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Jennifer V. Sinisi

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GENDER NON-CONFORMITY AS A FOUNDATION FOR SEX
DISCRIMINATION: WHY TITLE IX MAY BE AN
APPROPRIATE REMEDY FOR THE NCAA'S
TRANSGENDER STUDENT-ATHLETES

I. INTRODUCTION

Athletic competition and constructions of gender identity are constantly at tension with one another.¹ These two concepts often collide, as research shows that they present conflicting representations of societal norms.² Conventional ideas hold that most sports and athletic participation in general are inherently masculine endeavors that leave little room for femininity.³ It is commonly accepted that the world of sports is a man's world and cultural customs show that any movement away from these standards suggests a gross deviation from how we currently expect our athletes to appear.⁴

Construction of gender identity, while once thought to be a binary concept, is no longer as cut and dry.⁵ In the transgender community, gender identification is not so neatly addressed.⁶ Al-

1. See Yael Lee Aura Shy, "Like Any Other Girl": *Male-to-Female Transsexuals and Professional Sports*, 14 *SPORTS LAW J.* 95, 110 (2007) (describing conflict between gender and sports and suggesting possible remedies); see also Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 *SETON HALL J. SPORTS & ENT. L.* 1, 2-3 (2010) (explaining how "negative gender perceptions" can hinder participation in sports world).

2. See *infra* notes 21-53 and accompanying text for further discussion of this law.

3. See Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 *HASTINGS WOMEN'S L.J.* 209, 218 (1993) (explaining sports as inherently male).

4. See Shy, *supra* note 1, at 101-02 (showing importance of masculine and gender identity in sporting arena); see also Robert E. Washington & David Karen, *Sport and Society*, 27 *ANN. REV. SOC.* 187, 198-99 (2001) ("[T]he social construction of gender suggest that males and females are pressured to help maintain the appearances of 'hegemonic masculinity,' in which men appear to be well-muscled, strong, unemotional . . . and women appear uninterested in sports.").

5. See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 842-43 (1995) (stating theory of sex as binary concept); see also Jerold Taitz, *The Law Relating to the Consummation of Marriage Where One of the Spouses is a Post-Operative Transsexual*, 15 *ANGLO-AM. L. REV.* 141, 157 (1986) (articulating how law currently categorizes material but suggesting that "biological phenomena" cannot be classified so neatly).

6. See Jill Pilgrim et al., *Far From the Finish Line: Transsexualism and Athletic Competition*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 495, 498-99 (2003) (illustrating difficulty of gender conception); see also Pearlman, *supra* note 5, at 844-46 (describing "classification anxiety" of transgender individuals when forced to classify themselves as either male or female).

though a person is born genetically a man or woman, an individual might feel as though a psychological gender identity does not fit into this bi-polar construct.⁷ In the context of athletic participation, the question then is not what sport to play, but how an institution will classify gender for purposes of team division.⁸ In a world that is dominated by masculinity, it comes as no surprise that transgender competitors find themselves ostracized and facing discrimination.⁹

While many institutions and athletic associations are currently changing their eligibility requirements to accommodate transgender athletes, some have made greater strides than others.¹⁰ In the college setting, most schools are members of the National Collegiate Athletic Association (“NCAA”) and, as a result, must abide by that organization’s policies.¹¹ The current NCAA policy regarding the inclusion of transgender students does little more than state that they are indeed allowed to participate.¹² In most sex discrimination cases, Title IX of the Education Amendments of 1972 (“Title IX”) is the present, controlling statute for claims that occur on a public campus.¹³ Congress enacted this civil rights law to “eradicate sex discrimination at educational programs and activities that re-

7. See Pilgrim, *supra* note 6, at 498-99 (describing genetic and sex differences between males and females); see also Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, SCI., Mar.-Apr. 1993, at 20-21 (“[T]here are many gradations running from female to male; and depending on how one calls the shots, one can argue that along the spectrum lie at least five sexes—and perhaps even more.”).

8. See David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 516-17 (2010) (discussing sex segregation in terms of gender classification in sporting events).

9. See Pat Griffith & Helen Carroll, *The Transgender Athlete*, INSIDE HIGHER ED (Jan. 25, 2010), <http://www.insidehighered.com/layout/set/print/views/2010/01/25/griffin> (clarifying experiences of transgendered athletes when participating on sports teams); see also Greg Cote, *Transgender Athlete’s Bravery Worthy of Cheers*, MIAMI HERALD (Dec. 29, 2010), <http://www.miamiherald.com/2010/12/29/1992028/transgender-athletes-bravery-worthy.html> (recounting journey of first transgender athlete in NCAA Division I basketball).

10. See *infra* notes 68-109 and accompanying text for further discussion of this law.

11. See *NCAA Members by Division*, NCAA, <http://web1.ncaa.org/onlineDir/exec/divisionListing> (last visited Sept. 20, 2011) (listing all member institutions of NCAA by division).

12. See *Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, NCAA (July 30, 2009), <http://www.ncaa.org/wps/wcm/connect/0eece8804378fefdbaecba6bcdc87ae7/NCAA+TSA+Issues+Resource.pdf?MOD=AJPERES&CACHEID=0eece8804378fefdbaecba6bcdc87ae7> (stating current policy of NCAA regarding transgender athletes).

13. See Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS OF SPORT 253, 258-59 (2007) (illustrating prevalence of Title IX claims in discrimination cases); see also 20 U.S.C.A.

ceive federal funds.”¹⁴ When faced with a transgender athlete seeking to compete, many colleges following the NCAA’s procedures are subject to potential sex discrimination claims under Title IX.¹⁵

This Comment analyzes the impact that the NCAA’s current policies have on transgender competitors and possible Title IX protection.¹⁶ Section I outlines the controversy among transgender individuals involved in collegiate athletic competition.¹⁷ Section II juxtaposes what it means to be transgender in today’s society with the socially masculine construct of the sporting arena.¹⁸ Section III gives examples of many current athletic associations’ policies regarding transgender competitors.¹⁹ Section IV outlines Title IX case precedent and how it can be used, in conjunction with other case law, to provide a possible remedy for transgender competitors.²⁰ Finally, Section V explores possibilities for the future of these potential lawsuits and potential implications that the new policies may have on transgender student-athletes.²¹

§§ 1681-1688 (West 2011) (giving language of statute and showing how it is jurisdictionally limited to institutions receiving federal funds).

14. See Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223, 224 (2009) (defining Title IX and demonstrating legislative intent); see also Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 552-55 (2003) (outlining purpose of Title IX as advancing equal opportunities of sexes).

15. See Jennifer L. Levi, *Paving the Road: A Charles Hamilton Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 29-31 (2000) (explaining how discrimination against transgender individuals is possibly sex-based discrimination); see also Pilgrim, *supra* note 6, at 540-41 (describing possibility of sex discrimination claims against government actors).

16. For further discussion of this law, see *infra* notes 22 -192 and accompanying text.

17. For further discussion of this law, see *supra* notes 1-16 and accompanying text.

18. For further discussion of this law, see *infra* notes 22-67 and accompanying text.

19. For further discussion of this law, see *infra* notes 68-109 and accompanying text.

20. For a further discussion of this law, see *infra* notes 110-189 and accompanying text.

21. For a further discussion of this law, see *infra* notes 190-195 and accompanying text.

II. BACKGROUND: COMPETING CONCEPTS OF SPORTS AND MASCULINITY AS COMPARED TO GENDER IDENTITY STUDY

Participation in sports is one of the ultimate expressions of masculinity.²² Accordingly, this traditional concept can be troubling for individuals who do not feel as though they can conform to this overwhelmingly masculine standard.²³ A world that celebrates only the manliest of men and shuns most others tends to create a barrier that is difficult for outsiders to penetrate.²⁴ After developing an understanding for what it means to be transgendered in today's society, it is easy to see why transgender individuals are seen as outcasts in the realm of athletic competition.²⁵ This section brings to light this tension by directly showcasing the historical preference for men in sports against the scientific and psychological impact of being a transgender individual.²⁶

A. The Inherently Masculine Nature of the Sporting World

For centuries, athletic competition had been tied to an underlying perception of "maleness" and masculinity.²⁷ In the sports arena, contemporary society idolizes those who most neatly fit into this masculine ideal.²⁸ The sporting world's historical preference

22. See Anne Gregory, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 264, 266-68 (2004) (exploring sports as "one of the last arenas to be blatantly dominated by men"); see also Williams, *supra* note 13, at 255 ("[S]port is an expression of masculinity.").

