

# ANYTHING YOU CAN DO, I CAN DO BETTER: THE SEXIST IMPLICATIONS & HEALTH CONSEQUENCES OF K-12 TRANSGENDER GIRLS SPORTS BANS

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## I. INTRODUCTION

The musical *Annie Get Your Gun* tells the story of real-life sharpshooter Annie Oakley, “[a] backwoods gal” who defied gender norms by using her marksmanship skill to support her family by selling game.<sup>1</sup> After she was persuaded to join a Wild West Show, she quickly eclipsed the show’s leading man and star marksman, Frank Butler, thereby jeopardizing her chance at romance with him.<sup>2</sup> “Anything You Can Do” is a duet between the two characters in which both attempt to assert their superiority over the other before a competition. Annie is only able to ensure the future of their romance by pretending to lose to Frank during a shoot-out,<sup>3</sup> illustrating not only the historic fragility of the male ego, but also the requirement for many women to dim their lights for the love of men.

Annie’s story is not unique for the women of her time (the early 1900s), but today’s girls and women often still must tiptoe around the egos of boys and men to receive their love and admiration—or to simply avoid their ire. Misogyny persists, and sometimes it shows its ugly head in the oddest of places—like a transgender girls sports ban.

In recent years, several state legislatures have enacted legislation intended to prevent male-to-female transgender students from participating on the sports teams which affirm their gender identities.<sup>4</sup> Legislatures frame this legislation as protective in nature, the purported intention being to protect equality in women’s and girls’ sports by limiting access to biologically female student athletes. Idaho was the first state to enact such legislation with its 2020 Fairness in Women’s Sports Act.<sup>5</sup> The Idaho law reaches collegiate athletes and purportedly tracks various biological, psychological, and judicial rationales which suggest that biologically male athletes possess inherently superior athletic ability due to their sex-based characteristics. Based on these purported justifications, the law requires designation of sports teams as only male, female,

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1. *Annie Get Your Gun*, STAGEAGENT, <https://stageagent.com/shows/musical/874/annie-get-your-gun> [https://perma.cc/HK9P-BXPS] (last visited Nov. 10, 2022).

2. *Id.*

3. *The Truth Behind... Annie Get Your Gun*, BREAKING CHARACTER, <https://www.breakingcharacter.com/home/2020/12/11/the-truth-behind-annie-get-your-gun/> [https://perma.cc/RBA9-VZP9] (last visited Nov. 11, 2022).

4. *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans) [https://perma.cc/U5NZ-3CHL] (last visited July 29, 2023) [hereinafter *Equality Maps*].

5. IDAHO CODE ANN. § 33-6201 (West 2020).

or mixed.<sup>6</sup> The law specifies that “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.”<sup>7</sup> A temporary preliminary injunction, issued by the Idaho District Court in *Hecox v. Little*, is currently blocking enforcement of Idaho’s law.<sup>8</sup>

To answer the question whether the plaintiff in *Hecox*, a transgender woman wanting to join her state college’s women’s track and cross-country teams, had a reasonable likelihood of success on the merits of her claim at trial, the district court made several important findings. First, the court found that transgender women are an historically marginalized community and as less than one percent of the population are unlikely to “displace” female athletes.<sup>9</sup> Additionally, the court found a lack of definitive proof regarding transgender women’s physiological advantages.<sup>10</sup> Ultimately the Idaho law was found to be discriminatory by excluding that historically disadvantaged group from participation in sports and by discriminating against another historically disadvantaged group in cisgender women by subjecting them to the sex dispute process.<sup>11</sup> The court stated that the transgender girls at issue under the law never go through male puberty to create any potential advantage over their female classmates and that the policies of the National Collegiate Athletic Association<sup>12</sup> and Idaho High School Athletics Association, which require testosterone suppression for at least a year prior to competing on women’s teams, does not inadequately address fairness concerns.<sup>13</sup> A temporary injunction is currently barring implementation of a similar law in Utah for similar reasons.<sup>14</sup>

The United States District Court for the Southern District of West Virginia, however, found similar legislation permissible under the Equal Protection Clause and Title IX in a summary judgment order.<sup>15</sup> In the same order, the district court dissolved a preliminary injunction preventing the law from going into effect.<sup>16</sup> In a subsequent memorandum opinion, the same court denied the plaintiff’s motion to stay the dissolution of the preliminary injunction pending appeal,<sup>17</sup> meaning the law is currently in full effect in West Virginia.

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6. IDAHO CODE ANN. § 33-6202 (West 2020).

7. IDAHO CODE ANN. § 33-6203(2) (West 2020).

8. *Hecox v. Little*, 479 F. Supp. 3d 930, 989 (Idaho Dist. Ct. 2020), *aff’d mem.* 2023 WL 1097255 (9<sup>th</sup> Cir. 2023), at \*2.

9. *Id.* at 977-78.

10. *Id.*

11. *Id.*

12. The student in *Hecox* was enrolled in a state university attempting to join her college’s women’s cross country and track teams. *Id.* at 946.

13. *Id.* at 980-82.

14. *Roe v. Utah High Sch. Activities Ass’n*, No. 220903262, 2022 U.S. Dist. WL 3907182 (Utah Dist. Ct. Aug. 19, 2022).

15. *See B. P. J. v. W. VA State Bd. of Ed.*, No. 2:21-cv-00316, 2023 U.S. Dist. WL 111875 (S.D. W. Va., Jan. 5, 2023), *appeal denied*, 2023 U.S. Dist. WL 1805883 (S.D. W. Va., Feb. 7, 2023), at \*3.

16. *Id.* at \*10.

17. *B. P. J. v. W. VA State Bd. of Ed.*, No. 2:21-cv-00316, 2023 U.S. Dist. WL 1805883, at \*3 (S.D. W. Va., Feb. 7, 2023).

Nineteen states have since followed the lead of Idaho, Utah, and West Virginia, including Indiana.<sup>18</sup> In January 2022, Indiana House Representative Michelle Davis introduced House Bill (H.B.) 1041, which required (1) school corporations, public schools, nonpublic schools, and associations that organize, sanction, or sponsor athletic teams to designate athletic teams according to binary sex terms—either male or female—or as coeducational or mixed; and (2) proscribes biologically male students from participating on teams designated as exclusively female sports teams.<sup>19</sup> The bill described the assignment of male sex as “based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology[.]”<sup>20</sup> This definition treats sex and reproductive biology as purely binary concepts, which is a categorically false understanding of sex and reproductive biology considering the existence of intersex individuals and individuals with extraordinary hormone production that masks the expression of their sex chromosomes by preventing the development of traditionally understood secondary sex characteristics.

The Bill also requires schools to establish and maintain grievance procedures for students whose schools failed to designate athletic teams according to the Bill’s mandates or permitted male students to participate on female sports teams.<sup>21</sup> The Bill creates a cause of action for students who assert they were deprived of an athletic opportunity or were indirectly or directly injured as a result of the school’s failure to follow the Bill’s requirements.<sup>22</sup> Unlike the Idaho law, H.B. 1041 lacks any attempt at scientific or philosophical justification for its isolated focus on female students and girls’ sports. The purported purpose of the Bill according to its author “is to maintain fair competition in girls’ sports now and in the future.”<sup>23</sup>

While maintaining fairness in girls’ sports generally is a valid and perhaps even valiant goal, it is not clear the state of Indiana is facing a fairness problem in girls’ sports due to the participation of transgender girls. Proponents of the Bill failed to produce any instance wherein the participation of transgender

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18. *Equality Maps*, *supra* note 4.

19. IND. CODE ANN. § 20-33-13-4(West 2022): “(a) A school corporation, public school, nonpublic school, or association that organizes, sanctions, or sponsors an athletic team or sport described in section 1 of this chapter shall expressly designate the athletic team or sport as one (1) of the following: (1) A male, men’s, or boys’ team or sport. (2) A female, women’s or girls’ team or sport. (3) A coeducational or mixed team sport. (b) A male, based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women’s or girls’ athletic team or sport.”

20. *Id.*

21. IND. CODE ANN. § 20-33-13-5 (West 2022).

22. IND. CODE ANN. § 20-33-13-6 (West 2022).

23. Arika Herron, *Despite Indiana Governor’s Veto of Banning Transgender Girls in School Sports, It Will Be Law*, INDIANAPOLIS STAR (May 24, 2022), <https://www.indystar.com/story/news/education/2022/05/24/transgender-girls-school-sports-bill-law-despite-governor-holcombs-veto/9794587002/> [<https://perma.cc/C8V2-JGQN>] [hereinafter INDIANAPOLIS STAR Article 1].

girls—biologically male athletes—in girls’ sports negatively impacted competition or unfairly burdened female athletes.<sup>24</sup> This dearth of evidence suggests other justifications must belie the Bill. The possibility of other justifications is only increased by the Indiana legislature’s recent filing of a series of bills targeting the LGBTQ+ community, deemed by opponents the “Slate of Hate.”<sup>25</sup>

This Note proposes transgender girls’ sports bans’ true justifications are rooted in gender and sex-based stereotypes and roles which suggest the lesser capabilities and fragility of girls compared to boys, working to reinforce the idea of female inferiority and the system of patriarchy. By reinforcing this idea and system, the Indiana legislature perpetuates negative social and mental health consequences for Hoosier students.

This Note’s primary concern is the Indiana law and its likely social and mental health effects on all Hoosier children. To best elucidate those effects and the events leading to the law’s passage, this Note will also discuss other cases which illustrate the mounting transphobia in the state and in the nation more generally, as well as psychological research on the effects of imposing gender stereotypes and sex roles on children. The goal of this Note is to explain how K-12 transgender girls sports bans work to reinforce misogynistic and sexist stereotypes which paint girls and women as weak and physically inferior. Then, this Note will discuss how those stereotypes affect the mental and social health of children regardless of their gender presentation.

