levels of one hormone, does this give him or her an extreme competitive advantage compared to naturally-born males and females? Perhaps surprisingly, the evidence shows that male-to-female transitioned women have similar levels of testosterone and estrogen as biological women have.<sup>46</sup> Thus, once a male-to-female transgender athlete has fully transitioned, there should not be much concern over any perceived competitive advantages. Female-to-male transitioned males have higher testosterone *and* estrogen levels as compared to naturally-born men.<sup>47</sup> The proposed solution of some experts and physicians is to use long-acting testosterone to prevent the “peaks and troughs” of testosterone in the body normally associated with testosterone injections.<sup>48</sup> This would help level out the “advantage” transitioned males would have and would help them pass drug tests.<sup>49</sup>

However, even though there is evidence of varying levels of hormones

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41. WAGMAN, *supra* note 3, at 13.

42. World records are as of May 18, 2008.

43. DEVRIES, *supra* note 39, at 4.

44. *Id.* at 7.

45. *Id.* at 8.

46. *Id.* at 10.

47. *Id.*

48. *Id.*

49. *Id.* at 11.

in transitioned individuals, there is a total lack of scientific data concerning whether transitioned athletes actually *outperform* naturally-born men and women on the playing field.<sup>50</sup> The prevailing scientific view is that “fewer than [two] years may be required to minimize the effects of sex hormone exposure prior to transition on sport performance.”<sup>51</sup> Thus, the concerns about competitive performance advantages may be overblown, but more data needs to be compiled before this can be stated with certainty.

#### IV. CURRENT REGULATIONS

Current regulations vary widely across different levels of sport. The International Olympic Committee, for example, has a different policy from that of the United States Golf Association, from that of the NCAA, and from that of the Washington Interscholastic Activities Association. Each policy takes into account different values, goals and considerations. This part of the Article will detail the differing policies and will end with “best practice” suggestions from a professional think-tank.

##### A. Olympic and Professional Levels

The International Olympic Committee’s (“IOC”) policy is still developing,<sup>52</sup> but the IOC has a rich, albeit perhaps denigrating and humiliating, history in this area. In the 1960s, the IOC implemented sex-verification testing, focusing on female sports since the prevailing belief at the time was that the competitive “advantage went in one direction—there could only be an athletic advantage for males competing as females, and not the reverse.”<sup>53</sup> The verification initially consisted of a “humiliating visual examination of female athletes’ genitals.”<sup>54</sup> In 1968, chromosome testing was introduced, but it was replaced by DNA-based testing in 1992.<sup>55</sup> Due perhaps partially to the fact that sex-verification testing “has been a harmful, damaging, humiliating process fueled by inaccurate scientific assumptions and tests which do not accommodate the continuum that exists between maleness and femaleness,”<sup>56</sup> the IOC has not used any sex-verification testing from the year 2000 onwards, but has reserved the

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50. *Id.* at 11–15.

51. *Id.* at 15.

52. Anna Peterson, Comment, *But She Doesn't Run Like a Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 TUL. J. INT'L & COMP. L. 315, 331–32 (2010) (discussing how the IOC policy related to intersexed and transgendered athletes is still developing and will probably depend largely on whether the athlete has undergone any medical treatment).

53. WAGMAN, *supra* note 3, at 9.

54. *Id.*

55. *Id.*

56. *Id.* at 10.

right to use the test if considered necessary.<sup>57</sup>

In 2003, the IOC Medical Commission met in Stockholm “to discuss and issue recommendations on the participation of individuals who have undergone sex reassignment . . . in sport.”<sup>58</sup> The Commission concluded that, to participate with the gender he or she currently identifies with, an athlete must have undergone sex reassignment surgery prior to puberty *or* must meet the following conditions: (1) the athlete must have had sex reassignment surgery<sup>59</sup> at least two years prior to the competition; (2) the athlete must be legally recognized by the appropriate authorities as a member of the athlete’s new sex; and (3) cross-sex hormones must have been administered in a verifiable manner and for a sufficient length of time to minimize any associated advantages in sport competitions as determined on a case-by-case basis.<sup>60</sup> The Commission also concluded that the medical delegate has the authority to take “all appropriate measures for the determination of the gender of a competitor.”<sup>61</sup> This is a very vague standard and is perhaps reminiscent of the extreme sex verification procedures that were used in years prior. Furthermore, this policy noticeably does not cover athletes who are currently undergoing hormone therapies but have not had or completed sex reassignment surgery.

Even if a transgender athlete meets IOC guidelines still must comply with the World Anti-Doping Code (“the Code”), which applies to athletes competing at certain levels of sport, including the national and international levels.<sup>62</sup> An athlete has committed a violation of the Code if there is a valid detection of a prohibited substance in the athlete’s sample.<sup>63</sup> Prohibited substances include testosterone and estrogen that originate from a source outside the body.<sup>64</sup> If, however, there is a pre-existing and medically valid reason for the use of the prohibited substance *and* a valid therapeutic use exemption (“TUE”) has been granted in advance, there is no violation.<sup>65</sup> Thus, transitioning and fully-transitioned transgender athletes must submit for a TUE “to use testosterone or estrogen supplementation prior to

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57. *Id.* at 9.

58. IOC MEDICAL COMMISSION, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Oct. 28, 2003), *available at* [http://multimedia.olympic.org/pdf/en\\_report\\_905.pdf](http://multimedia.olympic.org/pdf/en_report_905.pdf) (hereinafter “STOCKHOLM CONSENSUS”).

59. Sex reassignment surgery must include the completion of surgical anatomical changes, including external genitalia changes and a gonadectomy. *Id.* A “gonadectomy” is the physical removal of ovaries or testes. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 977 (3d ed. 1986).

60. STOCKHOLM CONSENSUS, *supra* note 58.

61. *Id.*

62. WAGMAN, *supra* note 3, at 18.

63. *Id.*

64. *Id.*

65. *Id.*

participation in any sport activity subject to doping control.”<sup>66</sup> A panel of independent physicians decides whether to grant a TUE using four criteria:

- (1) whether the athlete would experience a significant impairment to health if the prohibited substance or method were to be withheld in the course of treating an acute or chronic medical condition;
- (2) whether the therapeutic use of the substance would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition;
- (3) whether there is no reasonable therapeutic alternative to the use of the otherwise prohibited substance or method; and
- (4) whether the necessity for the use of the otherwise prohibited substance or prohibited method is a consequence, wholly or in part, of the prior use, without a TUE, of a substance or method which was prohibited at the time of use.<sup>67</sup>

The athlete can appeal the decision, or the World Anti-Doping Agency, “on its own initiative or upon request, can review and can reverse the granting or denial of any TUE.”<sup>68</sup> Finally, any decision regarding a TUE made by the World Anti-Doping Agency can be appealed to the Court of Arbitration for Sport, whose ruling is final.<sup>69</sup>

In 2007, the IOC issued a Consensus Statement on Sexual Harassment and Abuse in Sport (“IOC Consensus Statement”) with the aims of improving the health and protection of athletes through the promotion of effective preventive policy, and increasing awareness of these problems among the people in the entourage of athletes.<sup>70</sup> The IOC Consensus Statement mentions research which “indicates that sexual harassment and abuse happen in all sports and at all levels, with a greater prevalence in

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66. *Id.* at 19.

67. WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD THERAPEUTIC USE EXEMPTIONS clause 4.1(Nov. 3, 2009), available at [http://www.wada-ama.org/documents/world\\_anti-doping\\_program/wadp-is-tue/2011/wada\\_istue\\_2011\\_en.pdf](http://www.wada-ama.org/documents/world_anti-doping_program/wadp-is-tue/2011/wada_istue_2011_en.pdf). It has been advised that the panel should use these guidelines in its entirety and “not merely judge aspects of an application in isolation.” WAGMAN, *supra* note 3, at 19. However, the decisions “are discretionary and entirely fact dependent. *Id.* One major consideration is “whether the sex hormone supplementation would result in testosterone and estrogen levels within the normal range for [the athlete’s] new sex.” *Id.*

68. WAGMAN, *supra* note 3, at 20.

69. *Id.*

70. IOC CONSENSUS STATEMENT, *supra* note 13, at 1.

elite sport [with] [m]embers of the athlete's entourage who are in positions of power and authority" being the primary perpetrators.<sup>71</sup> The IOC felt compelled to issue a statement due to the fact that sexual harassment and abuse can "seriously and negatively impact . . . [the] physical and psychological health," of athletes as well as their drop-out rate.<sup>72</sup>

The IOC's focus on sexual harassment relates to transgender athletes because "gender harassment, hazing and homophobia are all aspects of the sexual harassment and abuse continuum in sport."<sup>73</sup> Gender harassment is defined as "derogatory treatment of one gender or another which is systematic and repeated but not necessarily sexual," while homophobia is defined as "a form of prejudice and discrimination ranging from passive resentment to active victimization of lesbian, gay, bisexual and transgendered people."<sup>74</sup>

The IOC Consensus Statement recommends that every sport organization should have a policy that states its intent to create a safe and mutually respectful environment that allows it to "generate prompt, impartial and fair action when a complaint or allegation is made . . . [and] allows it to take disciplinary, penal and other measures, as appropriate."<sup>75</sup> Furthermore, the organization should establish a code that "describe[s] acceptable standards of behavior," and it should implement a policy that sets "clear benchmark[s] for what is acceptable and unacceptable."<sup>76</sup> Finally, the IOC Consensus Statement recommends analyzing the "impact of these policies in identifying and reducing sexual harassment and abuse."<sup>77</sup>

To (perhaps) further complicate matters, the IOC is seen as the "supreme authority" of the Olympic Movement, which also includes International Sport Federations ("IFs"), National Olympic Committees, and Organizing Committees of the Olympic Games.<sup>78</sup> The relationship between the four groups is described as "symbiotic [because] [t]he constituent organizations retain their autonomy while participating in a mutually reinforcing process."<sup>79</sup> The thirty-five IFs correspond to a different sport and have the authority to govern their individual sport as long as they conform to the

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71. *Id.* at 1, 4. It should be noted that the "research" the IOC mentions is not supported by any hard evidence in the IOC Consensus Statement.

