"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

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I. **Introduction**

For centuries students have participated in sports, motivated by the physical, mental, and social benefits that sports provide.\(^1\) Educational institutions provide extracurricular athletic opportunities because sports provide an opportunity for 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 while also improving student morale.\(^3\)

In recent years, educators have taken Dewey’s philosophy and expanded it to encourage the socialization component of sports.\(^4\) In particular, universities recognize the importance

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4. Compare Betty Spears & Richard Swanson, History of Sport and Physical
of sports, likening the competitive nature of sports to that of the business world.\textsuperscript{5}

The Virginia High School League oversees athletics across 313 public schools in the Commonwealth of Virginia.\textsuperscript{6} Virginia’s

\textit{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), with Ellen Gerber, \textit{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).

\textsuperscript{5} See generally Frank W, Carsonie, \textit{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, \textit{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).

new policy permits transgender student athletes to play on the team that they identity with; however, it remains extremely unlikely that any transgender individual will actually qualify to participate.\textsuperscript{7} The policy states, a student athlete will compete in the gender noted on their birth certificate, unless they have undergone sex reassignment surgery.\textsuperscript{8} Notably, Virginia only grants birth certificate changes to individuals who have undergone a medical procedure to change their sex.\textsuperscript{9}

This Comment argues that this new 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.\textsuperscript{10} Part II

\textsuperscript{7} See \textit{id.} (clarifying that the Virginia policy requires anatomical changes including gonadectomy, the removal of an ovary or testis).


\textsuperscript{9} See \textit{id.} (discussing the procedure of changing an individual’s sex on his or her birth certificate).

explores the background of what shapes a Title IX analysis and compares courts rulings on gender discrimination issues in Title IX and Title VII cases.\textsuperscript{11} Part III argues that the Virginia State High School League policy violates Title IX by requiring transgender individuals to undergo sex reassignment surgery in order to participate on the team of the gender they identify with, and establishes that transgender individuals are protected against sex discrimination.\textsuperscript{12}

\section*{II. Background}

\subsection*{A. The Virginia High School League’s Policy on the Inclusion of Transgender Student Athletes}

The Virginia State High School League rules and regulations allow transgender student-athletes to participate on school athletic teams under three conditions.\textsuperscript{13} Specifically, the

\textsuperscript{11} See infra Part II (examining the development and background of Title IX and Title VII to further analyze how Virginia’s policy is a violation of Title IX).

\textsuperscript{12} See infra Part III (arguing that the Virginia High School League policy incorrectly claims to include transgender individuals).

\textsuperscript{13} See Virginia High School League policy, supra note 8 (detailing the procedure that a transgender student must follow in order for the student to be allowed to participate on the
Virginia High School 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 if further conditions are met; and (C) a student-athlete seeking to participate as a result of sex reassignment must access the Virginia High School League eligibility appeals process.\textsuperscript{14}

Section (B) of the policy further requires that the student-athlete has undergone sex reassignment before puberty.\textsuperscript{15} If not, surgical anatomical changes must have been completed, including: external genitalia changes, hormonal therapy for the assigned sex has been administered in a verifiable manner for a sufficient length of time, and 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.\textsuperscript{16} The Virginia High School League’s requirement that transgender athletes undergo sex reassignment surgery before puberty, or after puberty with several other conditions, team of the gender he or she identifies with).

\textsuperscript{14} See id.

\textsuperscript{15} See id (meaning that the athlete has undergone a complete sex change, including the removal of either female or male genitalia).

\textsuperscript{16} See id.
presents concerns under Title IX.  

B. Title VII: “Because of Sex”

Courts have concluded that occasionally, the language of Title IX of the Civil Rights Act of 1964 should be construed the same as the language of Title VII. Federal courts originally ruled that protection based upon sex did not extend to the discrimination against transgender individuals. However, in 1989, the United States Supreme Court laid the

17 See generally Tates v. Blanas, 2003 U.S. Dist. LEXIS 260299 (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).

18 See e.g., Preston v. Virginia ex rel New River Comm. College., 31 F.3d 203, 207 (4th Cir. 1994) (comparing Title IX language to Title VII language).

19 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).
foundation for a more expansive reading of the word “sex”.\textsuperscript{20} Price Waterhouse v. Hopkins, centered on Ann Hopkins, a “macho” female that did not conform to standard gender norms.\textsuperscript{21} The Supreme Court ultimately recognized that Title VII includes gender discrimination.\textsuperscript{22} After the Supreme Court’s ruling, the Ninth Circuit held that “sex” meant both “sex” and “gender” under Title VII.\textsuperscript{23}

In Miles v. New York University, a professor made advances toward a female student.\textsuperscript{24} When the student brought a Title IX claim against NYU, the institution asserted that the student was not protected under Title IX.\textsuperscript{25} Courts rely on the meaning

\textsuperscript{21} Id. at 236 (holding that discrimination on the basis of a gender stereotype is sex-based discrimination).
\textsuperscript{22} See generally id. (clarifying the terms of Title VII, which arguably provided greater protection for transgender individuals).
\textsuperscript{23} See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (protecting gender nonconforming individuals).
\textsuperscript{24} See Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (fondling her breasts, buttocks, and crotch).
\textsuperscript{25} See id. (claiming that even though the student was admitted and treated as a female, the student was in fact a transsexual).
of “sex” within Title VII of the Civil Rights Act to determine whether an educational institution’s conduct constitutes sex discrimination under Title IX.26

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 began displaying a feminine appearance at work.27 In City of Salem, the court applied the analysis from Price Waterhouse, and held that Title VII prohibited discrimination on the basis of transsexual status.28

Additionally, Title IX, which generally refers to “sex” discrimination and harassment, but not transgender discrimination specifically, has been extended to transgender individuals in the context of harassment.29 The court in Pratt