In writing this Note, care was taken to examine the effects of transgender sports bans on *all* children, whereas other notes have primarily only considered the effects on transgender students and biological girls. This Note ultimately proposes that through its transgender girls’ sports ban, the Indiana legislature validates the perpetuation of gender stereotypes and sex roles in the classrooms of kindergarteners, middle schoolers, and high schoolers. By doing so, the Indiana Legislature perpetuates a hostile environment for transgender students and biologically female students and encourages aggression and misogyny in biologically male students. This hostile environment results from students absorbing these gender and sex stereotypes and converting them into misogynistic action and internalized misogyny, which ultimately negatively

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24. Arika Herron, *Minutes After Lawmakers Override Veto of Transgender Sports Ban, First Lawsuit is Filed*, INDIANAPOLIS STAR (May 24, 2022) <https://www.indystar.com/story/news/politics/2022/05/24/indianas-transgender-sports-ban-first-lawsuit-filed-over/9904915002/> [<https://perma.cc/YEQ6-KYZW>] [hereinafter INDIANAPOLIS STAR Article 2].

25. Of particular interest for this note are HB 1608 and SB 386. HB 1608 would ban schools and third parties from instructing students in kindergarten through third grade on gender roles, stereotypes, fluidity, expression or sexual orientation. *See* H.B. 1608, 123<sup>rd</sup> Gen. Assemb., Sess. § 1 (Ind. 2023). SB 386 would limit teachers from “promoting certain concepts” in topics including sex, gender identity, and sexual orientation. *See* S.B. 386, 123<sup>rd</sup> Gen. Assemb., Sess. § 1 (Ind. 2023). For a brief review of the entire “Slate of Hate” and what each bill would do if passed, see Lauren Chapman, *Indiana Lawmakers File Record Number of Anti-LGBTQ+ Bills, Tripling Previous Years*, WFYI (Feb. 16, 2023), <https://www.wfyi.org/news/articles/indiana-lawmakers-file-record-number-of-anti-lgbtq-bills-tripling-previous-years> [<https://perma.cc/3TZ9-45C4>].

impact the mental and social health of all Hoosier students.

## II. DEFINING ESSENTIAL TERMS & EXPLORING THEORETICAL UNDERSTANDINGS

Before engaging in discussion, it is important to define the terms used in this Note. Because this Note is primarily concerned with psychological and sociological concepts and effects, the majority of these definitions were extracted with little modification from the American Psychological Association's *APA Dictionary of Psychology*. To clarify the meaning of misogyny, which is so often erroneously presumed to mean the general hatred of women, this Note also discusses Kate Manne's understanding of misogyny according to her book *Down Girl: The Logic of Misogyny*. To explore the ramifications of misogyny as a mechanism of a patriarchal system on boys and men specifically, this Note also considers Bell Hooks's observations regarding the stunted abilities of men to feel and express their emotions, including love, detailed in *The Will to Change: Men, Masculinity, and Love*.

First, however, it is important to define social health and antisocial behaviors. Social health is defined as the ways in which people create healthy and positive interpersonal relationships.<sup>26</sup> Antisocial behaviors are "disruptive acts characterized by covert and overt hostility and intentional aggression toward others," including verbal abuse, physical violence, irritability and aggressiveness, indifference or rationalization of hurting others, a strong sense of personal superiority, and covertly aggressive actions like theft, vandalism, and fire-setting.<sup>27</sup> Antisocial behaviors exist along a continuum.<sup>28</sup> Enough antisocial behaviors may be indicative of antisocial personality disorder,<sup>29</sup> which laypeople typically understand as sociopathy. One can exhibit antisocial behaviors without having antisocial personality disorder, but those who exhibit persistent and severe antisocial behaviors from the age of fifteen may be considered for an antisocial personality disorder diagnosis.<sup>30</sup>

Gender and sex are frequently conflated, but the terms refer to two distinct conditions. Gender is the condition of being male, female or other, and is distinguished from sex by its reference to the psychological, behavioral, social, and cultural aspects of being male or female, masculine or feminine.<sup>31</sup> Sex refers

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26. Tammy George, *What is Social Health? Definitions, Examples and Tips on Improving Your Social Wellness*, HIF (2024), <https://healthhub.hif.com.au/mental-health/what-is-social-health-definitions-examples-and-tips-on-improving-your-social-wellness> [https://perma.cc/PK8R-X6MT] (last visited Nov. 16, 2022).

27. *Anti-Social Behavior Indicators*, CRAFTON HILLS COLL. <https://www.craftonhills.edu/faculty-and-staff/behavior-intervention-team/anti-social-behavior-indicators.php> [https://perma.cc/VR6-7726] (last visited Nov. 16, 2022).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Gender*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

to the specific physical and biological traits which distinguish males from females.<sup>32</sup> One's gender identity, which is one's self-identification as male or female and is influenced by both environmental (societal structures, cultural expectations, and personal interactions) and biological factors,<sup>33</sup> does not always perfectly align with the traditional understanding of sex as determinative of gender.

Humans often prescribe roles according to one's sex and gender. One's gender role encompasses behaviors and personality traits that culturally define masculinity and femininity.<sup>34</sup> Those whose gender identities match cultural expectations of behavior and roles considered socially appropriate for one's sex as male or female are considered cisgender.<sup>35</sup> Those whose gender identities differ from culturally determined gender roles for their birth sex or sex surgically assigned at birth (in the case of intersex individuals) are considered transgender.<sup>36</sup> Transgender individuals may experience gender dysphoria, which is discontent with the physical or social aspects of one's sex and distress resulting from a sense of incongruence regarding one's sex and gender,<sup>37</sup> prior to transitioning or adopting an alternate gender identity.

Gender roles do not exist in a vacuum, nor are they necessarily an inherent aspect of human nature. Gender roles occur through gender-role socialization, or the conditioning of people to the roles and expectations of behaviors prescribed by society for males and females.<sup>38</sup> People develop gender schemas to understand gender roles and ascribe them to others. Gender schemas are organized sets of beliefs and expectations that inform one's understanding of maleness and femaleness.<sup>39</sup> Through a process called gender typing, people develop and internalize expectations regarding behavior based on biological sex.<sup>40</sup> Gender roles, gender schemas, and gender typing are each interrelated to gender stereotypes, which are relatively fixed and simplified concepts of attitudes and behaviors associated with masculinity or femininity.<sup>41</sup> Gender stereotypes are used to support the social conditioning of gender roles.<sup>42</sup>

The mere existence of these terms suggests observable phenomena. While they may have not used these exact terms to describe their observations, feminist theorists have long recognized how we are socially conditioned to adopt gendered roles in society and how the adoption of these roles is integral to the continued functioning of the harmful system underlying our society—

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32. *Sex*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

33. *Gender Identity*, APA DICTIONARY OF PSYCH. (2d ed. 2015). Despite this definition's binary construction of sex, a person's gender identity may be neither male nor female.

34. *Gender Role*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

35. *Cisgender*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

36. *Transgender*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

37. *Gender Dysphoria*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

38. *Gender-role Socialization*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

39. *Gender Schema*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

40. *Gender Typing*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

41. *Gender Stereotypes*, APA DICTIONARY OF PSYCH. (2d ed. 2015).

42. *Id.*

patriarchy. In *The Will to Change: Men, Masculinity, and Love*, Bell Hooks defines patriarchy as “a political-social system that insists that males are inherently dominating, superior to everything and everyone deemed weak, especially females, and endowed with the right to dominate and rule over the weak and to maintain that dominance through various forms of psychological terrorism and violence.”<sup>43</sup> According to Hooks, “[p]atriarchy promotes insanity. It is at the root of the psychological ills troubling men in our nation.”<sup>44</sup> This promotion of insanity and mental illness begins in boyhood, where boys are socialized through violence and disconnection to turn into emotionally stunted men yearning for connection.<sup>45</sup> They learn in early childhood to silence and suppress their core feelings to achieve the patriarchal masculine ideal.<sup>46</sup>

The objectives of a patriarchal system can only be met with finely tuned instruments forged to reinforce the domination complex inherent in a patriarchal society as explained by Hooks. One such instrument is misogyny. In *Down Girl: The Logic of Misogyny*, Kate Manne offers a nuanced understanding of misogyny that adequately accounts for the reality of its effects and how it is wielded as a weapon. According to Manne, misogyny is “the system that operates within a patriarchal social order to police and enforce women’s subordination and to uphold male dominance.”<sup>47</sup> Manne differentiates this more accurate conceptualization from the naïve conception of misogyny, which is the traditional understanding that misogyny refers to a property of individuals, typically but not necessarily men, who are prone to hatred, hostility, or other negative emotions toward women “*simply because they are women.*”<sup>48</sup> The naïve conception envisions misogyny as a personal, psychological problem “rather than a systematic facet of social power relations and a predictable manifestation of the ideology that governs them: patriarchy.”<sup>49</sup> The naïve conception is inadequate because (1) it makes misogyny difficult to diagnose unless one is the misogynist’s psychologist, (2) by making it difficult to diagnose, it silences women who try to describe their experiences of misogyny which fall short of overt manifestations of hatred, and (3) it creates an affirmative defense to misogyny in all cases of misogyny because a misogynist’s hatred rarely extends to all women—they frequently valorize the women which conform to their ideas of womanhood.<sup>50</sup>

Misogyny as an instrument of maintaining a patriarchal system is important to consider with respect to H.B. 1041 because misogyny is learned. Children are assigned patriarchal gender roles and are guided by adults in how to best fulfill

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43. BELL HOOKS, *THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE*, 18 (2004).

44. *See id.* at 111.

45. *Id.* at 60.

46. *Id.* at 135, 153.

47. KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY*, 33 (2018).

48. *Id.* at 32.

49. *Id.* at 48-49.