23. See Kosofsky, *supra* note 3, at 218-22 (outlining relationship between sports and masculinity and illustrating possible consequences of digression from standard); see also Gregory, *supra* note 22, at 274-77 (showing extreme detriment to athlete's career that occurs when athlete moves away from typical standards of gender construction).

24. See Julie A. Baird, *Playing it Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31, 32-33 (2002) (describing obstacles "less masculine" athletes must eventually overcome); see also Griffith, *supra* note 9 (describing struggle of transgender athletes in society).

25. See Griffith, *supra* note 9 (showing inclusion difficulties of transgender athletes).

26. For a further discussion of this law, see *infra* notes 27-67 and accompanying text.

27. See Barbara Osborne, "No Drinking, No Drugs, No Lesbians": *Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L. REV. 481, 485-86 (2007) (discussing prevalence of masculinity in sports); see also MICHAEL A. MESSNER, *POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY* 13-16 (1992) (portraying development of organized sports as response to fears of societal femininity).

28. See Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 429-30 (2010) (constructing male ideal in realm of athletics); see also David S. Cohen, *No Boy Left*

for men is no secret.²⁹ The sports community claims that this is a result of the biological advantages men have during competition.³⁰ Generally, men have longer and stronger arms and legs, more muscle, larger hearts and lungs, and stronger upper backs and shoulders.³¹ In contrast, women are at a disadvantage in terms of these physical characteristics.³² As a result, women are automatically presumed to be less athletically capable.³³

Additionally, many of the most publicized sports tend to favor the male body type over the female.³⁴ Football, the most popular sport in the United States, can be characterized as a display of pure strength and agility, as it requires athletes to tackle their opponents to the ground and to be able to withstand impact from great weight.³⁵ The ability to defeat a competitor in feats of physical

Behind? Single-Sex Education and the Essentialist Myth of Masculinity, 84 IND. L.J. 135, 161-62 (2009) (“School sports define a pattern of aggressive and dominating performance as the most admired form of masculinity. . . . Success at sports is almost seen as the equivalent to success at being masculine.”) (internal quotations omitted).

29. See Kosofsky, *supra* note 3, at 210-11 (illustrating prevalence of male dominated attitude in sports by showing women’s historic exclusions from professional sports). Very few professional women’s teams have ever existed and, when they did, they did not last long. See *id.* (“There was a women’s professional baseball league during World War II. . . . A women’s football league was formed in 1972. . . . However, even in individual sports, women’s opportunities to be professional athletes have been limited.”).

30. See *id.* at 215 (showing sporting world’s preference for anatomical characteristics of men).

31. See P.S. Wood, *Women in Sports The Facts Show They’re More than in the Running*, GLOBE & MAIL, May 17, 1980, at F7 (explaining biological differences between men and women); see also Roslyn Carbon, *Female Athletes*, 309 BRIT. MED. J. 254, 254 (1994) (“Women are, on average, 10% smaller than men in most physical variables including cardiac size, blood volume, and haemoglobin concentration. However, they carry twice the body fat of men.”).

32. See Kosofsky, *supra* note 3, at 215 (discussing women’s physical characteristics).

33. See *id.* (outlining presumption of inferiority of female athletes); see also Koller, *supra* note 28, at 429-31 (“Thus athletic competition demonstrates that men’s bodies can ‘sustain physical punishment and engage in violence in ways that [make] them superior to women’s bodies.’”).

34. See Kosofsky, *supra* note 3, at 215 (demonstrating that most popular sports are male dominated); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 120 (1987) (“[W]e notice that most athletics, particularly the most lucrative of them, have been internally designed to maximize attributes that are identical with what the male sex role values in men.”).

35. See *Pro Football Continues Popularity Among U.S. Sports Fans*, SPORTS BUS. J. DAILY (Jan. 25, 2011), <http://www.sportsbusinessdaily.com/Daily/Issues/2011/01/Jan-25/Ratings-and-Research/Harris-Poll.aspx> (characterizing pro football as most popular sport); see also Kosofsky, *supra* note 3, at 215 (describing masculine nature of football); *Rule Book, NFL*, available at <http://www.nfl.com/rulebook/use> (last visited Mar. 21, 2011) (outlining official rules of professional football). The NFL rule book lists several opportunities where players can use their

strength and extreme endurance often exemplifies the ultimate definition of male heterosexuality.³⁶ Inherently, it is a way for men to show their perceived superiority over other men deemed to be weaker and less capable.³⁷ These observed advantages give rise to the acceptance and presumed superiority of the male stereotype.³⁸ An outsider who is not categorized within the confines of this stereotype is singled out and consequently rejected as inferior.³⁹

As a result of the prevalence and popularity of the male stereotype, many coaches degrade their players using gendered belittling techniques.⁴⁰ These types of comments discourage challenges to the accepted male hierarchy; “[c]omments such as ‘You play like a girl,’ or ‘You play like a sissy,’ are often an accepted part of sports. When directed at men, they signal that feminine characteristics are incompatible with athletics. Gender based hostility, then, is a fundamental aspect of the athletic environment.”⁴¹ Players and coaches may ridicule each other in such a way because it reaffirms their own masculinity.⁴² Such statements establish “hierarchies

bodies to block or otherwise get around the opposition. See Kosofsky, *supra* note 3, at 215 (illustrating how players are able to use arms and hands during game play).

36. See Kosofsky, *supra* note 3, at 215-16 (listing popular sports and their links to predominantly masculine characteristics); see also Gregory, *supra* note 22, at 269-72 (describing relationship between homophobia, masculinity, and ideals of male superiority).

37. See Koller, *supra* note 28, at 429 (illustrating male hierarchies achieved through sport); see also Gregory, *supra* note 22, at 269-72 (“Gay male athletes are assumed not to exist. Part of the reason for this is because our society views gay men as ‘weak’ and ‘effeminate,’ and therefore non-masculine.”); Baird, *supra* note 24, at 33-34 (articulating societal norms of “ideal male” as strong, successful athlete).

38. See Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 51-53 (1996) (examining “strong resistance” of athletic institutions to equal sporting opportunities); see also Koller, *supra* note 28, at 429-30 (explaining supported view of male superiority over females).

39. See Shy, *supra* note 1, at 103-04 (discussing perceived inferiority of individuals outside male sex); see also Williams, *supra* note 13, at 255-56 (“Men who rely on these masculine stereotypes often use them to assert and preserve their superiority over men who show stereotypically feminine stereotypes and over women who show stereotypically masculine stereotypes.”).

40. See Rhonda Reaves, “*There’s No Crying in Baseball*”: *Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283, 303-04 (2001) (describing gender-based hostility in language used by certain coaches and administrators); see also NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* 54 (1998) (“Coaching strategies may involve ridiculing players for behavior that is unmasculine with taunts of ‘wimp,’ ‘pussy,’ and ‘faggot.’”).

41. Reaves, *supra* note 40, at 303-04.

42. See MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* 35 (2002) (“In fact, it is a key part of the group process of dominance bonding that one or more members of the male group are made in the symbolic and debased feminized ‘other’ through which the group members bond and feel that their sta-

within male athletic teams.”⁴³ This type of environment is inherently hostile to athletes who fall outside accepted gender roles and affects transgender individuals in a particularly harmful way.⁴⁴

B. What It Means to Be Transgender

After learning about the transgender identity, it is easy to understand why an athlete can face such discrimination when thrown into gender-charged situations.⁴⁵ The term “sex” refers to traits that distinguish between traditionally male and female characteristics.⁴⁶ “Genotypic sex” refers to the presence of certain male and female chromosomal pairs, whereas “phenotypic sex” refers to the presence of the distinct anatomical features that are different in men and women.⁴⁷ “Gender,” however, refers to the “psychosexual individuality” of what is masculine and feminine.⁴⁸ These conceptions are derived, in part, from societal norms.⁴⁹

For most of the population, sex and gender correspond, “such that an individual fitting all the characteristics of the male sex also identifies with the masculine gender” and the female sex identifies with feminine constructs.⁵⁰ Transgender individuals, however, are a group of people where sex does not precisely match their gender

tus as ‘men’ is safely ensured.”); *see also* Williams, *supra* note 13, at 255 (analyzing behavior of aggressive male coaches and athletes); Gregory, *supra* note 22, at 270 (showing desire to preserve own masculinity through derision).