26 See id. at 249 (stating that the Title IX phrase, “on the basis of sex,” is interpreted in the same manner as similar language in Title VII).
27 See 378 F.3d 566, 574 (6th Cir. 2004) (explaining that firing a transsexual individual for dressing in accordance with his or her gender identity, instead of standard gender norms, is gender stereotyping).
28 See e.g., id. (explaining that transsexual individuals are protected under Title VII).
29 See id.
v. Indian River Century School District held that harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX.\(^{30}\)

Title VII of the Civil Rights Act of 1964 provides, that it is unlawful employment practice for an employer to discriminate against an individual, because of the individual’s race, color, religion, sex, or national origin.\(^{31}\) In Price Waterhouse the court held that Title VII’s prohibition of discrimination “because of sex” bars gender discrimination, including discrimination based on sex stereotypes.\(^{32}\) Ultimately the court ruled that Title VII barred discrimination, but also sex stereotyping.\(^{33}\) Further in City of Salem, the plaintiff

\(^{30}\) See Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135, 151 (N.D.N.Y. 2011) (implying that 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).


\(^{32}\) See Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (denying the plaintiff, a female senior manager in an accounting firm, a partnership in part because she was considered “masculine”).

\(^{33}\) See id. (clarifying sex stereotyping as failing to “act” like a male or female).
argued that the same theory of sex stereotyping should be applied to his case.\textsuperscript{34} Ultimately, the plaintiff resigned because he was forced to undergo multiple psychological evaluation of his gender non-conforming behavior.\textsuperscript{35} The court in \textit{Force v. Pierce City R-VI School District} also made clear that the average male and average female abilities should not be considered, but rather an individual’s ability.\textsuperscript{36}

C. \textbf{Background of Title IX: Purposes and Protections}

Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits, or be subjected to discrimination under any education program or activity receiving federal funding.\textsuperscript{37} The legislation also requires the promulgation of regulations

\textsuperscript{34} See \textit{Smith v. City of Salem}, 378 F.3d 566, 574 (6th Cir. 2004) (complaining that his co-workers alleged he did not conform to looking or behaving like a typical man).

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} See \textit{e.g.} \textit{Force v. Pierce City R-VI School District}, 570 F. Supp. 1020, 1022 (W.D. Mo. 1983) (rejecting the argument that a “typical” thirteen-year-old female would have a higher potential for injury than a thirteen-year old male).

\textsuperscript{37} 20 U.S.C. § 1681(a) (1972).
to achieve gender equity in educational opportunities.\textsuperscript{38} Although Title IX did not mention sports, Congress enacted a provision which instructed the Secretary of Health, Education, and Welfare ("HEW") to implement provisions of Title IX relating specifically to the prohibition on sex discrimination in federally assisted education programs, including intercollegiate athletic activities.\textsuperscript{39} In 1979, the Office for Civil Rights (OCR) of the United States Department of Education later developed an Intercollegiate Athletics Policy Interpretation that remains the policy today.\textsuperscript{40}

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

\textsuperscript{38} See \textsc{Matthew J. Mitten et al., Sports Law and Regulation} 769 (Vicki Been et al. eds., 3rd ed. 2014).

\textsuperscript{39} See McCormick v. School Dist. of Mamaroneck, 370 F.3d 275, 287 (2d Cir. 2004) (discussing the 1974 enactment by Congress known as the Javits Amendment, which instructed HEW to publish proposed regulations).

\textsuperscript{40} See 44 Fed. Reg. 71, 413-23 et seq. (1979) (clarifying that the policy interpretation is divided into three sections: scholarships, equipment and supplies, and meeting the interests and abilities of male and female students).
programs that received direct federal government financial assistance.\textsuperscript{41} The Bell decision seriously limited OCR’s jurisdiction over university athletic programs.\textsuperscript{42} Four years after the Bell decision, Congress passed the Civil Rights Restoration Act of 1987 ("CRRA"), which nullified the effects of Bell by outlawing sex discrimination throughout an entire educational institution if any part of that institution received federal funding.\textsuperscript{43}

In \textit{NCAA v. Smith}, the Court held that an entity qualifies as a federal funds recipient when it receives federal aid either itself or through an intermediary.\textsuperscript{44} In Alston \textit{v.}

\textsuperscript{41} See Grove City College v. Bell, 465 U.S. 555, 563-68 (1984) (explaining that “direct” meant the funds came directly to the school from the federal government).

\textsuperscript{42} See generally id. at 567 (neglecting to address that virtually none of those programs receive any federal funding).

\textsuperscript{43} See 20 U.S.C. § 1687 (1972); see also Civil Rights Restoration Act of 1987, S. REP. No. 100-64, 17 (explaining that 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).

\textsuperscript{44} See 525 U.S. 459, 461 (1999) (proposing that there may be
Virginia High School League, the court found that there was no dispute over whether the Virginia High School League received federal funds directly.\textsuperscript{45} Later, in Communities for Equity v. Michigan High School Athletic Association, the court ruled that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.\textsuperscript{46} In Brentwood Academy v. Tennessee Secondary School Athletic Association, the plaintiff, a private school, argued that the defendant, a statewide athletic association of public and circumstances in which entities will be covered by Title IX absent a direct link to federal aid; for example, when member institutions are recipients of federal funds and have ceded controlling authority of their federally funded athletic programs to the NCAA, the NCAA is under Title IX constraints). \textsuperscript{45} See Alston v. Va. High School League, Inc., 144 F. Supp. 2d 526 (W.D. Va. 1999) (discussing plaintiff’s view on how the Virginia High School League could be liable for a Title IX violation).