50. *Id.* at 44-45.

their roles.<sup>51</sup> As they grow, children learn to police their own and others' confinement within those roles, often by wielding the weapon of misogyny. These patriarchal teachings are reinforced through institutions—including schools and sports arenas.<sup>52</sup>

However, these patriarchal teachings have ramifications beyond the context of schools and sports. The long-term negative impacts of patriarchal teachings and misogyny on girls and women have been thoroughly considered by feminist theorists, but the long-term negative impacts of those teachings on boys and men have gone comparatively underdiscussed.<sup>53</sup> Hooks uses her book to explore these impacts. Hooks observes that adults tend to view gender equality in terms of granting girls the same privileges and rights as boys rather than in terms of granting boys the same rights as girls—e.g., “the right to choose not to engage in aggressive or violent play, the right to play with dolls, to play dress up, to wear costumes of either gender, the right to choose.”<sup>54</sup> This unilateral understanding of boys and men as all-powerful neglects the reality that to be all-powerful comes at the price of emotional and mental wellness and perpetuates violence against the weak, whether those weaklings be female, male, something in between or something else entirely. To achieve and maintain dominance, boys and men must shun some of the most human parts of them—the parts that enable them to feel empathy, compassion, love, and connection.

As this Note will explain, sex-segregated sports, in virtue of being segregated, work to enforce gender stereotypes<sup>55</sup> which in turn perpetuate misogynistic attitudes. Girls learn to implicitly (or in some cases explicitly) understand that they are inferior to boys. Boys, on the other hand, learn to implicitly (or explicitly) view themselves as superior to girls. Not only does this unreasonably inflate boys' egos, but it also fosters a derogation toward girls and women who fail to abide by feminine gender stereotypes. They grow up to have a distaste for women who challenge their sense of superiority, not only in athletic settings but also in the world more generally.<sup>56</sup> Girls and women also

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51. HOOKS, *supra* note 43, at 18.

52. *Id.*

53. *Id.*

54. *Id.* at 111.

55. See Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1819 (2019) (examining how tennis rules imply women's physical inferiority by limiting them to three sets while allowing men to play five; how female gymnasts are evaluated on different merits and face strict requirements for hair and makeup compared to male gymnasts; and how the high jump—a sport in which men tend to dominate—is considered an Olympic sport whereas limbo—where women tend to dominate—is rejected as a sport despite its requirements for incredible flexibility, strength, and coordination.)

56. See MANNE, *supra* note 47 at 101-02, 271 (2018) (“[W]omen may be penalized for being too qualified, too competent. People may be ‘taken aback,’ and unwittingly engage in post hoc rationalization to make sense of their inchoate feelings of suspicion or consternation. [A] woman who has done nothing wrong in moral and social reality [ . . . ] may be subject to moral suspicion and consternation for violating edicts of the patriarchal rulebook. And her *behavior* may then be cast as dangerous, suspicious, risky, or deceptive, in line with moral verdicts already rendered.”)



hesitate to challenge themselves due to their own internalized misogyny. In the context of athletics, they may be less willing to engage in physical activities out of fear harm will inevitably befall them due to their preconceived fragility.<sup>57</sup>

### III. MOUNTING TRANSPHOBIA: H.B. 1041'S PATH TO LAW

After making its way through the Indiana House and Senate, H.B. 1041, now codified in Ind. Code § 20-33-13-4, landed on Governor Eric Holcomb's desk for approval. In his letter vetoing the bill dated March 21, 2022, Governor Holcomb states the law "falls short" of "provid[ing] clarity and one consistent state policy regarding the fairness in K-12 sports in Indiana[.]"<sup>58</sup> He articulated three concerns. First, the law's grievance procedures leave unclear for students, parents, and school administrators who would establish procedures for maintaining consistency and fairness in sports and how those procedures would be established and maintained, which Governor Holcomb asserted could result in disparate treatment of students depending on which school they attend and compete for.<sup>59</sup> This uncertainty increases the likelihood of litigation against schools.<sup>60</sup> Additionally, the Governor noted the lawsuits filed or threatened to be filed on equal protection grounds in other states with similar legislation and the Indiana lawsuit already filed by a student regarding H.B. 1041.<sup>61</sup> He asserted the issues raised in those cases should be preemptively addressed by the bill before it becomes law.<sup>62</sup> Finally, the bill's implication that the goals of consistency and fairness in K-12 girls' sports are not currently being met is unfounded.<sup>63</sup> The Indiana High School Athletic Association's (IHSAA) decade-old policy for determining whether a male student may participate on a girls' sports team has not resulted in any male students being permitted to participate on a female team.<sup>64</sup>

Despite the Governor's concerns, the Indiana General Assembly overrode his veto to pass transgender girls' sports ban into law on May 24, 2022.<sup>65</sup> The law is currently codified at Indiana Code § 20-33-13, with § 20-33-13-4

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57. See Allison Torres Burtka, *Girls Play Sports Less Than Boys, Miss Out on Crucial Benefits*, GLOBAL SPORT MATTERS (Oct. 11, 2019), <https://globalsportmatters.com/youth/2019/10/11/girls-play-sports-less-than-boys-miss-out-on-crucial-benefits/#:~:text=Research%20show%20that%20girls%20are,especially%20in%20their%20teen%20years> [https://perma.cc/VJ3G-H2V6] (As to why girls turn away from sports, "Research suggests the reasons include a lack of fun, cost barriers and *cultural messages that tell girls in subtle and not-so-subtle ways that sports are for boys.*") (emphasis added).

58. Veto Letter from Eric Holcomb, , H.E.A. 1041 (Mar. 21, 2022), <https://www.in.gov/gov/files/Veto-HEA-1041.pdf>. [https://perma.cc/XQ86-YQG2] (last visited Mar. 24, 2023).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Herron, *supra* note 23.

specifically creating the designation of athletic teams requirement and prohibition of participation of male students on girls' sports teams.<sup>66</sup> Immediately following the override, the American Civil Liberties Union (ACLU) of Indiana filed the first lawsuit, known as *A.M. v. Indianapolis Public Schools*, on behalf of a ten-year-old Indianapolis Public Schools (IPS) student, challenging § 20-33-13-4 and requesting a preliminary injunction staying its implementation.<sup>67</sup> Prior to the filing of this case in the Seventh Circuit, the Seventh Circuit and the Court for the Southern District of Indiana heard two other cases concerning school districts' policies targeting transgender students. In both cases, school districts refused to permit female-to-male transgender students access to the boys' restrooms, leading those students to assert claims under Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>68</sup> While this Note is not concerned with the constitutionality of transgender sports bans, and while these two cases considered school district policies and not state laws, these cases give insight into the mounting transphobia in Indiana and other nearby states and the negative mental health and social health effects policy and law driven by transphobia have on transgender students.

#### A. *Whitaker v. Kenosha Unified School District (2017)*

In *Whitaker*, the United States Court of Appeals for the Seventh Circuit affirmed the grant of a preliminary injunction<sup>69</sup> in favor of Ash, a female-to-male transgender student, who sued Kenosha Unified School District, located in Wisconsin, for its unwritten policy prohibiting his use of the boys' bathroom.<sup>70</sup> Ash began openly identifying and presenting as a boy during the 2013-2014 school year, his freshman year.<sup>71</sup> He wore his hair short, dressed in masculine clothing, and began going by Ashton and masculine pronouns.<sup>72</sup> In his sophomore year, Ash requested that his teachers and classmates refer to him with masculine pronouns and began seeing a therapist, who diagnosed him with

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66. IND. CODE ANN. § 20-33-13-4 (2022).

67. INDIANAPOLIS STAR Article 2, *supra* note 24.

68. *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017); *see also B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 727 (S.D. Ind. 2022).

69. The Court conducted a full inquiry to determine whether to grant a preliminary injunction, including a discussion of potential remedies, the reasonable likelihood of success on the merits, and how to balance the plaintiff's proposed impending harms versus the school district's asserted interests. Because this Note is primarily concerned with the mental and social health effects of anti-transgender policy on students, I will omit discussion of potential remedies and the reasonable likelihood of success on the merits beyond acknowledging that courts have found a likelihood of success on the merits of Title IX claims. Discussion of these cases will instead primarily focus on the potential harms to the transgender students involved and the purported interests of the school districts.

70. *Whitaker*, 858 F.3d at 1045-46.

71. *Id.* at 1040.

72. *Id.*

gender dysphoria.<sup>73</sup> One common treatment for gender dysphoria is hormone replacement therapy, which can include puberty-blocking hormones and cross-sex hormones.<sup>74</sup>

In 2016, Ash began hormone replacement therapy and filed a petition to legally change his name to Ashton.<sup>75</sup> His petition was granted in September 2016.<sup>76</sup> During the spring of his sophomore year, Ash's request to use the boys' restroom while at school and during school-sponsored events was denied by the school administration.<sup>77</sup> The administration told him his options were the girls' bathroom and the gender-neutral bathroom in the school's main office.<sup>78</sup> Ash chose to continue using the boys' restroom out of fear that use of the girls' restroom would undermine his transition and draw unnecessary and unwanted attention to his transgender status.<sup>79</sup> After using the boys' restroom without incident for six months, a teacher observed Ash washing his hands in the boys' restroom and reported him to the school administration.<sup>80</sup>

The school reiterated that Ash may only use the girls' restroom or the gender-neutral bathroom in the school's main office, conditioning his access to the boys' restroom on Ash surgically transitioning.<sup>81</sup> Surgical transition is an inaccessible procedure to minors.<sup>82</sup> By making this the requirement, the school district created a policy by which no transgender student could access the bathrooms which affirm their gender identities, thus exacerbating their gender dysphoria by preventing complete assimilation and exposing them to animus from other students confused or angered by their incongruent gender presentation.

Security guards began monitoring Ash's bathroom use.<sup>83</sup> Fearing his classmates would notice his use of the office bathroom and feeling deeply uncomfortable using the girls' bathroom, Ash continued using the boys' restroom.<sup>84</sup> This continued use resulted in frequent class disruptions, with Ash being repeatedly pulled from class to discuss his violation of the school's unwritten policy.<sup>85</sup> Peers and teachers often questioned him regarding his frequent absences,<sup>86</sup> drawing further attention to his transgender status.

