

If You Build It, “They/Them” Will Come: The Misgendering of Transgender Nonbinary Athletes Is Discrimination on the Basis of Sex

Kelli Rodriguez Currie

Introduction

As a freshman at Oberlin College, Leo Ross¹ celebrated the first conference championship in the history of the women’s basketball program alongside their teammates. As the team looked ahead to a repeat performance during Leo’s second season, Leo prepared themselves mentally for persistent misgendering. “For two hours a day, six days a week, for five months, [Leo] anticipated a wide range of people would participate in misgendering [them].”²

Leo was a member of the Oberlin College women’s basketball team for the first three years of their college career.³ During that time, they were also an active leader in the larger Oberlin community.⁴ But through these formative years, Leo reported that their body and their understanding of it changed:

I don’t remember exactly when I realized I might be trans. ... I’m not entirely convinced that I was born into the “wrong” body, rather that I was born into the wrong society. ... It bends and shifts as my landscapes

¹ Leo Ross previously published under a different name. Abby Bellows & Leo Ross, *From the Perspective of Non-Binary Athletes*, THE OBERLIN REVIEW (Dec. 7, 2018), <https://oberlinreview.org/17668/sports/from-the-perspective-of-non-binary-athletes/>

² *Id.*

³ *Leo Ross - 2019-20 Women’s Basketball Roster*, OBERLIN COLLEGE ATHLETICS, <https://goyeo.com/sports/womens-basketball/roster/leo-ross/7434> (last visited July 14, 2021).

⁴ See generally Abby Bellows & Leo Ross, *From the Perspective of Non-Binary Athletes*, THE OBERLIN REVIEW (Dec. 7, 2018), <https://oberlinreview.org/17668/sports/from-the-perspective-of-non-binary-athletes/>; Jackie Brant & Jane Agler, *Leo Ross and Bethany Gen, Queer Varsity Athletes*, THE OBERLIN REVIEW (Sep. 13, 2019), <https://oberlinreview.org/19214/sports/leo-ross-and-bethany-gen-queer-varsity-athletes/>.

Kelli Rodriguez Currie, JD, MSAL, is a lecturer at Seattle University and Seattle University School of Law. Her research interests include the student-athlete experience and collegiate athletics compliance. Kelli uses she/her pronouns. Email: rodrig31@seattleu.edu



and environment have altered. My perception of femaleness is constantly rearranging itself ... [a]nd while Oberlin has provided a near-perfect atmosphere to explore my identity, the nuances of my identity start to break down when I enter the realm of collegiate basketball.⁵

Fellow Oberlin athlete Abby Bellows echoes the challenges Leo faced as a nonbinary athlete, forced to fit within the prescribed binary gender categories of athletics. “Existing in athletic spaces means choosing between a women’s space or a men’s space—there is no space for me.”⁶ At a time when transgender athletes face increasing scrutiny and discrimination,⁷ Leo and Abby’s journeys highlight an opportunity to increase protection against the discrimination of transgender nonbinary athletes with the expansion of Title IX to ensure equal access to participation in athletics.

Part I of this article provides necessary context to adequately engage in a discussion about transgender and nonbinary individuals, including defined terms. Part II provides a brief history of Title IX, articulates the requirements for compliance with the statute, and discusses its application to transgender athletes. Next, Part III of this article provides an overview of Title VII of The Civil Rights Act of 1964 and the recent statutory analysis of its prohibition on employment discrimination because of sex in *Bostock v. Clayton County* and extends the *Bostock* analysis to the statutory language of Title IX. This part also summarizes the recent interpretation by the Department of Education applying that analysis to Title IX. Part IV discusses the implications of the persistent misgendering of transgender nonbinary athletes and argues that only by allowing all athletes to compete as their true gender will the inclusive goals of Title IX be realized. Part V concludes that the requirements for Title IX compliance are not inclusive of transgender nonbinary athletes and are contradictory to the prohibition on discrimination on the basis of sex articulated by the statute itself. This article concludes by proposing several necessary changes to the language of the requirements for compliance under Title IX and argues that the Department of Education must make changes in its interpretation toward more inclusive language to truly achieve the goals of Title IX.

⁵ Bellows & Ross, *supra* note 1.

⁶ *Id.*

⁷ See generally Roman Stubbs, *As Transgender Rights Debate Spills into Sports, One Runner Finds Herself at the Center of a Pivotal Case*, WASHINGTON POST (July 27, 2020), <https://www.washingtonpost.com/sports/2020/07/27/idaho-transgender-sports-lawsuit-hecox-v-little-hb-500/> (describing the experience of Lindsay Hecox, a transgender woman desiring to participate on a women’s running team after Idaho passed a law requiring that transgender girls compete only on teams aligned with their assigned gender at birth); Ella Schneiberg, *These Are The States Trying To Stop Trans Kids from Playing Sports*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/news/these-are-the-states-trying-to-stop-trans-kids-from-playing-sports> (last visited March 1, 2021) (providing a map of the states that have introduced bills targeting transgender people in sports).



