HE’S THE WOMAN: CALLING FOR DISSOLUTION OF DISCRIMINATORY POLICIES IN HIGH SCHOOL ATHLETIC ASSOCIATIONS UNDER THE ADA

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ABSTRACT

Across the country, high school athletic associations have policies in place that address how to accommodate transgender athletes in sports. Many of these policies require male-to-female (MTF) athletes to undergo hormone therapy in order to compete on female teams. Such policies facially violate Title IX of the Education Amendments of 1974 and the disabilities acts concerning education. However, given the nature of the high school athletic associations and the ambiguity of the term “sex,” it is uncertain if all of these statutes will apply to the MTF student–athlete’s situation.

Although Title IX protects individuals from discrimination based on sex, it is undecided whether a transgender individual would even fall under its protections. This leaves MTF athletes to rely on the disabilities acts for protection. However, the nature of high school athletic associations as nonprofit organizations disqualifies IDEA and § 504 of the Rehabilitation Act as potential courses of action, causing MTF

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athletes to turn to the Americans with Disabilities Act to seek justice against discrimination.

Although the ADA expressly excludes transvestites from its scope, this exclusion becomes superficial in light of the legislative history of the ADA and new knowledge about what causes Gender Dysphoria. Following the framework set out by the ADA, high school athletic associations must implement Transgender Participation Policies that allow MTF athletes to compete on girls’ teams with as few barriers to play as possible or, alternatively, adopt a new structure of play that eliminates discrimination in sports based on sex.

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INTRODUCTION

On May 27, 2016, a high school senior competed in the final high school track meet of her career.\(^1\) It was the State Track and Field Meet at Dimond Alumni Field in Anchorage, and after a season of tough competition, only the best remained.\(^2\) The meet would make the papers, of course, but the press coverage would be national, promulgating a mixed bag of accolades and dissension.\(^3\)

The reason for the attention was not because a star athlete set a world record, or an underdog team stole a victory out from under the favored rival’s nose.\(^4\) Instead, it was bolstered by the participation of the high school senior discussed above. The athlete, Nattaphon Wangyot, was born male, though identifies with and represents herself as the female sex.\(^5\) Her athletic career at Haines High School started her senior year, where she participated in volleyball, basketball, and track.\(^6\) It culminated in the finals of the women’s 100M and 200M sprints at the state championship meet, where she finished respectably in fifth and third place.\(^7\) However, her participation in the race was not without conflict; a community

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3. See Rohrbach, supra note 1; see also Bragg, supra note 2; Ernst, supra note 1; Transgender Track Star Stirs Controversy Competing In Alaska’s Girls’ State Meet Championships, CBS N.Y. (June 8, 2016, 3:40 PM), http://newyork.cbslocal.com/2016/06/08/transgender-nattaphon-wangyot-alaska-track [https://perma.cc/862N-HHCN].

4. See Bragg, supra note 2.

5. See Rohrbach, supra note 1.

6. Id.

7. Id.
action group, Alaska Family Action, held a press conference objecting to her presence as a female athlete.8

Wangyot’s story brings to light a unique struggle of the twenty-first century—the difficulties transgender high school athletes face when trying to compete with their identifying gender.9 Although her final race stirred up some dissent, Wangyot is one of the lucky athletes whose school district allows her to compete on teams with her self-identifying gender.10 Alaska, the state where Wangyot lives, gives its school districts the discretion to enact their own policies concerning transgender student–athletes.11 Other states, however, do not grant their transgender student–athletes the same opportunities or, if they do, they erect stringent standards for those wishing to compete with their identifying sex.12

Given the recent emergence of transgender individuals in high school sports, high school athletic associations do not have much guidance when constructing policies to accommodate these athletes.13 However, when policies do emerge, they must be scrutinized to ensure male-to-female (MTF) athletes are allowed to play on girls’ teams without suffering any undue hardships.14 If a policy requires the MTF student–athlete to undergo hormone therapy in order to compete, then it violates her statutory rights under the Americans with Disabilities Act (ADA) by failing to accommodate her Gender Dysphoria.15

While the student–athlete could bring a claim under Title IX or an alternative disabilities act, the ADA best protects her rights as its clout is not contingent on the whims of a jurisdiction16 or a federal funding requirement.17 Although the ADA expressly excludes

9. Id.
10. Id.
11. Id.
12. See infra Section II.A.
14. See infra Part III.
15. See infra Section III.D.
16. See infra Section III.A (explaining the problems of bringing a claim under Title IX).
17. See infra Section III.B (explaining why it is difficult to bring a claim under IDEA or the Rehabilitation Act of 1973).
“transvestites” and those suffering from non-physical gender disorders, the legislative history, text of the Act itself, and recent medical breakthroughs cast doubt on whether this exclusionary provision should even still exist. Given that the diagnosis for Gender Dysphoria focuses on persistent and clinically significant distress, as opposed to the manifestation of amoral behaviors, high school athletic associations must enact policies that enable MTF athletes to play on teams with those of their gender identity with as few barriers as possible.

Part I of this Comment provides an overview of Gender Dysphoria and the relevant statutes that protect transgender individuals. Following this overview, Part II delves into the athletic association policies that attempt to reconcile concerns about fairness and opportunity for transgender athletes in sports. Finally, Part III proposes a new standard for athletic associations to impose in order to protect transgendered students’ civil liberties.

I. TRANSGENDER INDIVIDUALS AND THE LAW

Confronted with discrimination, transgender high school athletes have a variety of avenues for justice under United States law. Assuming that gender identity is analogous to sex, Title IX of

18. See infra Section III.C.
19. See infra Section III.E (suggesting two policies athletic associations can enact to comply with the ADA).
20. See infra Part I.
21. See infra Part II.
22. See infra Part III.
the Education Amendments of 1972 affords transgender student-athletes a wide breadth of protection by combatting sex discrimination in both schools and school athletics. In addition to Title IX, transgender student-athletes suffering from Gender Dysphoria can receive protection under the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act of 1973, and the Americans with Disabilities Act. While the scope of each statute differs, the ADA provides the broadest protection for disabled individuals by helping them gain access to all programs run by the federal government, regardless of whether the program receives financial assistance. Although the ADA expressly excludes transvestites and individuals suffering from gender identity disorders from its scope, the Act’s legislative history and case law cast doubt on how much longer that exclusion will continue.

A. Transgender in Relation to Sex

Beginning with the Civil Rights Act in 1964, the second half of the twentieth century produced substantial legislation advocating for the prevention and dissipation of discrimination. The Civil Rights Act of 1964 began a wave of social change, barring the discrimination of individuals on the basis of race, religion, or national origin. Approximately eight years later, Title IX of the Education Amendments of 1972 expanded on these themes by combatting sex discrimination in the educational forum.

25. See 20 U.S.C. § 1681(a) (2012) (“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[.]”).

26. See 34 C.F.R. § 106.41 (2016) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of . . . any interscholastic, intercollegiate, club or intramural athletics offered by a [federal funds] recipient.”).

27. See infra Section I.A.

28. See infra Section I.B.

29. See infra Section I.C.

30. See infra Subsection I.C.3.


32. See infra Subsections I.C.4-5.


Under Title IX, educational programs and activities receiving federal assistance are expressly forbidden from excluding individuals based on sex. While some exceptions to its scope apply, Title IX’s coverage extends beyond strictly educational forums to encompass athletics as well. This extension to athletics serves to foster more female participation in sports, and the statute’s implementing regulations allow athletic associations to establish separate teams for men and women in competitive and contact sports. Although this separation allows for more overall participation in sports, it leaves

37. For example, Title IX does not apply to certain religious institutions, fraternities, or scholarship awards in beauty pageants. See § 1681(a)(3), (6), (9).
38. See 34 C.F.R. § 106.41 (2016) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of . . . any interscholastic, intercollegiate, club or intramural athletics offered by a [federal funds] recipient[].") In 1988, Congress passed the Civil Rights Restoration Act of 1987, which broadened the scope of Title IX to cover athletic departments. See Title IX Legislative Chronology, WOMEN’S SPORTS FOUND. (Sept. 13, 2011), https://www.womenssportsfoundation.org/advocate/title-ix-issues/history-title-ix/history-title-ix/ [https://perma.cc/6CFR-GVQA] ("If any program or activity in an educational institution receives federal funds, all of the institution’s programs and activities must comply with Title IX."); see also Requirements Under Title IX of the Education Amendments of 1972, U.S. DEP’T EDUC. OFF. C.R., https://www2.ed.gov/about/offices/list/ocr/docs/interath.html [https://perma.cc/WR4Q-SJK7] (last visited Nov. 6, 2017) (noting that “[a]thletics are considered an integral part of an institution[] . . . and are therefore covered by [Title IX]").
39. 34 C.F.R. § 106.41 (2016). Title IX was designed to give male and female students equal access to athletic opportunities. See id. § 106.41(c) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”); see also Erin E. Buzuvis, Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletes, 21 SETON HALL J. SPORTS & ENT. L. 1, 6 n.19 (stating that § 106.41(c) may serve as an encouragement for schools to create more teams for female athletes); Requirements Under Title IX of the Education Amendments of 1972, supra note 38 (“The athletic interests and abilities of male and female students must be equally and effectively accommodated.”).
40. § 106.41(b). In addition, if there is no congruent team available for a sport, the entity must allow the disadvantaged sex to try out for the established team. Id. For example, if a school sponsors a boys’ golf team, but not a girls’, a female athlete wishing to play golf must be allowed to try out for the team. See id. That being said, this provision is limited to noncontact sports and can only be overruled at the discretion of the schools or the courts. See Darrin v. Gould, 540 P.2d 882, 893 (Wash. 1975) (en banc) (holding that the Washington athletic association cannot bar girls from competing on a boys’ football team); see also Buzuvis, supra note 39, at 6 n.23 (acknowledging schools allowing female athletes to play on male teams for contact sports).
athletic opportunities for transgender students in limbo as schools and athletic associations struggle to determine the meaning of sex.41

Title IX is free of any definition of sex.42 Furthermore, the Congressional record is void of any reference to what the term means.43 This silence has led the term to be interpreted by the courts and executive agents.44 Through these avenues, sex has come to mean either anatomical sex45 or, more recently, gender identity.46 In 2015, in response to an inquiry concerning transgender bathroom use in schools, James Ferg-Cadima47 of the Office for Civil Rights produced an informal letter that adopted gender identity as an alternate definition of sex.48 This letter served as the basis for the Fourth Circuit decision in Gloucester County School Board v. G.G., which relied on judicially prescribed deference49 to rule in favor of the transgender plaintiff.50

41. See Bragg, supra note 2 (discussing how schools in Alaska have chosen to accommodate transgender athletes); see also Pat Griffin, Developing Policies for Transgender Students on High School Teams, NAT’L FED’N ST. HIGH SCH. ASS’NS (Sept. 8, 2015), https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/ [https://perma.cc/2X4J-JWA8] (acknowledging the budding issue of accommodating the transgender athlete in high school athletics).


44. Id. at 26-35 (discussing how court decisions regarding Title IX have relied on physiological differences between the sexes).

45. At the time Title IX was passed, contemporary dictionaries interpreted sex to mean physiological sex only. Id. at 21.

46. See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720 (4th Cir. 2016) (discussing how the term “sex” should be determined under Title IX).

47. Ferg-Cadima was acting deputy assistant secretary for policy at the Office for Civil Rights. See Walsh, supra note 24.

48. Id. The employee interpreted 34 C.F.R. § 106.33 to mean that schools are allowed to provide separate bathrooms, but must allow students to use the facility consistent with their gender identity. See Petition for Writ of Certiorari at 123a, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (No. 15-2056). In Ferg-Cadima’s letter, he cites a FAQ sheet on the Department of Education’s website as justification for his interpretation that the term “sex” encompasses gender identity. See id. at 121a, 121a n.1.

49. Auer v. Robbins, 519 U.S. 452 (1997). Under Auer, the court gives deference to administrative interpretations of ambiguous provisions of a statute, unless the interpretations are plainly erroneous. See id. at 461.

50. G.G., 822 F.3d at 723 (holding that “sex” means gender identity). In G.G., a transgender male student brought a claim under Title IX against his school district for not permitting him to use the boys’ restroom. See id. at 715.
Following the Fourth Circuit’s ruling, the Department of Education and Department of Justice issued a “Dear Colleague” letter\(^\RN{51}\) stating that schools are required to treat transgender students consistent with students of the sex they identify with under Title IX.\(^\RN{52}\) Drawing on the Department of Education’s Regulation 106.6(b) and (c),\(^\RN{53}\) the “Dear Colleague” letter extended the definition of gender identity as sex to school-sponsored athletic teams.\(^\RN{54}\) However, the provision in the “Dear Colleague” letter conceded that Title IX allows athletic associations to impose requirements they see fit to preserve the competitive nature of the sport.\(^\RN{55}\)

While the “Dear Colleague” letter offered schools guidance about how to accommodate transgender students under Title IX, its

\begin{itemize}
  \item A “Dear Colleague” Letter is a directive issued by the Department of Education to guide schools in policy making decisions. See Naomi Shatz, States Sue Federal Government over Prohibitions on Discrimination Based on Gender Identity, BOS. LAW. BLOG (May 26, 2016), http://www.bostonlawyerblog.com/2016/05/26/states-sue-federal-government-prohibitions-discrimination-based-gender-identity/ [https://perma.cc/E7RK-99JH]. Although without the force of law of federal regulations, the Department of Education can take measures to punish those that do not comply with its interpretations. Id.
  \item In response to the transgender “Dear Colleague” letter, many states brought suit, challenging the enforcement of its contents. Id.; see also Emma Brown & Moriah Balingit, Federal Judge Temporarily Halts Obama’s Directive to Schools on Accommodating Transgender Students, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/news/education/wp/2016/08/22/federal-judge-temporarily-halts-obamas-directive-to-schools-on-accommodating-transgender-students/?utm_term=.393b8e551f41 [https://perma.cc/W8B6-QJUD]. Underlying these lawsuits is the notion that the executive branch is overstepping its bounds by continually relying on “Dear Colleague Letters” to enforce laws, as opposed to going through the notice and rulemaking process. See Brown & Balingit, supra; see also Shatz, supra (noting that lawmakers and activists have started “raising concerns about whether the DOE is issuing regulations or guidance without following the requirements of the Administrative Procedure Act”).
  \item See Petition for Writ of Certiorari at 129a, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (No. 15-2056) (“The Departments [of Justice and Education] treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.”).
  \item See id. at 135a n.17 (citing 34 C.F.R. § 106.6(b), (c) (2016)) (“An interscholastic athletic association is subject to Title IX if (1) the association receives Federal financial assistance or (2) its members are recipients of Federal financial assistance and have ceded controlling authority over portions of their athletic program to the association.”).
  \item Id. at 135a.
  \item Id. While the “Dear Colleague Letter” prohibits discrimination in athletics based on overly broad generalization of the sexes, it acknowledges that if there is “sound, current, and research-based medical knowledge,” participation restrictions can be imposed on transgender athletes. Id.
\end{itemize}
effects were hotly contested and its legacy short lived. With the onset of the Trump administration, both “Dear Colleague” letters were rescinded, returning the power to execute Title IX and determine the meaning of sex to local governments and schools. The Supreme Court, which had granted certiorari on *Gloucester County School Board v. G.G.* to decide whether “Dear Colleague” letters set forth a binding interpretation of sex, conceded this reallocation of discretion. In March 2017, the Court declined to exercise its judgment as to the proper meaning of sex under Title IX and remanded the case to the Fourth Circuit for mootness. With this decision, the Supreme Court returned the interpretation of sex to the discretion of state and local governments, rendered case law relying

56. In response to the transgender “Dear Colleague” letter, many states brought suit, challenging the enforcement of its contents. *Id.* at 15-16. Underlying these lawsuits is the notion that the executive branch is overstepping its bounds by continually relying on “Dear Colleague Letters” to enforce laws, as opposed to going through the notice and rulemaking process. See *Brown & Balingit, supra* note 51; see also *Shatz, supra* note 51 (noting that lawmakers and activists have started “raising concerns about whether the DOE is issuing regulations or guidance without following the requirements of the Administrative Procedure Act”).


60. *Id.*
on the “Dear Colleague” letters void, and ultimately left the status of transgender individuals under Title IX up in the air.

B. Transgender as a Disability

Although it is now ambiguous whether a transgender individual has a right to be free from discrimination based on sex, she should be protected from discrimination based on disability if she has been diagnosed with an affliction set out in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Until the publication of its revised edition in 2013, the DSM considered transgender individuals as having Gender Identity Disorder. Under DSM-III-R

61. See Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 299-300 (W.D. Pa. 2017) (acknowledging that Auer deference can no longer be used to interpret the meaning of sex). Prior to the rescission of the letters, a number of courts had followed the example set forth in G.G. and used Auer deference to adopt the Department of Education’s interpretation of sex under Title IX. See Carcano, 203 F. Supp. 3d at 639; Highland Local Sch. Dist., 208 F. Supp. 3d at 865-70.

62. Barnes, supra note 59; see also Evancho, 237 F. Supp. 3d at 298-302 (discussing the uncertain state of Title IX law following the rescission of the “Dear Colleague” letters); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047-48 (7th Cir. 2017) (allowing a transgender plaintiff to proceed under Title IX on the theory of sex stereotyping).