Eventually Ash was given an additional bathroom option. The

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73. *Id.*

74. *See Gender Dysphoria*, BOSTON CHILDREN'S HOSPITAL, <https://www.childrenshospital.org/conditions/gender-dysphoria> [<https://perma.cc/8V8S-7SXX>] (last visited Mar. 24, 2023).

75. *Whitaker* 858 F.3d at 1040.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1041.

81. *Id.*

82. *Id.* at 1040.

83. *Id.* at 1041.

84. *Id.*

85. *Id.*

86. *Id.*

administration gave Ash sole access to two additional single-user, gender-neutral bathrooms on the opposite side of campus relative to his classes.<sup>87</sup> His sole access to these bathrooms generated intrusive questions from his peers regarding his transition.<sup>88</sup> The location of these bathrooms also resulted in Ash missing more class time than he did using the boys' restroom.<sup>89</sup> To avoid his peers' questions and missing class, Ash began restricting his water intake to avoid using the school bathrooms altogether.<sup>90</sup> This exacerbated Ash's symptoms of vasovagal syncope,<sup>91</sup> a common nervous system condition which results in the nerves connecting the heart with blood vessels to give inappropriate signals.<sup>92</sup> Symptoms can include nausea, dizziness or lightheadedness, fainting, and blurred vision.<sup>93</sup> Symptoms may be triggered by intense emotions like fear, intense pain, prolonged exercise, or dehydration.<sup>94</sup> Ash's water intake restriction resulted in fainting and dizziness.<sup>95</sup> Ash also began suffering from stress-induced migraines.<sup>96</sup>

Psychologist Dr. Budge, who specializes in working with adolescents and adults with gender dysphoria, testified that the school's policy and actions "directly caus[ed] significant psychological distress and place[d] [Ash] at risk for experiencing life-long diminished well-being and life-functioning."<sup>97</sup> She also reported Ash's treatment by the school "significantly and negatively impacted his mental health and overall well-being."<sup>98</sup> Ash reported reemergent suicidal thoughts and worsened depression after each meeting with school officials regarding his bathroom usage.<sup>99</sup> Dr. Budge's assessment of the policy's effects on Ash's gender dysphoria corresponds with the known impacts of the increased risk of discrimination for transgender or gender non-conforming individuals.<sup>100</sup> To be clear, the distress associated with gender dysphoria is mostly due to this increased rate of discrimination, and "has been associated with an increased risk of substance abuse, self-harming behaviors, and suicide attempts."<sup>101</sup> This suggests the distress associated with gender non-conformity is a result of social factors rather than any innate characteristic of the individual

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87. *Id.* at 1041-42.

88. *Id.*

89. *Id.*

90. *Id.* at 1041.

91. *Id.*

92. *Vasovagal Syncope*, CEDARS SINAI, <https://www.cedars-sinai.org/health-library/diseases-and-conditions/v/vasovagal-syncope.html> [<https://perma.cc/Q2VE-KGTV>] (last visited Nov. 10, 2022).

93. *Id.*

94. *Id.*

95. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1041 (7th Cir. 2017).

96. *Id.*

97. *Id.* at 1045.

98. *Id.*

99. *Id.*

100. *See Gender Dysphoria*, *supra* note 74.

101. *Id.*

suffering the distress.

To argue against the granting of a preliminary injunction in Ash's favor, the school district appealed to the privacy rights of other students and asserted the students' parents' rights to direct the education and upbringing of their children would be jeopardized.<sup>102</sup> According to the school district, issuance of an injunction would also harm the public by suggesting to other school districts a need to change policies or alter facilities to maintain compliance with Title IX and retain Title IX funding.<sup>103</sup>

The Seventh Circuit Appeals Court quickly dismissed these arguments. First, the court looked to the record and noted only one parent complaint and no student complaints during the six months Ash used the boys' restroom, thus illustrating no students' privacy rights or parental rights to direct that the education and upbringing of their children were at risk of infringement.<sup>104</sup> Second, the court also recognized the school's concerns ignored the reality of how Ash uses the bathroom: behind a closed door in a stall.<sup>105</sup> Regarding the school's concern of harm to the public, the court referenced statements made by *amici*, school administrators from 21 states and Washington, D.C., who attested these hypothetical invasions of privacy never manifested throughout their efforts to maintain inclusive bathroom policies.<sup>106</sup> Given these facts, the Court found Ash demonstrated the requisite likelihood to suffer irreparable harm warranting a preliminary injunction.<sup>107</sup>

#### B. *B.E. v. Vigo County School Corporation (2022)*

The students' stories in *B.E.* are very similar to the student's story in *Whitaker*. Like Ash,<sup>108</sup> the *B.E.* plaintiffs, referred to in the case as B.E. and S.E., used names and pronouns reflecting their masculine identities, wore masculine clothes and haircuts, were diagnosed with gender dysphoria, had started gender-affirming testosterone therapy, and successfully changed their legal names to reflect their chosen masculine names.<sup>109</sup> They also amended their birth certificates to reflect their chosen names and gender.<sup>110</sup> Also like Ash,<sup>111</sup> the *B.E.* plaintiffs used the boys' bathrooms at the start of the school year without incident until a school employee noticed and reported it.<sup>112</sup> As a result of the report, Vigo County School Corporation, located in Indiana, told the

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102. *Whitaker*, 858 F.3d at 1054.

103. *Id.*

104. *Id.* at 1052.

105. *Id.*

106. *Id.* at 1054-55.

107. *Id.* at 1046.

108. *Id.* at 1040.

109. *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 727 (S.D. Ind. 2022).

110. *Id.*

111. *Whitaker*, 858 F.3d at 1040.

112. *B.E.*, 608 F. Supp. 3d at 728.

plaintiffs they were only permitted to use the girls' bathrooms or the unisex bathrooms in the health office and would be disciplined for using the boys' restrooms.<sup>113</sup> Similar to Ash,<sup>114</sup> the plaintiffs were informed they would be given access to the boys' restroom only if they surgically transitioned.<sup>115</sup> Because using the girls' bathroom felt wrong to the plaintiffs and the health restroom was farther away from their classes, plaintiffs eventually strove to avoid using the school bathrooms at all.<sup>116</sup> This avoidance exacerbated plaintiffs' gastrointestinal problems—S.E. once required a change of clothes because of an accident, and B.E. was once picked up early from school because his stomach hurt from “holding it.”<sup>117</sup>

In ruling on the irreparable harm to plaintiffs, the court relied primarily on expert witness and psychiatrist Dr. Fortenberry's statements asserting the importance of using the bathrooms which affirm one's gender identity to ameliorating the effects of gender dysphoria.<sup>118</sup> According to Dr. Fortenberry,

[b]eing forced to use restrooms that differ from the person's identity is a prime reminder that the transgender person is ‘different,’ and this undercuts the purpose and goal of social role transition and can exacerbate the negative consequences of gender dysphoria . . . and can have permanent negative consequences, [including] long-term influences on mental health, physical health, and overall wellbeing.<sup>119</sup>

An example of long-term consequences are increased risk of posttraumatic stress disorder, depression, anxiety, and suicidality.<sup>120</sup> The court also noted plaintiffs' testimonies that using the health office bathroom made them “outcasts.”<sup>121</sup> The plaintiffs also detailed the general distress and anxiety they experienced due to their exclusion from the boys' restrooms.<sup>122</sup>

The school corporation asserted similar interests as those asserted by the school district in *Whitaker*,<sup>123</sup> namely, students' privacy interests and public policy.<sup>124</sup> Like the *Whitaker* court,<sup>125</sup> the Court for the Southern District of Indiana dismissed those arguments, appealing to the practical use of the restrooms by the plaintiffs (via stalls) and the civil rights of the plaintiffs and

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113. *Id.*

114. *Whitaker*, 858 F.3d at 1040.

115. *B.E.*, 608 F. Supp. 3d at 728.

116. *Id.*

117. *Id.*

118. *Id.* at 732.

119. *Id.* at 733

120. *Id.*

121. *Id.* at 734.

122. *Id.* at 733.

123. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017).

124. *B.E.*, 608 F. Supp. 3d at 735.

125. *Whitaker*, 858 F.3d at 1054.

other transgender students as “a purpose that is always in the public interest.”<sup>126</sup>

C. *A.M. v. Indianapolis Public Schools (2022)*

The plaintiff in *A.M.*, a ten-year-old fifth grade student in the Indianapolis Public Schools (IPS) system, initiated suit against IPS and the IPS Superintendent by her mother and next friend, E.M., through the ACLU, alleging § 20-33-13-4 violates Title IX, 20 U.S.C. § 1681(a) and the Equal Protection Clause of the Fourteenth Amendment by discriminating against transgender students.<sup>127</sup> Unlike the student in *Whitaker*, who began presenting as his preferred identity in high school,<sup>128</sup> A.M. has been living and presenting as a girl since she informed her family at four years old that she was a girl.<sup>129</sup> As a four-year-old, A.M. considered mutilating herself to remove her penis.<sup>130</sup> At the age of six A.M. was diagnosed with gender dysphoria, which untreated culminated in suicidality, depression, anxiety, anger surrounding her body, and fear regarding her ability to be a girl.<sup>131</sup> Presumably A.M.’s mother thought embracing her daughter’s preferred identity to prevent genital mutilation and the results of untreated gender dysphoria would result in better outcomes for her child.