Part I. Background

To engage meaningfully in a discussion about transgender nonbinary athletes, it is important first to establish the meaning of several terms. This section defines several words and phrases used throughout this article and discusses the importance of supporting transgender nonbinary athletes by using these correct terms.

A. Definitions

Black’s Law Dictionary defines “sex” as “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.”⁸ Simply, “sex” is a word generally used to describe the biological aspects, such as chromosomes or genitalia, that differentiate males from females.⁹

“Gender,” however, is inclusive of both the phrase “gender roles” and “gender identities.”¹⁰ Black’s Law Dictionary notes that “gender” is increasingly distinguished from “sex” and defines it as “the psychological and societal aspects of being male or female.”¹¹ “Gender identity,” on the other hand, refers literally to the specific gender to which an individual person identifies.¹² Historically, gender and gender identity have been determined by an individual’s biological anatomy and, thus, viewed as a binary system with exclusively “male” and “female” classifications.¹³ Judith Butler suggests, however, that

[g]ender is not exactly what one “is” nor is it precisely what one “has.” Gender is the apparatus by which the production and normalization of masculine and feminine take place along with the interstitial forms of hormonal, chromosomal, psychic, and performative that gender assumes. To assume that gender always and exclusively means the matrix of the “masculine” and “feminine” is precisely to miss the critical point that the production of that coherent binary is contingent, that it comes at a cost, and that those permutations of gender which do not fit the binary are as much a part of gender as its most normative instance.¹⁴

⁸ Sex, BLACK’S LAW DICTIONARY (9th ed. 2009).

⁹ Shelby Hanssen, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 284 (Dec. 2017), <https://scholars-bank.uoregon.edu/xmlui/bitstream/handle/1794/22999/Hanssen.pdf>.

¹⁰ *Id.* at 284–85.

¹¹ Sex discrimination, BLACK’S LAW DICTIONARY (10th ed. 2019). (defining “gender” under the definition for “sex discrimination”); Hanssen, *supra* note 9, at 284–85.

¹² Hanssen, *supra* note 9, at 285.

¹³ See generally JUDITH BUTLER, UNDOING GENDER 41–43 (Routledge 2004).

¹⁴ *Id.* at 42.



“Nonbinary” often refers to someone who does not identify as either male or female or who may identify as both male and female.¹⁵ Like Leo, some nonbinary individuals also identify with the term “transgender.”¹⁶ “Transgender” individuals are those whose gender identity differs from the biological sex they were assigned at birth, whereas “cisgender” refers to an individual who identifies with their biological sex assigned at birth.¹⁷ Specifically, a “transgender woman” is a woman who was assigned the biological aspects of a male at birth, a “transgender man” is a man who was assigned the biological aspects of a female at birth, and a “transgender nonbinary” person was assigned the biological aspects of either male or female at birth.¹⁸

B. Misgendering

“Identity misclassification, or the experience of not having one’s social identity correctly recognized by others, is psychologically disruptive.”¹⁹ “Misgendering” occurs when individuals use incorrect pronouns or titles for a transgender person or make assumptions about the gender of a person based on their name.²⁰ Nonbinary and transgender individuals may also be subject to assumptions by others that their identity is not valid or should not be socially recognized.²¹ Kevin McLemore found that frequent misgendering lead transgender individuals to feel stigmatized.²²

McLemore conducted two online studies.²³ The first study included participation by 115 individuals on the transgender spectrum, with a median age of 36.²⁴ In this first study, “participants self-reported how frequently they are misgendered and how devalued these experiences make them feel.”²⁵ The second study had a total of 134 participants on the transgender spectrum, with a median

¹⁵ Hanssen, *supra* note 9, at 287; Douglas Knutson et al., *Recommended Terminology, Pronouns, and Documentation for Work with Transgender and Non-Binary Populations.*, 4 PRACTICE INNOVATIONS 214, 215 (Dec. 2019); Roberta Achtenberg et al., *SEXUAL ORIENTATION AND THE LAW*, December 2020 Update (West 2004).

¹⁶ Bellows & Ross, *supra* note 1; Hanssen, *supra* note 9, at 287.

¹⁷ Hanssen, *supra* note 9, at 287; Knutson et al., *supra* note 15; Achtenberg et al., *supra* note 15.

¹⁸ Hanssen, *supra* note 9, at 287; Knutson et al., *supra* note 15; Achtenberg et al., *supra* note 15.

¹⁹ Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF AND IDENTITY 51, 51 (Jan. 2015).

²⁰ Knutson et al., *supra* note 15, at 216–17.

²¹ *Id.* at 217. Knutson et al., *supra* note 14, at 217.

²² McLemore, *supra* note 19.

²³ *Id.* at 53–54.

²⁴ *Id.* at 54.