43. Williams, *supra* note 13, at 255.

44. *See* Pilgrim, *supra* note 6, at 536-37 (portraying dilemma of transgendered athletes as they struggle to maintain dignity yet avoid discrimination).

45. *See* Griffith, *supra* note 9 (illustrating difficult situation of transgendered athletes).

46. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 270-71 (1999) (outlining biological factors associated with individual’s sex); *see also* Pilgrim, *supra* note 6, at 498-99 (distinguishing characteristics of sex).

47. *See* Pamela B. Fastiff, Note, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937, 942 (1992) (“A genetically normal female has XX sex chromosomes, while a genetically normal male has XY sex chromosomes.”); *see also* Pilgrim, *supra* note 6, at 498-99 (explaining differences between genotypic and phenotypic sex); Shy, *supra* note 1, at 98 (diagramming characteristics of genotypic males and females).

48. *See e.g.* J.E.B. v. Alabama, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting) (“The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics . . . distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”). *See* Pilgrim, *supra* note 6, at 498-99 (showing meaning of gender); *see also* Pearlman, *supra* note 5, at 842 (discussing masculinity as male and femininity as female).

49. *See* Greenberg, *supra* note 46, at 274 (“Gender, as used in this sense, is socially constructed.”); *see also* Pilgrim, *supra* note 6, at 498 (resulting “in part from the societal manner of rearing (boy versus girl)”).

50. Pilgrim, *supra* note 6, at 498.

identity.⁵¹ Although not a medical term, the term “transgendered” collectively identifies people whose “gender behavior and sex identifications” are incongruent with “socially accepted male/masculine and female/feminine behavioral expectations.”⁵² Thus, the sex these individuals are born into does not conform to their gender.⁵³ Other psychiatric criterion is considered when defining transgender individuals as transsexuals.⁵⁴ Many individuals who feel strongly about the disparity between their sex and gender undergo gender reassignment surgery.⁵⁵

The perceived, and perhaps misconceived, advantages and disadvantages of transgender and transsexual individuals create difficulties for these athletes to assimilate into the sporting world.⁵⁶ The prevailing belief among spectators and opposing competitors is that an individual who decides to proceed with gender reassignment surgery will retain their pre-operative male or female physical characteristics.⁵⁷ Many women competing against post-operative male-to-female transsexuals feel as though they are at a disadvan-

51. See Greenberg, *supra* note 46, at 278 (citing JOHN MONEY & PATRICIA TUCKER, *SEXUAL SIGNATURE: ON BEING A MAN OR A WOMAN* 6 (1975)) (“The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other from XX chromosomes at conception to womanhood. The fact is that there are not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork.”); see also Pilgrim, *supra* note 6, at 498 (showing definitional aspect of transgender community).

52. Pilgrim, *supra* note 6, at 499.

53. See TRANSGENDER RIGHTS xiv (Paisley Currah et al. eds., 2006) (“Since about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose gender identity or expression do not conform to the social expectations for their assigned sex at birth.”); see also Pilgrim, *supra* note 6, at 499 (explaining incongruence of transgender individuals sex and gender identity).

54. See O. Bodlund & G. Kullgren, *General Outcome and Programmatic Factors: A Five-Year Follow-Up Study of Nineteen Transsexuals in the Process of Changing Sex*, 25 ARCHIVES SEXUAL BEHAV. 303, 303-13 (1996) (outlining factors considered for classifying transgender as transsexual); see also Pilgrim, *supra* note 6, at 501 (specifying transgender individual as transsexual).

55. See Pilgrim, *supra* note 6, at 499 (illustrating difference between transsexual and transgender individuals); see also TRANSGENDER RIGHTS, *supra* note 53, at 151 (explaining that access to sex reassignment surgery helped for emergence of transgender community).

56. See Anna Peterson, *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, 329-35 (2010) (arguing that some critics oppose inclusion because of perceived unfair competitive advantages of transgender athletes); see also Pilgrim, *supra* note 6, at 529 (discussing perceived competitive advantages of competing against transsexuals).

57. See Amadeus Rosenmund et al., *Sex-related Differences in Hematological Values*, 56 ANNALS OF HEMATOLOGY 13, 13-17 (1988) (explaining male-to-female transition as supplemented by hormone therapy); see also Pilgrim, *supra* note 6, at 529-32

tage because it may be believed that they are competing against men who have retained all of their natural physical capabilities.⁵⁸ On the other hand, men competing against post-operative female-to-male transsexuals could feel the opposite and may think they have an advantage over these athletes.⁵⁹ Either way, these notions seem to challenge the ethic of fair play.⁶⁰ There are some people who believe that this ruins the competitive integrity of the game.⁶¹

Scientists and scholars in the field, however, confirm that this risk, if it exists at all, is extremely minimal.⁶² The hormonal treatment and surgical procedures that accompany gender reassignment ensure that a transgender individual has no greater advantage than any other competitor.⁶³ There are those who believe that these athletes are simply dressing as the opposite gender in order to

(suggesting perception of outside competitors as opposing inclusion for competitive fairness).

58. For a further discussion of the male-to-female transition, see *infra* note 62 and accompanying text.

59. See Pilgrim, *supra* note 6, at 529-32 (showing that female-to-male transsexuals have exact opposite experience of male-to-female transsexuals). Additionally, many female-to-male transsexuals will be prohibited from participating in men's leagues because of the testosterone hormones that accompany their treatment are often a prohibited substance. See *The World Anti-Doping Code: The 2010 Prohibited List International Standard*, WORLD ANTI-DOPING AGENCY, Sept. 19, 2009, available at http://www.iaaf.org/mm/Document/Antidoping/Rules&Regulations/05/52/78/20110510024509_httppostedfile_WADA_Prohibited_List_2011_EN_24435.pdf (listing forms of testosterone as banned substances).

60. See Peterson, *supra* note 56, at 329-30 (showing prevalence for fair play in athletic competition); see also Pilgrim, *supra* note 6, at 533 (demonstrating spectator's perception of inclusion of transsexuals); Shy, *supra* note 1, at 106-07 ("Additionally, fair competition is one of the many benefits of changing the grouping of athletes for competitive purposes.").

61. See Peterson, *supra* note 56, at 334-35 (discussing possibility that some believe fair play would be eliminated).

62. See Pilgrim, *supra* note 6, at 530 (providing overview of male-to-female transition).

Transsexual males who become post-operative females are placed on estrogen therapy, which increases stored fat, decreases power-to-weight ratio, and slows athletic performance in sports where the body is supported by the limbs. Castration removes the gonadal source of testosterone, causing a reduction in skeletal muscle mass and circulating blood hemoglobin. The end result is a decrease in strength and in maximum oxygen uptake, which affects both strength-oriented and endurance-oriented activities. The physiological advantage male-to-female transsexuals had before the surgery disappears—their performance characteristics become similar to those of females.

Rosenmund, *supra* note 57, at 13-17.

63. See Peterson, *supra* note 56, at 333 (showing how transgender hormone therapy ameliorates athletic advantage); see also Pilgrim, *supra* note 6 (discussing details of the surgery).

participate.⁶⁴ After one post-operative male-to-female competitor explains her situation, it becomes clear that this is not the case; “the reassignment surgery and hormones mean she is ‘medically and legally’ female, with no more of an advantage that any other woman.”⁶⁵ The additional estrogen or testosterone supplements help assure that all athletes are placed on a level playing field.⁶⁶ In circumstances where post-operative individuals compete, many are not the strongest or fastest and, just like any other athlete in traditional sports, are often beaten.⁶⁷

III. AN ANALYSIS OF LEADING ATHLETIC ASSOCIATIONS’ CURRENT POLICIES REGARDING INCLUSION OF TRANSGENDER ATHLETES

In order to develop a better idea of the problem transgender athletes encounter, it is necessary to understand some of the major athletic associations’ current policies.⁶⁸ These procedures reflect the reality that competitors continuously face when attempting to enter athletic competition.⁶⁹ While some policies are inclusive, others retain certain procedures that the organization feels best balances the interests of the transgender athlete with maintaining the ethic of fair play.⁷⁰ Gaining an understanding of a selection of

64. See Douglas Robson, *Lana Lawless’ Suit Puts Gender in Sports in Spotlight Again*, USA TODAY, Nov. 30, 2010, available at http://www.usatoday.com/sports/2010-11-29-lana-lawless-lpga-transgender_N.htm (explaining sentiment of some critics of transgender athlete inclusions).