72. *Id.* at 1.

73. *Id.* at 3.

74. *Id.*

75. *Id.* at 4.

76. *Id.* at 5. The IOC contends that doing so will "help minimize opportunities for sexual harassment and abuse and unfounded allegations." *Id.*

77. *Id.*

78. Peterson, *supra* note 52, at 324–25.

79. *Id.* quoting James A.R. Nafziger, *International Sports Law* 18–19 (2d ed. 2004).

Olympic Charter.<sup>80</sup>

Not every IF has a gender verification policy, but the International Association of Athletics Federation (“IAAF”), which governs track and field, does.<sup>81</sup> According to that policy, there is no compulsory standard or regular gender verification during championships.<sup>82</sup> If an athlete’s gender is “challenged” (most likely by a competitor), then the athlete will be subjected to a medical exam.<sup>83</sup> The determination is not based solely on lab-based sex determination, but includes input from a panel comprised of a gynecologist, an endocrinologist, a psychologist, an internal medicine specialist, and an expert on gender/transgender issues, with an “initial check” being done by a medical delegate.<sup>84</sup>

The policy goes on to state that if surgery and hormone therapy have occurred *before puberty*, a male-to-female athlete can compete as a female.<sup>85</sup> If surgery and hormone therapy have occurred *after puberty*, the athlete must wait two years after a gonadectomy before she is allowed to undergo a physical and endocrinological exam.<sup>86</sup> The IAAF policy states that it is mainly concerned that an athlete should not be enjoying the benefits of natural testosterone predominance that is normally seen in a biologically-born male.<sup>87</sup>

Some biological conditions *are* allowed in a male-to-female athlete under the IAAF policy, including those conditions that accord *no advantage* over other females such as androgen insensitivity syndrome,<sup>88</sup> or gonadal dysgenesis,<sup>89</sup> which is another name for Turner’s syndrome.<sup>90</sup>

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80. Peterson, *supra* note 52, at 325.

81. *See generally* INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, IAAF POLICY ON GENDER VERIFICATION (2006) *available at* <http://www.iaaf.org/mm/document/imported/36983.pdf> (*hereinafter* IAAF POLICY).

82. *Id.* at 2.

83. *Id.*

84. *Id.*

85. *Id.* Notice that the policy does not even consider female-to-male transsexuals who may have undergone surgery and hormone therapy before puberty. It also leaves some questions unanswered. For example, can it be medically and precisely determined when a particular person goes through puberty? In addition, does the surgery and hormone therapy have to take place before puberty begins or before puberty is completed?

86. IAAF POLICY, *supra* note 81, at 2.

87. *Id.*

88. Androgen Insensitivity Syndrome is “when a person who is genetically male (has one X and one Y chromosome) is resistant to male hormones called androgens. As a result, the person has some or all of the physical characteristics of a woman, despite having the genetic makeup of a man.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, ANDROGEN INSENSITIVITY SYNDROME (last reviewed Aug. 31, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002163/>.

89. Gonadal dysgenesis is a synonym for Turner’s Syndrome. NATIONAL CENTER

Other conditions that *may* accord *some advantages* but are nevertheless acceptable are: congenital adrenal hyperplasia,<sup>91</sup> androgen producing tumors,<sup>92</sup> and anovulatory androgen excess (commonly referred to as polycystic ovary syndrome).<sup>93</sup>

The IAAF has a detailed policy for the “process for handling cases of gender ambiguity.”<sup>94</sup> After a challenge to an athlete’s gender has been brought to the attention of the IAAF, the appropriate authority decides if there is indeed a case to investigate.<sup>95</sup> If there is a case, the appropriate authority decides who will investigate the matter. The athlete is then referred to the investigating authority, all the while keeping the matter in strict confidence.<sup>96</sup> The verdict of the investigating authority is given to the national federation with recommendations for further action, including the possibility that the athlete must withdraw from competition until the issue can be “definitively resolved through appropriate medical and surgical measures.”<sup>97</sup> Finally, after such medical and surgical measures have taken place, there is an “[e]valuation of the effects of such measures to determine if and when the athlete can return to competition as per the IOC consensus

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FOR BIOTECHNOLOGY INFORMATION, TURNER’S SYNDROME (last reviewed Oct. 14, 2009), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001417/>.

90. IAAF POLICY, *supra* note 81, at 2. Turner’s Syndrome is “a genetic condition in which a female does not have the usual pair of two X chromosomes.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, TURNER’S SYNDROME (last reviewed Oct. 14, 2009), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001417/>.

91. Congenital adrenal hyperplasia “refers to a group of inherited disorders of the adrenal gland,” which cause the body to produce more androgen, a type of male sex hormone. “This causes male characteristics to appear early [in males] (or inappropriately) [in females].” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, CONGENITAL ADRENAL HYPERPLASIA (last reviewed Jan. 21, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001448/>.

92. Androgen is a male sex hormone, the overproduction of which can cause early-onset of male characteristics in males and inappropriate male characteristics in females. NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, *supra* note 88.

93. IAAF POLICY, *supra* note 81, at 2. Polycystic ovary syndrome (“PCOS”) is a “condition in which there is an imbalance of a woman’s female sex hormones. This hormone imbalance may cause changes in the menstrual cycle, skin changes, small cysts in the ovaries, trouble getting pregnant, and other problems. Female sex hormones include estrogen and progesterone, as well as hormones called androgens. Androgens, often called “male hormones,” are also present in women, but in different amounts. Hormones help regulate the normal development of eggs in the ovaries during each menstrual cycle. Polycystic ovary syndrome is related to an imbalance in these female sex hormones. Too much androgen hormone is made, along with changes in other hormone levels.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, POLYCYSTIC OVARY SYNDROME (last reviewed Mar. 31, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001408/>.

94. IAAF POLICY, *supra* note 81, at 3.

95. *Id.*

96. *Id.*

97. *Id.*

on this matter.”<sup>98</sup>

Other professional associations have also weighed in on the matter and established policies for gender verification. To highlight one in particular, the United States Golf Association (“USGA”) adopted a policy in 2005 with the purpose of “seek[ing] to assure fair competition for all entrants in a USGA championship.”<sup>99</sup> Transgender athletes are eligible to compete in USGA events two years after having a gonadectomy, subject to certain proof of gender guidelines.<sup>100</sup> In any USGA Championship that requires the player to be a specific gender, the “player must identify himself or herself during the entry application process as a person of that particular gender.”<sup>101</sup> When an athlete is transgender, failure to provide proof of gender and to comply with the verification process of that gender may result in disqualification.<sup>102</sup> If gender reassignment has happened after puberty, the player must provide certain documentation to the USGA, but gender reassignment prior to puberty is not subject to these requirements.<sup>103</sup> First time applicants to USGA Championships must provide documentation including:

- (i) the identification of a physician who conducted pre-operative psychiatric evaluation, including name, address and phone number;
- (ii) hospital records confirming completed surgical gonadectomy;
- (iii) all office records documenting related follow-up treatment; and
- (iv) [an] executed waiver allowing members of [the] USGA medical panel to contact all treating physicians if deemed necessary.<sup>104</sup>

Applicants who have previously been approved under this policy do not have to provide additional documentation.<sup>105</sup>

If there is a challenge to the athlete’s gender, the player may be contacted by the USGA to verify his or her gender within seven days by providing documentation in accordance with the above policy.<sup>106</sup> Notice that the USGA policy does not require independent medical examinations by a medical team of the USGA’s choosing as some other policies require; the onus is on the athlete to provide the necessary documentation. The athlete is apparently accepted at his or her word and no further investigation is performed by the USGA.