²⁵ *Id.* at 53.



age of 30.²⁶ The second study was a replication and an extension of the first, introducing “measures of shame, verification and enhancement strivings, evaluations of the self as a transgender person, and evaluations of non-transgender individuals.”²⁷

The first study found that when participants felt stigmatized by the misgendering, they reported an associated increase in hostility, guilt, anxiety, inauthenticity in social interactions, and perceived stigmatization of transgender people.²⁸ McLemore’s second study reported similar results and confirmed that “misgendering is associated with negative affect, state self-esteem, social identity, felt authenticity, and transgender felt stigma.”²⁹ Further, the second study replicated the pattern found in the first: that feelings of stigmatization when misgendered were associated with increased feelings of shame.³⁰

Particularly important, the “results suggest that more frequent experiences with misgendering shape a person’s desire for identity-consistent appraisals, whereas feeling stigmatized when misgendered is associated with a person’s desire to be seen in a more favorable manner.”³¹ Thus, not only is it important that transgender individuals experience the validation of having their gender identity affirmed, it is equally important that their gender identity be more frequently and consistently affirmed.

The inclusion of only “male” and “female” genders within the Title IX regulation both invalidates the identity of nonbinary individuals and perpetuates the consistent misgendering of nonbinary athletes. The statutory language of Title IX must be interpreted to include all genders or our athletic institutions risk reinforcing the psychological disruption that occurs when nonbinary athletes are consistently misgendered.

Part II. Title IX

Much has been written on Title IX over the last few decades, and a lengthy history need not be repeated here. As a summary, however, this section will discuss the history surrounding the enactment of the statute, the requirements imposed upon colleges and universities as they relate to athletics, and the guidance issued to colleges and universities regarding the implementation of Title IX with respect to transgendered students.

²⁶ *Id.* at 60.

²⁷ *Id.* at 53–54.

²⁸ *Id.* at 60.

²⁹ *Id.* at 67.

³⁰ *Id.*

³¹ *Id.*



A. History of Title IX

Enacted as a part of the Education Amendments of 1972, Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³² Courts and scholars alike have been left to interpret the scope of text of the statute from surrounding legislative dialogue because the statute was introduced as a floor amendment and no committee reports exist.³³ There is evidence, however, that Congress intended for the statute to be interpreted broadly and aimed to “root out [sex discrimination] as thoroughly as possible.”³⁴

Initially, Title IX aimed to address sex discrimination in faculty employment opportunities within higher education, but the statute also addressed sex discrimination in student admissions and scholarships.³⁵ However, following the enactment of the statute, Grove City College and its students challenged the scope of Title IX’s application to “any education program or activity receiving Federal financial assistance.”³⁶ First, the plaintiffs argued that neither the college nor any of its educational programs or activities receive federal financial assistance because any students receiving federal financial assistance receive the funds directly from the Department of Education and the college itself does not receive any federal financial assistance.³⁷ Second, the plaintiffs argued that although students receive federal financial assistance directly from the Department of Education, the receipt of these funds imposes Title IX liability only on the student financial aid program and not the entire college.³⁸ The Supreme Court held that although Title IX coverage was triggered by the receipt of federal financial assistance by some students, because this assistance was earmarked for student financial aid it does not trigger institution-wide coverage under Title IX.³⁹

³² Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019).

³³ *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); Claudia S. Lewis, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 *FORDHAM L. REV.* 1043, 1051 (1983).

³⁴ Lewis, *supra* note 33, at 1051 (citing 118 Cong. Rec. 5804 [1972] [remarks of Sen. Bayh.]).

³⁵ Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX.*, 102 *ACADEME* 69 (American Association of University Professors July–Aug. 2016), https://www.aaup.org/sites/default/files/TitleIXreport_0.pdf

³⁶ Education Amendments of 1972 § 1681(a) (emphasis added); *Grove City College v. Bell*, 465 U.S. 555 (1984).

³⁷ *Grove City Coll. v. Bell*, 465 U.S. at 563.

³⁸ *Id.* at 569.

³⁹ *Id.* at 555–56.



Following the decision in *Grove City College*, Congress passed the Civil Rights Restoration Act in 1988 and affirmatively extended the application of Title IX to include the protection against discrimination on the basis of sex to “all of the operations of” an educational institution receiving federal funding, including athletic departments.⁴⁰

B. Title IX Compliance Requirements

To adequately comply with Title IX, the Department of Education Office for Civil Rights (OCR) requires that colleges and universities (1) effectively accommodate student interests and abilities and (2) ensure equal benefits in treatment of the different sexes.⁴¹

First, institutions must equally and effectively accommodate the interests and abilities of both male and female athletes by (a) measuring the athletic interests of their students, (b) sponsoring sports that accommodate the athletic interests and abilities of each sex to the same degree, and (c) providing opportunities for intercollegiate competition and team scheduling that equally reflect the competitive abilities of male and female athletes.⁴²

The OCR applies a “three-part test” to determine whether an institution has complied with Title IX’s requirement that it effectively accommodate student interests and abilities.⁴³

- 1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- 2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- 3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the

⁴⁰ Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687(2)(A) (2019); Education Amendments of 1972, 34 C.F.R. § 106.41(a) (2020).

⁴¹ Education Amendments of 1972, 34 C.F.R. § 106.41(c) (2020); *Requirements Under Title IX of the Education Amendments of 1972* (US Department of Education), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last visited Apr. 1, 2021).