\textsuperscript{46} See 377 F.3d 504, 508 (6th Cir. 2004) (noting that a contrary ruling would encourage recipients of federal funds to transfer control over those funds to others which could permit both parties to avoid Title IX liability).

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private member schools, was a state actor because of its close involvement with state school officials and its public member schools.\textsuperscript{47} The Supreme Court agreed that the association was pervasively entwined with state officials and public schools.\textsuperscript{48}

However, in NCAA, the Supreme Court held that the NCAA was not subject to Title IX liability on the basis of its receipt of dues from federally funded member schools.\textsuperscript{49} The Court in NCAA failed to address the argument that when a recipient abandons controlling authority over a federally funded program

\textsuperscript{47}See 531 U.S. 288, 294 (2001) (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).

\textsuperscript{48}See id. (explaining that a “direct” link of federal funding is no longer the standard, and that a university having any level of federal funding would be enough to force the university to comply with Title IX).

\textsuperscript{49}See NCAA v. Smith, 525 U.S. 459, 463 (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).
to another entity, Title IX covers the controlling entity regardless of whether it is itself a recipient. Later, the Eastern District of Pennsylvania in *Cuerton v. NCAA* decided that the NCAA is subject to suit under Title VI, regardless of whether it receives federal funds because member schools have abandoned controlling authority over federally funded programs to the NCAA. In February 2001, another landmark Supreme Court decision, *Brentwood Academy*, ruled that a high school athletic association is a “state actor” and thus subject to the Constitution. Accordingly, elementary, high school, and colleges must all comply with Title IX. Virginia has yet to

50 See id. at 464.

51 See *Cuerton v. NCAA*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 1999) (explaining that the Title VI issue is equally applicable to a Title IX case because the drafters of Title IX “explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years”).


53 See *ERA’s Title IX Timeline, EQUAL RIGHTS ADVOCATES*, available at,
rule on whether the Virginia High School League is a state actor since the Brentwood Academy case, but Brentwood Academy holds that the Virginia High School League is subject to Title IX as it is a state actor.\textsuperscript{54} Finally, in February of 1992, the Supreme Court unanimously held in Franklin v. Gwinnet County Public Schools, that victims may be awarded monetary damages and attorney fees for intentional violations of Title IX.\textsuperscript{55}

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.\textsuperscript{56} Athletic programs are considered education programs and activities.\textsuperscript{57} The regulations, which are applicable to http://www.equalrights.org/title-ix-timeline/.

\textsuperscript{54} See Brentwood Academy, 531 U.S. at 290.

\textsuperscript{55} See Franklin v. Gwinnet County Public Schools, 503 U.S. 60, 63 (1992). See also Pederson v. Louisiana State University, 912 F. Supp. 892, 917 (M.D. La. 1996) (finding that “monetary damages are not recoverable under Title IX absent a finding of intentional discrimination”).

\textsuperscript{56} 44 Fed.Reg. 71, 413-23 (1979).

\textsuperscript{57} See generally Office for Civil Rights, Department of Education, A
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 on other athletic benefits and opportunities. 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 area alone cannot be used to offset a violation in another area.

To achieve compliance with Title IX’s requirement to provide equal participation opportunities (prong one of the three-part test), an institution must consider and satisfy one of the following subparts: (1) whether intercollegiate-level participation opportunities for men and women are provided in numbers substantially proportionate to their respective

Policy Interpretation: Title IX and Intercollegiate Athletics (Dec. 11, 1979), available at, http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html (connecting the scope of Title IX to intercollegiate athletics).


See e.g. Roberts v. Colo. State Univ., 998 F.2d 824, 828 (10th Cir. 1993) (clarifying 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).
enrollment; or (2) when the members of one sex are
underrepresented among intercollegiate athletics, the
institution can show a history and continuing practice of
program expansion which is responsive to the developing
interests and abilities of the members of that sex; or (3) when
the members of one sex are underrepresented among
intercollegiate athletics, and the institution cannot show
continued practice of expansion, the institution needs to show
that the interests and abilities of the members of that sex
have been fully and effectively accommodated by the present
program. \(^{60}\)

In *Brown University v. Cohen*, the court held that the
Policy Interpretation is entitled to substantial deference. \(^{61}\)
The court in *Cohen* dismissed Brown University’s argument that
women are less interested than men in participating in
intercollegiate athletics, and concluded that even if at a
particular time, women have less interest in sports than do

\(^{60}\) See generally *Boucher v. Syracuse University*, 164 F.3d 113,
120 (2d. Cir. 2004) (explaining the three-part test of Title
(clarifying that it is proper for courts to thoroughly rely on
the Policy Interpretation).
men, such evidence, standing alone, cannot justify providing fewer athletics opportunities. For example, in Mercer v. Duke University, a female athlete was allowed to try out for the university’s football team. Eventually the female student was selected by the players to kick a twenty-eight yard field goal, resulting in a team victory and a place on the team. The Fourth Circuit held that because the university made her a member of the team, and then discriminated against her by excluding her from participation in the sport on the basis of her sex, she had stated a claim under Title IX. The court in Pederson v. Louisiana State University further concluded that, a Title IX claimant must additionally prove intentional discrimination on the part of a recipient before she may recover monetary damages.

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62 See id. at 897.
63 See Mercer v. Duke Univ., 190 F.3d 643, 650 (4th Cir. 1999) (filing a claim against the university and the coach, alleging sex discrimination in violation of Title IX).
64 See id. (mentioning that despite being on the team, the female student was not allowed to dress for games or sit on the sidelines).
65 See id. at 648.
66 See Pederson v. Louisiana State University, 213 F.3d 858, 863.
III. Analysis

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, directly or indirectly, are subject to Title IX. In Alston v. Virginia High School League, although no dispute existed over whether the Virginia High School League received federal funds, the plaintiffs argued that Virginia High School League received federal financial assistance indirectly or “through another recipient.” As the court in Alston made clear, the Virginia High School League intentionally violated Title IX.