65. *Id.* Lana Lawless, a retired police officer, underwent gender reassignment surgery in 2005. See *id.* (recounting pre-operative profession of athlete and post-operative experiences). For a further discussion of Lana Lawless’s civil rights lawsuit, see *infra* notes 90-94 and accompanying text.

66. See Peterson, *supra* note 56, at 333 (explaining intricacies of hormone therapy).

67. See Erin Rook, *LPGA Votes to Scrap “Female at Birth” Policy*, JUST OUT: OREGON’S LESBIAN/GAY/BI/TRANS/QUEER NEWSMAGAZINE (Dec. 1, 2010), <http://blog.out.justout.com/?tag=lane-lawless> (“People say that I will have an advantage because I was once male. That is simply false. I have been beaten by other women before and most likely I will be beaten again.”); see also Shy, *supra* note 1, at 100 (“Mianne Bagger, the first known male-to-female transsexual to compete professionally in a women’s tournament in 2004, wrote on her web site: ‘I don’t hit the ball as far as I used to. . . . My game needs only to be compared to that of the other girls to see there’s no difference and more to the point, compare it with guys of the same standard . . . there just is no comparison!’”).

68. For a further discussion of these policies, see *infra* notes 72-109 and accompanying text.

69. See Cote, *supra* note 9 (announcing performance of first transgender athlete to participate on NCAA Division I basketball team); see also Robson, *supra* note 64 (explaining how golfer was excluded due to policy of LPGA).

70. For a further discussion of these policies, see *infra* note 72-109 and accompanying text.

some recent policies provides context to a situation where the case law is still speculative, as it is in its very early stages.⁷¹

A. The International Olympic Committee - IOC

In the context of international sports law, the Olympic Charter, the document governing the Olympic Movement, has taken center stage.⁷² Although it lacks official government standing, “the Olympic Charter has taken on a central position in the development of international sports jurisprudence, in that it ‘forms the normative foundation of international sports law.’”⁷³ The International Olympic Committee (“IOC”), established by the Olympic Charter, “is the ‘supreme authority’ of the Olympic Movement.”⁷⁴ The IOC and the Olympic Charter have been given a “special status” in international sports law, as participating countries and athletes respect and yield to its rulings.⁷⁵

Responding to accusations that some men were competing as women in order to prevail in sporting competitions, the IOC instituted mandatory sex testing for its female athletes.⁷⁶ In 1968, it began to use the Barr body test, a “sex chromatin analysis” test which analyzed cells from “the presence of a stainable chromatin mass (i.e. the Barr body), which is found only in females.”⁷⁷ If the

71. See *Genderism in Sports Under Attack Again*, GENDER CENTRE (Mar. 18, 2011), <http://www.gendercentre.org.au/86article7.htm> (commenting on magnitude of Lawless’s suit, “Ryan Rodenberg, an assistant professor of sports law at Florida State’s Department of Sports Management said Lawless’ [sic.] suit ‘could be a precedent-setting case’ for athletes in the future.”); see also Pilgrim, *supra* note 6, at 540 (articulating need for evolution in law to accommodate transsexual rights).

72. See Peterson, *supra* note 56, at 323-26 (discussing prominence of Olympic Charter in international sports law); see also *Olympic Charter*, INTERNATIONAL OLYMPIC COMMITTEE (July 8, 2011) http://www.olympic.org/Documents/olympic_charter_en.pdf (explaining governance structure of IOC and Olympic Charter).

73. *Id.*; see also JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 1 (2d ed. 2004) (reaffirming international sport’s communities reliance on Olympic Charter).

74. See Emily J. Cooper, Note, *Gender Testing in Athletic Competitions—Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER RACE & JUST. 233, 245 (2010) (outlining organization of IOC and Olympic Charter); see also Peterson, *supra* note 56, at 323-26 (explaining dynamic between Olympic Charter and IOC).

75. See Peterson, *supra* note 56, at 323-26 (illustrating widely accepted decisions of IOC); see also NAFZIGER, *supra* note 73, at 25 (confirming special status of both IOC and Olympic Charter).

76. See Fastiff, *supra* note 47, at 937 (articulating IOC’s reasons for instituting gender verification tests); see also Pilgrim, *supra* note 6, at 509-10 (recounting history of sex testing in Olympic law).

77. Pilgrim, *supra* note 6, at 510-11. “The test consists of a buccal smear taken from the inside of the athlete’s mouth. The sample is then examined for the requisite XX female sex chromosome.” Fastiff, *supra* note 47, at 940.

test found an athlete to be female, all concerns regarding her sex were discarded and she became free to compete.⁷⁸ The IOC discontinued the use of mandatory sex verification testing in 1999.⁷⁹ Currently, the IOC authorizes its officials to conduct such tests “on an individual basis, should such need arise.”⁸⁰

In 2004, the IOC altered its policies to include transsexual and transgender competitors.⁸¹ The IOC’s policies allow:

[T]ranssexual athletes to compete if the athlete’s sex reassignment surgery took place before puberty. If the surgery took place after puberty, he/she must show that: 1. Surgical changes must have been completed, including external genitalia and removal of gonads. 2. Legal recognition of their assigned sex must have been conferred by appropriate official authorities. 3. Hormone therapy must have been given for long enough to minimize any “gender related advantages” (at least two years after surgery).⁸²

This policy allows transsexual athletes to compete as their “true” gender.⁸³ Rules such as these demonstrate a trend toward inclusion

78. See Pilgrim, *supra* note 6, at 510-11 (showing how test was used to put at ease concerns of unfair competitions); see also Fastiff, *supra* note 47, at 940 (“If the correct chromosomes are present, the athlete is issued a femininity card and is then allowed to compete.”); Phil Hersh, *SEC Commissioner Tops List for Olympic Post*, CHI. TRIB., Oct. 14, 1987, at 2 (discussing gender verification testing and need for female athletes to verify gender).

79. See Pilgrim, *supra* note 6, at 510-11 (giving timeline for mandatory sex verification testing); see also Joe Leigh Simpson, *Gender Verification in the Olympics*, 284 JAMA 1568, 1568 (2000) (“In January 1999 the IOC Athletes’ Commission recommended to the IOC Executive Board that gender verification testing be discontinued, and the decision was ratified in June 1999 by the 109th IOC session in Seoul, South Korea.”).

80. See Pilgrim, *supra* note 6, at 510-11 (explaining current policy of IOC).

81. See Shy, *supra* note 1, at 108 (demonstrating current policy of IOC); see also Pat Griffin, *Inclusion of Transgender Athletes on Sports Teams*, TRANSGENDER L. AND POL’Y INST., <http://www.transgenderlaw.org/resources/Griffinarticle.pdf> (last visited Sept. 20, 2011) (“The International Olympic Committee became the first mainstream sport governing body to develop a policy governing the participation of transgender athletes in the Olympic Games. This policy, known as the Stockholm Consensus, became effective at the 2004 Games in Athens, Greece. Based on a report and recommendations from a committee of medical doctors, the IOC policy includes a list of three criteria for approval of transsexual athlete participation.”).

82. Shy, *supra* note 1, at 108-09.

83. See *id.* (“Over the past few years, several sports governing bodies have revised their rules to permit transsexual athletes to compete as their ‘corrected’ sex.”); see also Donna Rose, *Transsexual Athletes Treated Unfairly*, CNN OPINION (Oct. 20, 2010), <http://www.cnn.com/2010/OPINION/10/18/rose.transsexuals.sports/index.html> (outlining requirements for athletes to compete in “authentic” gender).

of transgender and transsexual athletes in athletic competition.⁸⁴ Many institutions now follow the IOC's footsteps, and have introduced similar guidelines regarding the acceptance of transgender and transsexual competitors.⁸⁵

B. The Ladies Professional Golf Association - LPGA

In the United States, a new trend amongst sporting organizations has begun as groups incorporate gender neutral language into their eligibility requirements.⁸⁶ Although many sport governing bodies do not have any type of sex testing policy, some are making their policies more accepting of the transgender community.⁸⁷ One such organization, the Ladies Professional Golf Association ("LPGA") recently changed the language in its Constitution.⁸⁸ Founded in 1950 by thirteen women, the LPGA has grown from a domestic organization into an international tour that spans eleven nations.⁸⁹

In its Constitution, the LPGA originally required its players to be "female at birth."⁹⁰ Faced with a pending lawsuit by a post-operative male-to-female transgender golfer, Lana Lawless, the LPGA members voted to remove the "female at birth" requirement from

84. See Pilgrim, *supra* note 6, at 108-09 (illustrating new policies that permit individuals to compete).

85. See *id.* at 108-110 (outlining several different organizations' policies); see also Rose, *supra* note 83 ("Many international sports organizations, including the governing body for wrestling, have adopted to defer to the IOC policies.")