⁴² *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

⁴³ Norma Cantú, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (US Department of Education), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (last visited Jul. 12, 2021) (often referred to as the “1996 Dear Colleague Letter”).



members of that sex have been fully and effectively accommodated by the present program.⁴⁴

Under this test, if an institution has demonstrated that it is compliant with any one of the three options, the institution meets this requirement.⁴⁵ Further, the first part of the test requiring opportunities “substantially proportionate” to the enrollment numbers of the institutions may serve as a “safe harbor” for colleges and universities to demonstrate compliance.⁴⁶ Specifically, if an institution is able to demonstrate compliance with part one, it need not comply with either parts two or three.⁴⁷

Second, institutions must ensure equal benefits by both providing substantially similar facilities, equipment, services, and financial assistance to both male and female athletes.⁴⁸ Colleges and universities are not required to provide identical or exactly equal benefits, so long as the differences in benefits are negligible and the financial assistance is proportionate to the participation rate of each sex in intercollegiate athletics.⁴⁹

Title IX *permits* colleges and universities to “sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁵⁰ However, the institution is only *required* to “provide equal athletic *opportunity* for members of both sexes.”⁵¹ Thus, a university is merely required to provide opportunity, which may or may not be achieved by sponsoring separate teams.

An institution may establish separate teams for men and women when selection is based on competitive skill or is a designated contact sport, such as football.⁵²

[A] separate team may be required if there is sufficient interest and ability among members of the excluded sex to sustain a team and a reasonable expectation of competition for that team. Also, where an institution sponsors a team in a particular non-contact sport for members of one

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Education Amendments of 1972, 34 C.F.R. § 106.37(c) (2020); *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

⁴⁹ Education Amendments of 1972 § 106.37(c); *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

⁵⁰ Education Amendments of 1972, 34 C.F.R. § 106.41(b) (2020).

⁵¹ Education Amendments of 1972, 34 C.F.R. § 106.41(c) (2020) (emphasis added).

⁵² *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.



sex, it must allow athletes of the other sex to try-out for the team if, historically, there have been limited athletic opportunities for members of the other sex.⁵³

C. Application of Title IX to Transgender Students

In 2016, the Department of Education and the Department of Justice under President Barack Obama’s administration issued a letter clarifying that a “student’s gender identity [be treated] as the student’s sex for purposes of Title IX and its implementing regulations.”⁵⁴ This clarification required that institutions “must not treat a transgender student differently from the way it treats other students of the same gender identity.”⁵⁵ Simply, the guidance required that a college or university treat a transgender male as the same way that it would treat a cisgender male.⁵⁶ Importantly, the guidance also clarified that under Title IX there was no requirement that the student have a medical diagnosis or other identification to support their gender identity.⁵⁷ Further, the Obama Administration’s guidance prohibited schools from adopting or adhering to “overly broad generalizations or stereotypes about the differences between transgender students” and cisgender students when sponsoring sex-segregated athletics teams.⁵⁸ In February 2017, President Donald Trump’s administration rescinded this guidance and cited the need for “due regard for the primary role of the States and local school districts in establishing educational policy.”⁵⁹

On his first day in office, President Joseph Biden signed the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which stated that “[c]hildren should be able to learn without worrying about whether they will be denied access to ... school sports,” signaling a policy reversal from the curtailed transgender rights enacted by the Trump Administration.⁶⁰ On March 8, 2021, President Biden signed Executive Order

⁵³ *Id.*

⁵⁴ U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter on Transgender Students 2* (May 2016) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter on Transgender Students 1* (Feb. 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx>

⁶⁰ Exec. Order, No. 13988, 86 Fed. Reg. 7023–24 (Jan. 20, 2021); U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter on Transgender Students* (Feb. 2017).



14021, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.⁶¹ Executive Order 14021 expanded on the previous order and specifically provided that this prohibition of discrimination on the basis of sex, including gender identity, be codified under Title IX.⁶² In response to Executive Order 14021, in April 2021, the OCR outlined the actions it would take to review the Department of Education’s existing regulations and ensure alignment with the directive of the order.⁶³

Part III. Discrimination Based on “Sex”

Title IX’s prohibition on discrimination on the “basis of sex” closely mirrors a similar prohibition on discrimination “because of sex” in Title VII of The Civil Rights Act of 1964.⁶⁴ This section (1) outlines the recent statutory analysis of Title VII’s prohibition in *Bostock v. Clayton County*, (2) extends the framework of that analysis to the statutory language found in Title IX, and (3) outlines the June 2021 guidance issued by the OCR that affirmatively adopts the Title VII prohibition of discrimination because of sex as applicable to Title IX.

A. Statutory Analysis of Title VII

The Supreme Court most recently interpreted the meaning of the term “sex” in *Bostock v. Clayton County*, when it evaluated whether the prohibition of “sex” discrimination in Title VII of the Civil Rights Act of 1964 included discrimination against employees because of their sexual orientation or transgender status.⁶⁵

Under Title VII, it is

unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.⁶⁶

⁶¹ Exec. Order No. 14021, 86 Fed. Reg. 13803–4 (March 8, 2021).

