

2022

Will the New State Laws on Fairness in Female Athletics and the Politics of Transgender Athletes Create a New Sports Exception Under Title IX?

Albert D. Clark

Southern University and A & M College, albert_clark@subr.edu

Follow this and additional works at: <https://digitalcommons.subr.edu/cbej>



Part of the [Business Administration, Management, and Operations Commons](#), [Business and Corporate Communications Commons](#), and the [Business Law, Public Responsibility, and Ethics Commons](#)

Recommended Citation

Clark, Albert D. (2022) "Will the New State Laws on Fairness in Female Athletics and the Politics of Transgender Athletes Create a New Sports Exception Under Title IX?," *Southern University College of Business E-Journal*: Vol. 16: Iss. 3, Article 2.

Available at: <https://digitalcommons.subr.edu/cbej/vol16/iss3/2>

This Article is brought to you for free and open access by the College of Business at Digital Commons @ Southern University and A&M College. It has been accepted for inclusion in Southern University College of Business E-Journal by an authorized editor of Digital Commons @ Southern University and A&M College. For more information, please contact maletta_payne@subr.edu.

Will the New State Laws on Fairness in Female Athletics and the Politics of Transgender Athletes Create a New Sports Exception Under Title IX?

Dr. Albert D. Clark; JD

Professor of Management (Legal Environment of Business, Ethics, Employment Law)

College of Business

Southern University Baton Rouge, Baton Rouge, Louisiana

albert_clark@sub.edu

Abstract: In the Summer of 2021, many states across the nation entered into a cultural, social, and legal war pitting the rights of female athletes against those of transgender athletes. Louisiana Governor John Bell Edwards vetoed the legislation here in the state of Louisiana. In a special Veto session of the Louisiana Legislature, the House voted 68-30 to override, and the Senate 26-12 to override the Governor's veto. The Veto session failed as the House could not deliver on the minimum 70 votes they had promised and which were needed to override the Governor veto. Although the session ended upon the vote, several of the parties have sworn that the fight is not over and the legal issues were not addressed. The proponents vow to bring the Fairness in Women's Sports Acts back to the forefront again next year. We are going to go back, review, analyze, and take a look at some of those issues.

Introduction

Louisiana has joined a growing number of States to pass bills that would ban the participation of transgender athletes in female sports competition." The Fairness in Women's Sports Act" is the general name of several bills being filed across the country with the belief that the passage of this type of Transgender legislation by states such of Louisiana is needed to protect female athletes. The Governor vowed to veto such legislation and knew that the state could not only lose Federal financial assistance, as well as the possibility that institutions such as the NCAA and Professional Sports Organizations would cancel or pass on the holding of National Sporting events and championships here in the state of Louisiana. This has already happened in several states where laws threatening the civil rights of citizens have been passed. It could take years for the challenges to the passage of the current legislation to works its way through the courts. The cost to the state and local government could easily amount to the loss of millions of dollars in revenue. It would be especially hurtful to small business who are still in a Covid 19 recovery mode and the loss of these Federal and Sporting event dollars would devastate their bottom lines. Legally, the passage of these laws is problematic is several legal areas such as Title IX, the Equal Protection Clause, and the Supremacy Clause of the U.S. Constitution. Title IX is a federal civil rights law passed as part of the Education Amendments of 1972. This law protects all people from discrimination based on sex in education programs or activities that receive

Federal financial assistance. It is enforced through The United States Department of Education under the Office of Civil Rights. Title IX states that:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

At one time, much of the focus under Title IX centered around the prevention of impermissible and illegal sexual conduct on college campuses. These include acts of sexual harassment, sexual assault, unwanted sexual contact, sexual misconduct, domestic violence, relationship abuse, stalking (including cyber-stalking) and dating violence. However, when read in its entirety, the statute is much more comprehensive than what one might think. Currently Title IX protects transgender student-athletes from sports competition discrimination. It is these Federal policies which have come under attack by local state legislatures. Some legal scholars also feel that the passage of these new transgender bans also violate, The Equal Protection Clause under the 14th amendment of the US Constitution, which prohibits states from denying “equal protection of the laws” to any person within its jurisdiction.