67 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 National Collegiate Athletic Association v. Smith, 525 U.S. 459, 461 (1999) (proposing that there may be circumstances in which entities will be covered by Title IX absent a direct link to federal aid).

68 See 144 F.Supp.2d at 526 (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).
High School League does not receive federal funds directly from any entity, most of the league’s revenue is nevertheless derived from “another recipient,” namely from insurance premiums, membership dues, fees, gate receipts from events, and corporate sponsorships. However, because the Virginia High School League charges a fee for schools to participate, a court should rule that the league is indirectly receiving federal funding.

Additionally, any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid. Like the Michigan High School Athletic Association


70 See id. (establishing that the member schools of the Virginia High School League have ceded to the league all authority, thus bringing it into the scope of Title IX).

71 See Community for Equity v. Michigan High School Athletic Association, 377 F.3d 504, 508 (6th Cir. 2004) (ruling that the Michigan High School Athletic Association was so entwined with the public schools and the state of Michigan, therefore, Michigan High School Athletic Association should be considered a
Association analyzed in *Community for Equity*, the Virginia High School League is the principal sanctioning organization for interscholastic athletic competition within Virginia; therefore, a court would rule that Virginia High School League is also a state actor.  

Further, as schools pay membership dues to participate in an athletic league, a court should rule in the same way as *Community for Equity* because those fees are a source of revenue for the league. Moreover, a court should similarly find that the Virginia High School League is an entity that exercises control of authority over a federally funded program making it subject to Title IX because the Virginia High School League, like Michigan, receives gate receipts, fees, and has a representative council.

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73 See Alston, 144 F. Supp. 2d at 529 (explaining that the Virginia High School League did not receive federal funds directly from any entity).

74 See Community for Equity, 377 F.3d at 512 (deciding that Michigan High School Athletic Association’s purpose was to
Accordingly, courts will likely deem the Virginia High School League a state actor despite the fact that it is a private organization.\textsuperscript{75} Specifically, the Virginia High School League’s members are the public high schools in the Commonwealth of Virginia.\textsuperscript{76} Just as the Supreme Court in Brentwood Academy agreed that the association was pervasively entwined with state officials and public schools, a court should find that the Virginia High School League has a sufficient mixing with the Commonwealth of Virginia.\textsuperscript{77} Thus, the Virginia High School League is subject to the provisions in create, establish, provide for, and conduct interscholastic athletic programs, thus making it a “state actor”).

\textsuperscript{75} See, e.g., Brentwood v. Tennessee Secondary School Athletic Association 531 U.S. 288, 294 (2001) (explaining that a majority of members are public schools, and the leadership is made up of public school officials; that is a state actor).

\textsuperscript{76} See generally id. at 297 (demonstrating that a nominally private entity may be a state actor when it is entwined with governmental policies or when government is entwined in its management or control).

\textsuperscript{77} See e.g. id. (providing that Tennessee Secondary School Athletic Association’s membership is composed of primarily public schools”).
the Civil Rights Act of 1964, including Title IX and Title VII.\textsuperscript{78}

B. Courts in Analyzing Title IX Claims Should Draw on Courts’ Interpretation of Title VII, Especially When Interpreting the Meaning of “Sex.”

The Virginia High School League is an educational institution that receives federal funds; however, although Title IX applies, a court must still determine whether transgender students are covered under Title IX’s meaning of “sex” and courts should look to Title VII for that determination.\textsuperscript{79} Prior to the Supreme Court’s decision in Price Waterhouse, several courts concluded that Title VII affords no protection to transgender victims of sex discrimination.\textsuperscript{80} However, 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

\textsuperscript{78} See generally, Civil Rights Act 1964, §§

\textsuperscript{79} See generally, Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (including transsexual individuals as individuals that are protected for discrimination).

\textsuperscript{80} 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 transsexual individual).
Title IX.\textsuperscript{81} While no published Title IX decision specifically discusses transgender students and their entitlement to participation in school athletics, Title IX’s prohibition of sex discrimination can be construed to require that transgender individuals be permitted to fully participate in school athletics.\textsuperscript{82} Title IX should also be understood to guarantee transgender students equal educational opportunities free from discrimination.\textsuperscript{83} Unfortunately, Title IX fails to specify the criteria for establishing a sex discrimination claim or the method by which a person may bring suit to challenge such discrimination.\textsuperscript{84}

\textsuperscript{81} See Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (stating that the Title IX phrase “on the basis of sex” is interpreted in the same manner as the language in Title VII).

\textsuperscript{82} See e.g., Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135, 151 (N.D.N.Y. 2011) (holding that a male student who is mocked because of perceived gender nonconformity constitutes a discrimination based on sex).

\textsuperscript{83} See id.; See also Miles v. New York University, 979 F.Supp. 248 (S.D.N.Y. 1997) (holding that a transgender woman who was sexually harassed was entitled to the protection of Title IX).

\textsuperscript{84} See 20 U.S.C. 1681 (providing no procedure by which a claim should be brought under the statute).
However, when analyzing the Virginia High School League policy, a court should use a combination of both Title IX and Title VII cases. Specifically, a Virginia state or federal court should follow the lead of other courts that take the Title VII “because of sex” phrase interpretation and apply it to Title IX gender discrimination cases. 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 Virginia High School League policy should also rule that transgender students are discriminated against “because of their sex.”

85 See e.g., Miles, 979 F. Supp. at 251.

86 See Franklin, 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 (4th Cir. 1994) (discussing that Title VII provides a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX).