⁶² *Id.*

⁶³ Suzanne B. Goldberg, *Letter to Students, Educators, and Other Stakeholders Re Executive Order 14021* (April 2021) <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-co-14021.pdf>

⁶⁴ Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019); Civil Rights Act of 1964, 42 U.S.C. § 2000 (2019). Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964); The Education Amendments of 1972, 20 U.S.C. § 1681(a) (1972).

⁶⁵ Civil Rights Act of 1964 § 2000; *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

⁶⁶ Civil Rights Act of 1964 § 2000. Civil Rights Act of 1964 § 2000.



Although Title VII is more broad, because it prohibits discrimination on the basis of characteristics other than “sex,” “Title IX generally follows Title VII’s approach to sex-based discrimination in employment.”⁶⁷

In *Bostock*, plaintiff Aimee Stephens argued that she was fired because she was a transgender woman.⁶⁸ When Ms. Stephens began her employment, she lived and presented as male.⁶⁹ After treatment for mental health concerns, Ms. Stephens was diagnosed with gender dysphoria and informed her employer that she planned to “live and work full-time as a woman.”⁷⁰ Her employer subsequently fired her.⁷¹

Courts generally interpret a statute “in accord with the ordinary public meaning of its terms at the time of its enactment.”⁷² In *Bostock*, the Court first considered the definition of “sex.” Next, the Court turned to the surrounding text to determine what the statute specifically said about the term “sex.” Finally, the Court considered whether the Title VII language should be applied narrowly to the specific treatment of individual employees.

The Court began its analysis with a definition of “sex” and then turned to consider how the surrounding language within the statute informs that definition.⁷³ The parties conceded, and the Court assumed, that the term “sex” in Title VII refers to the “biological distinctions between male and female.”⁷⁴ The Court then evaluated the importance of the statutory language that “prohibits employers from taking certain actions ‘because of’ sex.”⁷⁵

In the language of law, this means that Title VII’s “because of” test incorporates the “simple” and “traditional” standard of but-for causation. [*University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 346, 360]. That form of causation is established whenever a particular outcome would not have happened “but for” the purported cause. [See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176.] In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.⁷⁶

⁶⁷ Lieberwitz et al., *supra* note 35. Lieberwitz et al., *supra* note 27.

⁶⁸ See generally *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020)

⁶⁹ *Id.* at 1738.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1739.

⁷⁴ *Id.*

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Id.*



The Court specifically stated that Congress did not indicate that an employee's "sex" be the only cause for discrimination, but that it simply be one of the factors.⁷⁷ Indeed, the Court noted that Congress subsequently broadened the scope of this requirement when it affirmed that an employee may prevail on a Title VII claim by showing only that their sex was a "motivating factor" in the employer's actions.⁷⁸

The *Bostock* analysis then considered the specific activities that may impose liability upon employers, noting that Title VII is clear that employers are liable only "when they 'fail or refuse to hire,' 'discharge,' 'or otherwise ... discriminate against' someone because of" their sex.⁷⁹ The meaning of "discrimination" has not changed substantially since the enactment of the statute in 1964 and means "[t]o make a difference in treatment or favor (of one as compared with others)."⁸⁰

To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See *Burlington N. & S. F. R. Co. v. White*, 548 U. S. 53, 59 (2006). ... [A]n employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.⁸¹

Finally, because the statute prohibits discrimination against an "individual," the Court held that the Title VII imposes liability on an employer who discriminates against a single individual on the basis of sex and that the plaintiff need not establish that an employer demonstrated a pattern or larger practice of discrimination generally.⁸²

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating this woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally.⁸³

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1740.

⁸⁰ *Id.* (citing Webster's New International Dictionary 745 [2d ed. 1954]).

⁸¹ *Id.*

⁸² *Id.* at 1740–41.

⁸³ *Id.* at 1741.



The Court continued by highlighting an example that applies this analysis to Ms. Stephens’s specific circumstances.

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.⁸⁴

The holding in *Bostock* is clear: “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁸⁵

B. Statutory Analysis of Title IX

The prohibition of discrimination in employment based on “sex” under Title IX closely mirrors the language in Title VII.⁸⁶ Title IX prohibits educational institutions receiving federal financial assistance to discriminate against persons “on the basis of sex.”⁸⁷ The use of the term “sex” in Title IX is nearly identical to its use in Title VII.⁸⁸ Although parties may argue that “sex” should include gender identity, as the employees initially argued in *Bostock*, adopting the narrow definition articulated in *Bostock* does not preclude a transgender plaintiff from being discriminated against on the basis of “sex.”⁸⁹ Similar to the reasoning in *Bostock*, however, the statutory language surrounding the term “sex” in Title IX is important context, and the analysis does not end simply by defining “sex” as “referring only to biological distinctions between male and female.”⁹⁰

“On the basis of” in the language of Title IX is synonymous with the “because of” language in Title VII. As the *Bostock* court noted, the ordinary meaning of “because of” is “by reason of” or “on account of.”⁹¹ Similarly, the ordinary meaning of “on the basis of” is “based on.”⁹² Finally, the Supreme Court

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Civil Rights Act of 1964, 42 U.S.C. § 2000 (2019); Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019); Lieberwitz et al., *supra* note 35. Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964); The Education Amendments of 1972, 20 U.S.C. § 1681(a) (1972); *See also* Lieberwitz et al., *supra* note 27.