The purpose in this paper is to address a solitary issue of Fairness in Women’s Sports in athletic competition. Many proponents would argue that the participation of transgender student-athletes in sports is a Humanity issue, not a Legal, Left-Right, Liberal-Conservative, Democrat or Republican issue. It cannot continue to be ignored. The problem is that the solitary issue of Fairness has been hijacked by many who want to make political hay by making it part of some of the ongoing cultural and social and political movements that are crisscrossing the country today. These movements are currently trending on cable news and social media and have become increasingly political in their nature. It has become a Legal issue as well. By no means is it and meant to disintegrate into a discussion of LGBTQ rights. Many experts in Human Anatomy, Sociology, and Psychiatry often conflict when it comes to such discussions about LGBTQ rights.

Three Narratives

(1) You are attending a girls’ basketball game between two local rival high schools. The score is close and the competition is intense. You start to hear a chant from the rival schools’ stands. It’s low at first, but then it gets louder and louder.” ... “Man on the court”, “Man on the court”, “Boy playing basketball”, “Boy playing basketball”. It is just mean spirited. The particular player in question, who self-identifies as a girl has already had a really hard semester, even at her own school. She has been constantly teased and bullied. And of course, there’s this one parent who keeps threatening her if she continues to use the same rest room as the other girls in school. Her own school can only do so much to protect her. Life of a 15-year-old should not be

this tough and social media is just plain cruel. Suicidal thoughts have started to creep inside her head. She says, “God made me this way. It was not a personal choice the way my body was made. God does not make mistakes and God does not make junk. Everyone should just leave me alone.” It is visibly clear that she is not a boy. She would give anything not to have to be going through these agonizing trials and tribulations on a daily basis.

(2) Your middle school daughter faces a daunting task and an uphill battle. Yes, she was a terror in middle-school track, and, yes, she is really fast. However, her Track career is about to head in a totally different direction because of the transfer of two transgender student-athletes from another state. Just based on their current track times alone, the probability is that she will never finish better than 3rd place, when racing against them in her events for the next four years. Any hope of a high-level track scholarship to the college of her choice is fading and seems highly unlikely. How can any adult in their right mind possible think this is fair? These are boys running against girls. It is just not right or fair and yet she may be forced to compete against transgender student-athletes, who were born biological males her entire high school and collegiate career. It has come to the point now that none of the girls on last year’s track team are talking about signing up for track next year. I mean “Why bother”, when you already know the probable outcome of the race?

Who is Transgender?

Much of the modern debate regarding Transgender student- athletes’ centers around Sex and Gender. Once thought to be the same, Sex and Gender have been separated and mean different things. From a scientific perspective, there are only two genders. Biological sex is determined by gametes (that is, eggs or sperm). This is the case for intersex people, who produce one type of gamete or the other and typically prefer to live as female or male, not somewhere in between. Nature has not always been perfect in delegating sexual organs. There are sometimes variations where the individual or his representative, is given the right to make a final determination.

Regarding gender, more than 99% of people identify as their birth sex. Roughly 1% is transgender (and/or intersex) and identifies as the opposite sex. Therefore, both sex and gender are binary. This fact flies in the face of a nonbinary movement, where some people refuse to be identified or check the box that identifies them as either male or female and makes it a privacy issue under the Fourth Amendment. Some people believe that forced sports testing for underage athletes is the answer in resolving many of the question raised by allowing or not allowing transgender student-athletes to compete against biological female athletes. The Louisiana High School Athletic Association has taken the position that student athletes “shall compete in the gender of their birth certificate unless they have undergone sex reassignment.

Sports Testing similar to what you see in the Olympics to measure the amount of Testosterone in a transgendered student-athlete’s body is another possibility, but this would involves

subjecting young student athletes to the rigors of sports testing and raise some serious moral and ethical questions regarding medical treatments and therapies. Unless every athlete in every sport is tested, it could create and raise serious ethical and developmental issues for the transgender-student-athletes as they mature into adulthood. Law suits would be sure to follow on both sides.

Law, Politics, and Transgender

Of course, it was only a matter of time before Transgender Policies in Sports became political. Eventually, it will show up in every state. It can't be ignored. You can't just bury your head in the sand as would the proverbial Ostrich. Now, before anyone panics about some conspiratorial takeover by people who are transgender, it has been estimated that only 1% of general population today is transgender. The predicted death of female athletics at the hands of a few transgender athletes is somewhat premature. Transgender people are just people. They are not monolithic. They come in all shapes sizes and colors. They are not all super studs. They do not all like or even want to play sports. In a Democracy the Constitutional rights of both majority and minority groups must be protected. Ultimately, the U.S. Supreme Court may be forced to decide on the enforcement of a basic legal concept which is to be treated equal under the law and have an opportunity to be able to compete in a sporting event without discrimination.