87 See Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (recognizing that Title IX was enacted to deter sexual discrimination, even if legislators did not have transgender individuals specifically in mind).
Most courts have indicated that Title VII principles should be applied to Title IX actions.\textsuperscript{88} If an institution makes a decision not to provide equal athletic opportunities for its female students because of paternalism and stereotypical assumptions about their interests and abilities, then a court will find that the institution intended to treat women differently because of their sex.\textsuperscript{89} In Pederson the court ruled that appellees need not have intended to violate Title IX, but need only have intended to treat women differently.\textsuperscript{90} By requiring transgender students to have surgery, or not participate in sports, the Virginia High School League intended to treat transgender students differently than cisgender

\textsuperscript{88} See e.g., Preston v. Virginia ex rel New River Comm. College., 31 F.3d 203, 209 (4th Cir. 1994).

\textsuperscript{89} See Pederson v. Louisiana State University, 213 F.3d 858 (5th Cir. 2000) (emphasizing that ignorance about whether an institution is violating Title IX does not excuse an intentional decision not to accommodate the interests of their female students by not providing sufficient athletic opportunities).

\textsuperscript{90} See id. (overruling the reasoning that because the athletic director thought the women’s program was wonderful does not mean he was ignorant to the idea that the program violated Title IX).
students.\textsuperscript{91} Just as the Supreme Court in \textit{Preston} focused on whether the petitioner was excluded from participation in the program because of her sex, a court analyzing the Virginia High School League policy would also consider this factor in the courts analysis.\textsuperscript{92} Similar to the court’s finding in \textit{Pederson}, the Virginia High School League’s outdated attitude about transgender students amply demonstrates the intention to discriminate; therefore, mistreating transgender students.\textsuperscript{93}

Most courts that are faced with the question of defining “because of sex” ruled that Title VII principles should be

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\textsuperscript{91} See \textit{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).
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\textsuperscript{92} See \textit{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 which we may look in shaping actions under Title IX).
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\textsuperscript{93} See \textit{Pederson v. Louisiana State University}, 213 F.3d 858 (5th Cir. 2000) (establishing that Supreme Court precedent demonstrates that archaic assumptions constitute intentional gender discrimination).
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applied to Title IX actions.\textsuperscript{94} The Virginia High School League policy forcing a student athlete to compete on a team with the gender noted on their birth certificate unless they have undergone sex reassignment surgery prevents transgender students from participating in sports programs because of their sex.\textsuperscript{95} Like in Preston where the court held that the petitioner was excluded from the program based on her sex, a court faced with this policy will also likely find that transgender students are excluded from participation in sports programs because of their sex.\textsuperscript{96} Additionally, in City of Salem, the court found that Title VII included the prohibition of discrimination of

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\textsuperscript{94} See generally Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (claiming Title VII is “the most appropriate analogue when defining Title IX’s substantive standards.”).
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\textsuperscript{95} See Virginia High School League Policy, supra note 8 (claiming to include transgender students in the athletic program).
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\textsuperscript{96} See e.g., Preston v. Virginia ex rel New River Comm. Coll., 31 F.3d 203, 209 (4th Cir. 1994) (using Title VII to define sex; Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824, 832 (10th Cir. 1993) (finding the softball team established the abilities and interests prong of a Title IX analysis).
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transsexual individuals. A court faced with the Virginia High School League policy should rule similarly to the court in City of Salem and allow for transgender students to state a claim as a protected class. Further, in Mercer, the court held that the university discriminated against the female plaintiff by excluding her from participation in football, once she had already been declared a member of the team, based on her sex. Here the Virginia High School League similarly excludes transgender students from participation in sports based on their sex. Therefore, a court should rule in an analogous way by finding that the way transgender students are treated under the

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

98 See e.g. id. (clarifying that Title VII protection is not excluded to transgender individuals).

99 See Mercer v. Duke Univ., 190 F.3d 643, 648 (4th Cir. 1999) (ruling that preventing the Plaintiff from playing football is sex discrimination).

Virginia policy is encompassed under the meaning of “sex” as evidence by Title VII case law.\(^{101}\)

3. The Virginia High School League’s Policy Violates Title IX because Discrimination “because of Sex” Includes Discrimination Based on Sex Stereotyping Based on Courts Analysis Under Title VII.

An argument can also be made that Virginia High School League requiring transgender students to have surgery before participating on the team of the gender in which they identify with is discrimination based on gender stereotypes.\(^{102}\) The plaintiff in Price Waterhouse was told if she acted more feminine, then she might have been afforded the promotion.\(^{103}\) In effect, the Virginia High School League tells transgender


\(^{102}\) See e.g. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (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 confide to gender stereotype of how a man should act based on gender norms).

\(^{103}\) See 490 U.S. at 237 (1989) (arguing that because the female plaintiff did not conform to gender norms she was discriminated against).
students that they can only participate in school athletics if they have the sex reassignment surgery and conform to traditional male and female stereotypes.\textsuperscript{104} However, the plaintiff in a sex stereotyping case would have to show that the employer actually relied on her gender in making its decision.\textsuperscript{105} While the Virginia High School League is not an employer, the policy nevertheless relies on sex stereotypes to decide that transgender individuals must have surgery in order to compete in sports.\textsuperscript{106} Courts faced with the Virginia policy should therefore draw on the Title VII interpretation of what constitutes sex discrimination.\textsuperscript{107}

A court would further support the claim that the Virginia

\textsuperscript{104} See Virginia High School League Policy, supra note 46; see e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989) (confirming the District Courts finding of sex stereotyping).

\textsuperscript{105} See id. at 251 (discussing the sexist remarks made by the plaintiffs employer when deciding her candidacy for a promotion).