⁸⁷ Education Amendments of 1972 § 1681(a).

⁸⁸ Civil Rights Act of 1964 § 2000; Education Amendments of 1972 § 1681(a).

⁸⁹ *Bostock v. Clayton Cty.*, 140 S.Ct. at 1739.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *On the basis of*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/on%20the%20basis%20of> (last visited Aug. 23, 2021).



held in *Jackson v. Birmingham Board of Education* that “when a supervisor sexually harasses a subordinate *because of* the subordinate’s sex, that supervisor ‘discriminate[s] on the basis of sex.’”⁹³

Just as the *Bostock* court held that the “because of” language in Title VII establishes a but-for test, the phrase “on the basis of” in Title IX creates an identical but-for test.⁹⁴ This but-for test in Title IX analyses similarly do not require that sex be the only or primary reason for the discriminatory activity. Notably, in *Jackson*, the Court held that Title IX included a private right of action for retaliation against an individual because they have complained about sex discrimination.⁹⁵

Turning to the specific behaviors or activities that may impose liability, Title IX specifically states that an institution receiving federal funding is liable only when it excludes from participation, denies benefits of, or discriminates against people.⁹⁶ Just as in *Bostock*, here the meaning of “discrimination” is “[t]o make a difference in treatment or favor (of one as compared with others).”⁹⁷ That is, an institution “that intentionally treats a person worse because of sex,” such as exclusion from participation in educational opportunities, discriminates against that person and is in violation of Title IX.⁹⁸

Finally, just as Title VII imposes liability for discrimination against a single “individual,” Title IX imposes liability for exclusion, denial of benefits, or discrimination against any “person.”⁹⁹ Although Title IX does not require institutions to provide identical or exactly equal benefits to men and women, the statute also does not require that a plaintiff establish that the institution has demonstrated a pattern or larger practice of exclusion, denial of benefits, or discrimination generally.¹⁰⁰

Thus, just as the Court’s holding in *Bostock* stated clearly that “it is impossible to discriminate against a person for being homosexual or transgender without

⁹³ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (emphasis added).

⁹⁴ *Bostock v. Clayton Cty.*, 140 S.Ct. at 1739.

⁹⁵ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167.

⁹⁶ The Education Amendments of 1972, 20 U.S.C. § 1681(a) (1972).

⁹⁷ *Bostock v. Clayton Cty.*, 140 S.Ct. at 1740 (citing Webster’s New International Dictionary 745 [2d ed. 1954]).

⁹⁸ Education Amendments of 1972 § 1681(a); *Bostock v. Clayton Cty.*, 140 S.Ct. at 1740.

⁹⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000 (2019); Education Amendments of 1972 § 1681(a).

¹⁰⁰ *Requirements Under Title IX of the Education Amendments of 1972* (US Department of Education), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last visited April 1, 2021); See *Bostock v. Clayton Cnty.*, 140 S.Ct. at 1740. Pamphlets; *Laws, Equal Opportunity In Intercollegiate Athletics*, *supra* note 30; See *Bostock v. Clayton Cnty.*, 140 S.Ct. at 1740–41.



discriminating against that individual based on sex,” it is similarly impossible for an institution to exclude, deny benefits to, or discriminate against a person for being transgender without discriminating against that individual based on sex.¹⁰¹

C. OCR Interpretation in Light of *Bostock*

Following the *Bostock* decision in 2020, the OCR affirmatively adopted the Court’s interpretation of the Title VII language that discrimination because of “sex” includes discrimination because of sexual orientation and gender identity and extended it to Title IX.¹⁰²

In June 2021, the OCR issued an interpretation to “clarify the Department’s enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX.”¹⁰³ The 2021 interpretation specifically notes that “a school’s policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm.”¹⁰⁴ The OCR cites *Grimm v. Gloucester County School Board* and *Dodds v. United States Department of Education* as support for the harm to their emotional health that transgender students endure when they are subjected to different treatment.¹⁰⁵ In *Grimm*, the Fourth Circuit Court of Appeals held that that the plaintiff experienced emotional harm cognizable under Title IX when he was forced to use a separate restroom created only for students with “gender identity issues.”¹⁰⁶ In *Dodds*, the Sixth Circuit declined to stay an injunction issued by the district court requiring that the school district permit an 11-year-old transgender girl to access the restroom aligned with her gender identity.¹⁰⁷ The court of appeals specifically relied on “substantial and immediate adverse effects on the daily life and well-being” of the student, including multiple suicide attempts, when it held that she would suffer further irreparable harm if she continued to be subjected to different treatment otherwise prohibited under Title IX.¹⁰⁸

The OCR interpretation is clear: “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education

¹⁰¹ *Bostock v. Clayton Cnty.*, 140 S.Ct. at 1741.

¹⁰² Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637–40 (Jun. 16, 2021).

¹⁰³ *Id.* at 32637.

¹⁰⁴ *Id.* at 32639.