The Most Recent Debate

Admittedly, allowing individuals to self-identify as male or female is again problematic, but a better legal question might be as to whether it is really unfair and how do you measure Fairness? Is it only unfair when transgender student-athletes win? From an athletic point of view, that is not how sports and athletic competition works, but what does the Country want?

Banning transgender student-athletes from sports has been a common cause among conservative lawmakers this year. Bills to do so have been introduced in more than 20 states. Both the Associated Press and Transathlete.com have compiled statistics on the numbers. Currently, there are 17 states that allow transgender high school student-athletes to compete

without restrictions. On the other side, lawmakers in at least 25 states have proposed measures restricting transgender student-athletes from competing in school sports.

Much of what has transpired, first begin in the state of Connecticut. In March 2020, a Statement of Interest filed by SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, by Cheryl Radachowsky, her mother Plaintiffs, v. CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION. The previous Trump Administration supported the claim that the Connecticut Policy was unfair, partly based on the definition of "Sex" when Title IX was first enacted.

Two transgender athletes were at the center of the plaintiff's petition, Terry Miller, a Connecticut high school transgender-student-athlete transitioning to female, won the 55-meter dash at the state open indoor track championships, setting a new girl's indoor record. Andraya Yearwood, another transgender student-athlete, placed second in the race. Her time would have placed her a full second behind the last place boy in the male competition.

The debate has not gone unnoticed in mainstream society either. Does anyone remember former Olympian Bruce Jenner? (the guy on the Wheaties Box) Bruce, now Caitlin Jenner is perhaps one of the most famous Transgender people in the world. Caitlin recently declared her campaign to run for Governor of the state of California as a Republican. In an interview, she has come out against transgender or biological males competing against female athletes in sports. Why? She says it's about fairness. "It just isn't fair" ... "we must protect female sports". It is a reversal of a previous statement on her part, but is considered to be smart political move. She is siding with the majority of voters today and perhaps sees it as a way toward advancing her political career. Law and politics and public policy go hand in hand. *In a recent poll, 74 % of Republicans support the transgender bans as do 40% of Democrats. The poll was conducted by Politico and Morning Consult.. The survey also found 53% of registered voters favor such prohibitions. Many Republicans see the Transgender Policy as a win-win with their base, along with a way of gaining support from suburban women who have their children enrolled in sports.*

We are now talking about Constitutional law. It does not seem to matter that The U.S. Justice Department has recently informed the federal court in Connecticut that it is withdrawing its support for a filing by the three female high school students who wanted the transgender student-athletes banned from sports competition. It is a reversal of the prior administrations support of the same girls. In a short filing with the U.S. district court, the Biden administration said "the government has reconsidered the matter and hereby notifies the Court that it withdraws its Statement of Interest." The Biden Administration's withdrawing of its support shows that it continues the Title IX policy of protecting the rights of the transgender student-athletes and protects them from discrimination in sports competition. It also appears to put them on track towards a head on collision with the many new multiple state Transgender laws. We could see a challenge to the Supremacy Clause as well. The Supremacy Clause found in Article VI of the U.S. Constitution provides that states cannot interfere with federal laws and treaties made under the authority of the Constitution of the United States. It also says that states cannot interfere with Federal law and that Federal Law supersedes conflicting state laws.

How did Louisiana get Involved?

We know the Louisiana Legislature has passed the law to ban transgender student-athletes from participating and competing in cisgender (biological female) high school and collegiate sports. The Fairness in Women's Sports Act would also apply to biological females who want to play on boys' and men's teams. The Louisiana House of Representatives approved the Fairness in Women's Sports Act with a 78-19 vote. The senate vote was 29-6. Conservative Republicans in the Louisiana Legislature filed four bills to restrict transgender people's access to sports and health care in the state. They would also allow athletes, coaches and other employees to sue if they suffered "harm" as a result of a transgender student-athlete participating in a sports competition. The Bills were filed as Senate Bill 156 and House Bill 542. The bills in Louisiana were sponsored by two Republican women lawmakers, Beth Mizell, of Franklinton, and Beryl Amedee, of Houma. Mizell and Amedee are the chair and vice chair of the Louisiana Women's Caucus.