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98. *Id.*

99. UNITED STATES GOLF ASSOCIATION, GENDER POLICY FOR THE UNITED STATES GOLF ASSOCIATION (Mar. 2005), <http://www.usga.org/Content.aspx?id=24234>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

## B. Intercollegiate Level

Despite the presence of transgender athletes such as Keelin Godsey and Kye Allums in intercollegiate competition in recent years, the NCAA did not have a formal policy governing transgender athletes before August 2011. Prior to this time, the NCAA did not compile statistics on the number of transgender student-athletes competing in the NCAA. Gender was “calculated based on the data supplied by NCAA member institutions.”<sup>107</sup> The only guidance that *was* available stated that transgender student-athletes “must compete in the gender classification that matches their state classification, *as determined by their institution.*”<sup>108</sup> Thus, prior to August 2011, the NCAA left the decision up to the member institution to determine a student-athlete’s gender using documents provided by the state, such as driver’s licenses, taxes, voter registration cards, and the like.<sup>109</sup>

This prior “policy” of the NCAA could have been problematic each year, as “championship-access rules [could] be impacted by the institution’s [gender] certification decision.”<sup>110</sup> For example, an institution that had a male who participated on a women’s team would have had a “mixed team,” thus rendering the team ineligible for women’s championships but still eligible for men’s championships.<sup>111</sup> Conversely, a female participating on a men’s team “still count[ed] toward the mixed/men’s numbers,” and the team remained eligible for participation in men’s championships.<sup>112</sup> Furthermore, “[o]nce a team [was] classified as a mixed team, it . . . [retained] that status through the remainder of the academic year without exception.”<sup>113</sup> Thus, when the NCAA left the gender-classification decision up to the individual member institutions, it gave the member institutions some control with regard to championships.

To fill this void, the NCAA Executive Committee approved a new policy at its August 2011 meeting, which “clarif[ied] opportunities for participation [in NCAA athletics] by transgender student-athletes.”<sup>114</sup> The new policy aims to “allow[] the student-athlete to participate in competition in accordance with their [sic] gender identity while maintaining the relative balance of competitive equity among sports teams.”<sup>115</sup> To participate with the gender of one’s choice, the NCAA requires that any use of hormone

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107. 2009 NCAA POSITION, *supra* note 2.

108. *Id.* (emphasis added).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. CURRENT NCAA POSITION, *supra* note 10.

115. *Id.*

therapy be consistent with NCAA policies and with current medical standards.<sup>116</sup> The current NCAA policies state:

A trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men's team but is no longer eligible to compete on a women's team without changing the team status to a mixed team. A mixed team is only eligible for men's championships.

A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment.<sup>117</sup>

Following the release of this new policy, the NCAA provided a resource book to its members titled "NCAA Inclusion of Transgender Student-Athletes."<sup>118</sup> The resource book is intended to provide "best practice and policy recommendations for intercollegiate athletic programs to provide transgender student-athletes with fair and equal opportunities to participate," and "to provide guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge."<sup>119</sup>

The resource book begins by explaining to the NCAA membership the meaning of the term "transgender" and providing an entire appendix of definitions and terms relating to transgender persons in order to educate and help the membership understand the terminology.<sup>120</sup> This is an important section of the resource book since many terms are easily confused with the word "transgender," and many biases and stereotypes are evoked by its use.<sup>121</sup> In addition, the introductory section provides an invaluable overview to NCAA member institutions that may either have never approached the topic of transgender athletes or who are preparing to include a transgender athlete in their intercollegiate athletics programs.

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116. *Id.*

117. *Id.*

118. NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT ATHLETES (August 2011) (hereinafter "NCAA RESOURCE BOOK").

119. *Id.* at 2.

120. *Id.* at 3 and Appendix A.

121. See discussion, *supra* at Introduction.

Part One of the resource book sets out a “policy statement” of sorts for the NCAA. This part answers the question of “Why?” the issue of transgender athletes must even be addressed at all. The NCAA stresses the core values of equal opportunity and inclusion of diverse populations in participation in intercollegiate athletics, underscoring issues of basic fairness and equity.<sup>122</sup> Furthermore, the NCAA is encouraging its membership to take a proactive approach in “adopting policies that are consistent with school non-discrimination policies and state and federal laws prohibiting discrimination based on gender identity or expression.”<sup>123</sup> Perhaps the most telling answer to the “Why?” question is in the NCAA’s statement that “in the spirit of encouraging sports participation for all, it is the right thing to do.”<sup>124</sup>

Part One also addresses certain stereotypes that are often implicated in objections to the competitive equity opportunities of transgender athletes, especially in the context of male-to-female transgender athletes.<sup>125</sup> First, the NCAA addresses the fear that men may pretend to be transgender in order to compete against women and gain a competitive advantage.<sup>126</sup> The resource book addresses this assumption by saying that “the decision to transition from one gender to the other . . . is a deeply significant and difficult choice that is made only after careful consideration and for the most compelling of reasons.”<sup>127</sup> Further, the NCAA points out that “in the entire [forty] year history of ‘sex verification’ procedures in international sport competitions, no instances of such ‘fraud’ have been revealed.”<sup>128</sup> In this way, the NCAA seeks to dispel, as “a myth,” the concern that men may try to exploit an opportunity to compete against women by pretending to be transgender.

Second, the NCAA addresses the concern that male-to-female transgender athletes have a competitive advantage over naturally-born females due to the higher levels of testosterone that naturally occur in men as opposed to women.<sup>129</sup> To quell this fear, the NCAA first states that male-to-female transgender persons who transition before puberty do not have the higher levels of testosterone found in naturally-born men.<sup>130</sup> However, it is rare that such a drastic decision to fully transition is made before puberty. For that reason, the better argument the NCAA makes is in regards to the “great deal of physical variation” in transgender women,

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122. NCAA RESOURCE BOOK, *supra* note 118, at 5.

123. *Id.*

124. *Id.*

125. *Id.* at 7.

126. *Id.*

127. *Id.*

128. *Id.* at 8.

129. NCAA RESOURCE BOOK, *supra* note 118, at 7.

130. *Id.*

“just as there is a great deal of natural variation in physical size and ability among non-transgender women and men.”<sup>131</sup> Finally, the best argument the NCAA raises acknowledges that “any strength and endurance advantages a transgender woman arguably may have as a result of her prior testosterone levels dissipate after about one year of estrogen or testosterone-suppression therapy.”<sup>132</sup>

Part Two of the resource book details recommendations and guiding principles for the inclusion of transgender student-athletes in NCAA member institutions’ athletic programs. It also details the new NCAA Policy regarding the participation of transgender student-athletes in intercollegiate sports as identified above.<sup>133</sup> This section of the resource book fleshes out the participation guidelines for transgender athletes by clarifying NCAA rules regarding transgender student-athletes who are not undergoing hormone therapies. Female-to-male student-athletes who are not taking testosterone are able to participate on a men’s or a women’s team.<sup>134</sup> However, male-to-female student-athletes who are not taking hormones may only compete on men’s teams.<sup>135</sup> This requirement addresses the imbalance in testosterone occurring between naturally-born men and naturally-born women. As stated above, male-to-female student-athletes can compete on a women’s team once they have undergone one year of testosterone-suppression therapy.<sup>136</sup>

Part Two ends with recommendations that can guide student-athletes and member institutions in their respective responsibilities. Student-athletes should be responsible for: (1) alerting the director of athletics if they have completed, plan to begin, or are in the process of hormone therapy; and (2) submitting records from personal physicians documenting the intention to transition, the progress of the transition and/or treatment plans regarding hormone therapies.<sup>137</sup> The director of athletics should be responsible for: (1) meeting with the student-athlete to “review eligibility requirements” and the “procedure for approval of transgender participation;” and (2) notifying the NCAA of a medical exception request on behalf of the student-athlete if hormone treatment will be used.<sup>138</sup> Finally, the institution should be responsible for: (1) establishing a Transgender Participation Committee to develop institutional policy and educate all constituencies on campus; and (2) assuring that “all discussions among involved parties and

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131. *Id.*

132. *Id.* at 8.

133. *Id.* at 13.

134. *Id.*

135. *Id.*

136. *Supra* at note 113.

137. NCAA RESOURCE BOOK, *supra* note 118, at 14.

138. *Id.*

required written supporting documentation . . . [are] kept confidential.”<sup>139</sup>

Part Three of the NCAA resource book provides lists of “Best Practices” for different constituency groups to follow in helping to integrate transgender student-athletes in intercollegiate athletic programs. This part provides “Overall Best Practices,” “Best Practices for Athletics Administrators,” “Best Practices for Coaches,” “Best Practices for Student-Athletes,” “Best Practices for Athletics Staff Interacting With Media About Transgender Student-Athlete Issues,” and “Additional Guidelines for Transgender Student-Athlete Inclusion.”<sup>140</sup> These sections of the resource book are important because they provide concrete, explicit suggestions for each group to follow that can help the various members of collegiate athletic departments begin to implement policies and practices regarding transgender student-athletes. This can be especially helpful for the various constituencies of NCAA member institutions that are at a loss regarding where to begin in the inclusion of transgender athletes in its intercollegiate athletic programs.

