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Sarah M. Jacques

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“You Miss 100% of the Shots You Never Take”: Virginia High School League’s Policy Violates Title IX by Preventing Transgender Student Athletes from Taking a Shot at Participating in Athletics

Sarah M. Jacques

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I. INTRODUCTION

For centuries students have participated in sports, motivated by the physical, mental, and social benefits that sports can provide.¹ Educational institutions offer students extracurricular athletic opportunities because sports allow students to continue learning outside of the classroom.² John Dewey, an American philosopher and education reformer, firmly believed that physical education benefits students psychologically and socially and improves student morale.³

Administrators and educators at the collegiate and high school levels have adopted Dewey’s philosophy, encouraging participation in sports for its emotional and social benefits.⁴ The increasing recognition of the importance of sports to individual development supports the need to make sports as widely available to all students as possible.⁵ However, the availability of sports to transgender students is threatened when participation is made conditional on external factors, as it is for transgender high school students in Virginia.

The Virginia High School League (the “League”) oversees athletics across 313 public schools in the Commonwealth of Virginia.⁶ The League’s policy concerning transgendered athletes permits them to play on the team of the gender with which they identify.⁷ However, the policy conditions this guarantee on the student having undergone sex reassignment surgery; if the student has not undergone such surgery, then the student must compete with the gender indi-

1. See *O’ Bannon v. NCAA*, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014).

2. See Connecticut Ass’n of Schools, Connecticut Interscholastic Athletic Conference Handbook 9 (2009-10).

3. See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION*, Sec. 15 (1916).

4. See BETTY SPEARS & RICHARD SWANSON, *HISTORY OF SPORT AND PHYSICAL EDUCATION IN THE UNITED STATES* 181, 201, 208 (3d ed. 1988) (explaining how sports participation helps create a social identity by providing young people a place to meet other young people); Ellen Gerber, *The Controlled Development of Collegiate Sport for Women 1923-1936*, 2 J. SPORT HIST. 1, 13 (1975) (discussing how sports participation socializes girls into nontraditional gender roles).

5. See generally Frank W. Carsonie, *Educational Values: A Necessity of Reform for Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 661, 671 (1991) (discussing the character traits that individuals develop from sports, particularly how it makes men masculine); ROBERT MECHIKOFF, *A HISTORY AND PHILOSOPHY OF SPORT AND PHYSICAL EDUCATION: FROM ANCIENT CIVILIZATIONS TO THE MODERN WORLD* 221, 234 (5th ed. 2010) (explaining how sports provide lifelong benefits to students).

6. See Zack Ford, *Virginia’s New Policy Allowing Transgender Student Athletes Bans Transgender Student Athletes*, THINKPROGRESS (Feb. 20, 2014), available at <http://thinkprogress.org/lgbt/2014/02/20/3312321/virginia-transgender-athletes/>.

7. See *id.* (clarifying that the Virginia policy requires anatomical changes including gonadectomy, the removal of an ovary or testis).

cated on his or her birth certificate.⁸ Notably, Virginia only grants birth certificate gender changes to individuals who have undergone a medical procedure to change their sex.⁹

This Comment argues that the new League policy violates the protections of Title IX because it discriminates against transgender athletes by effectively excluding them from participating in athletics.¹⁰ Part II explores the background of what shapes the Title IX analysis and compares judicial rulings on gender discrimination issues in Title IX and Title VII cases. Part III argues that the League policy violates Title IX by requiring transgender individuals to undergo sex reassignment surgery to participate on the team of the gender they identify with; Part III also establishes that transgender individuals are protected against sex discrimination.

II. BACKGROUND

A. *The Virginia High School League's Policy on the Inclusion of Transgender Student Athletes*

The League rules and regulations allow transgender student athletes to participate on school athletic teams under three conditions.¹¹ Specifically, the League provides that:

- A) A student athlete will compete in the gender of their birth certificate unless they have undergone sex reassignment.
- B) A student athlete who has undergone sex reassignment is eligible to compete in the reassigned gender when:
 1. The student athlete has undergone sex reassignment before puberty, OR
 2. The student athlete has undergone sex reassignment after puberty under all of the following conditions:
 1. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy.
 2. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender related advantages in sports competition.
 3. If a student athlete stops taking hormonal treatment, they will be required to participate in the sport consistent with their birth gender.

8. February 2014 Executive Committee Meeting Highlights, Virginia High School League, available at <http://www.VHSL.org/doc/upload/ec-executive-committee-highlights-february-2014.pdf> (last visited May 9, 2016) (hereinafter League Policy).