\textsuperscript{106} See generally Virginia High School League Policy, supra note 44 (mentioning transgender students explicitly).

\textsuperscript{107} See e.g., Price Waterhouse, 490 U.S. at 236 (arguing that “because of sex” has the same meaning under Title IX and Title VII).
High School League is stereotyping by analogizing to the holding in *City of Salem.*\(^{108}\) The court in *City of Salem* found that sex stereotyping was present when the plaintiff was forced into multiple psychological evaluations of his gender non-conforming behavior.\(^{109}\) A court ruling on the Virginia High School League policy should make the analogy that forcing surgery on transgender individuals constitutes another form of forcing an individual to undergo evaluation of their gender non-conformity.\(^{110}\) Ultimately, the Virginia High School League requiring transgender athletes to have sex reassignment surgery is sex stereotyping, and therefore, gender discrimination.\(^{111}\)

Additionally, a Title IX claimant must prove intentional

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\(^{108}\) Smith v. City of Salem, 378 F.3d 566, 576 (6th Cir. 2004).

\(^{109}\) See *id.* (mentioning the struggles that the plaintiff faced before ultimately leaving the job because he was discriminated against).

\(^{110}\) See *e.g.* *id.* (scheming to force the plaintiff to resign if he did not follow the company’s requirement that he undergo multiple psychological evaluations).

\(^{111}\) See *id.* (ruling that forcing the plaintiff to take extra measures to conform to his typical gender is gender stereotyping).
discrimination before recovering monetary damages.\textsuperscript{112} The court in Pederson ruled that the university perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many ways.\textsuperscript{113} When the Virginia High School League decided to single out transgender individuals and require sex reassignment surgery to have occurred before puberty, the league acted similarly to Louisiana State University in Pederson; therefore, a court would likely rule that the Virginia High School League did in fact intentionally discriminate against transgender students.\textsuperscript{114} Based on Title VII case law, transgender individuals are included in “because of sex,” but just because those individuals are included does not mean that

\textsuperscript{112} See Pederson v. Louisiana State University, 213 F.3d 858, 860 (5th Cir. 2000) (admitting that the question of intentional discrimination is a “very close one”).

\textsuperscript{113} See e.g. id. (explaining that Louisiana State University consistently approved larger budgets for travel, personnel, and training facilities for men’s teams versus women’s teams).

\textsuperscript{114} See generally id. (emphasizing that if an institution makes a decision not to provide equal athletic opportunities for its female students because of paternalism and stereotypical assumptions about their interest and abilities, that institution intended to treat women differently because of their sex).
the Virginia policy is an immediate Title IX violation.\textsuperscript{115} A court would have to do a Title IX analysis through the three-pronged requirements of a Title IX action.\textsuperscript{116}

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

The Virginia High School League is in compliance with two of the three parts of the Title IX analysis, but because the policy fails to satisfy all three prongs under one part of the analysis, the Virginia High School League’s policy is a violation of Title IX.\textsuperscript{117}

\textsuperscript{115} See generally Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (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).

\textsuperscript{116} See generally, Brown University v. Cohen, 520 U.S. 1186, 1193 (1997) (finding that when a Title IX violation is raised, all three prongs of the Title IX analysis must be reviewed by the court).

\textsuperscript{117} See e.g. id. at 1197 (recognizing that Brown violated Title IX by failing to provide women athletes with an equal opportunity to participate in intercollegiate athletics).
1. The Virginia High School League Policy Does not Provide Opportunities for Transgender Students in Proportion to His or Her Enrollment, Violating Subpart One of the First Prong of the Title IX Analysis.

When the Virginia High School League adopted a new policy that forced transgender students to have sex reassignment surgery in order to participate on the team of the gender they identify with, Virginia failed to satisfy part one, providing opportunities in proportion the enrollment, of the three-part analysis.118 In Cohen, the Court made clear that even if there is less interest in sports from women that alone does not allow a University to provide fewer athletic opportunities to women.119 Currently there are no cases of transgender students speaking out against the Virginia High School League policy; however, if there is a transgender student that shows an interest in participating in sports in the Virginia High School League, a court will likely rule consistent with the court in

118 See Virginia High School League Policy supra, note 9; see also Title IX Policy Interpretation supra, note 47 (making clear that transgender individuals cannot participate without undergoing sex reassignment surgery).

119 See id. (finding that all three prongs of the Title IX analysis must be weighed equally).
Cohen. In particular, a court will similarly decide that a lower rate of participation does not necessarily mean that there is not a genuine interest to participate. Even if the Virginia High School League could demonstrate that at a particular time, transgender students have less interest in sports than do cisgender individuals, such evidence standing alone, cannot justify providing fewer athletic opportunities for transgender than for cisgender individuals.

However, another element, which must be considered under Title IX, is the requirement that there be evidence of some

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120 See generally Brown University v. Cohen, 520 U.S. 1186, 1194 (1997) (recognizing that women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports).

121 See id. at 1195 (acknowledging that interest evolves as a function of opportunity and without providing individuals the opportunity to participate interest will never grow).

122 See generally Brown University v. Cohen, 520 U.S. 1186, 1194 (1997) (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).
interest in athletics.\textsuperscript{123} Upon releasing the Virginia High School League’s policy, executive director Ken Tilley, noted that transgender students are interested in participating in athletics.\textsuperscript{124} Therefore, a court ruling on the Virginia High School League policy would further affirm the court’s ruling in Cohen, because the Virginia High School League, through its own admission, is aware that transgender students wish to participate in sports.\textsuperscript{125}

Additionally, an argument can be made that members of the excluded sex must be allowed to try out for the team offered

\textsuperscript{123} See Three Part Analysis supra, note 59 (clarifying that some kind of evidence of interest in athletics is required when analyzing the first prong of the three-part test).