¹⁰⁵ *Id.*; *Dodds v. United States Department of Education*, 845 F.3d 217 (Court of Appeals 2016); *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020).

¹⁰⁶ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d at 617–18.

¹⁰⁷ *Dodds v. US Dept. of Educ.*, 845 F.3d at 221–22.

¹⁰⁸ *Id.*



programs and activities that receive Federal financial assistance from the Department [of Education].”¹⁰⁹ However, although the interpretation states that “OCR carefully reviews allegations from anyone who files a complaint, including students who identify as ... nonbinary,” the Department of Education has failed to provide any guidance for the implementation of Title IX as it applies to specifically transgender nonbinary athletes.¹¹⁰

Part IV. Misgendering of Nonbinary Athletes

Despite the acceptance of transgender athletes who identify as “male” or “female,” the requirement that a student identify only and specifically as “male” or “female” within the framework of Title IX requires transgender nonbinary athletes to choose between two painful options: either they are forced to misgender themselves and play for a “men’s” or “women’s” team, or they do not participate in athletics at all. This section argues that the requirement that nonbinary athletes participate only in activities aligned with their assigned sex at birth results in pervasive misgendering of nonbinary athletes and may cause irreparable harm.

Many organizations that support transgender nonbinary athletes have identified the tension between the inclusion of transgender male and transgender female athletes and the resulting exclusion of transgender nonbinary athletes. Athlete Ally is an organization focused on “end[ing] the rampant homophobia and transphobia in sport.”¹¹¹ On the one hand, the Athlete Ally “Model Policy: Transgender and Nonbinary Athlete Inclusion” states clearly that transgender and nonbinary athletes require particular accommodations, such as access to appropriate locker rooms and hotel rooms, and that teammates, coaches, and personnel should use the correct pronouns for transgender and nonbinary athletes.¹¹² On the other hand, the policy recommends that “[a] student-athlete who identifies as ... nonbinary ... not taking hormones may participate in sex-separated sports activities in accordance with the individual’s assigned birth sex.”¹¹³

Similarly, the June 2021 OCR interpretation of Title IX in light of the *Bostock* decision acknowledges that a policy or actions that treat transgender students

¹⁰⁹ Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County* 32639.

¹¹⁰ *Id.*

¹¹¹ *About Athlete Ally*, ATHLETE ALLY, <http://www.athleteally.org/about/> (last visited April 1, 2021).

¹¹² *Model Policy #1: Transgender and Nonbinary Athlete Inclusion*, ATHLETE ALLY, <https://www.athleteally.org/model-policy-transgender-inclusion/> (last visited April 1, 2021).

¹¹³ *Id.*



differently from other students may cause irreparable harm.¹¹⁴ On the one hand, the interpretation states clearly that Title IX prohibits discrimination, including being excluded from extracurricular opportunities, based on gender identity.¹¹⁵ On the other hand, the OCR interpretation offers no guidance to include non-binary athletes that does not require them to choose between participation on a “men’s” or “woman’s” team.¹¹⁶ This lack of specific guidance implies that a nonbinary athlete is required to misgender themselves by participating on a team aligned with their assigned sex at birth, further invalidating the identity of the athlete, and possibly leading to increased feelings of stigmatization, hostility, and anxiety.¹¹⁷

Abby Bellows recounted their experience as a nonbinary athlete, running cross country and track for Oberlin College:

I am a non-binary trans masculine person who participates in women’s cross country and track and field because there is no gender category that fits me in the sports world, so I must compete according to my sex assigned at birth.¹¹⁸

Similarly, Leo Ross shared their experiences with the misgendering that necessarily follows when nonbinary athletes are required to participate on teams according to their assigned sex at birth:

Some days, I don’t have enough mental energy to combat the misgendering and I succumb to being a woman. I have yet to find an effective strategy, one that refuses to concede the existence of my gender while simultaneously acknowledging the importance of team over individual. Honestly, I’m scared that with the passage of time, the latter will overwhelm the former. For now, I resign myself to being a member of the “women’s” basketball team, trusting that my teammates and I will make enough space for my trans identity.¹¹⁹

Only by allowing all athletes to compete as their true gender will the inclusive goals of Title IX be realized. As the visibility of transgender nonbinary athletes increases, Title IX’s prohibition of exclusion or discrimination from educational

¹¹⁴ Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County* 32639.

¹¹⁵ *Id.*

¹¹⁶ See Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637–40 (June 16, 2021).

¹¹⁷ See Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF AND IDENTITY 51 (Jan. 2015).

¹¹⁸ Bellows & Ross, *supra* note 1.