66. Under DSM-III-R, transgender individuals could be diagnosed with one of two disorders. To be diagnosed with the first condition, Transsexualism, the following criteria had to be met:

1. A. Persistent discomfort and sense of inappropriateness about one’s assigned sex.
2. B. Persistent preoccupation of at least 2 years with getting rid of one’s primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.
3. C. The person has reached puberty.
and DSM IV-TR, the Gender Identity Disorder diagnosis derived from an individual’s actions regarding her gender, focusing on behaviors that broke gender norms. However, with the publication of the fifth edition of the DSM, the diagnostic focus shifted. Instead of reaching a diagnosis based on the objective manifestations of a transgender individual, doctors must render a diagnosis based on the individual’s subjective discontent with his or her personal incongruence between natal sex and recognized gender. Under DSM-V, transgendered individuals are now diagnosed with Gender Dysphoria.

Peggy T. Cohen-Kettenis & Friedemann Pfäfflin, The DSM Diagnostic Criteria for Gender Identity Disorder in Adolescents and Adults, 39 ARCHIVES SEXUAL BEHAV. 499, app. 1 (2010), https://link.springer.com/article/10.1007/s10508-009-9562-y?no-access=true [https://perma.cc/Q44R-HM64]. Furthermore, a person could be diagnosed with Gender Identity Disorder of Adolescence or Adulthood Nontranssexual Type if they had:

1. A. Persistent or recurrent discomfort and sense of inappropriateness about one’s assigned sex.
2. B. Persistent or recurrent cross-dressing in the role of the other sex, either in fantasy or actuality, but not for the purpose of sexual excitement (as in Transvestic Fetishism).
3. C. No persistent preoccupation (for at least 2 years) with getting rid of one’s primary and secondary sex characteristics and acquiring the sex characteristics of the other sex (as in Transsexualism).
4. D. The person has reached puberty.

Id.

Under the DSM-IV-TR, the following diagnostic criteria had to be met for an individual to be diagnosed with Gender Identity Disorder:

A. A strong and persistent cross-gender identification. . .
B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
C. The disturbance is not concurrent with a physical intersex condition.
D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.


Id.

Natal sex, as used in this paper, is defined as the sex that one is born with. For example, an individual born with XY chromosomes and male genitalia would have the natal sex of male. Recognized gender means the sex that an individual identifies with.


See id.
By definition, Gender Dysphoria is the experience of persistent, clinically significant distress about one’s anatomic or assigned gender role. This definition, adopted in DSM-V, is a dramatic departure from what had been the long running standard for a mental disorder diagnosis in transgender individuals. However, with this adoption, the American Psychiatric Association has turned the scope of the diagnosis away from the objective manifestation of traits unaligned with one’s natal sex and instead focuses on criteria similar to many other mental disorder diagnoses—extreme mental distress.

To be diagnosed with Gender Dysphoria as an adolescent, an individual must manifest a subjective belief for a period of six months or more that her assigned gender is incongruent with her expressed gender. In addition, that individual must feel clinically significant distress or impairment in social, occupational, or other

72. See id. at 453.

73. See DSM-IV-TR, supra note 67 (giving the criteria for an individual to be diagnosed with Gender Identity Disorder).

74. See DSM-V, supra note 70, at 452-53; see also Kevin M. Barry et al., A Bare Desire to Harm: Transgender People and the Equal Protection Clause, 57 B.C. L. REV. 507, 519 (2016) (“Under the DSM-5, dysphoria, rather than incongruence, is the problem in need of treatment.”); Howard H. Goldman & Gerald N. Grob, Defining ‘Mental Illness’ in Mental Health Policy, 25 HEALTH AFF. 737, 738 (2006) (defining mental disorder as “alterations in thinking, mood, or behavior . . . associated with distress and/or impaired functioning”); Catharina Schneider et al., Measuring Gender Dysphoria: A Multicenter Examination and Comparison of the Utrecht Gender Dysphoria Scale and the Gender Identify/Gender Dysphoria Questionnaire for Adolescents and Adults, 45 ARCHIVES SEXUAL BEHAV. 551, 551-52 (2016) (noting the shift from identity-based diagnosis to distress based diagnosis).

75. Adolescence generally begins around ages 13-15 and finishes when the brain has fully developed and bone growth ceases. Ira Haraldsen et al., Recommendations for Revision of the DSM Diagnosis of Gender Identity Disorder in Adolescents, 12 INT’L J. TRANSGENDERISM 75, 76-77 (2010) http://dx.doi.org/10.1080/15532739.2010.509201 [https://perma.cc/2ELP-EG22]. Although DSM-V has two separate diagnostic criteria, one set addressing Gender Dysphoria in Children, and the other Gender Dysphoria in Adolescents and Adults, this paper will focus exclusively on the latter. The full criteria concerning both can be found in the DSM-V. See DSM-V, supra note 70, 452-53.

76. See DSM-V, supra note 70, at 452. This incongruence can be established by having a strong desire to be or be treated like the other gender. Id. In addition, it can be found by an individual wanting to rid himself of his natal secondary sex characteristics, desiring the have the other sex’s genitalia, or having the conviction that he has the typical feelings or reactions of the other gender. Id.
areas of functioning. This could mean she struggles to focus in school or experiences extreme discomfort speaking with her peers. Due to these broad, general criteria of what constitutes Gender Dysphoria in adolescents, a wide range of individuals are now covered by the DSM-V provision.

Once diagnosed, a physician can work with the adolescent to develop an appropriate treatment plan. Suggested treatment options include social gender role transition, mental health care, hormone therapy, or sexual reassignment surgery. A combination of these treatment options can be employed to fight Gender Dysphoria most

78. See id. at 453.
79. See id. at 453.
80. See id. at 452. For example, a transgender female teenager can be diagnosed with Gender Dysphoria if she has been teased about her outward manifestation of gender to the extent that she develops anxiety. See id. at 455; see also Erin Buzuvis, Including Transgender Athletes in Sex-Segregated Sport, in SEXUAL ORIENTATION AND GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS 23, 24 (2012), http://ssrn.com/abstract=2149799 [hereinafter Including Transgender] (providing the example of Jaime, a transgender girl who wants to play soccer with her friends, but decides against it due to fear of being teased for her gender). This diagnosis would have withstood the standards for Gender Identity Disorder in DSM-IV-TR. See DSM-IV-TR, supra note 67. However, this would not have been the case for the mental disorder diagnosis for a teenage natal boy who experiences extreme depression because he is fully aware that he is supposed to be female. See DSM-V, supra note 70, at 454.
81. See DSM-V, supra note 70, at 453; see also Kevan Wylie, Kate Eden, & Emily Watson, Gender Dysphoria: Treatment and Outcomes, 18 ADVANCES PSYCHIATRIC TREATMENT 12, 15 (2012), http://apt.rcpsych.org/content/aptrepsych/18/1/12.full.pdf [hereinafter including Transgender] (“The specialist and patient should agree [on] goals for treatment once a diagnosis of gender dysphoria is made.”).
82. Social gender role transition is defined as living a life consistent with one’s gender identity. See Gender Dysphoria – Treatment, NAT’L HEALTH SERV. (Dec. 4, 2016), http://www.nhs.uk/Conditions/Gender-dysphoria/Pages/Treatment.aspx [hereinafter including Transgender].
83. Prior to hormone therapy, transgender individuals must have extensive conversations with their doctors about the extent of the treatment and possible side effects. See John Steever, Cross-Gender Hormone Therapy in Adolescents, 43 PEDIATRIC ANNALS e138, e139 (2014). While many treatments have the effect of soothing Gender Dysphoria, there remains the possibility of health related consequences to treatment. Id. at e138-39. For example, the use of GnRH (a puberty suppressing drug) has been known to lead to bone mineral density loss, and estrogen therapy can also increase the chance of thrombotic events. Id. at e143. Given the increased risk of thrombotic events, a doctor may be wary to prescribe feminizing hormones to some individuals. Id.
84. See Wylie, supra note 81, at 12 (providing an overview of treatment options).
effectively, though doctors are careful in prescribing hormone therapy to patients due to its potential health effects and cost. However, underlying all of these treatment options is the notion that the individual must be accepted for who he or she is.

Without proper support or treatment, Gender Dysphoria can amplify and cause further social distress. Consequences of untreated Gender Dysphoria include problems creating and sustaining relationships, difficulty performing in school, and negative self-conception. In extreme cases, it can even lead to self-harm, suicidality, and suicide. Although many aggravating factors, like stigmatization and discrimination, are outside of the control of the treating physician and patient, treatment of the mental discontent and efforts to raise the patient’s self-esteem can circumvent more dire consequences. Furthermore, outside factors, such as discrimination and stigmatization, can be diminished through advocacy, public policies, and acts of the legislature. In particular,

85. See id.
86. See Steever, supra note 83, at e141.
87. See Wylie, supra note 81, at 12. (“The general goal of treatment in gender identity disorder is to allow the individual to find lasting comfort with their gendered self, thus maximising their overall psychological well-being and self-fulfilment.”).
88. See DSM-V, supra note 70, at 455; see also Madison Aitken et al., Self-Harm and Suicidality in Children Referred for Gender Dysphoria, 55 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 513, 513 (2016).
89. See DSM-V, supra note 70, at 457-58.
90. Suicidality refers to thoughts and behaviors of suicide. See Aitken, supra note 88, at 513.
91. See id.
92. See DSM-V, supra note 70, at 458 (discussing the functional consequences of Gender Dysphoria); see also Wylie, supra note 81, at 12-13 (discussing the positive effects of therapy on the patient).
Congress has three statutes in place that combat discrimination based on disability and therefore should work to mitigate the negative experiences of those suffering from Gender Dysphoria.95

C. Protections Under the Disabilities Acts

To be clear, not all transgender individuals suffer from Gender Dysphoria.96 However, for the transgender students that are afflicted with it and want to be protected from discrimination based on it, there are three possible courses of action.97 They can use a procedural safeguard guaranteed by the Individuals with Disabilities Education Act to ensure reasonable accommodations for their disability.98 In addition, the transgender student can bring a claim

disability). However, some states have implemented their own policies to combat discrimination based on gender. See, e.g., MASS. GEN. LAWS ch. 76, § 5 (2012) (stating that an individual may not be barred from educational advantages based on gender identity).


96. See Barry, supra note 63, at 11 (discussing how some people in the transgender community resist the Gender Identity Disorder diagnosis). While some members of the transgender community shy away from being labeled as disabled, others recognize that being a protected class can lead to acceptance in a community. See Adrienne L. Hiegel, Sexual Exclusions: The Americans with Disabilities Act as a Moral Code, 94 COLUM. L. REV. 1451, 1479-80 (1994) (denoting the ADA as a way to call for inclusion of sexual and social outsiders).


under § 504 of the Rehabilitation Act of 1973\textsuperscript{99} or the Americans with Disabilities Act of 1990.\textsuperscript{100} All of the above statutes serve to protect individuals with disabilities; however, the reach of each varies depending on who is bringing the claim and the nature of the discriminating entity.\textsuperscript{101}

1. **Individuals with Disabilities Education Act**

Limited in scope to claims brought by certain disabled individuals against school districts receiving federal funds,\textsuperscript{102} the Individuals with Disabilities Education Act offers the narrowest protection of the three statutes.\textsuperscript{103} In general, IDEA provides public schools with federal funding to educate and accommodate children with disabilities.\textsuperscript{104} Schools are authorized to use the funds they receive to formulate an Individualized Education Program (IEP) for

\textsuperscript{99} See 29 U.S.C. § 794 (expressly forbidding entities receiving federal funding from excluding qualified handicapped individuals from participating in its activities or programs).

\textsuperscript{100} See 42 U.S.C. § 12101(b)(2) (asserting that the purpose of the Act is to provide enforceable standards to fight discrimination against individuals with disabilities).

\textsuperscript{101} See DREDF, supra note 95 (comparing who can bring claims under each statute).

\textsuperscript{102} See generally 20 U.S.C. §§ 1400(d)(1)(A)-(C), 1401(3), (9) (discussion who can bring claims against federal recipients of funds).

\textsuperscript{103} See DREDF, supra note 95 (detailing who is covered by IDEA and the scope of the protection).

\textsuperscript{104} See 20 U.S.C. §§ 1400-1482 (2012). Under the Education for All Handicapped Children Act of 1975 (EHA), an older version of IDEA, Congress established six guaranteed rights for handicapped children in relation to schools. See Special Education Public Policy, PROJECTIDEAL, http://www.projectidealonline.org/v/special-education-public-policy/ [https://perma.cc/VP2B-Z7GD] (last visited Nov. 6, 2017). Under EHA, handicapped children were assured a free appropriate education program, the least restrictive environment, an individualized education program, procedural due process, nondiscriminatory assessment, and parental participation in decision-making that impacted the child’s education. Id.; see also Education of the Handicapped Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as 20 U.S.C. §§ 1400-1411) (2012)) (“It is the purpose of this Act to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.”).
each qualified child with a disability. This includes a joint effort by parents, schools, and the student to set out what reasonable accommodations need to be made to enable the student to receive a proper education. Failure to implement a satisfactory IEP leaves students and their parents with a right to take action, as established by IDEA’s procedural safeguards. If a school fails to implement a satisfactory IEP, parents can meet with the school to reevaluate the program. If the parties fail to agree on the best route for educating the disabled child, parents can elect to undergo mediation with the school or take judicial action. However, these safeguards are only available against schools that receive federal funding.

105. See 20 U.S.C. § 1411(e)(2)(C) (describing how states can use their funds under IDEA). Under IDEA, schools receiving federal funds are required to create an individualized education program (IEP) for each disabled student. See id. § 1414(a)(1)(A). An IEP is a plan tailored to fit the disabled student’s needs that also details necessary accommodations that need to be made to advance the student’s education. See id. § 1414(d)(1)(A)(i). These IEPs are not only required to detail program modifications that help the student achieve educational goals, but also to help the student participate in extracurricular activities. See Indep. Sch. Dist. No. 12, Centennial v. Minnesota Dep’t of Educ., 788 N.W.2d 907, 915 (Minn. 2010) (holding that extracurricular activities that are included in an IEP are “not limited to those activities required to educate the disabled child”).

106. See § 1414(d)(1)(A)(i)(VI)(aa) (requiring an IEP to contain “a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child”). Both the State and local educational agencies that receive federal funds are required to use the funds to accommodate the needs of the disabled child. See generally id. § 1411(a)(1) (describing how states can use their federal funds). A local educational agency refers to a public board of education or an organization with administrative control over public elementary schools or secondary schools. Id. § 1401(19)(A). A State educational agency refers to the State board of education or other State entity responsible for State supervision of public schools. Id. § 1401(32).

107. See generally § 1415(a) (“Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.”).


109. Id. An individual can file either a State complaint, relying on State statutes, or a due process complaint against the school if it fails to comply with IDEA’s eligibility requirements for receiving funding. Id.; see also Five Options, 1-2-3, supra note 98 (describing guaranteed procedural safeguards for parents and students).

In addition, the procedural safeguards extend only to those covered by the statute.\textsuperscript{111} The Individuals with Disabilities Education Act broadly states that it covers “children with disabilities.”\textsuperscript{112} However, it limits this coverage to apply only to ten possible categories of disability.\textsuperscript{113} Although the reach of the statute goes beyond what facially appears in its “Definitions” section,\textsuperscript{114} if an individual has a disability that does not fall under a specified category of IDEA, she must assert her rights against discrimination under a different statute, such as the Rehabilitation Act of 1973.\textsuperscript{115}

\section*{2. Rehabilitation Act of 1973}

Although it contains similar fundamentals as IDEA, the Rehabilitation Act of 1973 applies to a broader range of individuals.\textsuperscript{116} Specifically, § 504 of the Rehabilitation Act protects

\begin{itemize}
\item \textsuperscript{111} See 20 U.S.C. § 1400(d)(1)(B) (stating that the purpose of the statute is to “ensure that the rights of children with disabilities” and their parents are protected).
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Under § 1401(3)(A)(i) of IDEA, a child with a disability means “a child . . . with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.”
\item \textsuperscript{114} Although IDEA covers only ten categories of disability, federal regulations further defined some disabilities to encompass more afflictions. \textit{See, e.g.}, 34 C.F.R. § 300.8(c) (2017). For example, the Department of Education has promulgated a regulation that defines emotional disturbance as a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:
\begin{itemize}
\item An inability to learn that cannot be explained by intellectual, sensory, or health factors.
\item An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
\item Inappropriate types of behavior or feelings under normal circumstances.
\item A general pervasive mood of unhappiness or depression.
\item A tendency to develop physical symptoms or fears associated with personal or school problems.
\end{itemize}
\textit{Id.}
\item \textsuperscript{116} See 29 U.S.C. § 12101 (stating that the Act affords protection to any qualified person with a disability).
\end{itemize}
the rights of qualified disabled individuals\footnote{117} to participate in federally funded programs and activities.\footnote{118} Boasting a broad definition of disabled individual,\footnote{119} § 504 extends its coverage past that of IDEA.\footnote{120}

However, like IDEA, the Rehabilitation Act of 1973 only applies to specific programs.\footnote{121} Although the Rehabilitation Act is a civil rights law, as opposed to a scheme to provide federal funding to schools,\footnote{122} it can only be used against programs and activities that

\begin{footnotes}

\footnotetext[117]{Id. § 794. Under the Rehabilitation Act of 1973, a handicapped individual is defined as “any individual who . . . has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment.” \textit{Id.} § 705.}

\footnotetext[118]{Section 504 of the Rehabilitation Act states that a qualified individual with a disability shall not “be excluded from the participation in . . . any program or activity receiving Federal financial assistance.” \textit{Id.} § 794. “[P]rogram or activity’ means all of the operations of . . . a local educational agency” as well as private organizations “which [are] principally engaged in the business of providing education . . . or parks and recreation.” \textit{Id.} § 794(b).}

\footnotetext[119]{Defining a handicapped individual as “any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 34 C.F.R. § 104.3(j) (2017).}

\footnotetext[120]{The purpose of the Rehabilitation Act is to provide broad coverage to all people with disabilities. \textit{See} Barry, \textit{supra} note 63, at 8 (discussing the broad interpretation of the Rehabilitation Act). A broad definition of “handicapped individual” gives judges and entities discretion in deciding whether or not an individual should be covered. \textit{See id.} IDEA, on the other hand, is limited to ten distinct categories, providing less discretion and more direction in deciding whether or not a student should receive protection. \textit{See} Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(3)(A)(i) (2015) (listing the ten categories of disability for a child recognized by IDEA).}

\footnotetext[121]{See 29 U.S.C. § 794(a) (“No otherwise qualified individual . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).}

\footnotetext[122]{IDEA provides funds to schools to enable them to provide a free appropriate public education for disabled students. \textit{See} Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as 20 U.S.C. §§ 1400, 1405-06, 1415-20) (2012); \textit{see also} Protecting Students with Disabilities, \textit{supra} note 110 (“IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds.”).}
\end{footnotes}
receive federal assistance. 123 This means that an individual with a disability would have no cause of action against a completely self-funded organization under § 504 124 and another statute would have to step in to provide protection.