\textsuperscript{125} See generally Cohen, 520 U.S. at 1190 (stating that the unprecedented success of these athletes is due to Title IX’s beneficent effects on women’s sports).
unless the sport involved is a contact sport. However, in examining the Virginia High School League Policy, a court will likely acknowledge that other courts recognize limitations on excluding students from participating in a contact sport based on their sex. Therefore, a court faced with the Virginia High School League policy will likely find support in cases like Mercer, that stand for the proposition that HEW certainly knew how to provide an exemption had it wished to do so, meaning contact sports are not exempt from Title IX. Therefore, a court that faces the Virginia High School League policy will likely rule that transgender students must be allowed to try out for teams regardless of if the sport is contact or not.

126 See generally Mercer v. Duke University, 190 F.3d 643, 646 (4th Cir. 1999) (ruling by the district court that contact sports, such as football, are specifically excluded from Title IX coverage; however, this ruling was reversed).

127 See e.g., id. at 648.

128 See generally id. (finding that there is no bright line rule that eliminates all contact sports from being obligated to follow Title IX).

129 See id. (explaining that when Duke failed to allow the female student to participate in the sport based on her sex, the female
If one transgender student is enrolled in a school that participates in the Virginia High School League, he or she will not be able to participate on the sports team of the gender he or she identifies with.\textsuperscript{130} 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.\textsuperscript{131} This requirement contemplates an argument 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 the student was entitled to bring a Title IX complaint before the court).

\textsuperscript{130} See Virginia High School League Policy \textit{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).

their natal born sex. However, if a transgender individual is undergoing hormone treatments, their body changes significantly. The school district in Force v. Pierce City R-VI School District argued that the plaintiff could not safely participate in the football program. However, as the court in Pierce City R-VI School District refused to accept that argument, a court would likely also refuse to accept the argument that the Virginia High School League forces transgender individuals to have the sex reassignment surgery to

132 See generally Force v. Pierce City R-VI School District, 570 F. Supp. 1020 (W.D. Mo. 1983) (explaining that a 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").

133 See e.g. Tates v. Blanas, 2003 U.S. Dist. LEXIS 26029 (acknowledging that hormone treatment changed the plaintiff’s voice, appearance, and demeanor, making transgender individuals body more consistent with his or her self-identified gender).

134 See Force v. Pierce City R-VI School District, 570 F. Supp. 1020 (W.D. Mo. 1983) (arguing 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).
prevent possible injury.\textsuperscript{135}

Another possible argument that the Virginia High School League may formulate is the unfair advantage that trans-female students would have in sports.\textsuperscript{136} In \textit{Pierce City R-VI School District}, the court acknowledged the expert testimony that an average male will to some extent outperform the average female in most athletic events.\textsuperscript{137} However, a court faced with the Virginia High School League policy should agree with the court in \textit{Pierce City R-VI School District} that the best way to encourage and maximize transgender participation is by providing individuals the right to try to succeed.\textsuperscript{138} Ultimately, a Virginia court will likely find that transgender students deserve a chance to display their athletic abilities, thus finding that the policy implemented by the Virginia High

\textsuperscript{135} See \textit{id}.

\textsuperscript{136} See generally \textit{id}. (suggesting that males (as a class) will always outperform females (as a class) in most athletic endeavors).

\textsuperscript{137} See \textit{id} (understanding that the argument is open to dispute).

\textsuperscript{138} See generally \textit{id}. (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).
School League discriminates against transgender students.\textsuperscript{139} Thus, the Virginia High School Leagues should at least allow transgender individuals to try out, and participate if his or her skills allow, for the sports teams that are non contact sports.\textsuperscript{140}

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 that a court may consider in determining whether an institution has established a history of program expansion.\textsuperscript{141} Virginia High School League

\textsuperscript{139} See, e.g., id (accepting that an individuals abilities may allow them to succeed or fail, as fortune’s dictate, but in the process at least those individuals are permitted to profit by those things that which are learned from trying).

\textsuperscript{140} See e.g., Mercer v. Duke University, 190 F.3d 643, 648 (4th Cir. 1999) (allowing schools to have separate gender teams for contact sports).

\textsuperscript{141} See generally Boucher v. Syracuse University, 164 F.3d 113 (2d Cir. 1999) (clarifying that adding or upgrading intercollegiate teams, increasing the number of participants in intercollegiate athletics who are members of an underrepresented class, and an institutions affirmative response to request by
has neither added any sports that transgender individuals could participate in nor increased the amount of transgender student athletes that participate in the Virginia High School League.\textsuperscript{142} An argument can be made that providing opportunities in new sports satisfies the continuing practice of program expansion; however, that argument is invalid because the focus should not be on the number of sports played, but on the number of transgender individuals afforded the opportunity to participate.\textsuperscript{143}

Many courts have ruled that the spirit of Title IX would be better served if the institution implemented a formal policy by which students could bring their interests and abilities to

\textsuperscript{142} See, e.g., Virginia’s New Policy Allowing Transgender Student Athletes Bans Transgender Student Athletes supra, note 6 (referring to the Virginia High School League executive director Ken Tilley who stated his office will handles students’ request on a “case-by-case basis”).