It was an important development for the NCAA to adopt a formal policy in regards to transgender athletes in the summer of 2011. Stating an explicit policy clarified NCAA rules by setting out one standard for all instead of leaving gender classifications up to each individual member institution and varying state laws. Furthermore, the “best practices” contained in the resource book are invaluable to the NCAA membership as they serve as a starting point for implementation and continuing guidance in the years to come.

### C. Interscholastic Level

The only statement that can be made with any certainty regarding the regulation of transgender athletes at the interscholastic level is that there is great variation among state policies, with the vast majority of states having no policy at all. This is important since many transgender athletes begin to have feelings that their gender identity does not match their biological sex in middle school or high school. The fact that there are virtually no policies concerning how to help young athletes transition and still gain all the benefits derived from participating in athletics is disturbing.

One of the few states that does have a formal policy is the state of Washington,<sup>141</sup> with a policy developed from a philosophy of “allow[ing] participation for all students regardless of their gender identity or

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139. *Id.*

140. *Id.* at 15–20.

141. GRIFFIN & CARROLL, *supra* note 5, at 26; WOMEN’S SPORTS FOUNDATION, WASHINGTON STATE SUPPORT POLICY FOR PARTICIPATION OF TRANSGENDER ATHLETES (Oct. 3, 2008), available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Homophobia/W/WIAA-Policy.aspx> (*hereinafter* WASHINGTON STATE POLICY).

expression in a safe, competitive and friendly environment, free of discrimination.”<sup>142</sup> The Washington State policy does a good job of defining key terms in an attempt to minimize confusion. For example, the policy defines “transgender person,”<sup>143</sup> “intersex person,”<sup>144</sup> “gender identity,”<sup>145</sup> and “gender expression.”<sup>146</sup>

The Washington State Policy states that students should participate on the sports team “that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”<sup>147</sup> This puts the power of the decision solely with the individual student-athlete, regardless of the student-athlete’s biological sex at birth. This can help alleviate the agonizing tension that transgendered student-athletes feel when they are forced to play on one sports team or another. The state of Washington bases its policy on certain core values such as:

Recognizing the value of extra-curricular athletics for all students;

Emphasizing that participation in extra-curricular athletics is not just allowed, but encouraged for all students;

Creating a level playing field for all students;

Providing a space for intersex and transgender students

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142. WASHINGTON STATE POLICY, *supra* note 141.

143. A “transgender person” is “[a] person whose gender identity does not match the sex assigned to him or her at birth. This cross gender identification is often referred to as gender dysphoria. When the gender dysphoria causes clinically significant distress or impairment, it is sometimes classified as Gender Identity Disorder. A transgender person who is born female-bodied but identifies as male is referred to as a transgender man or a female-to-male transsexual. A transgender person who is born male-bodied but identifies as female is referred to as a transgender woman or a male-to-female transsexual.” *Id.* Notice, though, that the definition uses the out-dated term of “transsexual.”

144. An “intersex person” is “a general term used to indicate a person born with a reproductive or sexual anatomy and/or chromosome pattern that [does not] seem to fit the typical definitions of female or male. This may be the result of several different medical conditions involving chromosomal variations, hormonal variations, ambiguous genitalia, and/or an anatomy that includes both male and female characteristics. The medical term for this condition is a Disorder of Sexual Development o[r] ‘DSD.’ ‘Intersex’ is not the same as ‘transgender,’ although some people identify as both intersex and transgender. However, the two groups may face similar situations in needing to change gender designations for the purposes of participation in school activities.” *Id.*

145. “Gender Identity” is “[a] person’s deeply-felt internal sense of being male or female.” *Id.*

146. “Gender Expression” is “[a] person’s external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.” *Id.*

147. *Id.*

to exist and thrive; and

Reducing bullying and harassment of students.<sup>148</sup>

If there is a question as to “whether a student’s request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide, a student may seek review of his or her eligibility for participation . . .” through a procedure stated in the policy.<sup>149</sup> In order to be granted permission to compete on a team consistent with one’s gender identity, or if it is questioned whether the student’s request is bona fide, the student or the student’s parents must contact the school, “indicating that the student has a consistent gender identity different than [sic] the gender listed on the student’s school registration records, and that the student desires to participate in activities in a manner consistent with [his or her] gender identity.”<sup>150</sup> Next, the school notifies the Washington Interscholastic Activities Association (“WIAA”) in order to get an assigned facilitator to assist in the WIAA Gender Identity Eligibility Appeal Process.<sup>151</sup> The appeal will be heard by the Gender Identity Eligibility Committee (“the Committee”), which is comprised of a minimum of three of the following, one of whom *must* be from the physician or mental health profession category:

Physician with experience in gender identity health care and the World Professional Association for Transgender Health Standards of Care;

Psychiatrist, psychologist or licensed mental health professional familiar with the World Professional Association for Transgender Health Standards of Care;

School administrator from a non-appealing school;

WIAA staff member; and

Advocate familiar with Gender Identity and Expression issues.<sup>152</sup>

Furthermore, the student should provide the Committee with the following documentation:

Current transcript and school registration information;

Documentation of student’s consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* While the Washington State Policy does a fine job of defining certain important terms such as “Transgender person” and “Intersex person,” it does not do an adequate job of defining who an “Advocate familiar with Gender Identity and Expression issues” would be.

provider); and

Any other pertinent documentation or information.<sup>153</sup>

If the Committee renders a decision unfavorable to the student-athlete, the student-athlete may appeal to the WIAA Executive Director within ten business days of the Committee's decision.<sup>154</sup> If it is confirmed that the student-athlete may participate on the team with which the student-athlete identifies, the "WIAA will facilitate the provision of resources and training for a member school seeking assistance regarding gender identity."<sup>155</sup> Once eligibility to compete on a certain sports team has been granted, it does not need to be renewed every year, as the determination is valid for the duration of the student-athlete's high school participation.<sup>156</sup> Finally, the discussion and documentation from the proceedings are sealed and kept confidential, "unless the student and [the student's] family make a specific request."<sup>157</sup>

#### D. Additional Guidance from the ON THE TEAM Report

*On the Team: Equal Opportunity For Transgender Student Athletes* (the "*OTT Report*") is a "think tank report [that] includes best practice and policy recommendations for high school and collegiate athletic programs about providing transgender student athletes [sic] with equal opportunities to participate in school-based sports programs."<sup>158</sup> The *OTT Report* follows Washington's policy by recommending that high school transgender student-athletes be permitted to compete on the team "in accordance with his or her gender identity irrespective of the gender listed on the student's birth certificate or other student records . . . ."<sup>159</sup>

However, the *OTT Report* goes on to say that this permission should be granted "regardless of whether the student has undergone any medical treatment."<sup>160</sup> Thus, the policy makes the radical departure from other similar policies by stating that a student-athlete should be able to compete on the team of his or her choosing, even if the student-athlete is currently undergoing hormone therapy treatments. Furthermore, the *OTT Report* recommends that policies "shall not prevent a transgender student athlete [sic] from electing to participate in a sports activity according to his or her

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. GRIFFIN & CARROLL, *supra* note 5, at 2.

159. *Id.* at 24.

160. *Id.*

assigned birth gender.”<sup>161</sup> Thus, a student-athlete could be taking hormone treatments, and the choice is solely the student-athlete’s as to whether to compete on the team of his or her assigned birth gender or on the team of the opposite gender. This is exactly what some critics fear: that a transgender athlete will gain a competitive advantage by taking hormones and using whatever advantage those hormones confer to choose which team to play on.

The *OTT Report* contends that different policies should apply to high school student-athletes for several reasons including: “The fact that students are guaranteed the availability of a high school education and a corresponding opportunity to participate equally in all high school programs and activities.”<sup>162</sup>

The reality is that intercollegiate sports are governed differently from high school sports. Intercollegiate athletics are regulated nationally by governing bodies that sponsor national competitions and oversee such functions as the random testing of student-athletes for the use of banned substances thought to enhance athletic performance. Testosterone is a banned substance under the current rules for intercollegiate competition, so the inclusion of transgender student-athletes in college sports must be consistent with those rules. Further, high school student-athletes are still growing and developing physically, cognitively and emotionally.

Additionally, high school-aged and younger transgender students are subject to medical protocols that are different from those available to adults because of their age and physical and psychological development. For children and youth, gender-identity transition typically consists entirely of permitting the child to dress, live, and function socially consistently with the child’s gender identity. For youth who are approaching puberty, hormone blockers may be prescribed to delay puberty in order to prevent the youth from going through the traumatic experience of acquiring secondary sex characteristics that conflict with his or her core gender identity. For older youth, cross-gender hormones or even some sex-reassignment surgeries may be prescribed.<sup>163</sup>

The *OTT Report* takes a view more radical than that espoused by either the IAAF or the NCAA because it views policies requiring genital reconstructive surgery for high school-aged athletes as too stringent, arguing that such surgery lacks a well-founded medical or policy basis.<sup>164</sup> Furthermore, most transgender athletes do not even end up getting this

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161. *Id.*

162. *Id.* In contrast, not every student in college is afforded the opportunity to be an athlete, and of course not every person is able to compete in professional athletics.