3. The Americans with Disabilities Act of 1990

The ADA fills in the spaces left by the Rehabilitation Act. 125 Unlike the Rehabilitation Act of 1973, which only works against programs receiving federal funding, the ADA applies to all public services, programs, and activities, regardless of whether they receive federal financial aid. 126 Defining disability as a “physical or mental impairment that substantially limits one or more major life activities,”127 the ADA recycles much of the 1973 Act’s definition, while applying to a much wider array of entities. 128

Broken down into five separate titles, the ADA takes on discrimination associated with employment, public services, and access to public property held by private entities. 129 The first three titles 130 each define the scope of the protection, explain what

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123. See 29 U.S.C. § 794(a) (stating that a qualified individual with a disability shall not “be excluded from the participation in . . . any program or activity receiving Federal financial assistance”). It goes on to define “program or activity” as “all of the operations of . . . a local educational agency.” Id. § 794(b)(2)(B).
124. See § 794(b) (applying the definition of “program or activity” to a number of agencies that receive Federal financial assistance).
125. See Protecting Students with Disabilities, supra note 110 (providing the general scope of the ADA).
126. Compare 29 U.S.C. § 794(a) (“No otherwise qualified individual . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”), with 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.”).
128. See id. § 12102(4)(A). For the Rehabilitation Act’s definition of disability, see supra note 119.
130. Title I—Employment, Title II—Public Services, Title III—Public Accommodations and Services Operated by Private Entities. See generally id.
constitutes discrimination in the field, and then provide the regulations and means to enforce them. Title I defines discrimination against an individual based on disability as creating an environment or using criteria that has the effect of keeping disabled members from being qualified to be employed. Under Title II, public entities are prohibited from excluding a qualified individual with a disability from participating in a program, service, or activity offered by the entity. This means, for example, an individual with a prosthetic leg cannot be barred from competing in a government funded basketball league if he is fully capable of running and playing. The public entity would be required to make accommodations to enable the athlete to play.

Despite its call for reasonable accommodations for all individuals with disabilities, the ADA explicitly excludes certain groups from coverage under the Act. Under §§ 509 and 512, illegal drug users, homosexuals, compulsive gamblers, and individuals with

131. Amongst its other provisions, Title I of the ADA includes a definition of discrimination as “utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability.” Id. § 12112(b)(3)(A).

132. See, e.g., id. § 12117 (providing for enforcement of the employment discrimination sections). The final two titles deal with making accommodations for telephone service for deaf individuals and miscellaneous provisions. See generally id. §§ 12101-12213.

133. See § 12112(b)(3)(A) (“[T]he term ‘discriminate against a qualified individual on the basis of disability’ includes . . . utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability.”). As evidenced by an early Senate Committee Report, discrimination constitutes not only the exclusion of an individual based on his disability, but also the exclusion of an individual based on fear of the effect he may have on others. See S. REP. NO. 101-116 at 7 (1989) (noting that an elementary school teacher barred a student with cerebral palsy from her classroom because “his physical appearance ‘produced a nauseating effect’ on his classmates”).

134. A public entity is defined as (A) any State or local government, (B) any department, agency, etc. of that State or local government, or (C) the National Railroad Passenger Corporation or any commuter authority. 42 U.S.C. § 12131.

135. Under Title II, a qualified individual with a disability means an individual who meets the essential eligibility requirements for participating in an activity with or without the modification of rules, policies, practices, or other aids. Id.

136. See id. § 12132.

137. See id.

138. See id. § 12112(5)(A).

139. See id. § 12131(2) (defining a qualified individual as an individual who can participate in activities with or without modification to the rules or policies).

140. See id. § 12211(b).
gender identity disorders not resulting from physical impairments are excluded from the benefits of the ADA.\textsuperscript{141} While some academics have looked upon the exclusion of transgender individuals as a reflection of moral disdain for certain behaviors in the late 1980s,\textsuperscript{142} others have suggested it to be a response to federal judges’ recognition of Gender Identity Disorder as a disability under the Rehabilitation Act of 1973.\textsuperscript{143} This incongruity can only be fully comprehended by looking at the history surrounding the passage of the ADA.\textsuperscript{144}

4. \textit{ADA’s Legislative History}

The Americans with Disabilities Act began its Congressional life as a proposed amendment to the Civil Rights Act of 1964.\textsuperscript{145} While incorporation of the category “handicap” into the Civil Rights Act ultimately failed, this setback helped fuel the development of the Americans with Disabilities Act of 1988.\textsuperscript{146} The first version of the Bill was introduced into the House and Senate in April of 1988.\textsuperscript{147}

\textsuperscript{141} See id. §§ 12210-12211.
\textsuperscript{142} See Barry, supra note 63, at 3-4.
\textsuperscript{143} Daniella A. Schmidt, Note, Bathroom Bias: Making the Case for Trans Rights Under Disability Law, 20 Mich. J. Gender & L. 155, 169 (2013) (discussing federal court cases where the judge recognized a transgender individual as having a disability).
\textsuperscript{144} See Barry, supra note 63, at 7-8 (discussing the legislative history of the ADA).
\textsuperscript{145} H.R. 192, 100th Cong. (1st Sess. 1987). In this proposed amendment, the word handicap was to be added to many of the provisions, replacing “sex or national origin” with “sex, national origin, or handicap.” \textit{Id.} Furthermore, a handicapped individual was defined as one who, through medical diagnosis or common perception, “has a physical or mental impairment which substantially limits any of such individual’s major life activities.” \textit{Id.} This amended definition expressly excluded alcoholics and drug abusers, though was mum about the status of transgender individuals. \textit{Id.}
\textsuperscript{146} See Jonathan M. Young, “Same Struggle. Different Difference”: The Americans with Disabilities Act and the Disability Rights Movement, 1964-1990 227 (2002) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file at ProQuest Dissertations) (“Since the political realities made it clear that [amendment of the Civil Rights Act] was not possible, the ADA emerged as the best way to gain basic civil rights protections[,]”).
\textsuperscript{147} In this first version of the Bill, individuals were protected from discrimination based on “a physical or mental impairment, perceived impairment or record of impairment.” H.R. 4498, 100th Cong. (2d Sess. 1988). Both physical and mental impairments were defined in this version of the Bill, with the latter being classified as “any mental or psychological disorder, such as mental retardation,
Advocating for equal employment opportunities and equal access to public and private places for individuals with disabilities, the 1988 Bill looked quite similar to the document that was passed in 1990.\(^\text{148}\) However, §§ 509\(^\text{149}\) and 512\(^\text{150}\) were not included.\(^\text{151}\) This absence of the express exclusion provisions lasted through much of the legislative life of the ADA.\(^\text{152}\)

However, on September 6, 1989, a hint of exclusion inched its way onto the Senate floor.\(^\text{153}\) As the Bill was being debated, Senator Armstrong of Colorado made a speech pointing out that its language was all encompassing and could lead to undesirable conditions being included in its protections.\(^\text{154}\) He proposed a list of conditions to be expressly excluded from the ADA.\(^\text{155}\) Although the list was taken into consideration off the Senate floor and the Bill’s sponsors moved to address other issues, the idea of excluding individuals from the scope of the ADA did not die off.\(^\text{156}\)

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organic brain syndrome, emotional or mental illness, and specific learning disabilities.” H.R. 4498, 100th Cong. (2d Sess. 1988) (emphasis added).


\(^\text{149}.\) Section 508 says: “For the purposes of this Act, the term ‘disabled’ or ‘disability’ shall not apply to an individual solely because that individual is a transvestite.” See 42 U.S.C. § 12208.

\(^\text{150}.\) Subsection 511(b) reads, “Under this act, the term ‘disability’ shall not include . . . transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders[.]” Id. at § 12211


\(^\text{152}.\) After failing to get through the 100th Congress in April of 1988, the Bill was reintroduced to the House and Senate on May 9, 1989. See H.R. 2273, 101st Cong. (2d Sess. 1989); see also S. 933, 101st Cong. (1st Sess. 1989). Three amendments were proposed on August 2, 1989, none of which called for express exclusion of transgender individuals from the scope of the act.


\(^\text{154}.\) Id. at S10753. Armstrong asked whether those with voyeurism, pedophilia, exhibitionism, homosexuality, and bisexuality would be covered. Id. at S10754. He said his list came from court cases that dealt with legislation that had similar definitions to the ADA. Id. at S10753.

\(^\text{155}.\) Id. at S10753-54.

\(^\text{156}.\) See Barry, supra note 63, at 23-24.
As the day wore on, Senator Helms from North Carolina took up Senator Armstrong’s scope-limiting argument. Inquiring first whether the Bill was to be all encompassing, to which Senator Harkin answered in the affirmative, Senator Helms then sought reassurance that certain groups would be included in the Bill. In particular, he asked whether “transvestites” would be a protected group. To this, Senator Harkin first responded with a firm “[a]bsolutely not.” However, he amended his statement seconds later, stating that the Bill might apply to transgender individuals. Despite this assertion, Senator Harkin still conceded that the Senate was willing to take amendments concerning the scope of the Bill.

In response to this call, Senator Armstrong submitted an amendment. Speaking once again to the Senate, Senator Armstrong stressed that the Americans with Disabilities Act gave the courts discretion to decide what constituted a disability, rather than limiting the term to apply only to the presence of certain characteristics. He explained that the courts generally used DSM-III-R to determine whether a condition was a mental impairment and DSM-III-R recognized conditions like voyeurism and transsexualism as mental disorders. The two facets of the latter condition were

158. Senator Harkin was one of the Bill’s sponsors. Id. at S10708 (statement of Sen. Harkin).
159. It is likely this line of questioning was actually to reassure Helms that certain groups would not be covered by the Bill. See id. at S10765 (statement of Sen. Helms). Helms first questioned the inclusion of pedophiles in the Bill (to which Harkin responded, “No”), then went on to ask about schizophrenics (yes), manic depressives (yes), and homosexuals (“No; absolutely not.”) Id.
160. Id.
161. Id. (statement of Sen. Harkin).
162. “I said no, but I am told by staff that one court at one time held that a transvestite was mentally impaired.” Id.
163. See id. (“If the Senator would like to offer an amendment, we will accept it.”) Scholars have argued that Harkin conceded the amendment because he was trying to get the Americans with Disabilities Act passed. See Barry, supra note 63, at 24.
165. Senator Armstrong’s argument juxtaposed the Americans with Disabilities Act with the Civil Rights Act of 1964. “[It] shall be against the law for a person to discriminate in employment . . . because of race, religion, and sex. These are easily discernible factual situations.” See id. at S10772-73 (discussing the objective standard for noting a violation under the Civil Rights Act).
166. See id. at S10772.
generally diagnosed based on an individual’s behavior of cross dressing and desire to be the other sex. Senator Armstrong argued that, without an amendment, the courts’ discretion could lead to the ADA covering individuals exhibiting morally objectionable behaviors, a problem that could be expressly limited by a provision in the ADA. In calling for approval of the amendment, Armstrong alluded to the fact that the amendment was the only compromise that could get the Bill passed that night.

Unsurprisingly, Senator Armstrong’s proposed Amendment 722 passed without much of a fight. However, Senator Harkin did express his distaste for the amendment and provided some commentary to clarify its scope. While acknowledging that an individual with an excluded disorder could not bring a claim for discrimination based on the exempted disorder, Senator Harkin noted that the presence of that disorder could not bar the individual from bringing a claim for an additional, covered disability. Although Amendment 722 found its way into the ADA, it perhaps was not as exclusive as Senator Armstrong would have desired.

167. See supra note 66 and accompanying text (describing content for transvestitism and Gender Identity Disorder under DSM-III-R).


169. See id. at S10785 (“What we are adopting here is an amendment which is a practical compromise to avoid a protracted debate, to avoid a series of rollcalls, and to address . . . the most obvious concerns.”). Senator Harkin said earlier in the session that he wanted a decision to be made on the Bill that night. Id. at S10754 (statement of Sen. Harkin).

170. Id. at S10787.

171. See id. (“I do not believe that this amendment is necessary or even particularly appropriate for this [B]ill.”).

172. Harkin stated that some of the behaviors on the list, such as homosexuality, were not even considered disabilities and would not have been covered anyways. Id.

173. See id. (“[T]he intent of the Senate is that only those who have one of the behaviors listed in this provision, and do not have a disability that is covered under this act, are to be excluded from protection.”) Senator Harkin gives the example that a community health program that serves mentally handicapped adults cannot exclude one of its members just because he has a sexual behavior disorder. Id. The organization must accommodate the person because he has a covered disability. Id.


175. Kevin M. Barry’s article, Disabilityqueer: Federal Disability Rights Protection for Transgender People, suggests that Senator Armstrong’s reasons for excluding were rooted in moral, legal, and pragmatic concerns. See Barry, supra note 63, at 13. In particular, Barry and his cohorts expressed concern about employers being unable to deny employment to individuals who displayed behavior
Following approval of an amended Bill in the House of Representatives,\textsuperscript{176} the Americans with Disabilities Act became law on July 26, 1990.\textsuperscript{177} For years, the ADA stayed fairly stagnant, left to interpretation by the court system;\textsuperscript{178} however, following a number of court cases narrowing its scope, Congress amended the ADA in 2008 to make it easier for individuals to receive coverage.\textsuperscript{179} Notably, the amended Act did not change §§ 509 or 512;\textsuperscript{180} instead it expanded the Act to protect individuals who were being discriminated against based on minor impairments, such as having a broken leg.\textsuperscript{181} Hence, the sections barring coverage of transgender individuals remained in the ADA.\textsuperscript{182}

5. Blatt v. Cabela’s Retail, Inc.

Although §§ 509 and 512 have remained static in substance, they have not been completely free from the clutches of litigation.\textsuperscript{183} The first challenge to the restrictive sections arose in August 2014 in that did not comport with the company’s moral standards. \textit{Id.} at 14. Given Harkin’s comments, there seems to be an underlying current that if an individual displays morally objectionable behavior, such as being transgender, and is also manic-depressive, that person cannot be barred from employment if he is capable of performing the job. 135 CONG. REC. S10786.

\textsuperscript{176} On June 26, 1990, the House of Representatives amended the Bill to exclude “transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments.” H.R. REP. No. 101-558, at 84 (1990).


\textsuperscript{178} S. 3406, 110th Cong. (2d Sess. 2008) (rejecting Supreme Court decisions that interpreted the “substantially limits” prong too narrowly).

\textsuperscript{179} Id. The revamped Act redefined the third prong of disability, adding provisions that laid out what would constitute as a major life activity or major bodily function. \textit{Id.} Furthermore, it preserved protection for those whose disabilities are in remission or are mitigated by AIDS. \textit{Id. See also Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm [https://perma.cc/4Z28-M6QQ] (last visited Nov. 6, 2017) (providing a broad overview of how the ADAAA re-expanded the ADA).

\textsuperscript{180} S. 3406, 110th Cong. (2d Sess. 2008).

\textsuperscript{181} Barry, supra note 63, at 29. This process involved redefining provisions that were misinterpreted by the Court, as opposed to correcting the oversights and hasty compromises of the past. \textit{Id.} at 28-29.


**Blatt v. Cabela’s Retail Inc.** In Blatt, the plaintiff had been subjected to disparate treatment by her employer due to her outward manifestation of Gender Dysphoria and filed a lawsuit for relief. In her complaint, she alleged Cabela’s violated both Title VII of the Civil Rights Act and the Americans with Disabilities Act in its treatment of her during her course of employment. In response, Defendant Cabela’s moved to dismiss the ADA’s claim on the basis that the statute exempted transgender individuals from its coverage.