\textsuperscript{143} See generally Boucher, 164 F.3d at 120 (holding that as a matter of law, Syracuse has a sufficient history of expanding opportunities for its women student-athletes so to satisfy the program expansion requirement).
the attention of the administration.\textsuperscript{144} However, the court in Boucher \textit{v. Syracuse University} found that because Syracuse had a strong history of adding women’s sports programs, a formal policy was not necessary.\textsuperscript{145} Unlike Boucher, in a case brought against the Virginia High School League’s policy, a court will likely rule that the Virginia league has not made a sufficient effort to expand programs for transgender individuals.\textsuperscript{146} Therefore the policy should be ruled discriminatory against transgender individuals.\textsuperscript{147}

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\textsuperscript{144} See, \textit{e.g.}, \textit{id.} (emphasizing the importance of a formal policy is particularly relevant where there is no actual expansion currently taking place).
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\textsuperscript{145} See \textit{id.} (finding that since 1995, Syracuse has added two additional women’s athletic teams, lacrosse and soccer, and is planning the induction of a third team, softball, by the year of 1999).
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\textsuperscript{146} See \textit{id.} (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 to expand in response to its student body’s abilities and interests).
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\textsuperscript{147} See generally \textit{id.} at 121.
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3. The Virginia High School League Failed to Show that Interest 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 of a Title IX analysis in accordance with its plain meaning, asking whether there are members of the underrepresented sex who have interest and ability to compete but are not given the opportunity.\footnote{Brown University v. Cohen, 520 U.S. 1186, 1199 (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).} Currently no transgender student is speaking out against the Virginia High School League policy, but if a transgender student brings a Title IX claim to a court, the court should rule alongside Cohen, and find that subpart three is also in violation.\footnote{See generally A Policy Interpretation: Title IX and Intercollegiate Athletics supra, note 47 (implying that success of a team is not relevant to assessing the team’s level of competitive ability, explaining in part, that a poor record is likely the negative effect of lack of funding, scholarships, and staff).} If a transgender student
brings a suit against the Virginia High School League, the league will not be able to show that the interest and abilities of transgender students have been fully accommodated because there is no alternative or exception to the sex reassignment policy. Therefore, a court will likely rule in favor of the transgender individuals, and find that the Virginia High School League’s policy fails to satisfy this prong of Title IX.

D. Courts in Analyzing the Virginia High School League’s Policy on Transgender Student Athletes Should Follow Precedent and Force the League to Create an Inclusive Policy.

All educational institutions that receive federal funds, directly or indirectly, are subject to Title IX. The Virginia High School League does not receive federal funds directly from any entity as most of the league’s income is

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150 See generally Cohen, 520 U.S. at 1197 (clarifying that satisfying interest and abilities of the underrepresented gender is a high standard demanding not merely some accommodation, but full and effective accommodation).

151 See e.g., id at 1199 (deciding that failure to accommodate the interest of the underrepresented sex fails to satisfy prong one of the Title IX analysis).

152 See 20 U.S.C. § 1681(a) (1972) (detailing Title IX and the requirements that education institutions must follow).
derived from membership dues, fees, gate receipts from events, and corporate sponsorships.\textsuperscript{153} 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.\textsuperscript{154}

When a court is faced with a case against the Virginia High School League policy, the court should look to Title VII and effectively rule that transgender student athletes are protected against discrimination.\textsuperscript{155} 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.\textsuperscript{156} There is no published Title IX

\textsuperscript{153} See Alston v. Va. High School 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 how the Virginia High School League makes money from member schools).

\textsuperscript{154} See id. at 530.


\textsuperscript{156} See Miles v. N.Y. Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (relying on Title VII to define the Title IX phrase “on
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.\textsuperscript{157} 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 unless the individuals undergo sex reassignment surgery in order to participate on the team of the gender they identify with.\textsuperscript{158}

In addition, the Virginia High School League requires transgender students to have surgery before participating on the team of the gender in which they identify with is discrimination based on gender stereotypes.\textsuperscript{159} Although the Virginia High

\textsuperscript{157} See Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135, 151 (N.D.N.Y. 2011) (holding that a male student was discriminated against because of his sex).

\textsuperscript{158} See Virginia High School League Policy, supra note 44.

\textsuperscript{159} See e.g. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (failing to promote plaintiff because she did not conform to stereotypical female persona); Smith v. City of Salem, 378
School League is not an employer, a court will 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.\textsuperscript{160}

Further, the Virginia High School League’s policy violates Title IX because the policy violates prong one of the Three-Part Analysis by not providing opportunities for transgender students in proportion to their enrollment.\textsuperscript{161} The Virginia High School League’s executive director Ken Tilley noted that transgender students are interested in participating in athletics, proving that the league is aware of the interest of transgender students.\textsuperscript{162} Additionally, the Virginia High School

\textsuperscript{160} See Price Waterhouse, 490 U.S. at 237 (establishing that there is a comparison for courts to make between Title IX and Title VII).


\textsuperscript{162} 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-
League has violated subpart two of the first prong of the Title IX analysis by failing to add any sports that transgender individuals could participate in and failing to increase the amount of transgender student athletes that participate in the Virginia High School League.\textsuperscript{163} By forcing transgender students to 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.\textsuperscript{164}

\textbf{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.\textsuperscript{165} Ultimately, the Virginia High School League policy

\footnotesize{transgender-athletes/; see also Cohen, 520 U.S. at 1190 (explaining that the underrepresented sex needs to show an interest and ability in athletics).

\textsuperscript{163} See, \textit{e.g.}, Virginia’s New Policy Allowing Transgender Student Athletes Bans Transgender Student Athletes \textit{supra}, note 6.

\textsuperscript{164} See \textit{generally} 20 U.S.C. \textsection 1681(a) (1972).

\textsuperscript{165} See \textit{Alston v. Va. High School League, Inc.}, 144 F. Supp. 2d 526, 529 (W.D. Va. 1999).}
violates the protections of Title IX because it discriminates against transgender athletes by effectively banning them from participating in athletics unless the individuals undergo sex reassignment surgery in order to participate on the team of the gender they identify with.\textsuperscript{166}

\textsuperscript{166} See Virginia High School League Policy, supra note 44.