9. *Id.*

10. See 20 U.S.C. § 1681 (1972).

11. See League Policy, *supra* note 8.

- C) A student athlete seeking to participate as a result of sex reassignment must access the VHSL eligibility appeals process.¹²

Section (B) of the policy requires that the student athlete has undergone sex reassignment before puberty.¹³ If not, surgical anatomical changes must have been completed, including: external genitalia must be changed and hormonal therapy for the assigned sex must have been administered in a verifiable manner for a sufficient length of time.¹⁴ Further, if a student athlete stops taking hormonal treatment, he or she will be required to participate in the sport consistent with his or her birth gender.¹⁵

The League's requirement that transgender athletes undergo sex reassignment surgery before puberty, or after puberty with several other conditions, raises concerns under Title IX.¹⁶

B. Background of Title IX: Purposes and Protections

Title IX provides, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal funding.”¹⁷ The statute also requires that an agency promulgate regulations to achieve gender equity in educational opportunities.¹⁸ Although Title IX did not mention sports, Congress included a provision that specifically instructed the Secretary of Health, Education, and Welfare (“HEW”) to prohibit sex discrimination in federally assisted education programs, including intercollegiate athletics.¹⁹ In 1979, the Office for Civil Rights (OCR) of the United States Department of Education developed an Intercollegiate Athletics Policy Interpretation that remains the policy today.²⁰

12. *Id.*

13. *Id.* Section (B) is rather stringent, requiring that the athlete undergo a complete sex change, including the removal of either female or male genitalia.

14. *Id.*

15. *See id.*

16. *See* *Tates v. Blanas*, No. S-00-2539 OMP P, 2003 WL 23864868 (E.D. Cal. Mar. 11, 2003) (acknowledging that surgery is unnecessary when individuals are receiving hormone therapy); *see also* PAT GRIFFIN & HELEN J. CARROLL, *ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES* 12 (2010) (requiring surgery before allowing participation for the high school student athlete is medically unnecessary).

17. 20 U.S.C. § 1681(a) (1972).

18. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 769 (3d ed. 2014).

19. *See* *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004) (detailing the legislative history of Title IX, including the 1974 Javits Amendment, which instructed HEW to publish proposed regulations regarding “the prohibition on sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports”).

20. 44 Fed. Reg. 71, 413-23 et seq. (1979).

1. *Federal Funding as it Applies to Title IX*

In *Grove City v. Bell*, the Supreme Court of the United States interpreted Title IX as applying only to institutions or programs that received direct financial assistance from the federal government, thereby seriously limiting the OCR's jurisdiction over university athletic programs.²¹ Four years after *Bell*, Congress passed the Civil Rights Restoration Act of 1987 ("CRRA"), which superseded *Bell* by outlawing sex discrimination throughout an entire educational institution if any part of that institution received federal funding.²²

After the passage of the CRRA, courts struggled with determining the circumstances in which entities would be covered by Title IX absent a direct link to federal aid; for example, one question that remained was whether member institutions whose members received of federal funds would be subject to Title IX constraints.²³ In *NCAA v. Smith*, the Supreme Court addressed this question and held that the NCAA was not subject to Title IX liability on the basis of its receipt of dues from federally funded member schools.²⁴ However, in 2001, another landmark Supreme Court decision, *Brentwood Academy*, held that a high school athletic association is a "state actor" and thus subject to the Constitution.²⁵ In that case, the plaintiff, a private school, argued that the defendant, a statewide athletic association of public and private member schools, was a state actor that was therefore subject to Title IX because it was closely involved with state school officials and its member public schools.²⁶ The Supreme Court agreed that the association was "pervasively entwined" with state officials and public schools, and therefore found that the organization must follow Title IX rules.²⁷ Accordingly, the court found that not only the high schools, but all elementary schools, high schools, and colleges must comply with Title IX.²⁸ Later, the Sixth Circuit in *Communities for Equity v. Michigan High School Athlet-*

21. *Grove City Coll. v. Bell*, 465 U.S. 555, 563-68 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (explaining that "direct" meant the funds came directly to the school from the federal government).

22. 20 U.S.C. § 1687 (1972); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), 17 (Under the CRRA, if any part of a secondary school system receives federal financial assistance, "all of the operations of the entire . . . school system are subject to the requirements of the four civil rights laws," which includes Title IX).

23. *See NCAA v. Smith*, 525 U.S. 459, 468 (1999).

24. *Id.* at 468 (1999) (explaining there was no allegation that member schools paid their dues to the NCAA with federal funds earmarked for that purpose, thus the NCAA was neither a direct nor an indirect recipient of federal funds).

25. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001) (explaining that substantial entwinement of state actors in TSSAA's regulation of state interscholastic sport permitted petitioner's civil rights action).

26. *Id.* at 304 (listing the association's funding by public member schools, the association's receipt of ticket revenue, and the involvement of association employees in the state retirement system, as reasons for declaring the association a state actor).

27. *Id.* (reasoning that a university having any level of federal funding would be enough to force the university to comply with Title IX).

28. *Id.*

ic Association held that an entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether the entity itself is a recipient of federal aid.²⁹

As discussed in more detail below, in litigation arising after the development of this case law, which overwhelmingly has indicated that the League should be classified as a state actor, the League chose to stipulate that it is, in fact, a state actor.³⁰ This indicates that for purposes of the League Policy on transgender athletes, the League will be treated as a state actor that is subject to Title IX.