A.M. began receiving care through Riley Hospital’s Gender Health Clinic soon after her gender dysphoria diagnosis in 2018 and started a puberty blocker, Leuprorelin, in August 2021.<sup>132</sup> Due to the Leuprorelin, A.M. has not experienced the physiological changes which accompany puberty in adolescent males,<sup>133</sup> and she would like to take feminizing hormones in the future so she can develop feminine secondary sex characteristics.<sup>134</sup> She changed her legal name to her preferred feminine first name in 2021.<sup>135</sup> Prior to the passage of § 20-33-13-4 into law and the resultant litigation, A.M.’s classmates had only ever known her as a girl.<sup>136</sup>

A.M. began playing on an IPS girls’ softball team in 2021, as a fourth

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126. *B.E.*, 608 F. Supp. 3d at 736 (quoting *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 222 (6<sup>th</sup> Cir. 2016)).

127. *A.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 954-55 (S.D. Ind. 2022).

128. *Whitaker*, 858 F.3d at 1040.

129. *A.M.*, 617 F. Supp. 3d at 954-55.

130. *Id.* at 955.

131. *Id.* at 959.

132. *Id.*

133. Puberty blockers in general work by limiting the growth of primary and secondary sex characteristics. See *Pubertal Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075> [https://perma.cc/9VPD-VX8S] (last visited Mar. 24, 2023). In *A.M.*’s case, the Leuprorelin would ideally have the effect of preventing her voice from deepening and preventing the growth of hair and genitalia.

134. *A.M.*, 617 F. Supp. 3d at 955.

135. *Id.* at 960.

136. *Id.*

grader, and reported the experience helped reduce her gender dysphoria symptoms and “experience her life more fully as a girl.”<sup>137</sup> A.M. did not appear to have a competitive edge over her teammates and was considered one of the weaker team members.<sup>138</sup> After the codification of § 20-33-13-4, IPS informed A.M. she would not be permitted to play with her softball team during the 2022–2023 school year because of the law.<sup>139</sup> Since joining the boys’ baseball team would undermine her social transition to live as a girl, fail to moderate her gender dysphoria symptoms, and reveal her sex to her classmates, joining that team was determined to be both traumatic and injurious.<sup>140</sup>

Judge Jane Magnus-Stinson ultimately granted A.M.’s motion for preliminary injunction, barring implementation of the law in the Indianapolis Public Schools system.<sup>141</sup> Judge Magnus-Stinson first considered the likelihood of success on the merits of A.M.’s Title IX claim.<sup>142</sup> The court acknowledged the United States Supreme Court recently resolved the question of whether transgender status is part of sex under Title VII in *Bostock v. Clayton County, GA*.<sup>143</sup> In *Bostock*, the Supreme Court acknowledged that “transgender status [is] inextricably bound up with sex [. . .] because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex. . . .” and stated “discrimination based on [. . .] transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”<sup>144</sup> Because the Seventh Circuit has looked to Title VII when construing Title IX, and the *Bostock* Court did not foreclose application of its holding to the Title IX context, Judge Magnus-Stinson looked to *Bostock* for guidance in A.M.’s case.<sup>145</sup> Additionally, Judge Magnus-Stinson concluded that discrimination based on transgender status was actionable under Title IX’s prohibition of sex-based discrimination as elucidated by this Court in *Whitaker* in 2017.<sup>146</sup> To avoid making unnecessary constitutional decisions, the district court refused to consider whether A.M. was entitled to a preliminary injunction based on her Equal Protection Claim.<sup>147</sup>

Judge Magnus-Stinson also found A.M. adequately showed she would suffer irreparable harm absent issuance of an injunction by elucidating the exacerbation of gender dysphoria symptoms of suicidality, depression, anxiety,

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137. *Id.*

138. *Id.*

139. *Id.* at 961.

140. *Id.*

141. *Id.* at 969.

142. *Id.* at 962-66.

143. *Id.* at 962.

144. *Id.* at 964 (quoting *Bostock v. Clayton County, GA*, 590 U.S. 644, 140 S. Ct. 1731 (2020)).

145. *Id.* at 964-65 (quoting *Bostock v. Clayton County, GA*, 590 U.S. 644, 140 S. Ct. 1731 (2020)).

146. *Id.*; see also *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1041-42 (7th Cir. 2017).

147. See *A.M.*, 617 F. Supp. 3d at 969.



and anger due to the legislation's prevention of her playing with her school's girls' softball team.<sup>148</sup> A.M.'s mother emphasized how playing softball significantly "lessen[ed] the distressing symptoms of [A.M.'s] gender dysphoria and allowed her to experience her life more fully as a girl, result[ing] in a better self-image and confidence."<sup>149</sup> Her mother also emphasized that prior to this situation, A.M.'s peers had only ever known A.M. as a girl.<sup>150</sup> By prohibiting her participation on the girls' softball team, A.M.'s biological sex would be revealed to her classmates, who may assert she is not "really" a girl.<sup>151</sup> This would traumatize A.M. and undermine her social transition, further reinforcing the negative symptoms of gender dysphoria.<sup>152</sup>

A.M.'s case was dismissed after she transferred to a charter school in January 2023.<sup>153</sup> A.M.'s representation, the ACLU of Indiana, released a statement acknowledging the dismissal was filed because of A.M.'s transfer to another school district and urging other transgender students being told they cannot participate on a public-school sports team to reach out.<sup>154</sup> The ACLU of Indiana also reasserted its argument in *A.M.*—

We stand by our argument that when misinformation about biology and gender is used to bar transgender girls from school sports it amounts to the same form of discrimination that has long been prohibited under Title IX, a law that protects all students – including trans people—on the basis of sex, as well as under the Equal Protection Clause.<sup>155</sup>

Absent the preliminary injunction in *A.M.*, § 20-33-13-4 is now in full effect in Indiana.

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148. *Id.* at 967.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Michelle Kaufman, *Lawsuit Against IPS Regarding Transgender Girls Playing Girls Sports Dismissed*, WRTV INDIANAPOLIS (Jan. 19, 2023), <https://www.wrtv.com/news/local-news/indianapolis/lawsuit-against-ips-regarding-transgender-girls-playing-girls-sports-dismissed> [<https://perma.cc/YZK6-7EP3>]; for a response from faith-based non-profit legal organization Alliance Defending Freedom in favor of the dismissal, see Rachel Csutoros, *Female Athletes Score Again: ACLU Drops Legal Challenge to Indiana Sports Law*, ALLIANCE DEFENDING FREEDOM (Jan. 20, 2023), <https://adfmedia.org/case/am-v-indianapolis-public-schools> [<https://perma.cc/RB34-XZ4Z>].

154. Kaufman, *supra* note 153.

155. *Id.*

## IV. THE HISTORY AND JUSTIFICATIONS OF SEX-BASED EXCLUSION IN SPORTS

A. *Historical Justifications—Women are Fragile, and Men Are Inherently Physically Superior*

Sports were originally exclusively male activities.<sup>156</sup> The belief that women should be excluded from the ancient Olympic Games persisted throughout the modern Olympic movement in 1896, when founder Baron Pierre de Coubertin justified female athletes' exclusion with his statement that "[n]o matter how toughened a sportswoman may be, her organism is not cut out to sustain certain shocks."<sup>157</sup> Eventually twenty-two women were permitted to participate in sailing, tennis, croquet, equestrian, and golf in the early 1900s, likely because these sports were not deemed inappropriately strenuous for women.<sup>158</sup> Elite sports officials and medical observers believed women could not safely perform more strenuous physical activities requiring strength and stamina because of the presumption of female fragility; athletics were purportedly dangerous to reproductive health,<sup>159</sup> emphasizing the traditional role of women being to procreate. A Harvard Medical School professor, Edward Clarke, advised reduction of muscular and brain labor at the onset of menstruation in 1874 because physical activity during menstruation was thought to be dangerous.<sup>160</sup> Feminine muscle development was thought to interfere with motherhood.<sup>161</sup> Feminine muscle development also likely uncomfortably challenged beliefs regarding female fragility and their inherent subordination.

Inclusion of female athletes in sports accompanied women's rights movements and historical events in which women's capabilities in traditionally masculine activities were highlighted.<sup>162</sup> Men generally responded to efforts to include female athletes with the assertion that female athleticism conflicted with conventional femininity, emphasizing the physical differences between the sexes to at least maintain separation of the sexes in competition.<sup>163</sup> Sports were also then viewed as suitable forums for training boys to become men.<sup>164</sup> Men worried the inclusion of female athletes would undermine this process by feminizing men.<sup>165</sup>

The exclusion and gradual but limited inclusion of female athletes in sports emphasizes a binary understanding of sex that perfectly corresponds with a

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156. Jordan Buckwald, *Outrunning Bias: Unmasking the Justifications for Excluding Non-Binary Athletes in Elite Sport*, 44 HARV. J. L. & GENDER 1, 10-11 (2022).

157. *Id.* at 11.

158. *Id.*

159. *Id.*; see also Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1256 (2018).

160. Leong, *supra* note 159, at 1256.

161. Buckwald, *supra* note 156, at 11.

162. *Id.*

163. *Id.* at 12-13.

164. *Id.* at 13.