163. *Id.* at 13–14.

164. *Id.* at 12.

surgery.<sup>165</sup> Finally, the *OTT Report* contends that the surgery does not have any bearing on athletic ability.<sup>166</sup>

Recommended implementation procedures begin with the parents or student giving notice to the school of the intent to compete on a team consistent with the student-athlete's gender identity, but inconsistent with the student's biological identity, similar to the policy of the state of Washington.<sup>167</sup> The athletic director should then give notice to the State Interscholastic Athletic Association ("SIAA").<sup>168</sup> While the athletic director gives notice to the SIAA, he or she is the one couched with the authority to make the eligibility determination. Once eligibility to participate on a particular sports team is granted, it should be granted for the remainder of the student's eligibility and should not be revisited every year.<sup>169</sup> Again, this is similar to the policy of the state of Washington. Of course, any discussion should be kept confidential (especially those concerning medical records) and sealed unless the student-athlete or his or her family makes the records available.<sup>170</sup>

Should there be any question about whether a student-athlete's request to participate on a certain sports team consistent with their gender identity is bona fide, there shall be a set procedure for the student to "seek review of his or her eligibility for participation."<sup>171</sup> The *OTT Report* suggests a first level of appeal before an SIAA committee "specifically established to hear gender identity appeals."<sup>172</sup> The committee will be comprised of at least three of the following, with at least one being from the physician or mental health professional categories:

Physician with experience in transgender health care and the World Professional Association for Transgender Health Standards of Care;

Psychiatrist, psychologist, or licensed mental health professional familiar with the World Professional Association for Transgender Health Standards of Care;

School administrator from a non-appealing school;

SIAA staff member; and

An advocate familiar with issues of gender identity and

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165. *Id.*

166. *Id.*

167. *Id.* at 24.

168. *Id.*

169. *Id.*

170. *Id.* at 24–25.

171. *Id.* at 25.

172. *Id.*

expression.<sup>173</sup>

Furthermore, the student-athlete should provide the committee with the following documentation and information:

Current transcript and school registration information;

Documentation of the student's consistent gender identification (e.g., written statements from the student and/or parent/guardian and/or health care provider); and

Any other pertinent documentation or information.<sup>174</sup>

If the first level appeal is denied, the student can appeal to the Executive Director of the SIAA within ten school business days of receiving written notice of the decision.<sup>175</sup> If after a hearing before this official there is "confirmation of a student's consistent gender identity, the . . . SIAA Executive Director will affirm the student's eligibility to participate in SIAA activities consistent with the student's gender identification."<sup>176</sup>

The *OTT Report* takes a different stance with regard to intercollegiate student-athletes than it does vis-à-vis other students. In this case, the policy differs based on whether the student-athlete is undergoing hormone therapy or not.<sup>177</sup> If the transgender student-athlete is transitioning from male-to-female and is taking a medically prescribed hormone treatment, the student-athlete "may participate on a men's team at any time, but must complete one year of hormone treatment related to gender transition before competing on a women's team."<sup>178</sup> Contrary to many governing bodies' thoughts that transgender athletes who have taken hormones need to have had treatment at least two years prior, the *OTT Report* suggests that "[r]ecent research indicates that most salient physical changes likely to affect athletic performance occur during the *first* year of hormone treatment making a longer waiting period unnecessary."<sup>179</sup> Finally, the student-athlete's eligibility should be extended to accommodate for the one-year transition period at the end of that period upon approval by the National Governing Body ("NGB").<sup>180</sup>

The recommendations are slightly different for female-to-male transgender student-athletes from those that apply to male-to-female

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173. *Id.* This committee strongly resembles that of the committee in the state of Washington.

174. *Id.* This documentation is identical to that recommended in the state of Washington's policy.

175. *Id.*

176. *Id.* at 26.

177. *See generally id.* at 28–31.

178. *Id.* at 28.

179. *Id.* at 28, n.20 (citing Goorin, Louis, and Mathijs Bunck, *Transsexuals and Competitive Sports*, 151 *EUROPEAN JOURNAL OF ENDOCRINOLOGY* 425–29 (2004)) (emphasis added).

180. *Id.* at 31.

transgender student-athletes. For these student-athletes, the *OTT Report* suggests that if these individuals are taking medically prescribed testosterone related to gender transition, they “may not participate on a women’s team after beginning hormone treatment, and must request a medical exception from the NGB prior to competing on a men’s team because testosterone is a banned substance.”<sup>181</sup> Even though the female-to-male transgender student-athlete must request a medical exception from the NGB prior to competing on a men’s team, he may still compete on a men’s team at any time, and the exception request is necessary only to avoid being suspended for using a banned substance.

The *OTT Report* puts responsibility on the student-athlete to ensure that the individual is eligible to compete in intercollegiate athletics. The transgender student-athlete “who has completed, plans to initiate, or is in the process of taking hormones as part of a gender transition shall submit the request to participate on a sports team in writing to the athletic director upon matriculation or when the decision to undergo hormonal treatment is made.”<sup>182</sup> The request should include a letter from a doctor “documenting the student athlete’s [sic] intention to transition or the student’s transition status if the process has already been initiated . . . [and] shall identify the prescribed hormonal treatment for the student’s gender transition and documentation of the student’s testosterone levels, if relevant.”<sup>183</sup>

The athletic director’s responsibilities are to meet with the student-athlete to review eligibility and the procedure for approval of participation. The athletic director should also notify the NGB of the student’s request to participate.<sup>184</sup> If the athletic director denies the transgender student-athlete’s request, the decision should be automatically reviewed by a committee including:

a health care professional, e.g. physician, psychiatrist, psychologist or other licensed health professional with experience in transgender health care and the World Professional Association for Transgender Health Standards of Care;<sup>185</sup>

a faculty athletic representative; and

a representative assigned by the institution’s president with expertise in institutional anti-discrimination policy, such as someone from the institution’s human resources, ombuds office,

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181. *Id.* at 28.

182. *Id.* at 30.

183. *Id.*

184. *Id.*

185. The *OTT Report* suggests that the student-athlete’s physician can serve in this health care professional role.

or Americans with Disabilities compliance office.<sup>186</sup>

## V. LEGAL IMPLICATIONS FOR TRANSGENDER INDIVIDUALS

Case law analyzing the legal rights of those who identify as transgender or transsexual is relatively new and nuanced. The foundational case for nondiscrimination based on gender identity is *Price Waterhouse v. Hopkins*.<sup>187</sup> In *Price Waterhouse*, the Supreme Court recognized that employees are protected from discrimination for their failure to conform to gender stereotypes under Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>188</sup> The plain language of Title VII prohibits discrimination because of race, color, religion, *sex*, or national origin.<sup>189</sup> Thus the critical question for courts has been: What does discrimination based on “sex” mean? While the plaintiff in *Price Waterhouse* was not transgender, the decision to define “sex stereotyping”<sup>190</sup> as a type of sex discrimination was important. It arguably created the basis for liability for sex discrimination based on gender identity or failure to conform to prevailing stereotypes regarding male and female behavior. Federal courts do not universally adopt this view, however, and since the ruling in *Price Waterhouse*, courts have debated the extent of antidiscrimination rights for those who identify as transgender.<sup>191</sup>

Transgender and transsexual individuals also face discrimination outside of the employment context. In those cases, other federal, state, and local laws may provide protection against that discrimination. Some transgender individuals have used the Equal Protection Clause to argue for protected status. New interpretations of Title IX of the Education Amendments of 1972 (“Title IX”) might also support federal protection for transgender students. States have also joined the battle to protect transgender individuals from discrimination based on gender identity. This section will analyze various federal and state laws affecting transgender individuals, and will also discuss what types of issues transgender student-athletes might face in light of current laws and policies.

### A. Title VII of the Civil Rights Act of 1964

Title VII<sup>192</sup> provides employees with protection against discrimination

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186. GRIFFIN & CARROLL, *supra* note 5, at 30.

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

188. *Id.*

189. Title VII of Civil Rights Act of 1964, 42 USC § 2000e-2 (2006).

190. *Price Waterhouse*, 490 U.S. at 250.

191. *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010) *aff’d* 663 F.3d 1312 (11th Cir. 2011)(outlining federal case law regarding the gender identity claims and Title VII).

192. 42 USCA § 2000e.

based on their race, color, religion, sex or national origin.<sup>193</sup> Recently, some transgendered individuals have used Title VII to protect against discrimination based on sexual orientation and gender identity. Several federal circuit and district courts have adopted the view that the law does protect transgender individuals,<sup>194</sup> although the legal reasoning supporting such views varies.<sup>195</sup> Other circuit courts have not yet had the chance to rule on the issues, and some do not recognize transgender individuals as a protected class under Title VII.<sup>196</sup>

In 2009, the Ninth Circuit addressed the issue in *Kastl v. Maricopa County Community College*. A male-to-female transgender plaintiff sought protection under Title VII for discrimination based on her failure to conform to gender norms.<sup>197</sup> Specifically, Kastl, a student and teacher at the community college, sought legal recourse when the college banned her from using female restroom facilities until she underwent sex reassignment surgery.<sup>198</sup> The court held that, after the Supreme Court ruling in *Price Waterhouse*,<sup>199</sup> “. . . it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women.”<sup>200</sup> The Ninth Circuit decision represents a growing majority viewpoint on the issue—a viewpoint that agrees that Title VII protects transgender individuals against violation of their rights.