86. See Pilgrim, *supra* note 6, at 512-13 (discussing policies of U.S. institutions); see also Naimah Jabali-Nash, *LPGA Players Vote to Eliminate "Female at Birth" Requirement*, CBS NEWS.COM (Dec. 02, 2010), http://www.cbsnews.com/8301-31751_162-20024319-10391697.html (recognizing change in environment for certain athletic organizations).

87. See Pilgrim, *supra* note 6, at 512-13 (showing acceptance of transgender community by LPGA). In the 1970s, the national governing body for tennis, the United States Tennis Association (USTA), required all female applicants for the U.S. Open to undergo a Barr body chromosome analysis. See *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267, 268 (N.Y. App. Div. 1977) ("The USTA first required a sex determination test for women in connection with the 1976 U.S. Open."). In *Richards*, the court determined that the requirement that an athlete pass the Barr body test in order to be eligible to compete is "grossly unfair, discriminatory, and inequitable." See *id.* at 272 (holding that chromatin testing was violative of athlete's human rights).

88. See Jabali-Nash, *supra* note 86 (explaining removal of language by members); see also Katie Thomas, *L.P.G.A. Will Allow Transgender Players to Compete*, N.Y. TIMES, Dec. 1, 2010, at B19 (showing how members of organization voted to eliminate discriminatory language).

89. See *The LPGA: 60 Years Strong*, LPGA.COM (Feb. 16, 2010), http://www.lpga.com/content_1.aspx?pid=23103&mid=4 (describing history of LPGA).

90. See Jabali-Nash, *supra* note 86 (illustrating original language of Constitution).

its bylaws.⁹¹ With the possibility that the organization might deem her ineligible to play, Lawless filed suit claiming that the policy violated California's civil rights laws.⁹² The LPGA stated that, although sparked by a lawsuit, the institution widely accepted the change.⁹³ Officials for the group stated that they had never intended to discriminate; they simply never had to consider the issue.⁹⁴

C. The National Collegiate Athletic Association - NCAA

The NCAA is a membership organization whose "core purpose" is to oversee athletic competition in a "fair, safe, equitable and sportsmanlike manner," as well as to ensure that the educational experience of any student-athlete is a top priority.⁹⁵ The association is composed mostly of "four-year higher education institutions and collections of institutions known as conferences."⁹⁶ The representatives selected from these institutions and conferences construct the NCAA's policies and procedures.⁹⁷ The NCAA is further broken down into three membership classifications known universally as Divisions I, II, and III.⁹⁸ Each division is di-

91. See *id.* (recounting facts and allegations of Lawless's suit). Lana Lawless is a retired police officer who, in 2005, underwent gender reassignment surgery. See Thomas, *supra* note 88, at B19 (articulating Lawless's pre-operative profession). After winning the 2008 women's world championship in long drive golf, Ms. Lawless sought to participate in the LPGA's qualifying tournaments. See *id.* ("Lawless sought to play in L.P.G.A. qualifying tournaments after Long Drivers of America, which oversees the world championship she won, changed its rules to match the L.P.G.A.'s. Lawless also sued Long Drivers of America."). In May of 2011, Ms. Lawless settled her case against the organization. See Katie Thomas, *Transgender Woman Settles Suit Against Two Organizations*, N.Y. TIMES, May 3, 2011, available at http://www.nytimes.com/2011/05/04/sports/golf/04sportsbriefs-TRANSGENDERW_BRF.html?_r=1&src=recg (announcing settlement of lawsuit against LPGA).

92. See Jabali-Nash, *supra* note 86 (demonstrating substance of claims against LPGA).

93. See *LPGA Drops 'Female at Birth' Clause*, FOX SPORTS (Dec. 01, 2010), <http://msn.foxsports.com/golf/story/lpga-drops-femals-at-birth-clause-allows-transgender-120110> (stating positive response from current LPGA members).

94. See *id.* (providing response of elected LPGA officials).

95. See *About the NCAA*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited Sept. 20, 2011) (explaining "core purpose" of NCAA).

96. See *Rules and Committees*, NCAA (last updated Feb. 17, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/How+We+Work/About+the+NCAA+Rules+and+Committees> (last visited Sept. 20, 2011) (illustrating hierarchy of NCAA).

97. See *id.* (outlining policy-making procedure of NCAA).

98. See *id.* (showing divisions of organization).

rected by a “presidential committee.”⁹⁹ Representatives from each of these committees form the NCAA Executive Committee, which is responsible for ensuring that each institution and division performs in accordance with the NCAA’s “core purpose.”¹⁰⁰

The NCAA’s current policy makes it clear that it does not prohibit transgender student-athletes from participation in the NCAA.¹⁰¹ The NCAA’s official policy states, “Transgender student-athletes who compete in the NCAA must compete in the gender classification that matches their state classification, as determined by their institution.”¹⁰² Furthermore, the organization suggests that “institutions use the gender classification that student-athletes have from their state (driver’s license, taxes, voter registration, etc.) in the eligibility certification process.”¹⁰³ Thus, the institution must first determine the state gender classification using state-issued documents and may then decide for which teams the transgender athlete is eligible to compete.¹⁰⁴

The team on which a transgender student is placed will then have ramifications for that specific team’s championship access.¹⁰⁵ NCAA rules for champion-access specifically state “a male participating in competition on a female team makes the team a ‘mixed team’. . . . Such a team is ineligible for a women’s NCAA championship but is eligible for a men’s NCAA championship.”¹⁰⁶ If the student is a female participating on a men’s team, however, that “does not impact sports sponsorship in the application of the [championship-access] rule. . . . Such a team is eligible for a men’s NCAA championship.”¹⁰⁷ In addition to the procedures governing championship-access and team eligibility, the NCAA’s rules regarding transgender athletes also include a reference to banned drug

99. *See id.* (explaining organization of membership institutions and representations).

100. *See id.* (discussing enforcement of NCAA’s provisions).

101. *See Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, NCAA (July 30, 2009), <http://www.ncaa.org/wps/wcm/connect/0eece8804378fefdbaecba6bcdc87ae7/NCAA+TSA+Issues+Resource.pdf?MOD=AJPERES&CACHEID=0eece8804378fefdbaecba6bcdc87ae7> (illustrating current position of NCAA regarding transgender athletes).

102. *Id.*

103. *See id.* (stating state documentation policy of NCAA).

104. *See id.* (listing process member institutions must follow when classifying athletes).

105. *See id.* (outlining championship-access rules for teams with transgender athletes).

106. *See id.* (discussing ineligibility of teams for certain championship games).

107. *See id.* (explaining ramifications for men’s mixed teams when accepting transgender athletes).

classes and the use of such medication.¹⁰⁸ Supposedly, this policy is currently under review.¹⁰⁹

IV. WHEN TITLE VII AND TITLE IX COLLIDE: PROVIDING A POSSIBLE REMEDY FOR TRANSGENDER ATHLETES

The first major case to bring the issue of the transgender athlete into the public light revolved around the question of whether requiring athletes to undergo sex-chromatin testing violated the New York Human Rights Law.¹¹⁰ In *Richards v. United States Tennis Association*, the plaintiff, a forty-one year old physician, underwent sex reassignment surgery to physically, mentally, and socially become a female.¹¹¹ As a biological male, the plaintiff was a nationally ranked tennis player and, after surgery, entered and successfully competed in several women's tennis tournaments.¹¹² The United States Tennis Association ("USTA") and the Women's Tennis Association ("WTA") prevented the plaintiff from qualifying for and participating in the U.S. Open as a woman because the governing bodies required her to take a sex-chromatin test to deter-

108. *See id.* (showing last few provisions of NCAA's policy regarding transgender athletes).