165. *Id.*

binary understanding of gender identity and gendered behavior.<sup>166</sup> Because sport as an institution formed partially to emphasize and revitalize traditionally masculine traits, the eventual inclusion of women in sports was rooted in traditional beliefs regarding sex differences and male competitive superiority.<sup>167</sup> These beliefs resulted in sex-centric policies like sex-verification testing.<sup>168</sup> Sex-verification testing exists to validate that female athletes are ‘fully’ women and tends to be resorted to when female athletes display extraordinary talent.<sup>169</sup> After Heinrich (Dora) Ratjen confessed in 1975 that he was forced to compete in the women’s high jump event disguised as a woman in the 1936 Berlin Olympics by German officials, sex-verification testing became routine in response to the discomfort surrounding female athleticism and fears of male athletes “masquerading” as female athletes.<sup>170</sup> The purported purposes of this testing is to prevent female athletes from participating against male athletes and maintain fairness in sports,<sup>171</sup> but it tends to prevent biologically female athletes who are especially skilled from competing.<sup>172</sup> Because most sports tend to favor traditionally masculine physiques, female athletes whose physiques and abilities “undercut assumed notions of female frailty,” i.e., were particularly tall, maintained higher muscle-to-fat ratios, or demonstrated any sporting advantage, were suspected of being male-sexed.<sup>173</sup>

Initially, sex verification worked by requiring female athletes to present testers with their genitalia.<sup>174</sup> Over time the testing shifted from reliance on external genitalia to chromosomal makeup.<sup>175</sup> Testers would swab competitors’ cheeks to determine their chromosomes.<sup>176</sup> Eventually reliance on chromosomal makeup was abandoned because it excluded female athletes with XY chromosomal patterns whose bodies were resistant to testosterone (e.g., athletes with complete androgen insensitivity syndrome, which prevents the body from properly responding to testosterone and thus results in the development of more feminine bodies) but permitted female athletes with XX chromosomal patterns who possessed conditions that enabled them to accumulate greater muscle mass and strength (e.g., congenital adrenal hyperplasia) to compete.<sup>177</sup> Variants of genetic testing continued despite failing to unequivocally determine sex until the late 1990s and early 2000s and are now only resorted to when suspicions

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 13-14.

170. *Id.* at 16.

171. *Id.* at 14.

172. See Matt Slater, *Sport & Gender: A History of Bad Science & ‘Biological Racism’*, BBC SPORT (July 28, 2015) <https://www.bbc.com/sport/athletics/29446276> [<https://perma.cc/L59L-7RNU>].

173. Buckwald, *supra* note 156, at 15.

174. Slater, *supra* note 172.

175. *Id.*

176. *Id.*

177. Buckwald, *supra* note 156, at 16.

arise regarding an athlete's gender identity.<sup>178</sup>

Now when female athletes display extraordinary athleticism, their sex is investigated, and they are recast as men or otherwise masculinized to downplay their abilities as females to be extraordinary athletes.<sup>179</sup> After female athlete Caster Semenya broke the South African 800 meter record and setting a world-leading time in 2008, the International Association of Athletics Federations (IAAF) asked for a gender test to prove her sex and found that the levels of testosterone her body naturally produced were normally only found in men, resulting in the IAAF scrambling to develop a plan for women with hyperandrogenism.<sup>180</sup> After failing a gender test in 2006, Indian female athlete Santhi Soundarajan was stripped of her 800 meter silver medal.<sup>181</sup> A year later she attempted suicide.<sup>182</sup> “[I]n practical effect, sex verification tests simply served as one method of policing the boundaries of gender; effectively granting sports’ governing authorities the power to decide what standards women must conform to if they wish to compete.”<sup>183</sup>

### *B. Modern Justifications*

International athletic associations eventually adopted policies specifically for male-to-female transgender athletes. The International Olympics Committee adopted a policy in 2004 which required transgender athletes to (1) complete sex reassignment surgery, (2) complete hormone treatments for two years prior to competing, and (3) obtain legal recognition of their transitioned sex.<sup>184</sup> This policy was heavily criticized in part because sex reassignment surgery has no discernible athletic impact on an individual.<sup>185</sup> Critics suggested the sex reassignment surgery requirement “impose[d] a sincerity test to weed out men who may be willing to perpetuate gender fraud by taking hormones for several years, but would presumably stop short of permanent removal of their genitals,”<sup>186</sup> suggesting both that men would go to great lengths to obtain athletic victory, but would presumably stop short of genital removal because of how much they value their penises and testicles.

The hormone requirement reflects the belief that testosterone is largely responsible for male athletes’ competitive advantage over female athletes, but there is dispute among the scientific community regarding that belief’s validity. Scientists have thus far failed to demonstrate that testosterone levels in non-

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178. *Id.* at 18-19.

179. *Id.* at 19.

180. Slater, *supra* note 172.

181. *Id.*

182. *Id.*

183. Buckwald, *supra* note 156, at 19-20.

184. *Id.* at 20.

185. *Id.*

186. *Id.* (quoting Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J. L. GENDER & SOC’Y 29 (2016).)

binary female athletes affect their abilities to win athletic competitions.<sup>187</sup> By adopting policies focused on testosterone levels, athletic associations assert that science has proven testosterone in non-binary female athletes creates an unfair advantage when no such consensus has been reached.<sup>188</sup>

## V. HOW GENDER STEREOTYPES INFLUENCE CHILDREN

Gender presentation and internalization is largely dependent on socialization according to socialization theorists and social psychologists. As boys and girls are socialized differently depending on their biological sex and assigned gender at birth, they learn different aspects of culture through gender typing.<sup>189</sup> Various socializing agents, e.g., parents, media, school faculty, peers, etc., treat boys and girls differently.<sup>190</sup> These agents model behaviors and punish or reward children's behaviors to enforce certain gender boundaries and norms.<sup>191</sup> Parents of newborn girls describe their daughters as frailer and more delicate than parents of newborn boys describe their sons,<sup>192</sup> parents tend to allow greater risk-taking by boys than girls, and parents tend to use more friendly speech with boys and assertive speech with girls.<sup>193</sup> In school, girls are taught to speak quietly, defer to boys, avoid science and math, and value appearance over intelligence, though teachers are generally more accepting of variation from gender norms in girls than boys.<sup>194</sup> In media, girls are generally underrepresented, sexualized, or portrayed as helpless, while boys are typically protagonists portrayed as aggressive and powerful.<sup>195</sup> Toys with girls as target audiences promote stereotypically feminine qualities, like attractiveness and nurturance (e.g., Barbie dolls and baby dolls), while toys marketed to boys tend to promote stereotypically masculine qualities, like a propensity toward violence and competitiveness (e.g., action figures and toy race cars).<sup>196</sup>

Children interact with these agents and observe their stereotypically feminine and masculine behaviors to build personal gender schemas, defining for themselves what it means to be a boy or girl.<sup>197</sup> "The primacy of gender as a social category encourages children to attend to and process gender-relevant information."<sup>198</sup> Over time and with the development of self-regulation skills,

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187. *Id.* at 32.

188. *Id.*

189. Diane Ruble & Carol Martin, *Learning to Be Ourselves in a Gender-Polarized World*, GROWING UP 74, 81 (2012), [https://j.b5z.net/i/u/2084689/f/yod\\_ch04.pdf](https://j.b5z.net/i/u/2084689/f/yod_ch04.pdf) [<https://perma.cc/WZ5E-6A7X>].

190. *Id.* at 82.

191. *Id.* at 83.

192. *Id.*

193. *Id.* at 86.

194. *Id.* at 87.

195. *Id.* at 89-90.

196. *Id.* at 90.

197. *Id.* at 82.

198. *Id.* at 84.

children become gender-typed themselves and will encourage or perpetuate gender-typed treatment.<sup>199</sup> They start monitoring their own gendered conduct and making judgments about the appropriateness of their actions, reacting with approval or disapproval in an effort to match their actions with what they are socialized to believe is appropriate.<sup>200</sup> For example, boys may be vehemently averse to playing with baby dolls because they were socialized to believe playing with baby dolls is exclusively a girl activity. This is likely the case since parents tend to prefer toys deemed gender-appropriate for their children.<sup>201</sup>

Students who mostly play with same-gendered children tend to conform their behavior more to gender stereotypes.<sup>202</sup> Boys who play mostly with boys tend to belittle feminine stereotyped traits.<sup>203</sup> In an 1996 study, children aged seven to twelve demeaned the personality of a videotaped fifth-grade girl exhibiting masculine stereotyped behavior.<sup>204</sup> Students are also aware of gender bias; in a study of 350 fourth, sixth, and eighth graders, girls complained about discrimination in sports, reporting that girls are not picked to play basketball because they are girls.<sup>205</sup>

Sociologists have conducted several studies over the years to determine the effects of gender and sex stereotypes on children in different scenarios. A study by sociologist Matthew Tipton on the effect of gender and sex stereotypes on children's career aspirations across sixty-four children aged five to eleven in the United Kingdom showed both boys and girls held gender stereotypes.<sup>206</sup> A total of 75% of children overall described boys as angry compared to girls, and the top three words used to describe boys were footballers, angry and strong, while girls were described as pretty, kind and dancers.<sup>207</sup> In another study, sociologist Eric Anderson investigated how segregated team sports fosters an oppositional masculinity that influences the reproduction of misogynistic views.<sup>208</sup> The article describes the costs of traditional masculinity for men and women. Male athletes in team sports tend to objectify women and view them as conquerable objects.<sup>209</sup> Some studies have shown that team sport participation increases violence against other men and symbolic, domestic, and public violence against women.<sup>210</sup> While male athletes constitute a mere 3.7% of the men at Division 1 universities, they are responsible for 19% of sexual assault reports to campus

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199. *Id.* at 83.

200. *Id.*

201. *Id.* at 86.

202. *Id.* at 88.

203. *Id.*

204. *Id.*

205. *Id.* at 87-88.

206. Matthew Tipton, *An Investigation into Children's Gender Stereotypes and the Effect They Have on Children's Career Aspirations*, 5 *STePJ*. 50, 55 (2018).

207. *Id.* at 56-57.

208. Eric Anderson, "I Used to Think Women Were Weak": *Orthodox Masculinity, Gender Segregation, and Sport*, 23 *SOCIO. F.* 257, 257 (2008).

209. *Id.* at 263.