The Sixth Circuit addressed the nuanced question of sex discrimination based on gender identity as well. In *Smith v. City of Salem*, a biological male Lieutenant in the Salem Fire Department began to express feminine characteristics after being diagnosed with Gender Identity Disorder.<sup>201</sup> He then sued his employer, as he believed he was suspended for being transsexual.<sup>202</sup> In its ruling, the Sixth Circuit relied on *Price Waterhouse* to

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193. *Id.*

194. *See* *Kastl v. Maricopa Co. Cmty. Coll. Dist.* 325 Fed. Appx. 492 (9th Cir. 2009); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010).

195. *See* *Etsitty v. Union Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007); *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.C. Cir. 2007).

196. *See* *Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002). The Court found that Congress’ thirty-one failed attempts to pass legislation that clarified the textual meaning of “sex” in Title VII was evidence that Title VII does not encompass gender identity. *Id.* at \*21-23.

197. *Kastl v. Maricopa Co. Cmty. Coll. Dist.* 325 Fed. Appx. 492 (9th Cir. 2009).

198. *Id.* at 493.

199. *Id.*

200. *Id.*

201. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

202. *Id.* at 568–70.

support the proposition that transgender and transsexual individuals are a protected class under Title VII. Specifically, the court acknowledged that, while previous interpretations of Title VII limited sex protection to “anatomical and biological characteristics,”<sup>203</sup> *Price Waterhouse* “eviscerated” that line of legal reasoning.<sup>204</sup> The court further stated that the motivation behind a person’s choice to avoid conforming to gender norms was irrelevant, as “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”<sup>205</sup>

A Fifth Circuit district court also upheld the rights of transgender individuals in the context of Title VII. In *Lopez v. River Oaks Imaging*, the court acknowledged that “litigants have seized upon the seemingly broad language of *Price Waterhouse* to argue that Title VII protects transgender individuals, who, it is argued, by dressing and behaving as a member of the opposite sex, merely fail to conform to other’s views of how men and women should look and act.”<sup>206</sup> In *Lopez*, a plaintiff, who identified as female, was denied a position at a mental health facility after her background check revealed that she was legally born a male.<sup>207</sup> The court adopted the view that transgender individuals are covered by the decision in *Price Waterhouse*, saying,

The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgender litigant who fails to conform to traditional gender stereotypes and an “effeminate” male or “macho” female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes.<sup>208</sup>

In contrast, the Tenth Circuit in *Etsitty v. Utah Transit Authority*, did not explicitly hold that transsexuals are covered under Title VII.<sup>209</sup> In *Etsitty*, the plaintiff argued two separate legal theories for sex discrimination—that discrimination based on transsexuality is indeed a form of sex stereotyping and, alternatively, that it is a form of gender stereotyping.<sup>210</sup> The court first

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203. *Id.* at 572–73.

204. *Id.* at 572 (“[T]he Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”)

205. *Id.* at 575.

206. *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008).

207. *Id.* at 655–56.

208. *Id.*

209. *Etsitty v. Union Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007).

210. Plaintiff “argue[d] discrimination based on an individual’s identity as a

dismissed the notion that discrimination against transsexuals is, on its face, prohibited sex discrimination. In reaching its conclusion, the court said that it would rely on the “plain language of the statute and not the primary intent of Congress,” to determine protective status.<sup>211</sup> Accordingly, the “binary conception of sex” did not leave room for transsexuals to be considered a protected class.<sup>212</sup> However, the court cautioned that “[t]he conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.”<sup>213</sup> Next, the court discussed the theory of protection for transsexuals under the *Price Waterhouse* theory of gender stereotyping. While the court acknowledged that several circuits have upheld protection for transsexuals under a theory of gender stereotyping,<sup>214</sup> it declined to answer the question in this case because it believed that the plaintiff did not present a genuine issue of material fact as to the employer’s pretext claim.<sup>215</sup>

In *Schroer v. Billington*, the D.C. Circuit court stated that merely being transsexual is not enough to support a claim for discrimination under Title VII:

[A] *Price Waterhouse*-type claim could not be supported by facts showing that Schroer’s non-selection resulted solely from her disclosure of her gender dysphoria and her intention to present herself as a woman . . . . This is so because protection from sex stereotyping is different, not in degree, but in kind, from protecting transsexuals as transsexuals.<sup>216</sup>

It can be argued that these cases do little to help the legal protection of transgender student-athletes at the college level, as student-athletes are not employees of the universities for which they play.<sup>217</sup> However, such cases might prove analogous when litigating the scope of protected parties in discrimination cases under Title IX, as Title IX directly applies to students

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transsexual is literally discrimination because of sex and that transsexuals are therefore a protected class under Title VII as transsexuals. Alternatively, she argues that even if Title VII does not prohibit discrimination on the basis of a person’s transsexuality, she is nevertheless entitled to protection under Title VII because she was discriminated against for failing to conform to sex stereotypes.” *Id.* at 1221.

211. *Id.*

212. *Id.* at 1222.

213. *Id.* at 1222 n.2.

214. *Id.* at 1223–24.

215. *Id.*

216. *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.C. Cir. 2007).

217. *Why Student Athletes Are not Paid to Play*, NCAA <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Why+student+athletes+are+not+paid+to+play> (last visited March 1, 2012).

in most colleges and universities and provides for protection against sex discrimination similar to Title VII.

#### B. Title IX of the Education Amendments of 1972

Title IX forbids discrimination on the basis of sex in public and private colleges and universities that receive federal funding.<sup>218</sup> In the athletic context, the statute has been read as mandating equity in athletic programs for men and women in secondary schools and postsecondary educational institutions.<sup>219</sup> However, the United States Department of Education Office for Civil Rights (“OCR”) maintains that the statute also imposes liability for educational institutions that discriminate against students on the basis of gender identity.<sup>220</sup> In a 2010 Dear Colleague letter, the OCR clarified its position by stating:

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX.<sup>221</sup>

The Department of Justice’s Title IX Legal Manual supports the implication that case law under Title VII can be used to support the inclusion of transgender students as a protected class under Title IX. The manual states:

Since Title VII legal theories are often used by courts to evaluate Title IX claims, sex stereotyping may violate the Title IX prohibition of discrimination on the basis of sex. The fact that the harassment was based on the perception that the individual was not properly ‘manly’ or ‘feminine’ may, in appropriate circumstances, be the basis for a sex stereotyping claim filed under Title IX.<sup>222</sup>

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218. 20 U.S.C. § 1681(a) (2006) (“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.”).

219. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52872 (2010).

220. United States Department of Education, Dear Colleague Letter, Oct. 2010.

221. *Id.*

222. *Title IX Legal Manual*, IV (D)(2)(a)(2)(c), Department of Justice, available at <http://www.justice.gov/>. See also Jennifer Sinisi, *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX May be an Appropriate Remedy for the NCAA’s Transgender Student Athletes*, 19 VILL. SPORTS & ENT. L.J. 343, 361 (stating that the Supreme Court first relied on Title VII cases to inform Title IX cases in *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (*citing* *Meritor Sav.*

Further, under certain circumstances, transgender students may have a right of action against educational institutions when teachers,<sup>223</sup> coaches,<sup>224</sup> and other students (or teammates)<sup>225</sup> harass<sup>226</sup> a student based on his or her gender identity.

### C. Equal Protection Clause

Both students and employees may also use the Equal Protection Clause to seek redress for discrimination based on gender identity and sexual orientation in schools<sup>227</sup>. To allege a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff “must allege that the plaintiff is a member of an identifiable group, was subjected to differential treatment from others similarly situated, and the difference in treatment was based on his or her membership in that group.”<sup>228</sup> The court, in its Equal Protection analysis in *Glenn v. Brumby*, acknowledged that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>229</sup>

The Ninth Circuit has also used the Equal Protection Clause to provide protection for lesbian, gay, bisexual, and transgender students. In *Flores v. Morgan Hill Unified School District*, students in a public school district brought suit against their school district, administrators, and school board under the Equal Protection Clause for the defendants’ failure to adequately address peer anti-homosexual harassment.<sup>230</sup> According to the court, the students were entitled to protection if they could “show that the defendants, acting under color of state law, discriminated against them *as members of an identifiable class* and that the discrimination was intentional.”<sup>231</sup> The court relied on previous Ninth Circuit case law,<sup>232</sup> holding that those

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Bank, *FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

223. *Title IX Legal Manual*, *supra* note 222 at IV (D)(2)(a)(1).