2. Title IX Policy Interpretation: the Three-Part Analysis

The Department of Education, through OCR, promulgated regulations and a “Policy Interpretation” to clarify the responsibilities of institutions subject to the mandates of Title IX.³¹ Athletic programs are considered education programs and activities.³² The regulations, which apply to claims of gender bias in athletics, fall within three categories: (1) effective accommodation of student participation opportunities; (2) equality in athletic financial assistance; and (3) equivalence of other athletic benefits and opportunities.³³ A violation in any one of these areas will give rise to a violation of the statute, and a strong record of compliance in one category cannot offset a violation in another category.³⁴

To comply with Title IX’s requirement to provide equal participation opportunities (the first prong of the three-prong test), the Policy Interpretation mandates that an educational institution must satisfy one of the following three subparts: (1) intercollegiate participation opportunities for men and women are provided in numbers substantially proportionate to their respective enrollment; (2) the members of one sex are underrepresented in intercollegiate athletics, but the institution can show a history and continuing practice of program expansion that is responsive to the developing interests and abilities of the members of the underrepresented sex; or (3) the members of one sex are underrepresented among intercollegiate athletics, and the institution cannot show a history and continued practice of expansion, but the institution can show that the interests and abilities of the members of that sex have been fully and effectively ac-

29. *Communities for Equity v. Michigan High Sch. Athletic Ass’n*, 459 F.3d 676, 692 (6th Cir. 2006)

30. *See Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 545 (W.D. Va. 1999).

31. 44 Fed.Reg. 71, 413-23 (1979).

32. OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, *A Policy Interpretation: Title IX and Intercollegiate Athletics* (1979), available at, <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

33. 34 C.F.R. §106.37-41 (1998).

34. *See e.g. Roberts v. Colo. State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993) (holding that a Title IX violation is shown when a substantial violation occurs in any of the three major areas of investigation set out in the Policy Interpretation).

commodated by the present program.³⁵

The OCR's policy interpretations have received substantial judicial deference.³⁶ The court in *Brown University v. Cohen* dismissed Brown University's argument that women are less interested than men in participating in intercollegiate athletics, and, instead, concluded that even if at a particular time women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities.³⁷

Courts have also found that the regulations support a Title IX claim where a person can show that he or she was subject to differential treatment on the basis of sex while part of a team. In *Mercer v. Duke University*, a female athlete was allowed to try out for a university's football team.³⁸ The female student was selected by the players to kick a twenty-eight yard field goal, which resulted in a position on the team.³⁹ Despite being a member of the team, the female student was not allowed to dress for games or sit on the sidelines.⁴⁰ The Fourth Circuit held that because the university made her a member of the team, and then effectively excluded her from participation in the sport on the basis of her sex, she had stated a claim under Title IX.⁴¹

Finally, courts have found that although the statute requires students to show that the school intentionally discriminated against them on the basis of sex, ignorance of the law will not preclude a finding of intent under the regulations.⁴² The court in *Pederson v. Louisiana State University* held that a state actor who provides differential treatment to women's athletic programs based on paternalism, stereotypes, and ignorance of the law has intentionally discriminated because of sex, and therefore violated Title IX.⁴³

C. Title VII: "Because of Sex"

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to discriminate against an individual on the basis of the individual's race, color, religion, sex, or national origin.⁴⁴ Courts have concluded that in certain circumstances the language of Title IX of the Civil Rights Act of 1964 should be construed the same as the language of Title VII.⁴⁵

35. See, e.g., *Boucher v. Syracuse University*, 164 F.3d 113, 120 (2d Cir. 2004).

36. See *Cohen v. Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

37. See *id.* at 175.

38. *Mercer v. Duke Univ.*, 190 F.3d 643, 650 (4th Cir. 1999).

39. *Id.*

40. *Id.*

41. *Id.* at 648.

42. See *Pederson v. Louisiana State University*, 213 F.3d 858, 863 (5th Cir. 2000).

43. See *id.* at 880.

44. 42 U.S.C. §2000e-2.

45. See e.g., *Preston v. Virginia ex rel New River Comm. College*, 31 F.3d 203, 207 (4th

Federal courts originally ruled that Title VII protections based on sex did not extend to discrimination against transgender individuals.⁴⁶ However, in 1989, the Supreme Court laid the foundation for a more expansive reading of the word “sex” in Title VII.⁴⁷ In *Price Waterhouse v. Hopkins*, plaintiff Ann Hopkins, a “macho” female who did not conform to gender norms, brought an action against her employer for sex discrimination.⁴⁸ The Supreme Court recognized that Title VII’s prohibition on sex discrimination includes discrimination on the basis of gender stereotypes.⁴⁹

Thus, the concept of “because of sex” could be applied to transgender individuals who were discriminated against when their gender expression did not conform to traditional gender stereotypes. In 2004, the Sixth Circuit in *Smith v. City of Salem* held that Title VII prohibited discrimination against a firefighter who was biologically male, but who began dressing in women’s clothing at work consistent with her gender identity.⁵⁰ In that case, the plaintiff, a transgender individual, was forced to undergo multiple psychological evaluations of her gender non-conforming behavior because she wished to present as a woman.⁵¹ The court applied the *Price Waterhouse* analysis and held that Title VII prohibited discrimination on the basis of transgendered status.⁵²

Some courts have extended the *Price Waterhouse* logic to Title IX by equating the protections offered under that statute to the protections offered under Title VII. After the *Price Waterhouse* ruling, the Ninth Circuit held that “sex” meant both “sex” and “gender” under Title VII.⁵³ Thus, courts can rely on the meaning of “sex” within Title VII of the Civil Rights Act to determine whether an educational institution’s conduct constitutes sex discrimination under Title IX.⁵⁴ Title IX, which generally refers to “sex” discrimination and har-

Cir. 1994) (comparing Title IX language to Title VII language).

46. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (holding that Congress passed Title VII with a narrow conception of sex and did not intend to extend protection to gender nonconforming individuals when an individual was fired after transitioning).

47. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-45 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Stender v. Lucky Stores*, 780 F. Supp. 1302, 1305 (N.D. Cal. 1992).

48. *Id.* at 250 (holding that discrimination on the basis of a gender stereotype is sex-based discrimination).

49. See *generally id.* (clarifying the terms of Title VII, which can provide greater protection for transgender individuals).

50. See *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (explaining that firing a transgendered individual for dressing in accordance with his or her gender identity, instead of standard gender norms, is gender stereotyping).

51. See *id.* (complaining that her co-workers alleged she did not conform to looking or behaving like a typical man).

52. *Id.*

53. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (protecting gender non-conforming individuals).

54. See *id.* at 249.

assment, but not transgender discrimination specifically, has also been extended to transgender individuals in the context of harassment based on the Title VII reading.⁵⁵

For example, in *Miles v. New York University*, a professor made advances toward a female student.⁵⁶ When the student brought a Title IX claim against NYU, the institution contended that the student was not protected under Title IX because, even though the student was admitted and treated as a female, the student was in fact transgender.⁵⁷ The court specifically noted that the Title IX phrase, “on the basis of sex,” is interpreted in the same manner as similar language in Title VII.

In *Pratt v. Indian River Century School District*, the court held that harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX.⁵⁸ The court found that the school districts violate federal and state civil rights laws when the district knowingly permits or fails to intervene to address harassment based on sexual orientation or sex.⁵⁹

Ultimately, when courts are ruling on Title IX issues, courts would look to these cases specifically that have ruled that the Title IX phrase, “on the basis of sex,” is interpreted in the same manner as similar language in Title VII.

III. ANALYSIS

If challenged, the League’s policy concerning transgendered athletes should be invalidated by a court under Title IX precedents.

A. *Title IX Applies to Virginia’s High School League Because the League is an Educational Program or Activity That Receives Federal Funding.*

All educational institutions that receive federal funds, whether directly or indirectly, are subject to Title IX.⁶⁰ Prior to *Alston v. Virginia High School League*,⁶¹ it was unclear whether indirect federal funding made an institution subject to Title IX. In *Alston*, although no dispute existed over the fact that the Virginia High School League received federal funds, the plaintiffs argued that the League received federal financial assistance indirectly or “through another recipient” of federal funding.⁶² The *Alston* court found that although the

55. *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997).

56. *Id.* (fondling her breasts, buttocks, and crotch).

57. *Id.*

58. 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011).

59. *See id.*

60. *See* 20 U.S.C. § 1681(a) (1972) (clarifying that institutions include: public, some private elementary and secondary schools, and virtually all colleges and universities); *see also* *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 294 (2001).

61. *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526 (W.D. Va. 1999).

62. *Id.* at 531 (claiming that the Virginia High School League receives federal funding through member schools that pay membership dues to the league, which makes the Virginia High School League accountable for Title IX violations).

League does not receive federal funds *directly*, most of the League’s revenue is nevertheless derived from “another recipient of federal funding,” namely membership dues.⁶³ Because the League collects membership fees from federally funded schools, the parties in *Alston* eventually stipulated that the League is a state actor.⁶⁴ Thus, the League will also be treated as a state actor that must conform with Title IX obligations.

B. Title IX Analysis Would Closely Mirror Title VII Analysis, Especially With Regard to the Phrase “On the Basis of Sex.”

The League is an educational institution that receives federal funds. Although Title IX applies, a court still must determine whether transgender students are covered under Title IX’s use of the term “sex”, and courts should look to Title VII in making that determination.⁶⁵ Prior to the Supreme Court’s decision in *Price Waterhouse*, several courts concluded that the Title VII prohibition against sex discrimination afforded no protection to transgender victims of sex discrimination.⁶⁶ However, as noted above, courts post-*Price Waterhouse* have interpreted ‘sex’ consistently with the meaning it is given in Title VII to determine whether an educational institution’s conduct constitutes sex discrimination under Title IX.⁶⁷ Consequently, these courts have found that Title VII prohibits discrimination against transsexual individuals.⁶⁸ While no published Title IX decision specifically discusses whether transgender students are entitled to participate in school athletics, Title IX’s prohibition against sex discrimination should be construed to require educational institutions to permit transgender individuals to fully participate in school athletics.⁶⁹

In light of the case law interpreting Title IX through the lens of Title VII, when analyzing the League’s policy, a court should look to precedent that interprets the relevant language of Title IX and Title VII cases.⁷⁰ Specifically, a

63. *Id.* (describing how Virginia High School League receives funding through insurance premiums, fees, gate receipts from events, and corporate sponsorships).

64. *Id.*

65. *See generally* Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997). (including transgendered individuals as individuals that are protected for discrimination).

66. *See e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) (concluding that discrimination against plaintiff was not because she is female, but because she is a transgendered individual).

67. *See Miles*, 979 F. Supp. at 249 (stating that the Title IX phrase “on the basis of sex” is interpreted in the same manner as the language in Title VII).