Following this motion, the presiding judge ordered the United States government to file a statement of interest concerning the plaintiff’s ADA claim. In response, the Department of Justice issued a statement that advised the court to avoid deciding a constitutional claim by any means necessary. However, it theorized that the statute could be applied to an individual with Gender Dysphoria, as recent research suggested that Gender Dysphoria has a physical etiology. Relying on the Department of Justice’s statements, the Pennsylvania district court denied Cabela’s motion to dismiss. In its opinion, the court took a narrow approach to § 512, delineating that the exclusion applied to individuals whose

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184. *Id.*
185. The plaintiff was hired as a seasonal worker for Cabela’s in the fall of 2006. Blatt v. Cabela’s Retail Inc., GLAD, http://www.glad.org/work/cases/blatt-v-cabela-rbt-inc [https://perma.cc/J7MF-673K] (last visited Nov. 6, 2016) [hereinafter GLAD]. Although she had been diagnosed with Gender Dysphoria and living as a woman for over a year, Cabela’s refused to recognize Blatt’s assumed gender identity. *Id.* According to her brief, Blatt was denied access to the women’s restroom at work and was forced to wear a nametag bearing her birth name of James. *Id.*
186. *Id.*
190. “The GID Exclusion excepts from the ADA’s definition of ‘disability’ those ‘gender identity disorders not resulting from physical impairments.’” *Id.* at 2. See also Barry et al., * supra* note 75, at 520 (noting that recent medical studies show that physical impairments can lead to gender incongruence).
sole disability was identifying with the opposite sex.\textsuperscript{192} Under such a construction, the court recognized the difference between individuals with an outward manifestation of the opposite gender identity and individuals who suffer from Gender Dysphoria.\textsuperscript{193} This decision marks the first time a court extended the ADA’s coverage to an individual with Gender Dysphoria.\textsuperscript{194}

Nevertheless, the idea of transgender individuals being covered by the ADA is not accepted by all, even amongst the transgender community.\textsuperscript{195} Some scholarship has acknowledged that there is a stigma attached to having an affliction covered by the Americans with Disabilities Act.\textsuperscript{196} This stems from the social construct of being ill at ease with disability and mental illness.\textsuperscript{197} However, as of late, there has been a growing movement of individuals embracing and accepting their mental disabilities,\textsuperscript{198} which can be seen as the first step to greater societal acceptance and understanding of difference.\textsuperscript{199} Furthermore, scholars have called the ADA itself an all-inclusive act, intended to introduce those that are different into mainstream society by ensuring them access to work and public places.\textsuperscript{200}

Assuming that Gender Dysphoria is a recognized mental disability, three statutory options exist to protect afflicted individuals

\textsuperscript{192.} \textit{Id.} at *2.

\textsuperscript{193.} \textit{Id.} at *2. The court drew a line between conditions that are disabling and not disabling in reaching this conclusion. \textit{Id.} at *3. Individuals that merely dress as the other gender were construed as having a non-disabling disorder that should not be covered by the ADA, whereas individuals with Gender Dysphoria experience clinically significant stress and are thus disabled. \textit{Id.} at *2-3.

\textsuperscript{194.} \textit{Id.} at *2-3.

\textsuperscript{195.} \textit{See} Barry, \textit{supra} note 63, at 33-49 (analyzing the arguments for and against the potential implementation of Gender Identity Disorder into the ADA); \textit{see also supra} notes 153-169 and accompanying text (discussing the reasons why Gender Identity Disorders were excluded from the ADA in the first place).

\textsuperscript{196.} \textit{See} Barry, \textit{supra} note 63, at 35 (noting that many members of the transgender community reject the notion of transgender as a disability).


\textsuperscript{198.} \textit{Id.}

\textsuperscript{199.} \textit{See id.} (discussing how people “come out” about mental illness and are met with acceptance).

\textsuperscript{200.} \textit{See} Hiegel, \textit{supra} note 96, at 1479-80 (“[The ADA] should . . . be understood as a call for inclusion of those identified as sexual and social outsiders.”); \textit{see also} Barry et al., \textit{supra} note 75, at 578 (stating that eliminating §§ 509 and 512 would “break down the ‘prejudiced attitudes or ignorance of others’ and the ‘inferior status’ that people with disabilities occupy in . . . society”).
from discrimination. 201 IDEA is most narrow in scope, applying to individuals with particular diagnoses in strictly educational settings. 202 Section 504 of the Rehabilitation Act of 1973 is slightly more inclusive, extending its coverage to a broader range of individuals with disabilities, though still restrictive regarding which entities discrimination claims can be brought against. 203 And with its broad reach over all programs run by public government entities, the Americans with Disabilities Act encompasses the rest of the claims, 204 excepting, of course, a few select categories that came as a result of a last minute compromise. 205 However, as apparent from Blatt, the perception of the validity of these exceptions is slowly changing. 206

II. THE TRANS-ATHLETE IN HIGH SCHOOL SPORTS: AN UNEXPLORED, EVER-CHANGING FRONTIER

In response to the growing participation of transgender students in high school athletics, many high school athletic associations have enacted policies to provide guidance on accommodation. 207 Three trends have emerged, ranging from all-inclusive policies where no extra qualifications have to be met, 208 to hormone requirement policies, 209 to no policies, where MTF athletes are simply relegated to

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201. See Protecting Students with Disabilities, supra note 110; see also DREDF, supra note 95.
205. See supra notes 164-175 and accompanying text (describing how Amendment 722 was included to get the ADA passed).
206. See supra notes 189-190 and accompanying text (describing the recognition by the Department of Justice of a physical etiology of Gender Dysphoria).
207. See infra Section II.A.
208. See Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity, MASS. Dep’t Elementary & Secondary Educ., http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html [https://perma.cc/PC7A-JMUW] (last visited Nov. 6, 2016) [hereinafter MASSACHUSETTS POLICY] (allowing MTF athletes to play on a team with their recognized gender).
playing on the team that matches the sex on their birth certificate. A policy is without its critics or flaws. Scholarship has addressed some of the worries associated with each type of policy, particularly in relation to natal males playing on teams with natal females. However, no plaintiff has litigated these matters, which leaves athletic associations without specific guidance about how to accommodate transgender student-athletes and free to implement the policies they deem best.

A. High School Athletic Associations’ Policies for Transgender Student–Athletes

With the emergence of the transgender athlete in modern society, many high school athletic associations have adopted


211. Many of these policies address specifically the participation of male to female transgender athletes. See e.g. Idaho Policy, supra note 209; Arkansas Policy, supra note 210.

212. See infra Section II.B.

213. See infra Section II.B.

214. See infra Section II.C.

policies to help their subsidiary school districts manage requests by transgender students to play on their self-identifying teams.216 In November 2015, the governing body for all high school athletic associations, the National Federation of State High School Associations (NFHS),217 published preliminary guidelines for schools to follow when addressing and accommodating transgender student−athletes.218 In its article, the NFHS advised its member districts to create “safe, inclusive, affirming and respectful environment[s]” for transgender students.219 To accomplish this, the NFHS suggests that schools allow transgender athletes to have access to the locker rooms of the gender of their choosing and limit the number of activities that are separated by gender.220 The guidelines call for the education of standards of eligibility for public, parochial, and private schools). The court system has held that an individual can bring a claim against a high school athletic association under the Americans with Disabilities Act. See Sandison v. Michigan High Sch. Athletic Ass’n, 64 F.3d 1026, 1035-36 (6th Cir. 1995) (declining to decide whether MHSAA is a public entity, though applying § 12132 to the ADA claim on hand); see also Cruz ex rel. Cruz v. Pennsylvania Interscholastic Athletic Ass’n, 157 F. Supp. 2d 485, 496 (E.D. Pa. 2001) (finding the Pennsylvania Interscholastic Athletic Association to be a public entity under Title II of the ADA). However, courts have been split in deciding whether an athletic association constitutes a public entity that receives federal funds. In K.L. ex rel. Ladlie v. Missouri State High School Activities Ass’n, the court held that the plaintiff could not bring a § 504 claim against the defendant because the athletic association did not receive any federal funds. 178 F. Supp. 3d 792, 809 (E.D. Mo. 2016). The crux of this decision, however, was that the athletic association did not receive any federal funds to pay for fees associated with the athletic department. Id. See also Cruz, 157 F. Supp. 2d at 496 (declining to accept that the athletic association received federal funds due to lack of proof). However, in Sandison v. MHSAA, the court found that § 504 of the Rehabilitation Act applied to the athletic association because it indirectly received federal financial assistance from the member schools. 64 F.3d at 1030-31. In regard to complying with disabilities regulation, the National Federation of State High School Associations focuses predominantly on providing accommodation to disabled athletes as opposed to recognizing athletics as an essential part of a disabled student’s right to a free and appropriate education. See Michael L. Williams, Accommodating Disabled Students into Athletic Programs, NAT’L FED’N ST. HIGH SCH. ASS’N (July 27, 2014), https://www.nfhs.org/articles/accommodating-disabled-students-into-athletic-programs/ [https://perma.cc/BL27-ESQ9] (“[IDEA and § 504] consider participation as an issue of nondiscrimination, accessibility and equal opportunity.”).

216. See, e.g., MASSACHUSETTS POLICY, supra note 208.


218. Pennepacker, supra note 13.

219. Id.

220. Id.
coaches and potential teammates to promote acceptance and understanding of their transgender teammates.\textsuperscript{221} This process fosters mutual understanding and also helps reduce the potential of disparate treatment,\textsuperscript{222} two factors key to mitigating Gender Dysphoria.\textsuperscript{223}

Although the NFHS stated that guidelines are not binding on the member associations, many of these associations have adopted policies concerning transgender student–athletes.\textsuperscript{224} Three common trends have emerged amongst the high school athletic associations: (1) a fully inclusive policy,\textsuperscript{225} (2) an inclusive policy with requirements to be met,\textsuperscript{226} or (3) no policy at all.\textsuperscript{227} While high school athletic associations have full discretion in deciding what policy is best, often times the association passes this discretion on to the school districts, which then pass it on to the schools.\textsuperscript{228} Many of these

\begin{itemize}
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} See Wylie, supra note 81, at 15 (discussing treatments for Gender Dysphoria).
  \item \textsuperscript{225} See MASSACHUSETTS POLICY, supra note 208.
  \item \textsuperscript{226} See IDAHO POLICY, supra note 209; see also Transgender Participation Policy, WIS. INTERSCHOLASTIC ATHLETIC ASS’N, https://www.wiaawi.org/Portals/0/PDF/Eligibility/WIAAtransgenderpolicy.pdf [https://perma.cc/8ZKP-L56H] (last visited Nov. 6, 2016) [hereinafter Wisconsin Policy].
  \item \textsuperscript{227} See Report of the University Interscholastic League Legislative Council, UIL TEXAS (June 14, 2016), http://www.uil texas.org/files/media/LC_Propsals_061416.pdf [https://perma.cc/4T6P-JS97] (stating the UIL tabled, rejected, or took no action on a proposal to allow transgender athletes to play sports with the gender they identify with); see also Eligibility, in 2016-2017 LA. HIGH SCH. ATHLETIC ASS’N HANDBOOK § 1.24.1 (2017), http://cdn.lhsaa.org/uploads/handbook/HB_Eligibility_Updated82317.pdf [https://perma.cc/B8NU-XLUK] (discussing boys being unable to play girls’ sports when there is a comparable team for boys and making no mention of transgender individuals).
  \item \textsuperscript{228} See Beth Bragg, Alaska’s New Policy for Transgender Prep Athletes: Schools Can Make Their Own Rules, ALASKA DISPATCH NEWS, https://www.adn.com/sports/article/alaskas-new-transgender-policy-high-school-athletes-asaa-will-accept-gender/2016/05/05/ [https://perma.cc/ZSV2-Y4HK] (last updated Sept. 28, 2016); see also GEORGIA POLICY, supra note 215, at 16 (stating that “[t]he GHSA will honor a gender determination made by a member school,” but will not listen to appeals from a denial of a gender determination); Policy and School Recommendations for Transgender Participation, ILL. HIGH SCH. ASS’N, http://www.ihsa.org/documents/equity/Equity-Transgender_Policy_Revised.pdf
schools evaluate eligibility on a case-by-case basis, leaving vast inconsistencies across the district, and, in turn, across the state athletic associations.  

The most transgender athlete-friendly policies come from states like California and Massachusetts. In these states, and others like them, a transgender athlete can compete on the team with his or her identifying gender without undergoing any surgery or hormone therapy. Under the California Interscholastic Federation’s (CIF) guidelines, a transgender athlete must be allowed to compete on the team aligned with his or her gender identity regardless of whether he or she is undergoing any hormone therapy. However, if a school questions the validity of the student’s asserted gender identity, the student–athlete must be validated by the Gender Identity Eligibility Committee, which assesses the student–athlete’s documentation to

[https://perma.cc/Y4PP-PFJE] (last visited Nov. 6, 2016) (discussing the school making the initial determination on a transgender athlete’s eligibility, which is then referred to the IHSA for final approval).

229. See GEORGIA POLICY, supra note 215; Policy and School Recommendations for Transgender Participation, supra note 228.

230. See MASSACHUSETTS POLICY, supra note 208; see also California Policy, supra note 224. Massachusetts amended its law regarding public school admittance to expressly state that a person cannot be prevented from obtaining the advantages of the school based on gender identity, amongst others. MASS. GEN. LAWS ch. 76, § 5 (2012). Under Massachusetts’s policy against discrimination on the basis of Gender Identity, the student or his parents determine his gender identity, not the school. See MASSACHUSETTS POLICY, supra note 208. The only reason why a school would not accept a student’s gender determination is when there is “credible basis for believing that the student’s gender-related identity is being asserted for some improper purpose.” Id.

231. See MASSACHUSETTS POLICY, supra note 208 (“No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity. . . .”). California’s policy states, “[a]ll students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records.” California Policy, supra note 224.

232. See California Policy, supra note 224.

233. Transgender student–athletes first notify their school that they wish to compete on a team with their identifying gender. Id. The school, in turn, appeals to the California Interscholastic Federation, which establishes the Gender Identity Eligibility Committee to validate the request. Id. The committee is generally composed of a physician with experience in gender identity health issues, a psychiatrist, a school administrator from a non-appealing school, a CIF staff member, and an individual familiar with gender identity issues. Id.
determine if he or she has established a consistent gender identity. If the committee recognizes the student’s established gender identity, he or she can play on his or her desired team. However, if the committee rejects the student’s request, the student can either play on the team of his or her natal sex or appeal to the CIF Executive Director, who will then conduct a hearing to determine whether the athlete can participate on his or her desired team.

However, even this type of policy has its critics. Dissenters have called into question the neutrality of the eligibility committee and suggested that the establishment of the committee serves as merely another hurdle to jump to compete on teams with peers. That being said, in most inclusive-policy states, student–athletes need only establish a concrete and legitimate gender identity to gain access to the team of their identifying gender.

Contrary to fully inclusive athlete association policies are ones that require a transgender athlete to meet certain criteria in order to compete with his or her identifying gender. For example, for an MTF athlete to compete on a girls’ team in Idaho, she must first

234. Id. Documentation generally consists of affidavits by the student, his or her parents, or a health care provider affirming the individual’s gender identity. Id.

235. Id.

236. Id.

237. Id.

238. See Samantha Michaels, High Schools Are the Next Battleground in the Fight over Transgender Athletes, MOTHER JONES (Sept. 1, 2016, 10:00 AM), http://www.motherjones.com/politics/2016/08/transgender-students-school-athletics-nebraska-title-ix [https://perma.cc/G9Z2-PQP9] (discussing the problems with eligibility committees)


240. See sources cited supra note 226.

241. See IDAHO POLICY, supra note 209; Nebraska School Activities Association – Gender Participation Policy, supra note 239.
undergo a year of hormone therapy. Following this well
documented year of hormone suppressing drugs, the athlete can
submit a request to her school’s administration and the Idaho High
School Athletic Association (IHSAA) to join her gender–identifying
team. Upon approval by the IHSAA’s Executive Director, the
student–athlete is allowed to participate on the team she desires.
Although the IHSAA’s policy requires a year of hormone therapy, it
still permits a transgender athlete to compete without having to
modify her legal identity or undergo irreversible surgery.

While many athletic associations boast transgender athlete
policies, others are completely silent on the issue. These athletic
associations are either in the process of formulating some sort of
policy, intentionally avoiding the issue, or delegating the
determination of eligibility to the schools. As a consequence of
this silence, transgender athletes are either relegated to play on teams
with their natal sex or subject to inconsistent admittance as
different schools have different barriers to participation. For
example, the Arkansas Activities Association does not have a

242. See Idaho Policy, supra note 209.
243. Id. The request must contain a letter from the student’s physician
discussing the hormone therapy and the date the hormone treatment began. Id.
244. Id. If approval is not granted, the decision can be appealed to the
Eligibility Committee. Id. However, an MTF athlete who has not undergone
hormone therapy will not be allowed to compete on a team with her identifying
gender. Id.
245. Id.
246. See Report of the University Interscholastic League Legislative Council,
supra note 227 (stating the UIL tabled, rejected, or took no action on a proposal to
allow transgender athletes to play sports with the gender they identify with); see also Eligibility,
supra note 227 (failing to mention any transgender policy, though stating
that boys are unable to play girls sports when there is a comparable boys team).
247. See John Sharp, Alabama School Officials Reviewing Rules for
Transgender Students, AL (Feb. 6, 2016, 6:00 AM), http://www.al.com/news/
mobile/index.ssf/2016/02/alabama_school_officials_revie.html [https://perma.cc/
98VE-Y7CF] (discussing the Alabama School Board’s meetings contemplating
policies regarding transgender students).
248. See Report of the University Interscholastic League Legislative Council,
supra note 227 (noting the UIL’s stagnancy in regard to formulating a transgender
student–athlete policy).
249. See Bragg, supra note 2.
250. See Arkansas Policy, supra note 210, at 52.
251. Without any sort of guidance from statewide athletic associations,
schools may make their own determinations about whether a certain student can
participate in a particular sport. This hands-off approach may lead to conflict
between teams of different districts, as one school may recognize a transgender
athlete while another may not. See Bragg, supra note 2.
He’s the Woman

transgender policy. However, its bylaws contain a provision stating the Association relies on birth certificates when determining the participation of girls or boys in sports. Given the lack of any policy, transgender student–athletes in Arkansas are relegated to playing on teams with their natal sex, unless they undergo sex reassignment surgery. With such standards in place, silence can be debilitating to a transgender student’s quest to participate in a high school sport.