210. *Id.*

judicial affairs offices.<sup>211</sup> Men involved in football, basketball, and hockey are responsible for 67% of the sexual assaults reported by other student athletes despite comprising only 30% of the student athlete population.<sup>212</sup> As part of his study, Anderson interviewed men who joined cheerleading squads, traditionally considered a female sport, and had their perceptions of women revolutionized—after their experiences, their opinions of female athletes as weak transformed.<sup>213</sup> They even suggested there were many sports in which women could excel.<sup>214</sup> Anderson ultimately concluded that the sex segregation of sports, more particularly the homosocial world of men’s team sports, socialized men to view women as sexual objects and devalued as athletes.<sup>215</sup> He suggests these views result in part because men are not given the opportunity to compete against women or be on teams with women for the majority of their lives.<sup>216</sup>

Taken altogether, these studies suggest the following:

- (1) Children are influenced by society to develop binary concepts of gender, which they feel compelled to both adhere to and require similar adherence by others, often by demeaning and devaluing possession of gender-inappropriate behavior as a method of controlling their own and the behavior of other children;
- (2) These concepts persist beyond the classroom and permeate every aspect of children’s lives, from their choices in toys to their choices in friends and careers; and
- (3) These concepts persist into adolescence and adulthood and contribute to violence against women as men who were isolated from women in team sports convert these concepts into misogynistic attitudes.

#### VI. TRANSGENDER SPORTS BANS RELY ON INADEQUATE BIOLOGICAL JUSTIFICATIONS TO EXCLUDE CERTAIN STUDENT ATHLETES

Modern and historical justifications ignore biological variation and the myriad of congenital disorders that affect hormone uptake and production. They ignore the existence of intersex individuals. Intersex refers to a variety of conditions in which a person is born with atypical reproductive or sexual anatomy, but more generally the term reflects the spectrum of natural, real biological variation.<sup>217</sup> Intersex anatomy is not always evident at birth;

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211. *Id.*

212. *Id.*

213. *Id.* at 271-72.

214. *Id.* at 271.

215. *Id.* at 274.

216. *Id.*

217. *What is Intersex?*, INTERSEX SOCIETY OF N. AM., [https://isna.org/faq/what\\_is\\_intersex/](https://isna.org/faq/what_is_intersex/) [https://perma.cc/AC45-AKXL] (last visited Nov. 16, 2022) [hereinafter INTERSEX SOCIETY OF

individuals may be born with outwardly appearing female anatomy but possess internal male-typical anatomy and only discover their intersex condition once they are having fertility issues.<sup>218</sup> Often times children with intersex anatomy noticeable at birth have their genitals modified or mutilated to match binary conceptions of sex, e.g., a girl born with a noticeably large clitoris and who lacks a vaginal opening<sup>219</sup> may have her clitoris surgically reduced and a vaginal opening created.<sup>220</sup> As briefly discussed in earlier paragraphs, some athletes with complete androgen insensitivity syndrome possess XY chromosomal patterns but develop feminine secondary sex characteristics due their bodies' inability to respond to testosterone, while other athletes with congenital adrenal hyperplasia possess XX chromosomal patterns but because of their congenital condition are able to accumulate greater muscle mass and strength.<sup>221</sup>

Modern justifications for excluding female athletes are similar to historical justifications. While those pressing for sex segregated sports dress up their justifications with incorrect and naïve understandings of biology, they primarily justify the exclusion of female athletes on traditional notions of gender roles and concerns regarding female frailty. While the ideal sportswoman has changed over time—female athletes are now expected to be strong, independent, and competitive compared to other female athletes—certain expectations remain, i.e., that the female athlete should be careful to maintain a feminine and sexy physique so they may continue to satisfy the male gaze.<sup>222</sup> Female athletes who meet traditional expectations of femininity while displaying extraordinary athletic ability are valorized, while those who fail to meet these expectations have their sexes questioned and are considered “suspicious.”<sup>223</sup> This is evidence of their primary status as sexual objects for men to enjoy and consume. The expectation is that the female athlete will remain *something* pretty to look at without challenging constructs of femininity or rivaling the abilities of male athletes or men in general. Society's unease regarding female athletes who transcend the traditional bounds of femininity manifests in sex-centric policies

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NORTH AMERICA]; see also *What is Intersex?*, INTERACT, [https://interactadvocates.org/\[https://perma.cc/7XT9-QGFD\]](https://interactadvocates.org/[https://perma.cc/7XT9-QGFD]) (last visited Nov. 16, 2022).

218. INTERSEX SOCIETY OF NORTH AMERICA, *supra* note 217.

219. It is important to mention here that lacking a vaginal opening is not the equivalent of lacking a urethral opening. Given the lack of comprehensive sexual education in the United States, many adults, including those with vaginas, do not realize they have not two holes down there, but three—the urethral opening, vaginal opening, and anus. See Attia, *How Many Holes Does a Female Body Have Down There?*, PLANNED PARENTHOOD (Oct. 28, 2019, 11:10 AM), [https://www.plannedparenthood.org/learn/ask-experts/help-i-know-alot-about-sex-and-everything-but-i-dont-know-anything-about-what-holes-are-for-what-i-dont-even-know-how-many-are-down-there-please-help#:~:text=The%20opening%20to%20the%20urethra%20\(AKA%20urethral%20opening\)%20is%20the,right%20below%20your%20urethral%20opening](https://www.plannedparenthood.org/learn/ask-experts/help-i-know-alot-about-sex-and-everything-but-i-dont-know-anything-about-what-holes-are-for-what-i-dont-even-know-how-many-are-down-there-please-help#:~:text=The%20opening%20to%20the%20urethra%20(AKA%20urethral%20opening)%20is%20the,right%20below%20your%20urethral%20opening) [https://perma.cc/3BJ5-BK3C].

220. INTERSEX SOCIETY OF NORTH AMERICA, *supra* note 217.

221. Buckwald, *supra* note 156 at 16.

222. *Id.* at 44.

223. *Id.* at 45.



and sex testing in athletic competitions.<sup>224</sup>

VII. THE PERPETUATION OF GENDER STEREOTYPES VIA TRANSGENDER GIRLS  
SPORTS BANS RESULT IN NEGATIVE MENTAL AND SOCIAL HEALTH  
CONSEQUENCES FOR ALL CHILDREN

What is framed as an effort to maintain fairness in women and girls' sports is a testament to the ingrained societal belief that female athletes must be inherently physically inferior to male athletes, and therefore female athletes should be protected from their male counterparts. Female physical inferiority is a transferrable stereotype in that it permeates beliefs about other activities, as evidenced by the psychological research canvassed above. The implication that female individuals are naturally physically inferior raises other questions, namely:

- I. *How* physically inferior are female individuals to male individuals?
- II. Is that a generalizable assertion? In other words, are *all* female individuals, regardless of their upbringing, inclinations, biology, etc., necessarily weaker than male individuals?
- III. What else about female individuals is inferior to those of male individuals? Are they also cognitively inferior?
- IV. What other activities outside of sports should female individuals not do because of their purported frailty? What activities are they predisposed to do or ought they engage in *because* of their frailty, i.e., should they avoid challenging men, be eager to marry so they will have a man's protection, or avoid challenging themselves in the public sphere?
- V. How should male individuals respond to female individuals' purported frailty and their own purported strength? Should they treat female individuals as delicate and easy to break? Should they utilize their own purported strength to achieve certain results in their relationships with others?
- VI. Most importantly, how will children perceive and act on these beliefs to structure their own behavior, intentionally or unintentionally?

Sex and gender stereotypes can have damaging effects on children in the short and long term. We know from psychological studies that children absorb sex stereotypes from their surroundings, caregivers, and peers, and tend to reify those stereotypes through their own self-policing and the policing of others. Short term, children who endorse traditional sex stereotypes may restrict their interests and berate and exclude those children who fail to do the same. Those

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224. *Id.*

children who do change their behavior to conform to sex and gender stereotypes may behave in antisocial ways, negatively impacting the social health of their schools and eventually their workplaces and general society. Those children who fail to conform may face inner turmoil compounded by the policing of their peers. Long term, as children become adolescents and eventually adults, antisocial behaviors and inner turmoil can manifest in self-harm, the harm of others for failure to conform, and a general restriction of one's own experiences in order to conform. This note will now consider how Indiana's K-12 transgender girls sports ban hurts the mental and social health of Hoosier transgender students, cisgender boys, and cisgender girls, respectively.

#### *A. Effects on Transgender Students*

The effects of Indiana's K-12 transgender girls sports ban on transgender girls are best demonstrated by the ban's negative mental health consequences on the transgender girl in *A.M.*, but the experiences of the transgender boys involved in *B.E.* and *Whitaker* exemplify how intolerant policies result in negative mental health consequences for all transgender students. For *A.M.*, being prevented from playing with her softball team exacerbated gender dysphoria symptoms of suicidality, depression, anxiety, and anger.<sup>225</sup> Playing on the softball team significantly reduced *A.M.*'s distressing gender dysphoria symptoms and improved her self-image and confidence by solidifying for both her and her peers that *she is a girl*.

For the boys in *B.E.* and *Whitaker*, being prevented from using the bathrooms which aligned with their masculine gender presentation resulted in negative mental and physical health consequences. The boys in *B.E.* experienced general distress, anxiety and exacerbated gastrointestinal problems as they tried to avoid using the school bathrooms at all rather than comply with the school's unofficial policy and jeopardize the effectiveness of their social transition.<sup>226</sup> In *Whitaker*, Ash's suicidal thoughts returned and his depression worsened after each meeting with school officials regarding his bathroom usage.<sup>227</sup> Ash was treated like a criminal, with his bathroom usage being observed by school security guards.<sup>228</sup> Symptoms of Ash's vasovagal syncope worsened, causing him to faint, and the stress of the school's policy caused migraines.<sup>229</sup> As the courts noted in these cases, the public's interest in privacy and parents' rights to raise and control the upbringing of their children are neither infringed nor jeopardized by these students' use of the boys'

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225. *A.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 967 (S.D. Ind. 2022).

226. See generally *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1041 (7th Cir. 2017).

227. *Id.* at 1045.

228. *Id.* at 1041.

229. *Id.*

bathrooms.<sup>230</sup> It is clear from these cases, *A.M.* included, that the only interests at jeopardy are those of the transgender students to exist within their schools without debilitating mental and physical health effects.