68. *See generally* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (discussing that discrimination against a plaintiff who is transgendered, is no different from discrimination directed against someone who fails to comply with gender stereotypes).

69. *See e.g.*, Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011).

(holding that a male student who is mocked because of perceived gender nonconformity constitutes a cognizable claim of discrimination based on sex).

70. *See e.g.*, Miles, 979 F. Supp. at 251.

Virginia state or federal court would follow the lead of other courts that apply the interpretation of Title VII's "because of sex" clause to Title IX gender discrimination cases.⁷¹ Just as the court in *Miles* ruled that the language in Title IX is interpreted in the same way as similar language in Title VII, a court faced with the League's policy should find that it discriminates against transgender students "because of their sex."⁷²

As noted above, *Pederson* held that an institution need only intend to treat women differently than their male peers to be liable under Title IX.⁷³ By requiring transgender students to have surgery if they wish to participate in sports, the League is similarly intending to treat transgender students differently than cis-gender students.⁷⁴ The *Pederson* court explained that precedent demonstrates that archaic assumptions constitute intentional gender discrimination.⁷⁵ The Virginia High School League's outdated attitude about transgender students, and its consequent refusal to allow them to participate on the team of the gender with which they identify, amply demonstrates it intends to discriminate based on sex in violation of Title IX.⁷⁶

Just as the Supreme Court's Title IX analysis in *Mercer* focused on whether the petitioner was excluded from participation in the program because of her sex, a court analyzing the League policy should also consider whether the League is excluding transgender students because their biological sex differs from their gender identity.⁷⁷

C. The Virginia High School League's Policy Violates Title IX Because Discrimination "Because of Sex" Includes Discrimination Based on Sex Stereotyping Based on Courts' Analyses Under Title VII.

The Virginia High School League policy requiring transgender students to have surgery before participating on the team of the gender with which they

71. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (explaining that Title IX places on public schools the duty not to discriminate on the basis of sex); see also *Preston v. Virginia ex rel New River Comm. College.*, 31 F.3d 203, 207 (discussing that Title VII provides a "persuasive body of standards to which [the court] may look in shaping the contours of a private right of action under Title IX").

72. See *Miles*, 979 F. Supp. at 249 (recognizing that Title IX was enacted to deter sexual discrimination, even if legislators did not have transgender individuals specifically in mind).

73. See *Pederson v. Louisiana State University*, 213 F.3d 858, 863 (5th Cir. 2000). (overruling the reasoning that because the athletic director thought the women's program was "wonderful" does not mean he was ignorant to the possibility that the program violated Title IX).

74. See *id.* (clarifying that the proper test is not whether the institution knew of, the actions of others; but whether the institution intended to treat women differently on the basis of their sex by providing them unequal athletic opportunities).

75. *Id.* at 881.

76. See generally *id.*

77. See *Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999).; see also *Preston v. Virginia ex rel New River Comm. College.*, 31 F.3d 203, 207 (4th Cir. 1994) (discussing that Title VII provides a "persuasive body of standards" to look to in shaping the contours of Title IX).

identify with is discrimination based on gender stereotypes.⁷⁸ The plaintiff in *Price Waterhouse* was told if she acted more feminine, then she might have been afforded the promotion.⁷⁹ In effect, the Virginia High School League tells transgender students that they can only participate in school athletics if they have the sex reassignment surgery in order conform to traditional male and female stereotypes.⁸⁰

A court could also make such a finding by analogizing to the holding in *City of Salem*.⁸¹ The court in *City of Salem* found a Title VII violation when the plaintiff was forced into multiple psychological evaluations of his gender non-conforming behavior.⁸² A court ruling on the Virginia High School League policy could argue that making surgery a prerequisite to participation is similar to forcing an individual to undergo invasive therapies to address their gender non-conformity; not all transgender individuals want to have sex reassignment surgery, just as not all transgender individuals desire to have an evaluation performed on how they identify.⁸³ Ultimately, the Virginia High School League requiring transgender athletes to have sex reassignment surgery is sex stereotyping that reflects an ill-informed assumption about transgender people on the basis of sex, and therefore, is sex discrimination.⁸⁴

The court in *Pederson* ruled that the university “perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many ways.”⁸⁵ The Virginia High School League’s decision to single out transgender individuals by requiring them to complete sex reassignment surgery before puberty, the League is one of these “perpetuated antiquated stereotypes” that is based on a false assumption about the desires and opportunities of transgender people; therefore, a court should rule that the Virginia High School League did in fact intentionally discriminate against transgender students insofar as it in-

78. See e.g. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (establishing that because the plaintiff failed to act like a woman she was passed over for a promotion); see also *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (failing to conform to gender stereotype of how a man should act based on gender norms).

79. See *Price Waterhouse*, 490 U.S. at 237 (arguing that because the female plaintiff did not conform to gender norms she was discriminated against).

80. See *League Policy*, *supra* note 8; see, e.g., *Price Waterhouse* 490 U.S. at 237.

81. *City of Salem*, 378 F.3d at 576.

82. See *id.* (mentioning the struggles that the plaintiff faced before ultimately leaving the job because he was discriminated against).