Across the country, there are numerous policies in place to integrate transgender student–athletes into high school sporting events with the gender they identify with. Unfortunately, there are a handful of state athletic associations that do not recognize the plight of the transgender student–athlete and even turn an intentional blind eye to the budding issue. However, it is with reason that these athletic associations remain inert. To fully comprehend the complexity of establishing a transgender accommodation policy, it is necessary to understand the reasons for them in the first place.

B. Trepidation and History Underlying Cross-Gender Participation in Sports

Historically, society has shielded itself from the idea of biological men competing in athletic events with biological women. From colonial times, men and women have competed

252. See ARKANSAS POLICY, supra note 210, at 52.
253. Id. This provision is governed by § 20-18-307, which states that a birth certificate will be amended “[u]pon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual . . . has been changed by surgical procedure.” ARK. CODE ANN. § 20-18-307 (West 2017).
254. ARKANSAS POLICY, supra note 210, at 52.
255. Id.
257. Id.
258. See Report of the University Interscholastic League Legislative Council, supra note 227.
259. See Sharp, supra note 247 (discussing Alabama’s desire to be fully informed as a reason for the state’s delay in establishing a policy).
260. See infra Subsections III.E.1-2.
261. See Buzuvis, supra note 39, at 4; see also Jennifer V. Sinisi, Gender Non-Conformity as a Foundation of Sex Discrimination: Why Title IX May Be an Appropriate Remedy for the NCAA’s Transgender Student Athletes, 19 VILL. SPORTS
separately in sport. Starting with the integration of women into the Olympics, sport has slowly turned from a strictly masculine field to one accepting of women as athletes. However, despite the recognition of female athletes, gender segregation in sport persists to this day. For today’s athletes, the justification for this separation still stems from archaic misconceptions, affirmative action, and pride.

For many years, sports organizations have affirmed the separation of the genders by noting safety concerns. They argue that women have a higher risk of injury when competing on teams with men, due to the differences between the male and female physique. However, as far back as 1979, the courts have rejected this type of argument. Scholarship has noted that the safety argument relies on overly simplified generalizations and lacks credible clout. In response, other reasons for separating sports based on sex have emerged.

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262. See Nancy L. Struna, Gender and Sporting Practice in Early America, 1750-1810, 18 J. Sport Hist. 10, 20-22 (1991) (suggesting gender segregation due to the lack of reports of women in men’s contemporary recordings of sporting events in the late eighteenth century). Struna’s article also hypothesizes that men were predominantly the ones competing in sports, as they were the ones who owned the sporting goods. Id. at 19-21.


264. See 34 C.F.R. § 106.41(b) (2016).

265. See Buzuvis, supra note 39, at 8-10.

266. Id. at 7. But see Petrie v. Illinois High Sch. Ass’n, 394 N.E.2d 855, 859 (Ill. App. Ct. 1979) (noting the defendant’s argument that “not all girls were of a physique making them excessively injury prone”).

267. See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, 393 N.E.2d 284, 294 (Mass. 1979) (discussing the Massachusetts’s courts rejection of a similar argument made by the athletic association).

268. Id. In Massachusetts Interscholastic, the Attorney General, Board of Education, and Commissioner of Education brought a case against the Massachusetts Interscholastic Athletic Association to compel it to allow two boys to play on the girls’ softball team. Id. at 287. In its discussion, the court noted that a girl is no less exposed to injury by playing on a team with boys than by playing on a team with girls. Id. at 294. In addition, the court shot down the idea that women are weak, physically inferior, and need to be protected from men. Id.

269. See Buzuvis, supra note 39, at 7-8; see also Adam S. Darowski, For Kenny, Who Wanted to Play Women’s Field Hockey, 12 Duke J. Gender L. & Pol’y 153, 158 (2005) (recognizing many justifications for excluding boys from girls’ sports are based on perceptions of the delicate woman and doubt in the female
Fueled in particular by the passage of Title IX, critics of gender integration policies argue that the presence of biological males on a team denies females an equal opportunity to compete.\(^271\) This argument relies heavily on the theory that the male body is physiologically better adapted to sports than the female body.\(^272\) Hence, these critics fear that a male athlete, if permitted to compete on a predominantly female team, would dominate playing time and usurp an opportunity to play from a female athlete.\(^273\)

Scholars have addressed this argument from a number of different angles.\(^274\) Most often, they point to the many possible physical variations of men and women.\(^275\) For example, a man can be 6’2” and 210 pounds, or he can be 5’3” and 120 pounds.\(^276\) Furthermore, scholars have noted the happenstance of being born with the XY gene does not guarantee that a man will be taller or athletic ability). Surprisingly, federal regulations maintain gender segregation in contact sports. 34 C.F.R. § 106.41(b) (2016).

\(^270\). See Buzuvis, supra note 39, at 7-10 (discussing reasons for discriminating sports based on sex).

\(^271\). See Pat Griffin & Helen J. Carroll, On the Team: Equal Opportunity for Transgender Student Athletes, Nat’l Ctr. Lesbian RTS. 1, 14-15 (2010), http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf [https://perma.cc/NNN4-2XQR]; see also Sinisi, supra note 261, at 350-51 (discussing that interplay between natal females and transgender females will lead the former to believe they are at a disadvantage against their opponent).

\(^272\). Id. at 347. This argument stems from the idea that post-pubescent biological males are generally taller, leaner, and more muscular. See Buzuvis, supra note 39, at 35; see also John Gleaves & Tim Lehrbach, Beyond Fairness: The Ethics of Inclusion for Transgender and Intersex Athletes, 43 J. Phil. Sport 311, 312-13 (2016), http://dx.doi.org/10.1080/00948705.2016.1157485 [https://perma.cc/A8L6-9GPS] (discussing concerns with male and intersex athletes having an unfair advantage over female athletes).

\(^273\). See Petrie v. Illinois High Sch. Ass’n, 394 N.E.2d 855, 859 (Ill. App. Ct. 1979) (quoting Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (1st Cir. 1979)) (“Open competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators.”).

\(^274\). See Buzuvis, supra note 39, at 35; see also Gleaves & Lehrbach, supra note 272, at 323; Alice Sanders, Is Gender Segregation in Sports Necessary?, How We Get To Next (July 14, 2016), https://howwegettonext.com/is-gender-segregation-in-sports-necessary-dc188150f242#.526fkb6dp [https://perma.cc/88D5-RRW6].

\(^275\). See Buzuvis, supra note 39, at 35-36; see also Griffin & Carroll, supra note 271, at 15-16 (“The assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.”).

\(^276\). See Griffin & Carroll, supra note 271, at 16.
stronger than a female counterpart. They reason that even if the athlete is taller than a female co-athlete, he is not guaranteed a competitive advantage; many sports require more than just physical dominance for athletes to be successful.

Scholarship has stressed in particular that outside factors dictate an athlete’s success in certain sports, as opposed to sex. They argue that having access to coaching, athletic training, and proper equipment can buoy a mediocre athlete’s skills. Women, granted the opportunity to participate in organized sport two hundred years after men, are steadily becoming stronger athletes. With greater access to athletics and training, female athletes appear to be closing the competitive gap between biological men and women.

That being said, the emergence of a strong female athlete has been seen as troublesome for some male athletes. Scholarship has promulgated the theory that segregation of the genders in sport enables men to save face and preserve their masculinity. Given the strong ties between success in sports and assertion of masculinity, the idea of a male athlete losing to a female one undermines what has been recognized as a norm for years. Coupled with the continued stigma attached to members of the gay and transgender

277. See id. at 15-16.
278. See Buzuvis, supra note 39, at 37 (discussing success in volleyball not being dependent on a participant’s height).
279. Id. at 37-38; see also Sanders, supra note 274 (noting that training, coaching, and better equipment lead to increased athletic performance).
280. Buzuvis, supra note 39, at 37.
281. See Struna, supra note 262, at 11 (discussing men’s organized sports leagues in the late eighteenth century); see also Sanders, supra note 274 (noting that the early twentieth century enabled women to become more involved in sports).
282. See Sanders, supra note 274.
283. Id. Sanders notes that much of this increase in athletic ability has to do with personal training tailored especially to the individual. Id. The training program is dictated based on the individual, as opposed to the person’s gender. Id.
284. See Buzuvis, supra note 39, at 9.
285. Id.
286. See Sinisi, supra note 261, at 346-48 (“[Sports are] a way for men to show their perceived superiority over other men deemed to be weaker and less capable.”).
287. See Buzuvis, supra note 39, at 9; see also Ross Tucker, Let Male and Female Compete Together, SCl. SPORT (Apr. 15, 2010), http://sportsscientists.com/2010/04/let-male-and-female-compete-together/ [https://perma.cc/QKL3-SKRP] (“If women and men compete, and women defeat men, then this will cause violent responses from men.”).
communities, the defeat of a male athlete by a gay or transgender opponent may be seen as another example of usurped masculinity.

While many gender participation policies have implemented a hormone therapy requirement to stifle the above concerns, some scholars have offered an alternative approach. In Gleaves and Lehrbach’s *Beyond Fairness*, the authors call for a complete reformatting of sport. Gleaves and Lehrbach shy away from the idea that the sole purpose of sport is to show mastery and prowess over others. Instead, they recognize sports as a way to express culture and personal identity, victors can arise even when they are not the declared winners of the competition. While respecting the decision to segregate sport based on gender, the article brings to light the fact that transgender individuals have a right to define themselves through sports as well. To enable this expression, *Beyond Fairness* suggests that sports should be open to allow transgender individuals to select the setting for their athletic narrative. While recognizing problems with an all-inclusive sporting forum, such as the possibility of fraudulent transgender females participating on girls’ teams to gain competitive

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288. See Including Transgender, supra note 80, at 24-25.

289. Kevin G. Davison & Blye W. Frank, *Sexualities, Genders, and Bodies in Sport: Changing Practices of Inequity, in Sport and Gender in Canada* 178, 182 (Kevin Young & Philip White eds., 2d ed. 2007) (“[T]he presence of lesbians and gay men in sport . . . is often seen as threatening to both gender and sport as a heterosexual space.”).

290. See sources cited supra note 241.

291. The authors first disregard the “physiological equivalence theory” discussed above by pointing out its reliance on biological norms. Gleaves & Lehrbach, supra note 274, at 312-13. They go on to cast doubt on the theory by stating that it reinforces gender binaries, creates unideal outcomes, and relies on a misguided notion of sport—the idea that sport should be fair. Id. at 314-15.

292. Id. at 318.

293. Id.

294. See id. at 319 (“[E]ven today, other meaningful narratives exist alongside . . . the comparative test interpretation of sport.”).

295. See id. at 319-20 (noting that individuals choose to create narratives based on their gender).

296. Id. at 321 (“[T]ransgender and intersex athletes have as great a right to express gendered narratives as any athletes.”).

297. The article suggests that transgender athletes could compete with their birth sex, the gender that matches their identity, or in a gender neutral forum, as long as it furthers their gender narrative. Id. at 320. See also Eileen McDonagh & Laura Pappano, *Playing with the Boys: Why Separate Is Not Equal in Sports* 224 (2008) (advocating that female athletes should be the ones to decide whether they want to integrate into sports with boys).
advantage, the article invalidates them by providing a different perspective on the meaning of athletics.

Although transgender athletes are still trying to find their place in sports, scholars are working hard to offer workable and inclusive solutions to help make this transition as easy as possible. While many of these solutions cater to traditional ideas of the fairness of sport, alternative theories have arisen. As far reaching as it may be, much of this scholarship calls for an acceptance of transgender athletes into the sporting world by one path or another. The remaining question is whether the courts have enforced this acceptance under the Americans with Disabilities Act.

C. Past and Present Legal Challenges

There have not been any legal challenges specifically concerning the exclusion of transgender high school athletes from competition with the gender they identify with under the Americans with Disabilities Act. However, male high school athletes have brought suits under equal protection statutes for the opportunity to play on female teams when there is not a comparable men’s sport. In addition, learning disabled students have sued high school athletic associations under the Americans with Disabilities Act for the chance to play on the football team. Although neither of these

298. Beyond Fairness cites that opponents will say that a male athlete will use the tolerant rules to compete on a female team. See Gleaves & Lehrback, supra note 272, at 322. It counters this by noting that an “inauthentic male interloper” would be easily discovered and his winning accomplishments would not have meaning because society would recognize that they were derived from fraud. Id.

299. See id. at 323.

300. See id.; see also Griffin & Carroll, supra note 271, at 14-15.

301. See Griffin & Carroll, supra note 271, at 14.


303. See sources cited supra note 271; see also Buzuvis, supra note 39; Gleaves & Lehrbach, supra note 272, at 312-13.

304. Cf. GLAD, supra note 185 (recognizing that this is the first case brought by a transgender individual questioning the constitutionality of the ADA).


306. In Sandison v. Michigan High School Athletic Ass’n, two nineteen-year-old learning disabled students brought a claim against the MHSAA for barring him from participating on the track team due to his age. 64 F.3d 1026, 1028 (6th Cir. 1995). The court held that the MHSAA was not discriminating on the basis of the
types of cases explicitly deals with transgender students in high school sports, they provide a framework for what judges look at when determining success under particular statutes. 307

For example, to ensure that the plaintiff has a cause of action under statutes like the Rehabilitation Act or the Americans with Disabilities Act, courts must figure out how to classify a high school athletic association.308 As high school athletic associations are nonprofit organizations that do not receive direct assistance from the federal government,309 courts are split on whether § 504 can apply to them.310 Recognizing that these organizations do not receive direct funding from the federal government, many courts fail to uphold plaintiff’s claims under the Rehabilitation Act.311

However, courts generally classify high school athletic associations as public entities,312 enabling plaintiffs to bring claims

plaintiffs’ handicaps; rather, it was imposing a cap on age. Id. at 1033-34; see also Cruz ex rel. Cruz v. Pennsylvania Interscholastic Athletic Ass’n, 157 F. Supp. 2d 485, 488-93 (E.D. Pa. 2001).


308. See Cruz, 157 F. Supp. 2d at 496 (stating that the Pennsylvania Interscholastic Athletic Association is a public entity under Title II of the ADA); see also K.L. ex rel. Ladlie v. Missouri State High Sch. Activities Ass’n, 178 F. Supp. 3d 792, 807-09 (E.D. Mo. 2016) (determining the classification of the high school athletic association).

309. See About the IHSA, ILL. HIGH SCH. ASS’N, http://www.ihsa.org/AbouttheIHSA.aspx [https://perma.cc/5CWM-VUZA] (last visited Nov. 6, 2017) (declaring that the IHSA is a non-profit organization that “is not funded by tax dollars or administered by the government in the state of Illinois”); MHSAA History, supra note 215 (“A private, non-profit corporation, the MHSAA receives no tax dollars from the state of Michigan or the federal government.”); see also K.L., 178 F. Supp. 3d at 809 (stating that the MSHAA gets most of its income from gate receipts, registration fees, membership fees, and other financing).

310. Compare K.L., 178 F. Supp. 3d at 808-09 (stating that a plaintiff must show that the MSHSAA received assistance “from federal funds not enjoyed by the public generally”), and Cruz, 157 F. Supp. 2d at 496 (citing Cureton v. National Collegiate Athletic Ass’n, 198 F.3d 107, 118 (3d Cir. 1999)) (failing to recognize the P.I.A.A. as an entity that receives financial assistance), with Sandison, 64 F.3d at 1031 n.2 (declining to decide whether or not the athletic association received financial assistance).

311. See K.L., 178 F. Supp. 3d at 809 (declining to recognize the MSHSAA as a recipient of federal funds); Cruz, 157 F. Supp. 2d at 496 (stating that the P.I.A.A. is not a recipient of federal funds).

312. See Rhodes v. Ohio High Sch. Athletic Ass’n, 939 F. Supp. 584, 591 (N.D. Ohio 1996) (recognizing the OHSAA to be a public entity due to the amount of authority delegated to it by the state); see also Cruz, 157 F. Supp. 2d at 496 (“The
under the American with Disabilities Act. Success under the ADA rests upon the plaintiff’s ability to demonstrate that the athletic association’s policies either expressly discriminated against the plaintiff based on his disability, failed to reasonably accommodate the plaintiff’s disability when it could have done so, or had a disparate impact on the plaintiff. Generally, ADA cases against athletic associations concern the organization’s failure to accommodate the plaintiff’s disability. However, courts will only uphold these allegations if the disability is the sole basis for the discrimination, not some attenuated factor that may be caused by the disability.

Although a transgender athlete has not brought a discrimination claim against a high school athletic association, a few causes of actions are available to her. However, success on the merits will depend on the policy being challenged and its effects on the transgender student. While there is no universal policy for how to accommodate transgender athletes in high school sports, three common recommendations have emerged. Each policy reflects a certain stance on what it means to compete in high school athletics

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P.I.A.A. is, in my opinion, a public entity under Title II of [the Americans with Disabilities] Act. . . .”). But see Sandison, 64 F.3d at 1036 (declining to decide whether MHSAA is a public entity).

313. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . .”).

314. See McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 460 (6th Cir. 1997) (sketching out the applicable standard for evaluating an ADA claim against a public entity).