109. *See* Shy, *supra* note 1, at 109 (demonstrating that NCAA is currently studying a proposal similar to that of IOC). Recently, a group from the NCAA "proposed an interpretation of existing policies to create paths for transgender athletes to compete on teams." *See also* David Moltz, *NCAA Considers Transgender Policy*, INSIDE HIGHER ED (Dec. 15, 2010), http://www.insidehighered.com/news/2010/12/15/transgender_ncaa (announcing organization's consideration of new proposal regarding transgender athletes). Under this new proposal:

A male athlete transitioning to female would be permitted to play on a women's team if "that athlete has undergone testosterone suppression treatment for at least one year." The member institution would have to provide the NCAA with "written documentation of testosterone suppression for the year of treatment" and "documentation of ongoing monitoring" to be eligible to play on a women's team. In the instance of a female athlete transitioning to male, the athlete would be permitted to play on a men's team at any time. If the athlete wants hormone treatment, however, then the athlete "must get a medical exception for the use of testosterone before being eligible to participate in intercollegiate athletics" because the substance is on the NCAA's banned drug list. Athletes who transition socially, but do not seek hormone treatment, also have the option to compete for their "birth-gender team."

Id.

110. *See* *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267, 268 (N.Y. App. Div. 1977) (articulating central dilemma of groundbreaking case).

111. *See id.* at 267-68 (describing plaintiff and circumstances surrounding case).

112. *See id.* (illustrating plaintiff's athletic endeavors). The plaintiff entered nine women's tournaments, won two tournaments, and finished in a second place position in three of them. *See id.* (listing plaintiff's tournament qualifications).

mine her sex.¹¹³ Plaintiff alleged that this violated the New York State Human Rights Law and the Fourteenth Amendment to the Constitution.¹¹⁴ The court agreed and held that, in addition to the chromosome testing, certain circumstances warrant consideration of other factors when making sex and gender determinations.¹¹⁵ Since the decision in *Richards*, the issues revolving around transgender athletes have shifted from the applicability of sex verification testing to the possibility of sex discrimination claims for disparate and unequal treatment of athletes.¹¹⁶

Title VII of the Civil Rights Act of 1964 (“Title VII”) and Title IX both prohibit discrimination on the basis of one’s sex.¹¹⁷ Title VII is limited to employment discrimination, and Title IX deals with discrimination in an educational context; however, the two statutes are very similar in their application as well as the remedies they provide.¹¹⁸ While no court has addressed the issue of Title IX sex discrimination of a transgender collegiate athlete, the combination of the case law of both Title VII and Title IX provides a possible solution to such a claim.¹¹⁹ The NCAA’s policy regarding the inclusion of transgender athletes may provide the grounds for the same claim.¹²⁰

113. See *id.* (describing plaintiff’s claim against defendant organizations).

114. See *id.* (outlining substance of plaintiff’s claim against defendants).

115. See *id.* at 272-73 (explaining holding of court and articulating need for consideration of surrounding circumstances).

116. See Pilgrim, *supra* note 6, at 540-41 (discussing possibility of sex discrimination cases by transgender athletes); see also *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d. 1081, 1091 (D. Minn. 2000) (showing case of sex discrimination interpreted under Title IX cases). For a further discussion of the NCAA policies, see *supra* notes 95-109 and accompanying text.

117. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006) (prohibiting discrimination because of sex for publically funded educational institutions); see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006) (forbidding similar discrimination of employees because of sex).

118. See 20 U.S.C. § 1681(a) (using language similar to that found in Title VII); see also 42 U.S.C. § 2000e-2(a)(1) (reading similarly to language of Title IX); Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 33-34 (2011) (discussing how both Title VII and Title IX can be used for certain types of similar cases).

119. For a further discussion of this argument, see *infra* notes 153-189 and accompanying text.

120. For a further discussion of this policy, see *infra* notes 153-189 and accompanying text.

A. Relevant Title VII and Title IX Case Precedent

Title IX provides, in pertinent part, “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”¹²¹ By prohibiting sex discrimination within every program or activity receiving federal funds, the law applies to essentially all public schools and colleges.¹²² Title IX, however, makes no mention of prohibiting discrimination on the basis of sexual orientation or gender identity.¹²³ Title IX itself does not specify any standards for determining sex discrimination with regards to athletics.¹²⁴ Essentially, these Title IX standards divide conformity with the statute broadly into three main categories: participation, scholarships, and the treatment of athletes of both sexes.¹²⁵ In evaluating participation, a three part test is used to determine an institution’s sufficient compliance:

- (1) [providing] intercollegiate level participation opportunities for male and female students . . . in numbers substantially proportionate to their respective enrollments; or
- (2) . . . show[ing] a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex; or (3) . . . demonstrat[ing] that the interests and abilities of the members of [the under-

121. 20 U.S.C. § 1681(a).

122. See § 1681(a)(1) (listing institutions subject to provision); see also Heckman, *supra* note 14, at 224 (discussing wide reach of Title IX); Mark Kelman, (Why) Does Gender Equity in College Athletics Entail Gender Equality?, 7 S. CAL. REV. L. & WOMEN’S STUD. 63, 63-65 (1997) (“Title IX legally commits us to ‘gender equity.’ . . . One thing that this has come to mean . . . is that the vast bulk of universities and colleges must spend roughly as much per capita on varsity athletic programs for the women enrolled . . . as they do for men.”).

123. See § 1681(a) (making no mention of sexual orientation discrimination).

124. See Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 46-47 (2001) (articulating lack of Title IX standards for sex discrimination determinations). “Title IX’s standards governing athletics derive from the regulations and interpretations issued by the federal agency charged with enforcing Title IX, previously the Department of Health, Education and Welfare (HEW), and now the Department of Education (DOE).” *Id.* at 46.

125. See *id.* at 47-48 (explaining theoretical divisions of Title IX jurisprudence).

represented] sex have been fully and effectively accommodated by the present program.¹²⁶

This analysis of the statute provides the framework under which educational institutions are scrutinized.¹²⁷

In first recognizing a Title IX cause of action, the Supreme Court relied heavily on Title VII.¹²⁸ Title VII prohibits employment discrimination by making it unlawful for an employer “to discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹²⁹ Put simply, both statutes bar similar types of discrimination, particularly with regards to sex.¹³⁰ The Supreme Court recognized these similarities with its holding in *Davis v. Monroe County Board of Education*.¹³¹

In *Davis*, the Court differentiated between the two statutes on agency principles, but cited Title VII precedents in deciding what amounts to “gender-oriented” harassment.¹³² The Court indirectly established that the logic articulated in a Title VII case could also be applied in a Title IX discrimination case.¹³³ Additionally, it has been recognized that no rational reasoning exists for distinguishing Title VII and Title IX in connection with determining claims of sex discrimination.¹³⁴ As its case law suggests, transgender athletes

126. Title IX of the Education Amendments of 1972; a Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,413-18 (Dec. 11, 1979) (to be codified at 34 C.F.R. pt. 106).

127. See Brake, *supra* note 124, at 46-49 (showing standards educational institutions must meet in order to be non-discriminatory).

128. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (applying same rules of Title VII cases to Title IX case).

129. 42 U.S.C. § 2000e-2(a)(1) (2006).

130. See *id.* (addressing discrimination because of sex); see also 20 U.S.C. § 1681(a) (prohibiting similar discrimination because of sex).

131. See 526 U.S. 629, 631 (1999) (citing Title VII precedents for Title IX case).

132. See *id.* at 641-42 (relying on Title VII holdings for definitions of gender oriented conduct).

133. See *id.* (applying Title VII case to Title IX sex discrimination claim).

134. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1091 (D. Minn. 2000) (“Furthermore, no logical rationale appears to exist for distinguishing Title VII and Title IX in connection with the issue raised here regarding the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’”).

seeking a remedy under federal laws may be well served to rely upon Title VII.¹³⁵

Discrimination or harassment based on one's failure to comply with traditional gender expectations is a recognizable claim under Title VII precedents.¹³⁶ In *Price Waterhouse v. Hopkins*,¹³⁷ the Supreme Court specifically addressed the issue of sex stereotyping:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹³⁸

In its decision, the Court determined that Title VII discrimination "because of . . . sex" included a claimant's departure from conventional stereotypes associated with his or her sex.¹³⁹ Under the Supreme Court's holding in *Davis*, courts can apply this Title VII theory of sex discrimination to Title IX cases.¹⁴⁰

Federal courts have already applied this reasoning to Title IX cases of discrimination based on a plaintiff's departure from society's ideal conceptions of masculinity and femininity.¹⁴¹ These

135. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (explaining that discrimination based on sex stereotyping is prohibited); see also Buzuvis, *supra* note 118, at 32-33 (suggesting that transgender athletes "fare better" under antidiscrimination statutes).

136. See *Price Waterhouse*, 490 U.S. at 251 (recognizing cause of action under Title VII).

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

138. *Id.* at 251.