83. *Id.* at 569 (scheming to force the plaintiff to resign if he did not follow the company’s requirement that he undergo multiple psychological evaluations).

84. See *id.* (ruling that forcing the plaintiff to take extra measures to conform to his typical gender is gender stereotyping).

85. See *Pederson v. Louisiana State University*, 213 F.3d 858, 863 (5th Cir. 2000). (explaining that Louisiana State University consistently approved larger budgets for travel, personnel, and training facilities for men’s teams than for women’s teams).

tended to treat transgender people differently.⁸⁶ Based on Title VII case law, discrimination against transgender individuals qualifies as discrimination “because of sex.”⁸⁷ The analysis then proceeds under Title IX through the three-pronged requirements of a Title IX action.⁸⁸

D. The Virginia High School League’s Policy Violates Title IX Because the Policy Violates Prong One of the Three-Prong Analysis.

The Virginia High School League complies with two of the three prongs of the Title IX analysis, but because the policy fails to satisfy all three subparts under the first prong of the analysis, the Virginia High School League’s policy violates Title IX.⁸⁹

1. The Virginia High School League Policy Does Not Provide Opportunities for Transgender Students in Proportion to Their Enrollment, Violating Subpart One of the First Prong of the Title IX Analysis.

When the Virginia High School League adopted a new policy that required transgender students to have sex reassignment surgery in order to participate on the team of the gender with which they identify, Virginia failed to satisfy the first prong of the three-part Title IX analysis, which requires covered institutions to provide opportunities in proportion the enrollment.⁹⁰ In *Cohen*, the Court held that even if women express less interest in sports than men that alone does not allow a university to provide fewer athletic opportunities to women.⁹¹ Currently there are no cases of transgender students speaking out against the Virginia High School League policy; however, if a transgender student shows interest in participating in sports in the Virginia High School League, a court should rule that the lack of opportunities for transgender individual to participate on the team of the gender they identify with violates Title IX, consistent with *Cohen*.⁹² The court should similarly decide that a lower rate of participation does not necessarily prove the absence of genuine interest to participate.⁹³ Even if the Virginia High School League could demonstrate that

86. *Id.* at 880.

87. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-45 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (clarifying that the first determination a court makes is if the party is a member of a protected class; however, that does not mean there is always a discrimination claim).

88. *See generally*, Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (finding that when a Title IX violation is raised, all three prongs of the Title IX analysis must be reviewed by the court).

89. *See id.*

90. *See* League Policy, *supra* note 8.

91. Cohen, 101 F.3d at 175 (finding that all three prongs of the Title IX analysis must be weighed equally).

92. *Id.* (recognizing that women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports).

93. *Id.* at 179 (acknowledging that interest “evolves as a function of opportunity and expe-

at present transgender students have less interest in sports than do cisgender individuals, such evidence alone does not justify providing fewer athletic opportunities for transgender than for cisgender individuals.⁹⁴

Nonetheless, under Title IX, there must be evidence of some interest in athletics by members of the marginalized group.⁹⁵ Upon releasing the Virginia High School League's policy, executive director Ken Tilley noted that transgender students are not interested in participating in athletics.⁹⁶ This bald conclusion would probably not be enough to defeat a Title IX claim once a transgendered student comes forward with a demonstrated interest.

Additionally, members of the excluded sex must be allowed to try out for the team offered for the opposite sex, unless the sport involved is a contact sport.⁹⁷

A transgender student enrolled in a school that participates in the Virginia High School League is unlikely to be allowed to participate on the sports team of the gender with which he or she identifies.⁹⁸ The Virginia High School League policy states that a student athlete will compete in the gender noted on their birth certificate unless they have undergone sex reassignment surgery before puberty.⁹⁹ This requirement assumes that transgender students gain an unfair advantage over their opponents, and therefore should not be allowed to participate on a team that is different than their natal born sex.¹⁰⁰ However, when transgendered individuals undergo hormone treatments, their bodies change significantly, limiting any potential advantage that such a student might gain from his or her birth gender.¹⁰¹ The school district in *Force v. Pierce City R-VI*

rience" without which interest will never grow).

94. *Id.* at 180 (justifying the ruling by recognizing the tremendous growth in women's participation in sports since Title IX was enacted, disproving Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity).

95. *See generally id.* at 176.

96. *See generally* Zack Ford, Virginia's New Policy Allowing Transgender Student Athletes Bans Transgender Student Athletes, ThinkProgress (Feb. 20, 2014), available at http://thinkprogress.org/lgbt/2014/02/20/331_2321/virginia-transgender-athletes/ (summarizing the Virginia High School League's reasoning behind the new transgender policy).

97. *See* *Mercer v. Duke Univ.*, 190 F.3d 643, 646 (4th Cir. 1999); *see also* *Preston v. Virginia ex rel New River Comm. College.*, 31 F.3d 203, 207 (4th Cir. 1994) (reversing the district court's finding that contact sports, such as football, are specifically excluded from Title IX coverage).

98. *See* League Policy, *supra*, note 8. *See also* *Cohen*, 520 U.S. at 1191 (stressing that the language of Title IX does not require a finding of noncompliance based strictly upon numerical inequality between the gender balances of a university's athletic program).