224. *Id.*

225. *Id.* at IV (D)(2)(a)(2).

226. *Id.* IV(D)(1). “The protection against sexual harassment derives from the general prohibitions against sex discrimination contained in the Title IX common rule . . .” *Id.* Of course, a suit will only be successful in these cases if institutions meet the familiar requirements of actual knowledge and deliberate indifference, and the student-athlete proves causation. *Id.*

227. 42 U.S.C. § 1983 (2006).

228. *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010).

229. *Id.* at 1300.

230. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132 (9th Cir. 2003).

231. *Id.* at 1134 (emphasis added).

232. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570–71 (9th Cir. 1990).

discriminated against because of sexual orientation are members of an identifiable class for equal protection purposes.<sup>233</sup> The court held that the school's failure to enforce school anti-harassment and anti-discrimination policies violated the equal protection rights of the students.<sup>234</sup>

This case is particularly informative as to the current legal protection available to transgender student-athletes. *Flores* shows that public school administrators, who are state actors, may be liable for Equal Protection Clause violations against protected classes not specifically enumerated in federal and state statutes so long as there is case law finding that the group has been labeled an identifiable class.<sup>235</sup>

Thus it appears that the Equal Protection Clause may provide some protection for transgender students who are the victims of harassment in an education context. However, current case law is not well-developed, and there are no pending cases regarding the rights of transgender athletes in education. Undoubtedly, more cases will be litigated under the Equal Protection Clause in the future given the fact that being openly transgender is becoming more accepted and thus, more prevalent.

#### D. State Statutes and Case Law

States have taken up the legal question of protection for transgender individuals by enacting laws and developing case law to protect transgender individuals. States' willingness to protect transgender students is making slow progress, with less than half of states enacting laws that protect against discrimination based on gender identity.<sup>236</sup> While some states specifically prohibit discrimination based on sexual orientation, only a few state statutes contain language that specifically prohibits discrimination based on gender identity.<sup>237</sup>

One example of a state that prohibits gender identity discrimination is California. The California Student Safety and Violence Prevention Act of 2000<sup>238</sup> amends several parts of the California Education Code to prohibit

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233. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003).

234. *Id.*

235. *Id.* at 1136–1138 (9th Cir. 2003).

236. NCAA Resource Book, *supra* note 118. States include California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

237. *Id.* at 28. According to the NCAA, 13 states and the District of Columbia “have enacted non-discrimination laws prohibiting discrimination on the basis of sexual orientation and gender identity or expression while eight more have laws that protect against discrimination based on only on sexual orientation.”

238. See *California Student Safety and Violence Prevention*, California Department of Education, <http://www.cde.ca.gov/re/lr/sv/> (last visited April 2, 2013). See also CAL. PENAL CODE §422.56 (West 2002 & Supp. 2013) (amended by SB 1234 to define “gender” for purposes of identifying hate crimes and eliminating unlawful discrimination in public schools.”). *Id.*

discrimination against students based on “gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.”<sup>239</sup> Additionally, several organizations have formed the California State Schools Coalition, “a statewide partnership of organizations and individuals dedicated to eliminating discrimination and harassment on the basis of actual or perceived sexual orientation and gender identity in California schools,” to hold the state accountable for enforcement of the statute.<sup>240</sup>

Other states, including, Iowa,<sup>241</sup> Maine,<sup>242</sup> Maryland,<sup>243</sup> Minnesota,<sup>244</sup> New Jersey,<sup>245</sup> and Oregon,<sup>246</sup> also prohibit gender identity discrimination in public schools. In late January 2012, Massachusetts joined the trend when Governor Deval Patrick ceremonially signed H.B. 3810, An Act Relative to Gender Identity, into law.<sup>247</sup> The bill amends the current Massachusetts Code to include a definition of “gender identity,” and inserts the definition into several sections of the current Code.<sup>248</sup> Massachusetts’s courts also protect transgender school students under a unique theory—freedom of speech protection. In *Doe v. Yunitis*, a state court upheld a student’s request for an injunction after his school refused to allow him to wear female clothing and accessories.<sup>249</sup> The court found that the school’s policies regarding his choice of clothing represented “direct suppression of speech” and, thus, violated his First Amendment rights.<sup>250</sup>

In New York, a 1970s Supreme Court case discussed the rights of transgender athletes under the Fourteenth Amendment.<sup>251</sup> In *Richards v. United States Tennis Association*, the plaintiff sued the tennis association for its failure to allow her to compete in a women’s tournament after she had undergone gender re-assignment surgery to become a woman.<sup>252</sup> In this

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239. *Id.*

240. *About Us*, California Safe Schools Coalition, <http://www.casafeschools.org/aboutus.html#mission> (last visited February 29, 2012).

241. IOWA CODE § 280.28 (West 2011 & Supp. 2013).

242. ME. REV. STAT. ANN. tit. 5 § 4553 (West 2013).

243. MD CODE ANN., EDUC., § 7-424.1 (West 2012).

244. MINN. STAT. ANN § 363A.03 ( West 2012).

245. N.J. STAT ANN. §18A: 37-13 (West 1999 & Supp. 2012).

246. OR. ADMIN. R. §581-021-0045 (2013).

247. Jorge Rivas, *Massachusetts Gov. Patrick Signs Transgender Equality Bill into Law*, COLOR LINES, Jan. 19, 2012, available at [http://colorlines.com/archives/2012/01/massachusetts\\_gov\\_patrick\\_signs\\_transgender\\_equality\\_bill\\_into\\_law.html](http://colorlines.com/archives/2012/01/massachusetts_gov_patrick_signs_transgender_equality_bill_into_law.html). This bill was formally signed into law in late 2011.

248. H.R. 3810, 187 Gen. Ct. (Mass. 2011).

249. *Doe v. Yunitis*, 2000 Mass. Super. LEXIS 491, \*12 (Mass. 2000).

250. *Id.*

251. *Richards v. United States Tennis Assoc.*, 93 Misc. 2d 713 (N.Y. 1977).

252. *Id.*

court's view, "the requirement of defendants that this plaintiff pass the Barr body test in order to be eligible to participate in the women's singles of the United States Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State."<sup>253</sup> While the situation faced by the plaintiff in this case is instructive, it is not directly on point with the current situation faced by student-athletes—*Richards* involved a private tennis association and an athlete who had already undergone sex reassignment surgery in her 40s.

The variation in types of protection afforded by the states undoubtedly implicates what some might perceive as unfairness, because the ability of a student to bring a claim could hinge on whether or not the student goes to a public or private college or university or where the student lives. A few members of Congress believe that the country would be well served by a comprehensive federal statute banning discrimination against students on the basis of sexual orientation or gender identity. As recently as March 2011, Representative Jared Polis (D-Colo.) and Senator Al Franken (D-Minn.) reintroduced the Student Non-Discrimination Act to provide protection for LGBT students.<sup>254</sup> According to the American Civil Liberties Union, which supports the bill:

The Student Non-Discrimination Act will help to ensure that discrimination against lesbian, gay, bisexual and transgender students has no place in our country's public schools. The legislation builds on existing protections for students based on their race, color, sex, religion, disability or national origin, and will provide LGBT students and their families with legal recourse against discriminatory treatment.<sup>255</sup>

#### E. Compliance with Federal and State Antidiscrimination Laws

The impact of federal and state antidiscrimination laws on transgender athletes is yet to be realized. Based on the research presented, it is clear that there are federal statutory implications, state statutory implications, and NCAA policy implications, which have the potential to impact colleges and universities throughout the country. Relying on precedent among federal circuit and state courts, it appears that transgender individuals arguably have a legal cause of action for discrimination based on their gender identity under both the Fourteenth Amendment and Title IX. This legal right is grounded in the *Price Waterhouse* analysis that states that

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253. *Id.* at 721.

254. Chris Johnson, *Polis reintroduces Student Non-Discrimination Act*, WASHINGTON BLADE, March 19, 2011, available at <http://www.washingtonblade.com/2011/03/10/polis-reintroduces-student-non-discrimination-act/>.

255. *Protect LGBT Students from Harassment and Discrimination*, American Civil Liberties Union, <https://secure.aclu.org/site/Advocacy/> (last visited Jan. 30, 2012).

discrimination against transgender students is a form of sex stereotyping and, thus, constitutes sex discrimination.

Colleges and universities should be on notice that discrimination based on gender identity, while not explicitly addressed by federal law, might still be impliedly unlawful based on several federal court cases that include transgender individuals as a protected class. Even before the NCAA policy was enacted, several colleges and universities already recognized the need for clear policies protecting the rights of transgender students. According to the Transgender Law and Policy Institute, 420 colleges and universities currently have nondiscrimination policies that explicitly include transgender or gender identity provisions, or both.<sup>256</sup>

One potential legal issue arising out of the NCAA policy is the availability of gender-neutral bathrooms and locker rooms for transgender student-athletes. The regulations that implement Title IX provide that, “[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex.”<sup>257</sup> Some universities already recognize the need for such facilities, and have implemented policies that support transgender students by creating gender-neutral bathrooms.<sup>258</sup> Indeed, the NCAA supports the creation of gender-neutral facilities for students who request them.<sup>259</sup> Schools with transgender athletes should consider providing such facilities for their student-athletes in the interest of nondiscrimination.