139. See *id.* (restating primary holding of case); see also Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 574-75 (2009) ("However, as discussed below, some federal courts have now ruled that, in many circumstances, transgender discrimination can be categorized as Title VII sex discrimination. In fact, no less an authority than the U.S. Equal Employment Opportunity Commission has stated that transgender employees are eligible for Title VII protection.").

140. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (outlining that Title VII precedents can be used in Title IX cases); see also *Price Waterhouse*, 490 U.S. at 251-52 (demonstrating Title VII precedent of prohibition of gender stereotyping discrimination).

141. See *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d. 1081, 1091-93 (D. Minn. 2000) (applying reasoning to Title IX claim); see also *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d. 952, 963-65 (D. Kan. 2005) (revealing similar holding to *Montgomery* case). In *Theno*, fellow students harassed and abused the plaintiff continuously over a period of four years. See *id.* at 954-61 (giving account of verbal and physical abuse suffered). As a result, the

courts have held that this type of disproportionate treatment is analogous to sex discrimination because these plaintiffs do not meet traditional sex stereotypes.¹⁴² In *Montgomery v. Independent School District No. 709*,¹⁴³ the United States District Court for the District of Minnesota came to this very conclusion.¹⁴⁴

In *Montgomery*, the court found that other students teased the plaintiff “on an almost daily basis” about his “perceived sexual orientation.”¹⁴⁵ Additionally, this individual alleged that his tormentors targeted him because “he did not meet their stereotyped expectations of masculinity.”¹⁴⁶ In assessing this claim, the court determined that the characterized conduct supported his allegation.¹⁴⁷ Because the students teased the plaintiff from such a young age, the court recognized that it was likely that “the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.”¹⁴⁸

The *Montgomery* court used the Supreme Court Title IX and Title VII precedent outlined above in recognizing the plaintiff’s claim of discrimination.¹⁴⁹ The combined holdings of *Price Waterhouse* and *Davis* led the District Court for the District of Minnesota to identify a claim of sex discrimination based on a claimant’s lack of conformity to conventional notions of masculinity and femininity.¹⁵⁰ Specifically in line with this reasoning, it held that, “by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereo-

plaintiff, a male student, received medical treatment. *See id.* at 962 (documenting fact that plaintiff sought psychotherapy, psychiatric treatment, and medication).

142. *See Montgomery*, 109 F. Supp. 2d. at 1091-93 (showing relationship between sex discrimination and gender oriented harassment).

143. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d. 1081 (D. Minn. 2000).

144. *See id.* at 1091-93 (announcing holding of court).

145. *See id.* at 1084 (listing key facts of case). The plaintiff in *Montgomery* alleged that his classmates abused him both verbally and physically. *See id.* (restating plaintiff’s accounts of bullying and taunting). Additionally, he also claimed that he received threats of a sexual nature and others called him names like “faggot,” “fag,” and “gay.” *See id.* (giving details of plaintiff’s abuse). Because of this torture, plaintiff missed school on several occasions and avoided all participation in sports. *See id.* at 1085 (discussing fear of plaintiff caused by schoolmates).

146. *See id.* at 1090 (explaining allegations made by plaintiff).

147. *See id.* (illustrating that court found support for such allegations of abuse).

148. *Id.*

149. *See id.* at 1091-92 (showing reasoning for decision).

150. *See id.* (giving rise to new claim under Title IX by using Title VII precedents).

types, plaintiff has stated a cognizable claim under Title IX.”¹⁵¹ Other plaintiffs have successfully withstood summary judgment with similar claims, and it appears that a trend in gender-stereotyping discrimination is taking hold in the federal courts.¹⁵²

B. How this Precedent Could Help the NCAA’s Transgender Student-Athletes

A large part of the problem with some sex discrimination laws rests with the fact that gender and sex are treated separately from one another under current case law.¹⁵³ The concepts of masculinity and femininity form the gendered portion of the male and female sexes.¹⁵⁴ Current sex discrimination law, however, does not reflect the distinct meaning of these two interwoven ideas.¹⁵⁵ Instead, the law disaggregates gender from sex, separating the greater theory into two distinctly separate components and giving the perceived advantage to accepted societal notions of sex:

Antidiscrimination law is founded upon the idea that sex, conceived as biological difference, is prior to, less normative than, and more real than gender. Yet in every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.¹⁵⁶

151. *Id.* at 1092.

152. *See* *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (outlining holding of court and giving same reasoning as was handed down in *Montgomery* decision).

153. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2-3 (1995) (analyzing use of gender and sex in conjunction with antidiscrimination law); *see also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: the Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1-2 (1995) (“Contemporary sex discrimination jurisprudence accepts as one of its foundational premises the notion that sex and gender are two distinct aspects of human identity. That is, it assumes that the identities male and female are different from the characteristics masculine and feminine. Sex is regarded as a product of nature, while gender is understood as a function of culture. This disaggregation of sex from gender represents a central mistake of equality jurisprudence.”).

154. *See* Case, *supra* note 153, at 2-3 (showing relationship between masculine, feminine, male, and female).

155. *See* Franke, *supra* note 153, at 2-7 (describing current problem with sex discrimination law).

156. *Id.* at 2.

In forming antidiscrimination law, the two concepts should be considered together rather than ripped apart.¹⁵⁷ To achieve this balance, “[t]he targets of antidiscrimination law, therefore, should not be limited to the ‘gross, stereotyped distinctions between the sexes’ but should also include the social processes that construct and make coherent the categories male and female.”¹⁵⁸

As previously discussed, several courts have come to the conclusion that discrimination based on a plaintiff’s departure from traditional masculine and feminine stereotypes constitutes a cognizable cause of action under both Title VII and Title IX.¹⁵⁹ In doing so, these courts have relied upon Title VII case law to support sex discrimination claims.¹⁶⁰ This Title VII law specifically states that “gender-stereotyping” is classified as a type of sex discrimination and, consequently, is prohibited under the federal statute.¹⁶¹ Many courts have followed the Supreme Court’s lead in effectively applying Title VII precedent to Title IX discrimination claims.¹⁶² It follows then, that because courts have held Title VII bars gender stereotyping discrimination, Title IX does as well.¹⁶³ Should claimants be harassed for failure to maintain society’s conventional idea of masculinity and femininity, the educational institutions to which they belong may be liable.¹⁶⁴

This line of reasoning has the potential to be incredibly helpful to transgender athletes competing at an institution of higher

157. *See id.* at 98 (suggesting future improvements to sex discrimination law regarding gender concepts).

158. *Id.* at 3.

159. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (announcing that sex stereotype discrimination is actionable under Title VII); *see also* *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (giving similar holding to *Montgomery*); *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1091-93 (D. Minn. 2000) (reaffirming Title IX causes of action under holding in *Price Waterhouse*).

160. For a further discussion of this law, see *supra* notes 121-152 and accompanying text.

161. *See Price Waterhouse*, 490 U.S. at 251-53 (showing new type of Title VII sex discrimination).

162. For a further discussion of this law, see *supra* notes 121-152 and accompanying text.

163. *See Montgomery*, 109 F. Supp. 2d. at 1091-93 (restating claim that Title IX can apply to certain types of sex discrimination cases). For a further discussion of this law, see *supra* notes 121-152 and accompanying text.

164. *See Montgomery*, 109 F. Supp. 2d. at 1091-95 (denying summary judgment to school); *see also* *Pilgrim*, *supra* note 6, at 540-43 (suggesting potential claims arising out of Title IX).

education.¹⁶⁵ The term “transgender” specifically refers to individuals whose gender identity does not fit conventional gender norms.¹⁶⁶ In its decision in *Price Waterhouse*, the Supreme Court already concluded that it is sex discrimination to punish individuals for a lack of adherence to strict, conventional stereotypes associated with sex.¹⁶⁷ It appears that transgender athletes have a solid argument under previous case law.¹⁶⁸ Although a transgender athlete has yet to bring a sex discrimination case under Title IX, many courts already appear to be willing to extend the holding and reasoning of *Price Waterhouse* to Title IX sex discrimination cases.¹⁶⁹

Those colleges and institutions that are current members of the NCAA may be left open to sex discrimination suits, as they attempt to enforce the NCAA’s policies regarding transgender athletes.¹⁷⁰ As the policy states, member institutions must have their athletes compete as the gender that matches their state classification.¹⁷¹ During the eligibility certification process, it is recommended that programs use state-issued documentation, such as a driver’s license or voter registration card, to determine gender clas-

165. See Heckman, *supra* note 14, at 233 (“Title IX protects against such sex discrimination regardless if the individual is a heterosexual, homosexual, or even a transgender person.”).