315. See generally Sandison, 64 F.3d 1026. Furthermore, athletic associations are only required to make reasonable accommodations that do not unfairly alter the nature of the program or are not overly costly. See also K.L., 178 F. Supp. 3d at 802.

316. See Sandison, 64 F.3d at 1036 (holding that plaintiffs’ claims failed under the ADA because they were “excluded by reason of age, not disability”); see also Rhodes, 939 F. Supp. at 592 (concluding that Rhodes’ § 12132 claim failed because he was excluded from participation due to the eight semester rule, not his disability).

317. See generally Sandison, 64 F.3d 1026; Cruz, 157 F. Supp. 2d 485; Rhodes, 939 F. Supp. 584.

318. See McPherson, 119 F.3d at 460 (evaluating whether a plaintiff can bring a claim under the ADA).

319. See supra notes 224-227 and accompanying text (discussing the all-inclusive, semi-inclusive, and silent policies on transgender athletes).
and highlights the values of the surrounding community.320 Given the vast differentiation in public views and overarching law, many of these guidelines could be viewed as discriminatory.321 Therefore, the only way to fabricate a comprehensive and legal policy is to observe all of these concerns and come to a reasonable compromise.322

III. FIXING BROKEN AND OVERBEARING POLICIES

Although it expressly excludes individuals suffering from transvestitism and gender identity disorders not caused by a physical impairments from its scope,323 the Americans with Disabilities Act is the best vehicle for an individual with Gender Dysphoria to bring a claim against discriminatory athletic association policies.324 Given the ADA’s history,325 the Blatt decision,326 and the changing atmosphere of the United States,327 an individual with Gender Dysphoria should be able to bring a claim against a public entity, such as a high school athletic association.328 With that legal option available, an MTF student–athlete can sue the high school athletic association for requiring her to take hormone therapy in order to compete with her recognized gender because it fails to accommodate her disability.329 Hence, it is necessary for athletic associations to implement policies that do not exclude individuals with disabilities

320. See supra notes 261-303 and accompanying text (noting different schools of thought in regard to cross-gender participation in sports).
321. Compare California Policy, supra note 224 (declaring that any bona fide transgender athlete can compete with the gender of her choosing), with Arkansas Policy, supra note 210, at 52 (failing to implement any transgender policy and therefore relegating the student to play on teams with her natal sex).
322. See infra Part III.
324. See infra Sections III.A-B (discussing the advantages of using the ADA over Title IX, IDEA, and Section 504).
325. See supra Subsection I.C.4 (discussing generally a compromise that got the Bill passed).
329. Section 12132 of the Americans with Disabilities Act says that no qualified individual with a disability “shall . . . be excluded from participation in or be denied the benefits of the . . . activities of a public entity.” Id.
when their treatment does not involve taking hormone-suppressing supplements.\textsuperscript{330}

A. Why Not Use Title IX?

Under Title IX, a transgender student–athlete could attempt to sue a high school athletic association for excluding her from participating on girls’ teams.\textsuperscript{331} By barring her from playing on girls’ teams, the associations would be discriminating against her based on gender identity.\textsuperscript{332} However, success on this action relies on courts equating \textit{gender identity}\textsuperscript{333} to \textit{sex} under Title IX, an interpretative conclusion some jurisdictions are unwilling to make.\textsuperscript{334} Furthermore, the rescission of the Obama administration’s “Dear Colleague” letters eradicates much of the legal basis for this argument.\textsuperscript{335}

To begin, a claim under Title IX relies on the assumption that \textit{sex} is equivalent to \textit{gender identity}.\textsuperscript{336} Under this interpretation of the word, a high school athletic association would not be allowed to exclude an individual from participating in interscholastic sports based on the individual’s gender identity.\textsuperscript{337} However, \textit{sex} has historically been interpreted to mean one’s anatomical sex,\textsuperscript{338} and at

\textsuperscript{330} See id. \textsection 12131 (stating that a qualified individual can participate in public activities “\textit{with} or \textit{without} reasonable modification to rules, policies, or practices”) (emphasis added).

\textsuperscript{331} See Education Amendments of 1972, 20 U.S.C. \textsection 1681 (2012) (stating that educational programs receiving federal assistance are forbidden from discriminating against an individual based on sex); see \textit{also} 34 C.F.R. \textsection 106.41 (2016) (stating that an individual cannot be excluded from participation in any interscholastic sport offered by a federal funds recipient).

\textsuperscript{332} See 20 U.S.C. \textsection 1681; see \textit{also} Walsh, \textit{supra} note 24 (stating that schools must treat transgender children consistent with their gender identity).

\textsuperscript{333} G.G. \textit{ex rel.} Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016) (acknowledging that “gender identity” can be construed to mean \textit{sex} under Title IX).


\textsuperscript{335} See G.G., 822 F.3d at 722-23 (relying on \textit{Auer} deference to adopt the Department of Education’s interpretation of gender identity as \textit{sex}); see \textit{also} Board of Educ. of the Highland Local Sch. Dist. v. Dep’t of Educ., 208 F. Supp. 3d 850, 865-70 (S.D. Ohio 2016) (using identical reasoning to hold the same).

\textsuperscript{336} See Walsh, \textit{supra} note 24 (stating that schools must treat transgender children consistent with their gender identity).

\textsuperscript{337} See 34 C.F.R. \textsection 106.41 (2016) (stating that no individual shall be excluded from participation in athletics based on his \textit{sex}).

\textsuperscript{338} See Brief of Petitioner at 21, Gloucester Cty. Sch. Bd. v. G.G. \textit{ex rel.} Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 65477 (noting that \textit{sex} was
the time Title IX was passed, neither the Senate nor the House referenced gender identity in their debates.\textsuperscript{339} Therefore, it is unlikely that Congress intended Title IX coverage to allow a MTF athlete to play on a girls’ team.\textsuperscript{340}

Furthermore, many successful Title IX claims relied on the vacated \textit{G.G. v. Gloucester County School Board} case and the directives of the repealed “Dear Colleague” letters.\textsuperscript{341} In \textit{G.G.} and subsequent actions, transgender individuals successfully brought Title IX claims when courts used \textit{Auer} deference to determine that the Obama administration’s interpretation of gender identity as sex was reasonable.\textsuperscript{342} However, the repeal of the “Dear Colleague” letters shattered the legal basis for the Fourth Circuit’s decision\textsuperscript{343} and removed \textit{Auer} deference as a tool for interpreting the meaning of sex under the statute.\textsuperscript{344} Without this leverage, transgender individuals have a much weaker basis to make their Title IX claims.\textsuperscript{345}

In addition, the Trump administration’s “Dear Colleague” letter returns the power to interpret sex to state and local jurisdictions.\textsuperscript{346} Given the nation’s differing views on transgender rights, this reallocation of interpretive power makes it nearly impossible to bring

\textsuperscript{339}. Id. at 26-33 (discussing “sex” as interpreted by contemporary dictionaries and also the legislature).

\textsuperscript{340}. See id. at 32-33 (noting that the purpose of Title IX was to extend opportunities to women in education programs and that gender identity was not discussed at all).

\textsuperscript{341}. See Bd. of Educ. of the Highland Local Sch. Dist. v. Dep’t of Educ., 208 F. Supp. 3d 850, 865-66 (S.D. Ohio 2016) (performing an \textit{Auer} analysis to see if deference is warranted); Carcaño v. McCrory, 203 F. Supp. 3d 615, 639 (M.D.N.C. 2016) (“\textit{G.G.} compels the conclusion that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim.”).

\textsuperscript{342}. See \textit{supra} note 335 and accompanying text.


\textsuperscript{345}. See Order, No. 16-1733, 4:15-cv-00054 (4th Cir. Apr. 18, 2017) (recognizing that G.G. and other transgender individuals’ plight has been “delayed and rebuffed” by judiciary decisions).

a successful Title IX claim in certain jurisdictions.\textsuperscript{347} Although some jurisdictions have granted transgender individuals protection under Title IX,\textsuperscript{348} others have dismissed these individuals’ claims.\textsuperscript{349} With the broad array of interpretations of the statute nationwide,\textsuperscript{350} it is difficult to pinpoint the success of an action.

Finally, even if Title IX encompasses transgender individuals, athletic associations are still allowed to impose participation restrictions to help preserve the competitive nature of sports.\textsuperscript{351} This means that a high school athletic association can compel a MTF athlete to take hormone suppressing drugs in order to compete on a girls’ team.\textsuperscript{352} Given the government’s acquiescence to discriminatory measures\textsuperscript{353} and the hurdles to overcome to be


\textsuperscript{349} See Texas, 201 F. Supp. 3d at 830 (declining to recognize Department of Education’s interpretation of gender identity due to improper rulemaking procedure); Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015) (stating that transgender is not a protected characteristic covered by Title IX).

\textsuperscript{350} See Balingit, supra note 347.

\textsuperscript{351} See 34 C.F.R. § 106.41 (2016) (allowing for separate teams when selection for the team is “based upon competitive skill or the activity involved is a contact sport”); see also Petition for Writ of Certiorari at 135a, Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (No. 16-273). These requirements cannot be based on stereotypes; instead, they must be based on sound scientific reasoning. \textit{Id.}

\textsuperscript{352} See Petition for Writ of Certiorari at 135a, \textit{Gloucester Cty. Sch. Bd.}, 137 S. Ct. 1239 (No. 16-273).

\textsuperscript{353} See \textit{id.} (noting that athletic associations can impose “age-appropriate, tailored” restrictions if there is “sound, current, and research-based medical
covered by Title IX, a transgender student–athlete should consider other statutory options under which to bring a claim.

B. Why Use the Americans with Disabilities Act?

When faced with an athletic association that predicates her ability to play on girls’ teams on her acquiescence to taking hormone suppressing drugs, an MTF student–athlete would have three statutory options to sustain her cause of action. Students with disabilities have rights under the Individuals with Disabilities Education Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. While each statute generally grants rights to individuals with disabilities, the scope of each varies based on the individuals and entities involved. Given the nature of high school athletic associations as private, non-profit organizations, the Americans with Disabilities Act best protects the rights of MTF student–athletes.

To begin, the protections of both IDEA and the Rehabilitation Act of 1973 only apply against an entity that is the recipient of

knowledge about how the student’s participation will affect the fairness and safety of the sport).

354. See supra notes 42-49 and accompanying text (discussing how Title IX does not contain a definition of sex).

355. See supra Section I.C (discussing the three different civil rights protections for high school students with disabilities).

356. IDEA assures handicapped children the right to a free education, a least restrictive environment, an individualized education program, procedural due process, nondiscriminatory assessment, and parental participation in decision-making that impacts the child’s education. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400-1482 (2012).


359. See supra Section I.C (describing the three different disabilities statutes and their reaches).

360. High school athletic associations are generally nonprofit organizations that may or may not receive indirect federal funds from their member schools. See supra note 215 and accompanying text (discussing court decisions that decide whether or not athletic associations are required to comply with § 504 of the Rehabilitation Act).

361. Section II of the ADA applies to public entities that conduct programs, services, or activities. 42 U.S.C. § 12132.
federal funding. 362 Under IDEA, a parent’s cause of action accrues when the educational institution violates the criteria necessary to obtain federal funding under the Act or supplemental state statute. 363 Oftentimes a violation occurs by failing to formulate an adequate IEP. 364 Although Gender Dysphoria would probably fall into a category of disability recognized by IDEA, 365 it is ambiguous whether a high school athletic association would be considered an extension of a school receiving financial assistance to accommodate children with disabilities. 366 While IEPs are not limited to learning and activities that strictly go toward a disabled child’s education, 367 the fact remains that high school athletic associations are not local or state educational agencies that directly receive federal funds under IDEA. 368 Although the athletic associations may indirectly receive these federal funds, the cause of action under IDEA is directed against the educational agency that is implementing the IEP and required to comply with the promulgated federal regulations. 369 High school athletic associations, as nonprofit private organizations, do not directly get funds to comply with IDEA. 370 Therefore, it would be

362. See supra Subsections I.C.1-2 (discussing the scope of IDEA and the Rehabilitation Act).
363. See supra notes 108-109 and accompanying text (detailing legal remedies for parents when a school is not enabling disabled child to get an appropriate education).
364. See supra note 105 and accompanying text (discussing the requirements for IEPs).
365. Under IDEA, the category emotional disturbance includes “[a] general pervasive mood of unhappiness or depression” and “[a]n inability to build or maintain satisfactory interpersonal relationships with peers,” two characteristics that are crucial to the Gender Dysphoria diagnosis. 34 C.F.R. § 300.8 (2017); see also DSM-V, supra note 70 (noting that a key factor in the Gender Dysphoria diagnosis is clinically significant distress or impairment in social, occupation, or other areas of functioning).
366. See supra notes 310-311 and accompanying text (discussing whether or not athletic associations receive federal funding).
367. See Indep. Sch. Dist. No. 12 v. Minn. Dep’t of Educ., 788 N.W.2d 907, 915 (Minn. 2010) (stating that IEPs can include provisions concerning extracurricular activities and athletics).
368. IDEA applies to state and local educational agencies that receive federal funds to assist in accommodating students with disabilities. 20 U.S.C. § 1400 (2012).
369. See supra notes 104-107 and accompanying text (describing how IDEA works).
370. See supra notes 104-107 and accompanying text. Many athletic associations focus predominantly on accommodating disabled athletes and fostering participation, as opposed to complying with the goals of IDEA and offering a
ineffective to bring a claim under IDEA against the high school athletic association.371

Furthermore, due to its status as an indirect recipient of federal funds, it would also be difficult to bring a civil rights claim against the athletic association under § 504 of the Rehabilitation Act of 1973.372 Section 504 protects a disabled individual’s right to participate in programs and activities hosted by organizations that receive federal assistance.373 High school athletic associations, however, do not directly receive federal funds; instead their funding comes from membership dues paid by member schools.374 Where the money for the dues comes from determines whether the Rehabilitation Act of 1973 applies to athletic departments.375 Oftentimes, applicability of the Rehabilitation Act lies in the discretion of the courts and whether they want concrete proof that the money did not come from a federal source.376 Hence, a claim brought against an athletic association under § 504 would fall flat if a judge required proof that the school’s dues money came from a nonfederal source and there was none available.377

Given the collective nature of money and the arbitrariness of different courts, a claim brought under the Rehabilitation Act of 1973 appears to be hit-or-miss.378 Although the scope of IDEA recognizes Gender Dysphoria as a disability, its reach is limited to

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371. See supra notes 104-107 and accompanying text (describing framework for IDEA). See generally supra notes 308-311 and accompanying text (discussing how many courts do not view athletic associations as recipients of federal funds).


374. See supra note 215 and accompanying text (discussing generally the applicability of § 504 to high school athletic associations).

375. See supra notes 310-311 (discussing whether or not athletic associations receive federal funding).

376. Compare K.L. ex rel. Ladlie v. Missouri State High Sch. Activities Ass’n, 178 F. Supp. 3d 792, 809 (E.D. Mo. 2016) (holding that an athletic association’s affidavit that no federal funds were used was enough to exempt it from litigation under § 504), with Sandison v. Michigan High Sch. Athletic Ass’n, 64 F.3d 1026, 1029 (6th Cir. 1995) (recognizing an entity under § 504 due to the commingling of federal and nonfederal funds).


378. See id.
entities subject to the state and federal government regulations. 379 With these hindrances to IDEA and the Rehabilitation Act of 1973, it is necessary to turn to the broadest protection for disabled people against discrimination—the ADA. 380

C. The Americans with Disabilities Act Should Apply to Transgendered Individuals

From its initial proposal, the Americans with Disabilities Act was intended to be all-encompassing. 381 The Rehabilitation Act of 1973 provided a broad definition of handicap that protected transgender individuals; 382 in its first drafts, the ADA was an expansion of the Rehabilitation Act, intended to protect disabled individuals not just from employment discrimination, but also from discrimination in their everyday activities and lives. 383 From its inception to September 1989, there was no limit to its scope and no provision expressly excluding transgender Americans from coverage. 384 In fact, as apparent from remarks on the Senate floor, transgender individuals were intended to be included in its coverage. 385 Were it not for a last minute compromise to get the Act passed, §§ 509 and 512 would not exist in the ADA. 386

A reading of the ADA, without §§ 509 and 512, leaves no doubt that certain transgender individuals should be within its

380. See supra Subsection I.C.3 (discussing how the ADA is the most-encompassing statute for disability civil rights protection).
382. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (defining a handicapped individual as a person with a physical or mental disability that interferes with the individual’s ability to obtain employment); see also Schmidt, supra note 143, at 169 (noting that pre-ADA federal judges had recognized transgender individuals as having a disability).
385. See id. (statement of Sen. Harkin) (recognizing that transvestites have been regarded as mentally impaired).
386. See id. at S10776 (statement of Sen. Harkin) (acknowledging that the amendments excluding transvestitism and Gender Identity Disorder were a concession to the opposition to get the Bill passed).
To reiterate, an individual is protected by the Americans with Disabilities Act if he or she has “a physical or mental impairment that substantially limits one or more major life activities.”

Taking the first half of that requirement to light, Gender Dysphoria is unequivocally a mental impairment. To begin, it is listed as an impairment in the *Diagnostic and Statistical Manual of Mental Disorders*. Furthermore, its diagnostic criteria focus heavily on clinically significant distress and feelings of incongruence between one’s natal and assumed gender. Both of these indicators of Gender Dysphoria align with the definition of mental disorder, which focuses on changes in thinking or behavior that stem from distress. Because the diagnosis for Gender Dysphoria rests on an individual’s manifestation of significant distress associated with being born the wrong sex, it is clearly a mental impairment.