In addition, if enacted, two other bills, Senate Bill 104 and House Bill 575 would have prohibited health care for transgendered youth. The bills would ban people under the age of 18 from receiving health care services — including mental health services — related to their gender identity. Those provisions were later withdrawn. The Senate bill, sponsored by Sen. Mike Fesi, R-Houma, would require people under 18 years old to get permission from their parents before pursuing any medical care — including counseling — related to their gender identity. It would also allow any parent to block health care related to gender identity for a child, even if they weren't actively involved in a child's life. A violation could result in a two-year prison term or a \$10,000 fine. Dyland Waguespack, with Louisiana Trans Advocates, said such proposals could put transgender children and teenagers at higher risk of suicide and self-harm. The House bill, sponsored by Rep. Gabe Firment, R-Pollock, prohibits any drug therapy or surgery that would help a transgender person's appearance align with their gender identity from being prescribed to people under 18 years old — regardless of whether a medical professional or parent agrees.

Battle of the Sexes

Can anyone honestly answer these questions? Is athletic competition between female and transgender athletes fair? Do transgender student-athletes have an advantage in sports competition? Is athletic competition between males and females ever fair? What does Fairness really mean?

(3rd. (Narrative))

"Dear, what happened at your school Track Meet today? "I got beat, says your daughter, but it wasn't fair, because I lost to ... (pick one) 1. an older, bigger, stronger, girl, (2. a Lesbian girl, (3. a transgender girl. Then she goes on to say "I did beat one the trans boy though, but he sucked.

When Title IX was first passed and the question of transgender student-athletes competing against females in sports first arose, the thought process was that some transgender athletes might have a slight biological edge in athletic competition. However, it was thought that over a period of time the gap would be closed, as females would rise to the level of the competition. That statement in itself may be considered Sexist. In reality, for the most part that has not happened. As a whole, males' athletes generally have broader shoulders, more lung capacity, more skeletal muscle mass and greater bone density than cisgender or biological females. Some, transgender student-athletes could have some of the same attributes. It is simply a biological fact. It is also a biological fact that some athletes are just going to be bigger faster, and stronger than other athletes whether male or female. That does not in itself make an athletic competition illegal or unfair. Again, it begs the question as to whether the transgender student-athlete with the big muscles or who can actually win an event be the only one to get banned? A better question regarding transgender student-athletes competing against female athletes might not be whether the competition is fair but rather is the competition legal under existing laws and the rules are not being broken.

There are dissenting arguments on both sides. Sports can teach important values such as self-confidence, teamwork, and discipline. However, competitive sports are more about winning. Remember as a kid you heard "It's not whether you win or lose, it's how you play the game" vs the famous Green Bay Packer football coach Vince Lombardi saying "Winning isn't everything. It's the only thing". Competitive sports create winners and losers. It is the same concept for male, female or transgender student-athletes. The biggest, strongest, and fastest generally win.

Another angle might be to look at Transgender athletes as minorities. It might be argued that throughout history, many minorities have used Sports as a way of bringing about awareness, fairness, and equality, especially when it comes to discrimination. You only need to look at the plight of the Jewish athlete in Hitler's Germany or how they were discriminated against here in America when they begin to show athletic prowess at American Colleges. We want even speak of Jesse Owens in the 1936 Berlin Olympics. He only won because he was somehow different than other athletes. Remember, one of the girls who filed the Connecticut suit has actually beaten transgender student-athletes before.

It may be time for more of our young people to start taking the advice of and learn from the wisdom of people like Bill Gates and Matthew McConaughey (next possible Texas Governor) who have said, "Life is not fair, it never was and it is now and won't ever be. Don't fall into the trap, the entitlement trap of feeling like you're a victim. You are not". Learning how to accept and handle failure is also an important lesson learned in life, sports and all types of athletic competition. But again, is this what our country wants today and is where our country is headed?

Exceptions to Title IX and Conclusion

Title IX currently has three basic exceptions. The timing and the make-up of the current U.S. Supreme Court might be the difference maker and guide us in the direction that only a Supreme Court decision might take in addressing these new states enacted Transgender bans. Note that with former President Donald Trump's nomination of Judge Amy Coney Barrett, the nine-member bench would lock in a 6-3, conservative-liberal majority, ending an era of 5-4 liberal voting. The Supreme Court has not been this conservative since the 1930's. It could make short of any debate. Title IX could be the answer.