99. League Policy, *supra*, note 8.

100. *See generally* *Force v. Pierce City R-VI School District*, 570 F. Supp. 1020 (W.D. Mo. 1983) (explaining that a "gender based classification which results from ascribing a particular trait or quality to one sex, when not all share that trait or quality, is not only inherently unfair but generally tends only to perpetuate 'stereotypical notions'").

101. *See e.g.*, *Tates v. Blanas*, 2003 WL 23864868 at *1.

School District argued that the plaintiff could not safely participate in the football program because hormone treatments made participation unsafe.¹⁰² However, the court in that case refused to accept that argument because the argument assumed that a particular trait or quality associated with one sex applies to every member of that sex, an assumption that is inherently unfair.¹⁰³ A court should also refuse to accept the argument that the Virginia High School League requires transgender individuals to have the sex reassignment surgery to prevent possible injury to cisgender athletes.

Another possible argument that the Virginia High School League may formulate is that trans-female students would have an unfair advantage in sports.¹⁰⁴ This issue was also addressed in *Pierce City*, where the court heard expert testimony that an average male will to some extent outperform the average female in most athletic events.¹⁰⁵ However, the court in *Pierce City* found that the best way to encourage and maximize transgender participation is by providing individuals the right to try to succeed, and that this outweighed concern over a possible unfair advantage.¹⁰⁶ Ultimately, a Virginia court should find that the policy implemented by the Virginia High School League discriminates against transgender students.¹⁰⁷

2. *The Virginia High School League Has Failed to Show Any Attempt of Continued Practice of Expansion, Violating Subpart Two of the First Prong of the Title IX Analysis.*

There are three additional factors a court may consider in determining whether an institution has established a history of program expansion that is responsive to the developing interests and abilities of the members of the underrepresented sex: adding or upgrading intercollegiate teams, increasing the number of participants in intercollegiate athletics who are members of an underrepresented class, and an institution's affirmative response to requests by students or others for addition or elevation of sports.¹⁰⁸ The Virginia High School League has failed to satisfy these factors because it has neither added

102. See *Force v. Pierce City R-VI School District*, 570 F. Supp. at 1028-29 (citing the defendants' argument that a "typical" thirteen-year-old female would in fact have a higher potential for injury in mixed-sex football than would a "typical" teenage boy).

103. *Id.*

104. See *generally id.* at 1025-26 (accepting the defendants' proposition that teenage males (as a class) will, to some extent, outperform females (as a class) in most athletic endeavors, but acknowledging the matter is open to dispute).

105. See *id.* (acknowledging that the argument is open to dispute).

106. See *generally id.* at 1028, 1031 (clarifying that there is no such thing as a constitutional "right to try," but trying is a concept deeply engrained in our way of thinking).

107. See, e.g., *id.* at 1031 (accepting that individuals' abilities and fortunes will dictate whether they succeed or fail, but that in the process those individuals will at least "profit by those things which are learned in the trying").

108. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 117 (2d Cir. 1999) (citing 34 C.F.R. § 106.41(c)(1); 44 Fed. Reg. 71413 (1979)).

any sports that transgender individuals could participate in nor increased the number of transgender student athletes who participate in the Virginia High School League.¹⁰⁹ The League might argue that providing opportunities in new sports satisfies the continuing practice of program expansion; however, that argument is invalid here because the focus should not be on the number of sports funded, but on the number of transgender individuals afforded the opportunity to participate in already-established sports.¹¹⁰

Many courts have ruled that the spirit of Title IX would be better served if institutions implemented formal policies through which students could bring their interests and abilities to the attention of administrations.¹¹¹ However, the district court in *Boucher v. Syracuse University* found that because Syracuse University had a strong history of adding women's sports programs, a formal policy was not necessary.¹¹² Unlike the school in *Boucher*, the League has not made a sufficient effort to expand programs for transgender individuals because Virginia has failed to offer transgender students another option for participating on the team of the gender they identify with.¹¹³ Therefore a court should hold the policy discriminates against transgender individuals.¹¹⁴

3. *The Virginia High School League Failed to Show that Interests and Abilities of Transgender Students Have Been Fully and Effectively Accommodated by the Present Program, Violating Subpart Three of the First Prong of the Title IX Analysis.*

Courts have uniformly interpreted the language of subpart three of the first prong – requiring that a program fully and effectively accommodate the interests and abilities of members of an underrepresented sex – in accordance with its plain meaning, asking whether members of the underrepresented sex who have interest and ability are given the opportunity to compete.¹¹⁵ If a transgender student brings a suit against the Virginia High School League, the

109. See, e.g., Ford, *supra* note 6.

110. See generally *Boucher*, 164 F.3d at 116 n.4 (“[F]or Title IX accommodation purposes, it is the aggregate number of opportunities provided for each sex, and not the number of teams funded for each sex, that matters.”) (citation omitted).

111. See, e.g., *id.*

112. See *id.* at 116, 118 (finding that since 1995 Syracuse had added two additional women's athletic teams, lacrosse and soccer, and was planning to debut a women's softball team during the 1999-2000 academic year).

113. See *id.* at 117 (citing to district court opinion explaining that to be successful on an affirmative defense under Title IX, a defendant must show a history of program expansion and a continuing practice of expansion in response to a student body's abilities and interests).