Moving on to the second part of ADA’s criteria for coverage, Gender Dysphoria has a substantial impact on an individual’s major life activities. The Americans with Disabilities Act lists communicating, learning, and working as examples of major life activities that are impacted by an individual’s disability. These inhibited activities nearly mirror the obstacles faced daily by individuals diagnosed with Gender Dysphoria. These individuals experience clinically significant distress and impairment in social, occupational, and other settings. Such distress can manifest in the individual’s inability to focus in school or communicate with peers. Juxtaposing these behaviors with the definition set out by

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387. *See supra* note 147 and accompanying text (discussing the broad, all-encompassing definitions of the initial Bill).
390. *See id.*
391. *Id.*
392. *See Goldman & Grob, supra* note 75, at 738.
393. *See DSM-V, supra* note 70.
394. *See id.*
396. *See DSM-V, supra* note 70.
397. *See id.* This distress in an adolescent can lead to problems sustaining relationships, poor performance in school, and thoughts of suicide. *See also* Aitken, *supra* note 88, at 513 (discussing the effects of lack of treatment on adolescents with Gender Dysphoria).
398. *See DSM-V, supra* note 70 (discussing consequences of untreated Gender Dysphoria).
the ADA, Gender Dysphoria clearly has a significant impact on everyday life activities. Given that Gender Dysphoria inhibits an individual’s ability to communicate with classmates and learn, afflicted individuals should receive the protections set forth in the ADA.

Despite the clear applicability of the ADA to individuals suffering from Gender Dysphoria, opponents of this inclusion will cite §§ 509 and 512 and state there is no coverage under the statute. However, this argument relies on the assumption that Gender Dysphoria is the equivalent to transvestitism or Gender Identity Disorder and thus falls flat. Gender Identity Disorder and transvestitism were excluded from the ADA because they were deemed morally objectionable behaviors akin to voyeurism or pedophilia. Given the contemporaneous diagnostic criteria for transvestitism and Gender Identity Disorder, Congress’s adoption of these amendments is nearly excusable. In 1990, both diagnoses hinged on the individual’s desire to be the opposite sex; Gender Identity Disorder specifically listed cross-dressing as an essential element of the diagnosis. The diagnostic criteria affirmed these afflictions as behaviors or oddities, as opposed to mental disorders.

However, with DSM-V’s diagnosis of Gender Dysphoria, senators’ aversions to certain behaviors can no longer exclude transgender individuals from protection under the ADA. To put it simply, Gender Dysphoria is distinct from Gender Identity Disorder

400. See id.; see also id. § 12131 (defining “qualified individual with a disability”).
401. See § 12131(2) (defining a “qualified individual with a disability”); id. § 12132 (prohibiting discrimination for qualified individuals).
402. See Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1002 (N.D. Ohio 2003), aff’d, 98 F. App’x 461 (6th Cir. 2004) (finding that the plaintiff did not have a claim under the ADA due to her transsexualism).
404. See 42 U.S.C. § 12211(b); see also 135 CONG. REC. S10772 (daily ed. Sept. 7, 1989) (statement of Rep. Armstrong) (stating that the Bill was too broad and covered objectionable disorders like voyeurism).
405. See supra note 66 and accompanying text.
406. Id.
408. Compare 42 U.S.C. § 12132 (prohibiting discrimination of qualified individuals), with DSM-V, supra note 70 (establishing that those with Gender Dysphoria are qualified individuals).
because it addresses a mental disorder as opposed to a conduct. An individual is diagnosed with Gender Dysphoria because she experiences clinically significant distress caused by incongruity between her natal and perceived sex. The diagnostic guidelines for Gender Identity Disorder, on the other hand, reference distress, but focus predominantly on the individual’s desire to be the opposite sex. Given the different emphasis of each diagnoses’ criteria, Gender Dysphoria cannot be deemed the same as Gender Identity Disorder or transvestitism. Unlike the previous two diagnoses, it is a mental affliction.

Nevertheless, it could be argued that Gender Dysphoria is a type of Gender Identity Disorder and thus barred from coverage, given the general overlap in the diagnostic criteria of each. If that is the case, Gender Dysphoria may still be eligible for ADA coverage by technicality. In a Statement of Interest issued by the Department of Justice, the presiding attorney recognized that the cause of Gender Dysphoria might be physical. This is crucial to the case for coverage under the ADA, as § 512 expressly states that disability does not include “transvestitism, transsexualism,

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409. See DSM-V, supra note 70.
411. See DSM-V, supra note 70.
412. See DSM-IV-TR, supra note 67.
413. See supra notes 67-75 and accompanying text (discussing the differences between Gender Dysphoria and Gender Identity Disorder).
414. See DSM-V, supra note 70. It is important to note, however, that Gender Identity Disorder is no longer a recognized diagnosis by the American Psychiatric Association. See Camille Beredjick, DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria’, ADVOCATE (July 23, 2012 at 8:00 PM), https://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria/ [https://perma.cc/F5E9-D2LF] (discussing the reasons why Gender Dysphoria has replaced Gender Identity Disorder as the diagnosis in DSM-V). However, as this Comment argues, the criteria for the two diagnoses are rather different, see supra Section I.B, and the new criteria changes the focus from an “all-encompassing disorder” to a “temporary mental state.” Beredjick, supra note 414.
415. Both deal with elements of discontent with natal sex and clinically significant distress, among other things. See supra notes 67-75 and accompanying text.
416. See Second Statement of Interest of the United States of America at 1-2, Blatt v. Cabela’s Retail, Inc., No. 5:14-CV-4822 (E.D. Pa. Aug. 15, 2014) (noting that while the ADA expressly excludes GID that are not caused by physical traits, Gender Dysphoria may have a physical cause).
417. Id.
pedophilia, . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”418 If Gender Dysphoria is due to a physical impairment, then it can be classified as a disability under the ADA.419

Furthermore, the mere manifestation of transvestitism does not preclude an individual from coverage under the ADA.420 During the Senate’s discussion of the Bill, Senator Harkin stated that an individual with an affliction that falls under an excluded category could not be barred from coverage if he or she also has an affliction that is included in the ADA.421 This comment indicates that a transgender individual will not be excluded from coverage simply because he or she is transgender.422 If he or she has extreme depression that impairs his or her daily life, the individual will still be protected from discrimination under the ADA.423

However, there is some pushback against the inclusion of Gender Dysphoria as a recognized disability under the Americans with Disabilities Act.424 Some academics argue that the removal of §§ 509 and 512 will create a stigma against members of the transgender community by acknowledging that they are a disabled population.425 However, the ADA serves to promote inclusiveness and provide individuals with a disability the same opportunities as those without.426 Furthermore, under the new definition of Gender Dysphoria, not all members of the transgender community would be

419. Id.
420. See 135 CONG. REC. S10765 (daily ed. Sept. 7, 1989) (stating that the ADA cannot disqualify an individual from coverage if she has both an excluded and included disorder).
421. See id. (“[F]or example, a community health program which serves mentally retarded adults . . . may not expel that adult solely on the basis . . . that he exhibits a sexual behavioral disorder.”).
422. Id.
423. Id. The diagnosis for Gender Dysphoria banks heavily on having persistent distress and depression concerning one’s assigned gender. See DSM-V, supra note 70. Given Harkin’s comment, a transgender individual who has significant depression could not be barred from coverage under the ADA solely because she has a Gender Identity Disorder. See 135 CONG. REC. S10786.
424. See Barry, supra note 63, at 33-49 (analyzing the arguments for and against the potential implementation of Gender Identity Disorder into the ADA).
425. Id. at 35 (noting that some members of the transgender community “reject the notion of ‘impairment’ altogether”).
426. See Hiegel, supra note 96, at 1479-80 (denoting the ADA as a way to call for inclusion of sexual and social outsiders).
eligible for protection under the Americans with Disabilities Act, only those with “clinically significant distress” in social and occupational settings.\textsuperscript{427} Therefore, removing the exclusion of Gender Identity Disorder would merely serve to provide protection to those that the Act was intended to encompass—individuals with mental disorders.\textsuperscript{428} Given that the ADA would be recognizing those with Gender Dysphoria as disabled, as opposed to those who manifest characteristics of the opposite gender, the potential stigmatization of the entire transgender population should subside.\textsuperscript{429}

Although only a single court has recognized that Gender Dysphoria should be within the scope of the ADA,\textsuperscript{430} it is only a matter of time before more adopt this approach.\textsuperscript{431} While the 2008 ADA amendments did not dispel §§ 509 and 512, they served to make it easier for individuals with any kind of disability to be protected under the Act.\textsuperscript{432} Given new research, growing precedent, and the rapidly changing public perception of transgender individuals, it is unlikely that transgender individuals can remain expressly excluded from the protection of the ADA for long.\textsuperscript{433}

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\item \textsuperscript{427} Under DSM-V, the diagnosis for Gender Dysphoria rests upon the subjective feelings of an individual’s unease with his or her gender, as opposed to the physical manifestations of gender nonconformity. See DSM-V, supra note 70; see also Barry, supra note 63, at 47-48 (“GID [does] not cease being [an] impairment[] because many of those classified as having these conditions do not consider them to be impairments.”).
\item \textsuperscript{428} See supra note 147 and accompanying text (describing the individuals covered by the first version of the Bill).
\item \textsuperscript{429} See Barry, supra note 63, at 47-49 (acknowledging that not all forms of gender non-conformity should be seen as a disability).
\item \textsuperscript{431} See supra Section I.C.5 (addressing the possibility that Blatt opened the door for further litigation on §§ 509 and 512).
\item \textsuperscript{432} See Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA, supra note 179 (describing how the ADAAA revamped the ADA to provide broader coverage).
\item \textsuperscript{433} See Second Statement of Interest of the United States of America at 1-2, Blatt v. Cabela’s Retail, Inc., No. 5:14-CV-4822 (E.D. Pa. Aug. 15, 2014) (discussing the possibility that Gender Dysphoria has a physical etiology).
\end{itemize}
D. Requiring Male to Female Transgender Athletes to Take Hormone Suppressing Supplements Violates the Americans with Disabilities Act

Assuming an MTF athlete is covered by the ADA, she should be able to successfully bring a claim against a high school athletic association under Title II. 434 Title II protects a qualified individual from being excluded from programs, services, or activities offered by a public entity, which is defined as any department or instrumentality of a State or local government. 435

Due to the amount of authority granted to an athletic association by its state, courts have recognized them to be public entities. 436 Hence, an MTF athlete could sue an athletic association as a public entity. 437

However, for a plaintiff to successfully sue under Title II, she must show that she was discriminated against due to her disability 438 and that she meets the eligibility requirements to participate in the service or program. 439 Specifically, the plaintiff must prove that the athletic association expressly discriminated against her based on her disability, failed to accommodate her disability when it reasonably could have done so, or implemented a policy that had a disparate impact on her. 440 Generally, athletic association policies either have a disparate impact on the transgender student–athlete or fail to reasonably accommodate the student–athlete’s disability. 441

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435. Id. § 12132.
436. See supra note 312 and accompanying text.
438. 42 U.S.C. § 12132. See also Sandison v. Michigan High Sch. Athletic Ass’n, 64 F.3d 1026, 1033-36 (6th Cir. 1995) (noting that the plaintiffs were not discriminated against due to their disabilities).
441. See ARKANSAS POLICY, supra note 210, at 52 (disparate impact by requiring students to play on teams with members of their natal sex); see also IDAHO POLICY, supra note 209 (failing to reasonably accommodate the individual’s disability by requiring her to undergo hormone therapy).
Certain athletic association policies have a disparate impact on the transgender student–athlete.\textsuperscript{442} For example, in Arkansas, student–athletes are directly relegated to playing on teams with the sex that is listed on their birth certificates.\textsuperscript{443} While this does not constitute express discrimination, it has the impact of harming an MTF athlete more than a gender-conforming athlete.\textsuperscript{444} An MTF athlete with Gender Dysphoria would be required to play on a team with her natal sex if she desired to play a sport.\textsuperscript{445} Such a hard-line rule could cause the athlete great distress or depression by failing to recognize her adopted gender identity.\textsuperscript{446} Seeing as an MTF athlete would be barred from playing on a team if she does not gender conform, Arkansas’s policy has a disparate impact on her due to her disability.\textsuperscript{447}

In addition, athletic association policies discriminate against MTF student–athletes when they fail to reasonably accommodate the student’s disability.\textsuperscript{448} For example, Idaho’s policy allows MTF athletes to compete on teams with their identifying gender as long as they have undergone hormone therapy for a year.\textsuperscript{449} Although this policy accommodates a transgender athlete’s Gender Dysphoria by allowing her to play on a team with peers of her recognized gender, it places an unreasonable requirement on her as well.\textsuperscript{450} A wide variety of treatments exist for those suffering from Gender Dysphoria; however, each treatment plan is tailored to the

\textsuperscript{442}. See ARKANSAS POLICY, supra note 210, at 52 (limiting sport participation to the sex listed on the student’s birth certificate).

\textsuperscript{443}. Id.

\textsuperscript{444}. See id. (requiring athletes to participate on teams matching the sex on their birth certificates); see also 42 U.S.C. § 12112 (disallowing “standards, criteria, or methods of administration” that have the effect of discriminating against a disabled individual).

\textsuperscript{445}. See e.g. ARKANSAS POLICY, supra note 210, at 52

\textsuperscript{446}. See DSM-V, supra note 70, at 457-58 (discussing the consequences of untreated Gender Dysphoria).

\textsuperscript{447}. Id. Arkansas’s policy inhibits the effectiveness of treatment by forcing the student to play on a team with her natal gender. See ARKANSAS POLICY, supra note 210, at 52. Instead of accommodating the individual’s disability, Arkansas’s policy potentially worsens it. Id.

\textsuperscript{448}. See IDAHO POLICY, supra note 209 (requiring an MTF athlete to take hormone suppressing supplements for a year before being allowed to play on girls’ teams).

\textsuperscript{449}. Id.

\textsuperscript{450}. See id.; Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012) (stating that a qualified individual must be permitted to participate in an activity with or without modification to rules).
individual’s needs,451 and not all individuals will elect to undergo hormone therapy.452 Given the potential side effects and costs associated with that treatment,453 a policy that forces an adolescent athlete to take hormone suppressing drugs in order to compete is unreasonable.454

Furthermore, Title II is silent in regard to what constitutes discrimination.455 However, use of the whole act canon sheds light on the legislature’s intent.456 Although it relates to employment, Title I of the ADA says discrimination includes “utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability.”457 Because of the ADA’s silence on the meaning of discrimination, this definition should be applied to the totality of the statute.458 A semi-inclusive policy like Idaho’s, then, discriminates against MTF athletes by imposing hormone treatment requirements on MTF athletes.459 By implementing a standard requiring a year’s use of hormone suppressing drugs to be eligible to play, Idaho is imposing either a yearlong or complete high school career ban on MTF athletes, depending on when or if they start hormone therapy.460 Of course, the athlete could always compete on a team with members of her natal

451. See DSM-V, supra note 70, at 452-54 (discussing treatment options for individuals with gender dysphoria); see also Wylie, supra note 81, at 12.

452. See Wylie, supra note 81, at 12 (stating that “[s]ome patients want only partial treatment,” such as undergoing social transition).

453. See supra note 83 and accompanying text (discussing the health risks caused by hormone therapy).

454. Some hormone therapy has been known to cause thrombotic defects, in addition to infertility. See generally Steever, supra note 83; see also Gender Dysphoria – Treatment, supra note 82.