### *B. Effects on Cisgender Boys*

By reinforcing sex and gender stereotypes regarding the inherent superior physical capabilities of boys, Indiana's K-12 transgender girls sports ban perpetuates misogynistic attitudes in cisgender boys that lead to antisocial behavior toward other children. Since cisgender boys associate masculinity with anger, strength, and violence, they may embrace their anger more readily and act on it with violence. They learn to demean, devalue, and objectify cisgender girls and ridicule cisgender boys who fail to abide by masculine gender stereotypes. This policing of peers turns into sex-based violence as cisgender boys become men. Cisgender women who fail to be uniquely feminine, who refuse to be objectified, who challenge cisgender men cognitively and physically, are rewarded with sexual violence.

While cisgender boys and men's egos may be inflated by their misogynistic attitudes initially, cisgender boys and men are also harmed by misogyny. Misogyny is a mechanism of upholding patriarchal society and therefore cisgender men's position as the rulers of society, cisgender boys and men are discouraged from exhibiting feminine traits which are healthy to express solely because they are portrayed as unbecoming and weak. Cisgender boys and men are told not to cry unless it is in anger and to be hateful as a sign of strength. These behaviors may lead to poorer intimate<sup>231</sup> relationship outcomes for cisgender boys and men as they restrict themselves from expressing emotion to their friends and contract their social circles to exclude cisgender girls and women, and those cisgender boys and men who fail to meet the patriarchal masculine ideal. The lesser diagnoses of depression in cisgender men<sup>232</sup> may be a result of this conditioned hesitancy to allow themselves to express the full spectrum of human emotion and share those feelings with others.

The assertion that female athletes are frailer than, and therefore need to be protected from, their male counterparts also suggest something sinister about the nature of boys and men—that their biology makes them weapons, that they are inherently dangerous beings capable and maybe even inclined toward predation. American society reinforces this message in a myriad of ways, but

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230. *Id.* at 1034; *see also* *B.E. v. Vigo Cnty. Sch. Corp.*, 608 F. Supp. 3d 725, 735 (S.D. Ind. 2022).

231. Intimacy does not exclusively refer to romantic or sexual relationships. Intimate relationships include warm friendships developed through long association or familiarity. *See Intimate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intimate> [<https://perma.cc/X5A5-PH3K>] (last visited Nov. 16, 2022).

232. Gwendolyn Puryear Keita, *Psychosocial and Cultural Contributions to Depression in Women: Considerations for Women Midlife and Beyond*, 13 SUPP. TO J. MANAGED CARE PHARMACY S12, S12 (2007).

sex-segregated K-12 sports policies are particularly powerful tools because of the physical nature of many sports and the homogenous social environment the teams create. This myth being taken as truth also makes it difficult to prevent violence perpetuated by boys and men. Those who do act violently outside of socially acceptable situations, especially toward those they perceive to be weaker than them, may find feeling true shame or guilt for their behaviors difficult. After all, they only became what the world told them they were born to be. Meanwhile, those who fail to be aggressive even in situations where it is encouraged may be shamed as not masculine enough. Cisgender boys and men are caught in a catch twenty-two.

### *C. Effects on Cisgender Girls*

By reinforcing sex and gender stereotypes regarding the inherent physical inferiority of cisgender girls and women, Indiana's K-12 transgender girls sports ban perpetuates internalized misogyny within cisgender girls and women, violence against cisgender girls and women, and limited autonomy and ambition for cisgender girls and women. Because cisgender girls are taught to associate femininity with frailty, they may opt out of strenuous physical activities for fear of hurting themselves and thus deprive themselves of opportunities to build certain skills. As they develop, they are objectified and berated for their sexual anatomy and gender presentation. They learn that to be worthy, they must maintain a feminine appearance—they must be pretty to be valuable. They may pursue prettiness at the expense of the development of other skills and ambitions. As adults, they are disproportionately victimized by cisgender men, resulting in severe trauma with lasting mental health consequences. Cisgender girls and women learn to shrink themselves as they live in fear of what the world has in store for them. Together these experiences contribute to extremely poor mental health consequences for cisgender women, who are twice as likely to develop depression than cisgender men.<sup>233</sup>

## VIII. WHAT SHOULD BE THE PATH FORWARD?

Because Indiana's K-12 transgender girls sports bans serves to emphasize and reify purported gender and sex differences that fail to accurately capture the variability of human existence, they work to restrict behaviors and interests in children and thereby may result in antisocial behavior and poorer mental health for all children. These bans are an attempt to solidify a divide between men and women that not only does not exist naturally but may only exist where children are conditioned to believe it should. Teaching children to abide by binary gender norms works to place female and non-binary individuals generally below male individuals in the hierarchy of life. The socialization of children according to strict masculinity and femininity norms reinforces an exploitative system which

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233. *Id.*

tends to result in (1) exacerbation of distressing gender dysphoria symptoms in children and adults who internally do not and cannot abide by this binary system, (2) antisocial behavior in boys and men as they are conditioned to neglect their own emotional and relational development, and (3) jeopardization of cisgender girls' safety in the classroom and later cisgender women's safety in public.

Though this Note primarily considers the results of this socialization in the context of sports, this socialization clearly has long-lasting effects on society. For this reason, Indiana's K-12 transgender girls sports ban should be eliminated from its code of laws and replaced with legislation that gradually integrates K-12 sports to reduce the impact of patriarchal expectations on children and the resulting antisocial behavior in childhood and adulthood. If there is anything every Hoosier can agree upon, it is that the well-being of our children is of infinite importance. The research and case law are clear—sexist and misogynistic sex and gender stereotypes hurt every child, regardless of their sex and gender. To counteract the impacts of patriarchal expectations on children, states should take a proactive approach and consider legislation which would gradually integrate K-12 sports. Ind. Code § 20-33-13-4 need not be repealed in its entirety, but several aspects of the law should be revised. Subsection 20-33-13-4(b) is that which prohibits the participation of transgender girl athletes from participating on girls' athletic teams. It should be struck from the code entirely and replaced with something resembling the following:

(b) Following the enactment of this legislation, [insert date], a school corporation, public school, and/or charter school, must provide only coeducational or mixed sports or athletic teams to students beginning kindergarten in the year 20XX. For every incoming group of kindergarten students thereafter, school corporations, public schools, and charter schools must continue providing only coeducational or mixed sports or athletic teams to students. Effective 20XX (twelve years after the enactment of this legislation) all Indiana school corporations, public schools, and charter schools must provide only coeducational or mixed sports or athletic teams to all students.

By replacing Ind. Code. § 20-33-13-4(b) with something resembling the example above, Indiana would be removing law which exacerbates negative health outcomes short and long-term for Hoosier children and adults and replacing it with a necessary mechanism for a culture shift. By implementing the change gradually over the course of twelve years, the incoming child athletes will be able to grow accustomed to integrated sports and learn from the start how to hone their skills to compete against opposite sex athletes. More importantly, the students will gain deeper understanding, appreciation, and compassion for the other sex and for themselves.

Students spend a lot of time with their sports teams. As they continue to practice with the other sex, the unhealthy sex roles and gender expectations will

seem less imperative to fulfill. Children will ideally find in their sports teams safe havens to explore and be as fully themselves as possible. This exploration and opportunity to acquaint themselves with more of the world—all the student athletes rather than just those with the same sexual anatomy or gender presentation—is critical to creating kind, socially and emotionally intelligent children with secure senses of self.

It should be noted that by integrating sports teams, Indiana would be removing one avenue for binary gender expression in schools. It is clear from the case law that for transgender girls in particular, participating on the sports team which affirms her gender is extremely ameliorative of gender dysphoria symptoms. While transgender students will lose one avenue for binary gender expression, they will still benefit from the integrated teams in the long-term from the relational harmony they should foster. The fact of one's biological sex will be less necessary to question because there will be no "boys' team" or "girls' team." A.M., for example, would be able to be on the baseball team with girls and boys, and given her gender expression, she would likely be identified with the girls.

Researchers appear not to have studied the benefits of sex-segregation in sports, but one psychological study found no real advantages associated with single-sex education compared to integrated education.<sup>234</sup> In fact, there is evidence single-sex school environments reinforce sex stereotypes and violence.<sup>235</sup> Sex-segregated sports, and specifically male-only teams, perpetuate the culture of male dominance "through sexual abuse and dominance by males over males as well as over females."<sup>236</sup> The social and emotional benefits we usually associate with team sports—the development of good sportsmanship, loyalty to a team with a common goal, and camaraderie—can be achieved just as well if not better with integrated teams.

Additionally, excluding associations from the legislation enables athletic associations to continue conducting, organizing, sanctioning, or sponsoring interscholastic high school athletic events for sex-segregated teams indefinitely. This is because the legislation only reaches those schools which receive state funding. This means private K-12 schools with sex-segregated teams can continue to compete against each other through the organizing of associations, leaving at least one viable alternative to integrated sports.

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234. Erin Pahlke et al., *The Effects of Single-Sex Compared with Coeducational School Students' Performance and Attitudes: A Meta-Analysis*, 140 PSYCH. BULLETIN 1042, 1064 (2014).

235. *Researchers: Coed Schools Provide Societal Benefits Over Single-Sex Classes*, ARIZ. ST. UNIV., <https://news.asu.edu/content/researchers-coed-schools-provide-societal-benefits-over-single-sex-classes> [<https://perma.cc/Q3M4-C58A>] (last visited Mar. 26, 2023).

236. Julia Jonieczny, *There's Nothing Worse than Losing to a Girl: An Analysis of Sex Segregation in American Youth Sports*, 8 IND. J. L. & SOC. EQUALITY 70, 83-84 (2020).

## IX. CONCLUSION

Indiana does not have a “fairness in girls’ sports” problem. Indiana does have a patriarchy problem, and in that it is not alone. By amending the Indiana Code to integrate publicly funded K-12 sports, Indiana would be pioneering a small effort to put a wrench in the cycle of the social and emotional harms of patriarchy. There is a chance for the change to be smooth and sustainable if only the Indiana legislature is willing to try.