114. See generally *id.*

115. *Cohen v. Brown Univ.*, 101 F.3d 155, 178 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). (stating that if there is interest and ability in athletics among members of the underrepresented gender, not satisfied by the existing programs, an institution fails this prong of the analysis).

League will not be able to show that the interests and abilities of transgender students have been fully accommodated because the League offers no alternative or exception to the sex reassignment policy.¹¹⁶ Therefore, consistent with *Cohen*, a court should rule in favor of the transgender individuals and find that the Virginia High School League's policy fails to satisfy the third subpart of the first prong of the Title IX analysis.¹¹⁷

E. Courts Analyzing the Virginia High School League's Policy on Transgender Student Athletes Would Follow Precedent by Requiring the League to Create an Inclusive Policy.

All educational institutions that receive federal funds, directly or indirectly, are subject to Title IX.¹¹⁸ The Virginia High School League does not receive federal funds directly from any entity as most of the League's income is derived from membership dues, fees, gate receipts from events, and corporate sponsorships.¹¹⁹ However, because the Virginia High School League charges a fee for member schools to participate in the League, a court will rule that the League is indirectly receiving federal funding, and therefore, subject to Title IX.¹²⁰ Furthermore, in *Alston*, discussed above, the plaintiff and the League stipulated that the League is a state actor, making it subject to Title IX.¹²¹

When a court is faced with a case against the Virginia High School League policy, the court should look to Title VII and rule that transgender student athletes are protected against discrimination.¹²² Courts now rely on the meaning of "sex" within Title VII of the Civil Rights Act to determine whether an educational institution's conduct constitutes sex discrimination under Title IX.¹²³ There is no published Title IX decision that specifically addresses a transgender student's participation in school athletics, but Title IX's ban of sex discrimination can be construed to require that transgender individuals be allowed to fully participate in school athletics.¹²⁴ The Virginia High School

116. *See id.* at 174 (clarifying that satisfying interest and abilities of the underrepresented gender is a high standard demanding not merely some accommodation, but "full and effective" accommodation).

117. *Id.* (an institution that fails to accommodate the interests and abilities of the underrepresented sex necessarily fails to satisfy prong one of the Title IX analysis).

118. *See* 20 U.S.C. § 1681(a) (1972) (detailing Title IX and the requirements that educational institutions must follow).

119. *See Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 529 (W.D. Va. 1999). (clarifying that the court was not making a decision on federal funding, however, the court did recognize that member schools pay dues to the Virginia High School League).

120. *See id.* at 530.

121. *Id.* at 545.

122. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 239-45 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

123. *Miles v. N.Y. Univ.*, 979 F. Supp. 248, 249-50 (S.D.N.Y. 1997) (relying on Title VII to define the Title IX phrase "on the basis of sex" and noting that other courts have relied on the similarities between Title IX and Title IV).

124. *See Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151 (N.D.N.Y. 2011)

League policy violates the protections of Title IX because it discriminates against transgender athletes by effectively banning them from participating on the team of the gender with which they identify unless the individuals undergo sex reassignment surgery before puberty.¹²⁵

In addition, the Virginia High School League's policy requiring transgender students to undergo surgery before participating on the team of the gender they identify with is discrimination based on gender stereotypes.¹²⁶ A court should find that the League is relying on sex stereotypes when forcing transgender individuals to have sex reassignment surgery prior to participating on a sports team because it is preventing transgender students from an opportunity simply because of their sex.¹²⁷

Further, the Virginia High School League's policy violates Title IX because the policy does not provide opportunities for transgender students in proportion to their enrollment.¹²⁸ Additionally, the Virginia High School League has violated Title IX by failing to add any sports that transgender individuals may participate in and by failing to increase the number of transgender student athletes that participate in the Virginia High School League.¹²⁹ By requiring that transgender students have sex reassignment surgery in order to participate on the team of the gender he or she identifies with, the Virginia High School League policy violates Title IX by discriminating on the basis of sex.¹³⁰

IV. CONCLUSION

The Virginia High School League charges a fee for member schools to participate in the League, meaning the League indirectly receives federal funding and is subject to Title IX.¹³¹ Ultimately, the Virginia High School League policy violates the protections of Title IX because it discriminates against transgender athletes by effectively banning them from participating in athletics on the team of the gender they identify with unless the individuals undergo sex reassignment surgery.¹³²

(holding that the plaintiff had alleged facts plausibly suggesting he had been discriminated against).

125. *See* League Policy, *supra* note 8.

126. *See, e.g.*, Price Waterhouse at 235 (1989) (failing to promote plaintiff because she did not conform to stereotypical female persona); Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (holding that an employer that discriminates against a male employee for failing to behave like a stereotypical male engages in sex discrimination).

127. *Price Waterhouse*, 490 U.S. at 237 (establishing that there is a comparison for courts to make between Title IX and Title VII).

128. *See generally* Cohen v. Brown Univ., 101 F.3d 155, 178 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

129. *See, e.g.*, Ford, *supra* note 6.

130. *See generally* 20 U.S.C. § 1681(a) (1972).

131. *See* Alston v. Va. High Sch. League, Inc., 144 F. Supp. 2d 526, 529 (W.D. Va. 1999).

132. *See* League Policy, *supra* note 8.