455. See generally 42 U.S.C. §§ 12101-12213 (containing no definition of “discrimination” in Section II).

456. See id.

457. Id. § 12112.


459. See IDAHO POLICY, supra note 209.

460. Id. For example, if an MTF athlete decides to transition in the spring of her sophomore year of high school, she would be unable to participate in women’s field hockey until the fall of her senior year. See id.
gender; however, that would still violate the ADA by failing to accommodate the individual’s disability.462

Therefore, an MTF athlete could successfully bring a claim against a high school athletic association under the Americans with Disabilities Act.463 With exclusionary and semi-inclusionary policies deemed discriminatory, it will be necessary for high school athletic associations to adopt accommodating, inclusive Transgender Participation Policies.464 While facially nondiscriminatory policies may be obtainable, high school athletic associations must ensure that these policies both comply with the ADA and take into account substantial policy concerns.467

E. Transgender Participation Policy Options

Taking into account the framework set out by the Americans with Disabilities Act, high school athlete associations must implement policies for qualified MTF athletes that both treat them the same as other students and reasonably accommodate their disability.468 While the goal of these policies should be to allow the MTF athlete barrier-free access to the team of her recognized gender, such access may lead to deception and discontent.469 The key to a successful policy will be to mitigate these objections by verifying the legitimacy of the athlete in the most reasonable way possible.470

461. Natal gender refers to birth sex in this paper.
462. See DSM-V, supra note 70, at 458 (discussing the consequences of untreated Gender Dysphoria).
464. See Griffin & Carroll, supra note 271, at 11.
465. See California Policy, supra note 224 (leaving participation decisions up to the discretion of the Eligibility Committee).
466. See 42 U.S.C. §§ 12101-12213.
467. See supra Section II.B (discussing common objections to the participation of natal males in sport with natal females).
468. See McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 460 (6th Cir. 1997) (stating how courts determine if the ADA has been violated).
469. See supra Section II.B (discussing apprehensions about natal males playing on teams with natal females).
470. See McPherson, 119 F.3d at 461-62 (acknowledging that athletic associations are required to make reasonable accommodations); see also supra notes 233-240 and accompanying text (describing the use of an eligibility committee to verify a student–athlete’s identity).
Alternatively, athletic associations could accommodate the MTF athlete by completely restructuring the format of sport.\footnote{471}{See Gleaves & Lehrbach, supra note 272, at 311-15.}

1. Formulating an Inclusive Policy

To begin with a more contemporary approach, the touchstone for each Transgender Participation Policy should be that the MTF athlete can play on the team of her choosing without having to undergo hormone therapy or gender reassignment surgery.\footnote{472}{See Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a)-(b) (2012) (stating that a public entity cannot use criteria that prevents an individual from becoming gainfully employed); see also id. § 12131(2) (stating that a qualified individual is one who can participate in activities with or without modification to rules or policies).} Title II of the ADA states that a public entity cannot bar any qualified individual from participating in its activities based on disability;\footnote{473}{See § 12132.} this notion is reinforced by the definition of “discrimination” in Title I, which forbids entities from using standards to exclude an individual from participation.\footnote{474}{See id. § 12112(b) (“[T]he term ‘discriminate against a qualified individual on the basis of disability’ includes . . . utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability.”).} By imposing hormone therapy or gender reassignment requirements, athletic associations fail to accommodate an MTF athlete’s Gender Dysphoria.\footnote{475}{See Gender Dysphoria – Treatment, supra note 82. Treatment for Gender Dysphoria includes recognition and acceptance of an individual’s gender identity. See id.} Therefore a policy in line with the Americans with Disabilities Act must allow the MTF athlete to play on a girls’ team without any strings attached.\footnote{476}{See id. (noting the importance of social transition to a transgender individual’s treatment).} To do otherwise would fail to accommodate the distress caused by playing on a team with members of the MTF athlete’s natal gender.\footnote{477}{See DSM-V, supra note 70, at 452-54 (stating that an individual has Gender Dysphoria when she experiences long term and extreme distress in regard to her natal sex).}

However, implementing such an inclusive policy raises concerns about fairness, safety, and legitimacy.\footnote{478}{See supra Section II.B (discussing concerns about natal males competing with natal females).} Opponents of an
inclusive policy may be concerned that the presence of an MTF athlete may usurp athletic opportunity from her teammates due to genetic competitive advantage. While this argument has clout in certain cases, it fails to take into account all of the factors pertaining to athletic success. Although natal men generally are taller and stronger than natal women, there exists great variation in size and strength in each group. Given this wide array of physiques, many MTF athletes will not have any greater athletic ability than their natal female counterparts.

Furthermore, women have been involved in athletics for a shorter period of time than men, causing them to be disadvantaged in terms of training and tradition. However, as apparent from recent research, women are steadily becoming more competitive in athletics by exposing themselves to athletic opportunity and training. Therefore, even if there is a disparity in skill, natal female athletes can obtain competitive advantage with practice and further training. Given the reality of diverse body types and the growing

479. See Griffin & Carroll, supra note 271, at 14 (“Concern about creating an ‘unfair competitive advantage’ on sex-separated teams is one of the most often cited reasons for resistance to the participation of transgender student athletes.”).
480. See Sanders, supra note 274 (noting that men historically have outperformed women in sports).
481. See Griffin & Carroll, supra note 271, at 15 (noting that there is great variation in men); see also Buzuvis, supra note 39, at 37 (stating that athletic training contributes predominantly to competitive advantage); Sanders, supra note 274 (acknowledging that access to training has allowed women to improve more rapidly than men).
482. See Sanders, supra note 274 (quoting a sports psychologist who notes that “[t]here are physical differences between males and females”).
484. See id.
485. See Struna, supra note 262, at 19-20 (suggesting that men were predominantly competing in sports during colonial times as they were the ones who owned the equipment); see also Buzuvis, supra note 39, at 37-38 (“[M]en and boys have enjoyed centuries of preferential treatment . . . not to mention the tailoring of sport to suit men’s physical and socially-constructed characteristics.”).
486. See Buzuvis, supra note 39, at 37-38; Sanders, supra note 274.
487. Sanders, supra note 274; see also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, 393 N.E.2d 284, 293 (Mass. 1979) (“The general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men . . . .”).
number of training opportunities for women, an MTF athlete would generally not have a competitive advantage over her teammates.\textsuperscript{488}

In addition, the presence of an MTF athlete on the field does not make sports inherently more dangerous.\textsuperscript{489} To begin, not all male-born individuals are 6’2” and 210 lbs.\textsuperscript{490} Furthermore, natal females can be as big and aggressive as males.\textsuperscript{491} A female athlete has as much a risk playing with the former as she does with the latter; she has the power to decide what risks she wants to take, not the athletic association.\textsuperscript{492} By relying excessively on physiological stereotypes, the safety argument does not accurately reflect the nature of sports, which involve risk with or without an MTF athlete on the field.\textsuperscript{493}

Nevertheless, athletic associations will need to take steps to ensure that only bona fide MTF athletes are on the field.\textsuperscript{494} Although unlikely,\textsuperscript{495} the participation of a fraudulent MTF athlete poses great risks to Title IX by taking away athletic opportunities that should rightfully go to those of the female gender.\textsuperscript{496} Therefore, to preserve these opportunities for female athletes, athletic associations should have an unobtrusive safeguard in place to verify the legitimacy of the

\begin{itemize}
\item \textsuperscript{488} See Griffin & Carroll, supra note 271, at 15-16 (noting that there is no inherent advantage a transgender female may have over her natal female peers).
\item \textsuperscript{489} See supra notes 266-269 and accompanying text (describing how scholarship has treated the safety argument).
\item \textsuperscript{490} See Griffin & Carroll, supra note 271, at 15-16 (discussing the number of body types for male athletes).
\item \textsuperscript{491} Id.
\item \textsuperscript{492} See Massachusetts Interscholastic Athletic Ass’n, 393 N.E.2d at 294 (“[A] girl is entitled as much as a boy to choose to take a risk . . . .”).
\item \textsuperscript{493} See id. (noting that there is an inherent risk involved when participating in sports); see also Darrin v. Gould, 540 P.2d 882, 892 (Wash. 1975) (noting that the nature of certain sports is inherently risky to both boys and girls).
\item \textsuperscript{494} See California Policy, supra note 224 (discussing steps to verify the athlete’s gender).
\item \textsuperscript{495} See Buzuvis, supra note 39, at 9 (acknowledging the prevalent stigma that boys face when losing to girls); see also Griffin & Carroll, supra note 271, at 16 (“[F]ears that boys or men will pretend to be female to compete on a girls’ or women’s team are unwarranted. . . .”).
\item \textsuperscript{496} See 34 C.F.R. § 106.41(c) (2016) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”). Gender, as used here, refers to one’s gender identity. Therefore, “female gender” would encompass MTF athletes. See Griffin & Carroll, supra note 271, at 9 (outlining what it means to be transgender). One of the purposes of Title IX is to give female athletes the same opportunities to compete in athletics as men. See id.; see also Title IX Frequently Asked Questions, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions/ [https://perma.cc/U67C-2MQL] (last visited Feb. 21, 2018).
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He’s the Woman

student–athlete.497 Such a safeguard can come in the form of the athlete being verified by an eligibility committee, similar to the one used in California.498

However, a policy containing such a safeguard does have its flaws. To begin, there is always the possibility that the Gender Identity Eligibility Committee could be biased.499 Although California’s policy puts this responsibility in the hands of individuals who should be competent in determining whether a transgender athlete has established a consistent gender identity,500 there is always the chance that a committee will be biased or otherwise not neutral.501 Having an inadequate eligibility committee could result in direct discrimination of transgender athletes, barring them from sport and leaving little room for appeals.502 Although California’s policy does have an appeals process that refers the case to the CIF Executive Director,503 the chance persists that the Director will not accept a transgender student–athlete’s gender assertion as legitimate.504 This possibility is especially pertinent in more conservative states.505

However, the verification process does not have to rest on the whim of a committee.506 To comply with the ADA, an athletic association cannot impose standards or criteria that keep a disabled athlete from being qualified to join a girls’ team.507 Although this

497. See Buzuvis, supra note 39, at 57 (stating that policymakers can limit their transgender inclusion policies to ensure “the athletes are not claiming a gender identity for the purpose of sport that is inconsistent with the identity they claim in other aspects of their lives”).
498. See California Policy, supra note 224 (requiring student athletes to be verified by an Eligibility Committee).
499. See id. (discussing the makeup of the California Gender Identity Eligibility Committee).
500. Id. In California, the Gender Identity Eligibility Committee consists of a physician with experience with gender identity disorders, a psychiatrist, a school administrator from a non-appealing school, a CIF staff member, and an individual familiar with gender identity issues. Id.
501. See supra notes 238-239 and accompanying text.
502. Id.
503. See California Policy, supra note 224.
504. Id. With this appeals process, the Director’s say is final. Id.
505. See Michaels, supra note 238 (discussing Nebraska’s challenges in passing an inclusive policy due to the conservative nature of the state).
506. See California Policy, supra note 224 (describing the committee verification process).
prevents a requirement for hormone treatments, it does not stop the athletic association from verifying the disability.\footnote{Id. § 12112.} Therefore, high school athletic associations can require an MTF athlete to provide an affidavit or document from a medical professional stating that she has Gender Dysphoria.\footnote{Id. See also Buzuvis, supra note 39, at 56-57.} This verification process amounts to a less egregious process for the MTF athlete, as the determination of whether she can participate is resolved on the spot and relies solely on the opinion of a medical expert, as opposed to the subjective belief of a biased committee that may not be qualified to make a proper assessment.\footnote{See California Policy, supra note 224 (describing the members of a committee); see also supra notes 238-239 and accompanying text (discussing problems with Eligibility Committees).} Such a Transgender Participation Policy is not only unobtrusive, but it also ensures that the gender identity of the MTF athlete is bona fide.\footnote{See DSM-V, supra note 70, at 452 (stating that the diagnosis of Gender Dysphoria requires a subjective belief for six months that one’s gender does not line up with one’s anatomical sex).}

Therefore, to comply with the ADA, an athletic association should implement a Transgender Participation Policy that allows bona fide MTF athletes to compete on girls’ teams without having to overcome any strenuous barriers.\footnote{See McPherson v. Michigan High Sch. Athletic Ass’n, 119 F.3d 453, 461-62 (6th Cir. 1997).} Under the policy, MTF athletes will be approved to play on girls’ teams upon presenting a school administrator with an affidavit from an accredited medical professional stating the individual suffers from Gender Dysphoria.\footnote{See Buzuvis, supra note 39, at 56-57 (stating that policy makers can impose requirements transgender athletes must comply with in order to compete).} With such a policy in place, the MTF athlete is allowed to compete with her identifying gender, while also ensuring that the goals of Title IX are protected.\footnote{See Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012) (“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 . . . .”); see also 34 C.F.R. § 106.41(c) (2016) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural activities shall provide equal athletic opportunity for members of both sexes.”).}
2. An Alternate Approach

While a simple verification procedure accomplishes the short-term goal of admitting MTF athletes into play with minimal discrimination, athletic associations should be looking for long-term solutions that remove the “difference” between the genders. Such a solution would consist of completely restructuring the nature of sport. Instead of having separate athletic competitions based on gender, athletic associations should instead divide players based on ability.

Although this format is potentially troublesome at the high school level, where emphasis is placed on opportunity to play, as opposed to ability, it obviates much of the tension associated with Title IX and other Civil Rights Acts. An individual would not be barred from playing a sport due to her sex or disability; instead, she would have the opportunity to play on a team with individuals of a similar athletic ability. The makeup of a team would shift from being based on gender to being based on ability. With such a formulation, the essence of sport as a competition would be most effectively fulfilled. Furthermore, the Americans with Disabilities Act would not be violated as an MTF athlete would not have to meet

515. See Gleaves & Lehrbach, supra note 272, at 317 (“[E]nding gender segregation would also end any gender-based exclusion of transgender and intersex athletes . . . .”).
516. See id. at 316, 318, 322 (disagreeing with the use of sport to showcase mastery over others).
517. See id. at 316 (discussing at higher levels of sport, the emphasis should be on ability, as opposed to allowing access).
518. See Buzuvis, supra note 39, at 54-55 (discussing the psychological benefits of sports on participants).
519. See 20 U.S.C. § 1681(a). Title IX serves to prevent discrimination based on sex. Id. If sports were not separated based on sex, rather separated based on ability, athletes would have an open field to play whatever sports they choose, rendering void lawsuits like Attorney General v. Massachusetts Interscholastic Athletic Ass’n, 393 N.E.2d 284 (Mass. 1979), and Petrie v. Illinois High School Ass’n, 394 N.E.2d 855 (Ill. App. Ct. 1979).
521. See Gleaves & Lehrbach, supra note 272, at 317 (“[E]nding gender segregation would also end any gender-based exclusion of transgender and intersex athletes; their participation would derive form their status as a human rather than their gender.”).
522. See id. at 312-13.
any sort of requirements to play on a team. She would instead be placed on the proper team according to ability.

Of course, this type of policy could bring discontent from members of both the transgender and cisgender communities. As noted in Beyond Fairness, athletes like to have the ability to make their own narratives in regard to sport. Many of these narratives pertain to one’s gender and the feeling of being part of something bigger. Under an athletic association separated by ability, not gender, some athletes may lose the opportunity to define themselves through gender, or an MTF athlete may end up on a team made up predominantly of her natal gender. That being said, within this realignment, the perception of sport would change. Instead of an MTF athlete feeling like she does not fit in on a team with her natal gender, she would be placed on a team made up of both genders of similar skill levels. Such a formation allows her to participate in sport, while also choosing what type of sporting narrative she wants to make. On a co-ed team, a transgender athlete would have the option to choose who she wants to form meaningful relationships with, instead of being relegated to peers of her natal sex. Based on the members of the team, she would still be able to create the gender narrative of her choosing. With an athletic system based on level

524. See Gleaves & Lehrbach, supra note 272, at 316.
526. See Gleaves & Lehrbach, supra note 272, at 313.
527. Id. at 318 (discussing sport as a way for individuals to define and insert themselves into a community’s story).
528. Id.
529. Id. at 314.
530. See id. at 316 (acknowledging the competitive nature of sport and offering an alternative approach to society’s perception).
531. Id.
532. See id. at 320.
533. See id. at 321 (discussing coed sports as a way for transgender athletes to define themselves).
534. Id. The athlete can choose to spend time with individuals of the gender she identifies or feels most comfortable with. Id. Although a non-gendered approach to team sports would rob her of solidarity with members of her recognized gender, it seems to provide a forum for MTF athletes to create the gender narrative of her choice. See id.
of play, as opposed to gender, all parties would be free from discrimination based on physical characteristics.\textsuperscript{535}

Although a gender-free athletic arrangement may not be feasible today given the prevailing perception of sport,\textsuperscript{536} it should be something athletic associations consider implementing in the future. Given the growing capabilities of the natal female athlete,\textsuperscript{537} the archaic reasons for separating sport will no longer exist.\textsuperscript{538} With those fears subsided, any athlete can compete on the team that they choose,\textsuperscript{539} rendering legitimizing requirements unnecessary. However, until the day that gender stereotypes subside and athletics realign, athletic associations must impose policies that provide MTF athletes with access to female teams with as little restraint as possible.\textsuperscript{540}

\textbf{CONCLUSION}

The MTF athlete is still trying to find her place in the political arena.\textsuperscript{541} Although she has many legal options available to give her clout when faced with a discriminatory high school athletic association, each require some creative arguing to be completely applicable to her situation.\textsuperscript{542} Out of all of the possible statutory remedies, the ADA is the best fit, with its broad reach to public entities and wide range of coverage.\textsuperscript{543}

Under the statutory framework set out by the ADA, high school athletic associations are barred from implementing policies that prevent MTF athletes from participating on girls’ teams for not undergoing hormone therapy.\textsuperscript{544} While policy concerns provide a

\begin{itemize}
  \item \textsuperscript{535} \textit{Id.}
  \item \textsuperscript{536} \textit{See Buzuvis, supra} note 39, at 4 (noting the long tradition of separating the genders in sport).
  \item \textsuperscript{537} \textit{See Sanders, supra} note 274 (discussing how women are becoming stronger athletes in the modern era).
  \item \textsuperscript{538} \textit{See supra} Section II.B (discussing the reasons for separating the genders in sport).
  \item \textsuperscript{539} \textit{See Gleaves & Lehrbach, supra} note 272, at 321.
  \item \textsuperscript{540} \textit{See Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012)} (stating that a public entity cannot bar a qualified individual from participating in its activities or programs).
  \item \textsuperscript{541} \textit{See supra} Part III.
  \item \textsuperscript{542} \textit{See supra} Sections III.A-C (discussing why Title IX, IDEA, the Rehabilitation Act of 1973, and the ADA do not perfectly encompass transgender individuals).
  \item \textsuperscript{543} \textit{See supra} Subsection I.C.3
  \item \textsuperscript{544} \textit{See supra} Section III.D.
backdrop for the advent of these restrictive policies, these concerns cannot be justified in light of the wide variation of physiques in the separate sexes, the increase in the athletic prowess of women, and the potential harm to the transgender student if the association fails to accommodate her Gender Dysphoria.\footnote{545} Therefore, high school athletic associations must implement barrier-free Transgender Participation Policies that allow MTF athletes to play on girls’ teams.\footnote{546} Failure to do so would deny a competent athlete access to a sporting team based solely on her Gender Dysphoria.\footnote{547} In other words, Title II of the Americans with Disabilities Act would be blatantly violated.\footnote{548}