Currently there are 3 basic exceptions to the enforcement of Title IX. They are in the area of 1. Music Classes, 2. Sex Education, and 3. Physical Education. For example, In Music classes, schools are allowed to discriminate in creating male or female choirs because of different characteristics in voice or vocal ranges. For Sex Education, schools are allowed to conduct separate Human Sexuality classes for boys and girls because of the biological differences in sexes. For Physical Education, schools are allowed to discriminate in sports that involve bodily contact, such as wrestling and football, primarily for safety concerns. Exceptions are sometimes made, such as a girl being a kicker on a football team. A single vote could now bring an end to the protections currently provided in Title IX on behalf of the Transgender student-athletes, who feel that they are about to be illegally discriminated against because of the passage of these new States Fairness in Sports laws. A Supreme Court decision could also resolve the issue by creating another exception (4) to Title IX. That exception would basically say that Title IX protections do not apply to transgender student-athletes who want to compete against biological females in athletic competition. In essence, state laws banning transgender student-athletes in female competition would no longer be illegal discrimination against transgender student-athletes and the state bans against them would be constitutional and upheld. States would then simply have to accommodate all athletes most probably in separate events depending on how their governing body classifies them.

References

1. What is Title IX? [What is Title IX? | Title IX Office \(harvard.edu\)](#)
2. Exemptions to Title IX. Find Law. [Sex Discrimination in Education: Exemptions Under Title IX - FindLaw](#)
3. Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule DORIANE LAMBELET COLEMAN* MICHAEL J. JOYNER** DONNA LOPIANO*** [Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule \(duke.edu\)](#)
4. Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People, NAT. WOMEN'S LAW CTR. (Apr. 10, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf> [hereinafter Statement of Women's Rights and Gender Justice Organizations].
5. Abigail Sharer Newsweek [The Transgender Threat to Women's Sports | Opinion \(newsweek.com\)](#)
6. Estimated Probability of competing in College Athletics. [Estimated probability of competing in college athletics | NCAA.org - The Official Site of the NCAA](#)
7. Title IX and Sex Discrimination . United States Department of Education. Office of Civil Rights [Title IX and Sex Discrimination \(ed.gov\)](#)
8. Don Mclean ... American Pie The day the Music Died. <https://youtu.be/uAsV5-Hv-7U>
9. [TRANSATHLETE - transgender athlete policy](#)

10. Is it Fair? Transgender Athletes and High School Sports. [Is it fair? Transgender athletes and high school sports \(https://metrovoicenews.com\)](https://metrovoicenews.com)
11. [Transgender sports debate heads to the Louisiana House floor \(apnews.com\)](https://apnews.com)
12. [Female HS track star says lawsuit to overturn Conn. transgender athlete policy 'absolutely necessary' | Fox News](https://www.foxnews.com)
13. [Justice Department withdraws support from case challenging rules for transgender student athletes - CBS News](https://www.cbsnews.com)
14. [Louisiana lawmakers looking at restricting transgender access to health care, sports | New Orleans' Multicultural News Source | The Louisiana Weekly](https://www.neworleansmulticulturalnews.com). Julie O'Donoghue
15. [Louisiana House committee advances transgender sports bill -- after rejecting an identical proposal | Legislature | theadvocate.com](https://theadvocate.com) Blake Patterson
16. Melissa Quinn , Caitlan Huey-Burns [Transgender sports bans become conservative litmus test - CBS News](https://www.cbsnews.com)
17. Chris Mosier [Transgender Women in Sports - NCAA Athletes and Their Right to Compete \(runnersworld.com\)](https://www.runnersworld.com)
18. Will Sentell [Bill to ban transgender athletes from women's sports in Louisiana wins final legislative approval | Legislature | theadvocate.com](https://theadvocate.com)
19. [Caitlyn Jenner opposes transgender girls participating in women's sports: "It just isn't fair" - CBS News](https://www.cbsnews.com)
20. [The problem with the 'nonbinary' trend \(msn.com\)](https://www.msn.com) Debra Soh
21. [POLITICO Playbook PM: Trump position against transgender athletes draws broad support - POLITICO](https://www.politico.com) Mike Zapler, Eli Okun and Garrett Ross
22. [A Solution for Transgender Athletes | by Dave Olsen | Dialogue & Discourse | Medium](https://www.dialogueanddiscourse.com)