166. See Pat Griffin, *Chalk Talk: Inclusion of Transgender Athletes on Sports Teams*, NCAA (July 30, 2009), <http://www.ncaa.org/wps/wcm/connect/0eece8804378fefd8bae7/NCAA+TSA+Issues+Resource.pdf?MOD=AJPERES&CACHEID=0eece8804378fefd8bae7> (explaining use of “[t]ransgender is an umbrella term that describes people whose gender identity or expression does not conform to prevailing social expectations”); see also TRANSGENDER RIGHTS, *supra* note 53, at 7-10 (describing ways transgender individuals defy conventional norms of sex).

167. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1988) (illustrating holding of Court). For a further discussion of this law, see *supra* notes 121-152 and accompanying text.

168. For a further discussion of this law, see *supra* notes 121-152 and accompanying text.

169. See *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005) (announcing similar ruling); see also *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1091-93 (D. Minn. 2000) (applying *Price Waterhouse* to Title IX).

170. See *Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, *supra* note 101, (outlining current policies of NCAA regarding transgender athletes); see also Buzuvis, *supra* note 118, at 23-25 (describing ways NCAA could be discriminating against transgender athletes).

171. See *Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, *supra* note 101, at 1-6 (differentiating between state and gender classifications).

sification.¹⁷² The implementation of this particular policy could create a discriminatory effect.¹⁷³

The procedures that allow people to legally change their gender on their state-issued identification vary from state to state.¹⁷⁴ Many states set forth different requirements, some of which are more difficult to achieve than others.¹⁷⁵ For example, in order to complete a simple name change, some states require a court-order name change.¹⁷⁶ In a few cases, courts have even required “a pre-operative transsexual to present evidence that he or she wanted to live permanently as a member of the opposite sex before the name change would be granted”¹⁷⁷ Additionally, the requirements for changing one’s birth certificate also vary among states.¹⁷⁸

In most states one must present an “original letter from a sex-reassignment surgeon” and a copy of the court order of a name change.¹⁷⁹ This practice is not uniform across all fifty states.¹⁸⁰ If athletes are unable to legally change their gender, they would be denied participation under their true gender identity.¹⁸¹ Because of the differing policies, athletes who are unable to get the

172. See *id.* at 2 (“NCAA recommends that institutions use the gender classification that student-athletes have from their state (driver’s license, taxes, voter registration, etc.) in the eligibility certification process.”).

173. See Buzuvis, *supra* note 118, at 23-25 (outlining how current NCAA policy discriminates against transgender competitors).

174. See NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE* 177-78 (4th ed. 2004) (describing how states have different requirements for name and identification change). For example, in New Jersey, if transgender individuals want to change their driver’s license, they must fill out a special form and have all medical information verified by a licensed physician. See *Declaration of Gender Designation Change for New Jersey Motor Vehicle Commission (MVC) Driver License or Identification Card*, NEW JERSEY MOTOR VEHICLE COMMISSION <http://www.state.nj.us/mvc/pdf/Licenses/genderchange.pdf> (last visited Sept. 20, 2011) (showing New Jersey gender change requirements). In Texas, however, changing your driver’s license for reasons other than marriage, divorce, or death of a spouse require a certified court order or amended birth certificate. See *Replace or Change a Driver License/ID Card*, TEX. DEPT. OF PUBLIC SAFETY, <http://www.txdps.state.tx.us/DriverLicense/changes.htm> (last visited Sept. 20, 2011) (describing different procedures required by Texas).

175. See HUNTER, *supra* note 174, at 178 (giving evidence of state variations).

176. See *id.* at 177 (showing how even to legally change one’s name, states require different substantive procedures).

177. *Id.*

178. See *id.* at 178 (summarizing few ways for transgender individuals to legally change one’s birth certificate).

179. See *id.* (solidifying differences between states for birth certificate changes).

180. See *id.* (recognizing that policies vary from state-to-state).

181. See *Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, *supra* note 101, at 1 (restating qualifications necessary for transgender team participation).

requisite identification change because of complicated state requirements will be denied team participation, unlike similarly situated transgender competitors who are able to overcome less strict state policies.¹⁸² This athlete would be left without further recourse and, unlike other athletes, would also be denied membership onto certain teams because of sex and nonconformity to accepted gender stereotypes.¹⁸³ As previously stated, under current case law, this type of discrimination could potentially be problematic for institutions of higher education.¹⁸⁴

Furthermore, the policies surrounding the championship-access rules may also be problematic.¹⁸⁵ The two policies for the men's and women's teams are different.¹⁸⁶ While a women's team with a transgender competitor becomes ineligible for the women's championship, the inclusion of a transgender athlete on a men's team has no real effect on its championship access.¹⁸⁷ Critics argue that it is important to keep this binary team dynamic in order to preserve the ethic of fair play.¹⁸⁸ This rule, however, may provide additional ammunition for transgender athletes in their Title IX sex discrimination claims against the NCAA's educational institutions.¹⁸⁹

182. See Buzuvis, *supra* note 118, at 24 ("To obtain the same change, some states require a court order, while others require an applicant to provide an amended birth certificate—a prerequisite that itself requires evidence of sex reassignment surgery in the forty-seven states that will issue them. This patchwork of state laws creates the possibility that an NCAA member institution could—consistent with NCAA policy—field a women's team that includes an athlete from Massachusetts who identifies as female but has not undergone sex reassignment surgery, but not a similarly-situated athlete from Rhode Island.").

183. See *id.* at 23-24 (discussing possible disparate treatment of athletes in similar situations).

184. See *supra* notes 121-152 and accompanying text for further discussion on impacts to colleges and universities.

185. See *Current NCAA Position Regarding Transgender Student-Athlete Participation and Resource List*, *supra* note 101, at 1 (rearticulating qualifications required for championship team access).

186. See *id.* (showing qualifications).

187. See *id.* (providing different rules for women's championship team access).

188. See Peterson, *supra* note 56, at 329-31 (defining concept of fair play and possible challenges); see also Pilgrim, *supra* note 6, at 533 ("Spectators wedded to a heightened ideal of competitive integrity might also denounce such integration, their argument being that inclusion would detract from competition and the 'purenness' of sport.").

189. See Buzuvis, *supra* note 118, at 23-26 (explaining policies regarding NCAA transgender athletes that athletes may have claims against).

V. CONCLUSION: LOOKING AHEAD

Although this theory has yet to be tested in this context, the combination of Title VII and Title IX case law provides a potential remedy to transgender student-athletes.¹⁹⁰ Colleges and universities that are members of the NCAA may find themselves embroiled in sex discrimination lawsuits after attempting to institute the organization's policies.¹⁹¹ Currently, there are no statistics recording the number of transgender competitors; however, these educational institutions may be liable for several sex discrimination suits depending on the amount of athletes that come forward.¹⁹² Should the NCAA decide to reevaluate its policy, it needs to consider aspects of law, science, as well as education in order to provide transgender competitors with a thorough, non-discriminatory policy.¹⁹³ Such a policy would reflect the current trend of inclusion already adopted by many athletic associations.¹⁹⁴ Perhaps only then will transgender student-athletes have no need of Title IX sex discrimination claims against institutions of higher education.¹⁹⁵

*Jennifer V. Sinisi**

190. For a further discussion of this law, see *supra* notes 153-189 and accompanying text.

191. For a further discussion of this law, see *supra* notes 153-189 and accompanying text.

192. Dr. Pat Griffin et al., *NCAA Inclusion of Transgender Student-Athletes*, NCAA OFFICE OF INCLUSION (Aug. 2011), http://www.ncaa.org/wps/wcm/connect/fd9a78804841ff93953f9bf5e8bc9cc/Transgender_Handbook_2011_Final.pdf?MOD=AJPERES&CACHEID=fd9a78804841ff93953f9bf5e8bc9cc (stating number of transgender youths is small but increasingly more recognized).

193. See Buzuvis, *supra* note 118, at 56-58 (recognizing value of three foundational elements for new inclusion policies).

194. For a further discussion of some of the most inclusive policies, see *supra* notes 68-94 and accompanying text.

195. See Buzuvis, *supra* note 118, at 56-59 (highlighting importance of any new policies and possible effects on athletes).

* J.D. Candidate, May 2012, Villanova University School of Law; B.A., Connecticut College, 2009.