Moreover, adoption of the new NCAA policy can have real repercussions for schools with respect to tournament eligibility,<sup>260</sup> which has the potential to create backlash from students, coaches and fans. Colleges and universities must be mindful of the actions of their students and staff, as these institutions could be liable for any harassment or discrimination perpetrated against transgender student-athletes that arises from implementation of the policy.<sup>261</sup> Further, failure to enforce existing anti-discrimination school policies with respect to transgender student-athletes potentially creates Equal Protection Clause violations. Unfortunately for transgender student-athletes, while the NCAA Policy

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256. Transgender Law and Policy Institute, Colleges/Universities, [www.transgenderlaw.org/college/index.htm](http://www.transgenderlaw.org/college/index.htm) (last visited Jan. 23, 2012).

257. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52871 (2010).

258. Brett Beemyn et al. *Transgender Issues on College Campuses*, 111 NEW DIRECTIONS FOR STUDENT SERVICES 55 (2005) (stating that San Diego State University created “safe bathrooms” and University of Chicago and Beloit University established “gender-neutral bathrooms.”)

259. NCAA Resource Book, *supra* note 118, at 20.

260. NCAA Bylaw 18.02.2.

261. United States Department of Education, Dear Colleague Letter, Oct. 2010, *supra* note 220.

does directly impact some of the NCAA's operating bylaws, it has not been adopted into the NCAA bylaws and, thus, is not binding on the NCAA member institutions.

In summary, the fact that a transgender student-athlete has yet to challenge a higher-educational institution's policy dealing with transgender students should not give colleges or universities comfort. State and local policies, in addition to Title IX and, for public institutions the Equal Protection Clause, may allow transgender student-athletes to play on sports teams regardless of whether their gender identity conforms to their biological sex.

## VI. PROPOSED SOLUTIONS

Where do governing bodies go from here? Two things are clear. First, there needs to be concrete regulation for interscholastic and intercollegiate athletics on the topic of transgender and transitioning athletes. It is an issue that cannot be ignored at these levels due to the facts that: (1) many transgender people will start to question their biologically-assigned genders with their internal sense of gender identity during these periods in their lives; and (2) courts are increasingly willing to accept discrimination claims based on gender identity. Second, the standards for interscholastic and intercollegiate athletics need to be different because there are marked differences in maturity at these times of students' lives and because there are different governing bodies for the differing levels of sport.

### A. Interscholastic Level

At the interscholastic level of competition, governing bodies need to be more flexible with children, pre-teens, and teens since many of them experiencing gender identity issues will be very confused about the thoughts running through their minds. Unfortunately, since there is no national governing body at this level and no current federal legislation, it will be up to each state to determine its own policy. It is imperative that the states try to keep some type of consistency between the policies, as a transgender athlete eligible to compete in one state may not be eligible to compete if the student's family moves to another state. Perhaps one way to encourage this consistency is to promote a Uniform Interscholastic Transgender Athlete Policy. At best, however, it could only be hoped that most states would follow or adopt it.

Due to the age of athletic participants at the interscholastic level, it is unrealistic to follow some of the policies that require sex reassignment surgery before puberty to compete on the team with which the athlete identifies. Surgery is an extreme step, and one that is very rarely taken

before puberty, if even at all.<sup>262</sup> Student-athletes at this level of sport should be allowed to compete on the team they identify with, as per the philosophies of the *OTT Report* and the state of Washington. However, this competition should be better regulated using different pieces from different policies outlined above.

First, to avoid challenges later on down the line that an athlete's request to play on a different-gendered team is not bona fide, an in-depth psychiatric evaluation should be done when the student-athlete requests to play on a team different from his or her biological gender. At this young age, it would probably be very difficult for a child or young adult to conceal his or her true motives from a highly-trained psychiatric professional if the child was not being sincere about transgender feelings and thoughts. The psychiatrist could also help the young athlete make sense of personal feelings, provide guidance and encouragement, and become a source of support during what is normally a very difficult time. Again, if there was a challenge later by a competitor or a fellow athlete that such a request was not bona fide, the psychiatrist's evaluation would be available.

Second, most child, pre-teen, or teenage transgender athletes only go through the steps of socially identifying as a different gender. Some may worry that this may give males who want to compete on a female team an edge, and this is a legitimate concern. However, physical differences between the sexes are least pronounced during these early years, and females may in fact outperform males in many athletic aspects. This will likely do little to assuage the fears of critics, but the psychiatric evaluation should at least assure them that any particular transgender athlete's motives are pure.

If the young transgender athlete decides to use hormones (or even hormone blockers to prevent the onset of puberty), there should be some formalized process in place to grant an exception from rules that ban these substances. Such a process would again legitimize the decision and help to quiet critics' fears that an athlete's request to play on a different gender's team is not bona fide. Again, at this stage, it would be prudent for another psychiatric evaluation to take place to make sure that young transgender athletes (and their parents) understand the consequences of such drastic measures at such a young age.

If the extreme action of surgery is undertaken, most policies (including the IOC, IAAF, and USGA policies) suggest making the athlete wait two years before competing on the team with athletes of the new gender. As explained above, making an athlete sit out for two years during high school when physical differences between the sexes are not as pronounced as they

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262. GRIFFIN & CARROLL, *supra* note 5, at 12.

will be later in life would have more negative consequences than positive. Athletes would get out of shape in their sport, miss the chance to develop their skills, and might be passed over for intercollegiate athletic scholarships. An athlete who undergoes surgery should be allowed to participate immediately with the athlete's new gender at the interscholastic level, especially in light of the scientific evidence that suggests that transitioned athletes do not have the competitive advantages previously feared.<sup>263</sup>

#### B. Intercollegiate Level

It is an extremely positive step that the NCAA and its member institutions have recognized that a formal policy regarding transgender athletes was needed. Leaving this crucial decision up to individual institutions with little to no guidance only left the door open for scandal with no recourse from the NCAA.<sup>264</sup> However, the NCAA policy should be revisited and tweaked throughout the years as member institutions gain experience in helping transgender athletes and as more scientific research becomes available regarding the use of hormones in transitioning and transitioned persons.

At the collegiate level, it is still unrealistic to assume that most transgender athletes have had surgery before puberty. If they have, then the issue will be moot, and the athlete should be able to participate immediately on the team of the new gender. However, many transgender athletes are still just coming to grips with how they feel about their gender identity during their late teenage years and early-twenties. Many of them may not be able to speak out about these feelings during these years.

Those who do come out and express their transgender identity should not be limited to expressing it socially.<sup>265</sup> The new NCAA policy is a big step forward when it comes to including transgender athletes in

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263. See generally DEVRIES, *supra* note 39.

264. This is the exact position the NCAA found itself in when Heisman Trophy Winner and National Champion Cam Newton's father was shopping his athletic services around to the highest bidder, even though no money eventually changed hands. Unfortunately, the NCAA had no rule that prevented a parent from doing so. "It's wrong for parents to sell the athletics services of their student athletes [sic] to a university, and we need to make sure we have rules to stop that problem. And today, we don't," [NCAA President] Emmert said. "We have to fix that." Steve Wieberg, *NCAA President Emmert sets no nonsense tone in address*, USA Today (Jan. 14, 2011) available at [http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert\\_N.htm](http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert_N.htm). The NCAA was caught off-guard in the Cam Newton situation and should not be caught so off-guard again the number of openly transgender athletes will likely rise as more and more identify themselves as transgender.

265. This was the case for Keelin Godsey and Kye Allums, discussed in the Introduction, who only changed their identities socially in order to continue competing in intercollegiate athletics on their current women's teams.

intercollegiate athletic participation, but it does not go far enough. Student-athletes are probably mature enough at this point to make the decision to begin physical transitioning through the use of hormone replacement therapies and the contemplation of gender reassignment surgery. Thus, the NCAA should have *specific* steps in place that help athletes actively transition if they so choose. Further, the NCAA policy should be officially adopted into the organization's bylaws, so as to make schools subject to the NCAA enforcement process for failure to comply with the policy of inclusion.

## VII. CONCLUSION

How one feels regarding one's own gender is not a decision that requires much thought for many people who are athletes. However, some athletes *do* question their internal sense of gender identity. Due to the publicity surrounding certain athletes who have had the courage to come out and discuss the situations and challenges they face being a transgender athlete, it is probably safe to presume that more and more athletes who have transgender thoughts will have the desire to compete on the team of the gender with which they identify. Sport governing bodies need to get in front of this issue and not be caught trying to implement policies after scandals, problems, and perhaps even tragedies, have occurred. Foremost in all minds should be a spirit of inclusion and opportunity of participation for all, no matter how it is to be achieved, while balancing the delicate considerations of fairness of competition for all who compete.