¹¹⁹ *Id.*



opportunities, including athletics, on the basis of sex will require that colleges and universities equally and effectively accommodate transgender nonbinary athletes by sponsoring additional teams and competitive opportunities.¹²⁰

Part V. The Future of Title IX

Under Title IX, educational institutions receiving federal financial assistance may not be subjected to discrimination on the basis of sex.¹²¹ The OCR requires that colleges and universities effectively accommodate student interests and ensure equal benefits.¹²² Over the last 50 years, the OCR has issued different interpretations and clarifications of the “three-part test” used to determine compliance, but has continued to use language that identifies only two, binary gender options.¹²³ The continued validation of only two, binary gender options perpetuates the misgendering and discrimination of transgender nonbinary athletes on the basis of sex. To achieve the inclusive goals of Title IX, the OCR must change the language of its requirements for Title IX compliance to be inclusive of transgender nonbinary athletes. This section proposes necessary changes to the language of the requirements for compliance with Title IX, including changes to the language and interpretation of the “three-prong test” and to the requirement that institutions provide equal benefits and opportunities. Finally, this section concludes that the Department of Education must be proactive by including transgender nonbinary athletes in its interpretations of Title IX and that failure to do so perpetuates discrimination on the basis of sex and is in direct conflict with the language of the statute itself.

A. Include All Genders

Under the first prong, an educational institution may demonstrate that it meets the requirements of Title IX if the “intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”¹²⁴ By specifically including only “male and female” students, the language of the guidance excludes the participation of nonbinary athletes, who are neither male nor female. This exclusion is discrimination against nonbinary athletes on the basis of sex and is in direct violation of the Title IX statute itself and must be addressed.

¹²⁰ *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

¹²¹ Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019).

¹²² Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019); *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

¹²³ Cantú, *supra* note 43.

¹²⁴ *Id.*



The OCR should revise the language of this first prong to reconcile the inherent discriminatory impact of this interpretation of a statute designed specifically to address discrimination on the basis of sex. An interpretation that is inclusive of the wide spectrum of gender might require that “participation opportunities for *all genders* are provided in numbers substantially proportionate to their respective enrollments.”

Although some may argue that requiring an institution to provide separate varsity teams for the myriad options along the spectrum of gender is unreasonable, providing a separate “all gender” team in addition to sponsoring both a “men’s” and “women’s” team would quickly address the gap present in the exclusive binary language currently provided. Transgender men and transgender women would still be welcome to participate on the team that aligns with their gender identity, as they are under the current OCR interpretation. Additionally, transgender nonbinary athletes would have a separate option to participate and compete with other athletes who may identify along the spectrum of gender identity, without being forced to choose to misgender themselves on a regular basis.

B. Strive for Inclusivity

Under the second prong, colleges and universities may demonstrate a continuing practice of expansion to serve the developing interests and abilities of the members of an *underrepresented sex*.¹²⁵ Because this second prong does not utilize the binary gender options of “male” or “female,” no change is needed to the language of the interpretation. Rather, the OCR need only require institutions to expand their athletics programs to provide opportunities to students who identify along the wide spectrum of gender identity, including transgender nonbinary athletes.

This change in guidance would not specifically require that an institution create a separate team for nonbinary athletes. Because many institutions comply with Title IX under the first prong as a “safe harbor,” an institution must demonstrate compliance under this second prong only if it is unable to provide opportunities that are substantially proportionate to the enrollment numbers of the student body. Further, this second prong requires only that institutions demonstrate program expansion that is “demonstrably responsive to the developing interests and abilities” of the underrepresented sex. Creating an all-gender team similarly provides an opportunity that does not require transgender nonbinary athletes to choose to regularly misgender themselves and may be sufficient to demonstrate “demonstrably responsive” expansion at this time.

¹²⁵ *Id.*



C. Expand Assessment of Interests

Under prong three, an institution that fails to comply with Title IX under either of the first two prongs may demonstrate that it has fully and effectively accommodated the interest and abilities of the members of the underrepresented sex.¹²⁶ In 2010, the OCR issued guidance clarifying the requirements for such assessments.¹²⁷ In alignment with its June 2021 guidance that institutions not discriminate on the basis of transgender status or gender identity, the OCR must require that these assessments of interest and ability include options to gauge the interests and abilities of all transgender athletes, including transgender nonbinary athletes.

D. Provide Equal Benefits and Opportunities

Finally, the requirement that institutions provide equal benefits to “both *male and female* athletes,” and may only be required to establish separate teams for *men and women* when selection is based on skill or is otherwise a contact sport are discriminatory on the basis of sex.¹²⁸ The binary language of gender identity further alienates transgender nonbinary athletes.

First, the language requiring that institutions ensure equal benefits must be changed to require that colleges and universities provide “substantially similar facilities, equipment, services, and financial assistance to *all* athletes.”¹²⁹ Second, the requirement that an institution establishes a separate team for members of an excluded sex *only* if there is sufficient interest and a reasonable expectation of competition for such a team creates a classic Catch 22.¹³⁰ Without the opportunity to compete on a team that aligns with the identity of a transgender nonbinary athlete, there will be insufficient competition to require that an institution sponsor a separate nonbinary or all-gender athletic team.

¹²⁶ *Id.*

¹²⁷ Russlynn Ali, *Guidance on Accommodating Students’ Athletic Interests and Abilities: Standards for Part Three of the “Three-Part Test”* (Apr. 2010) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

¹²⁸ *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

¹²⁹ Education Amendments of 1972, 34 C.F.R. § 106.37(c) (2020); *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

¹³⁰ “Catch-22” was a phrase introduced in Joseph Heller’s 1961 novel by the same name; it describes a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule. JOSEPH HELLER, *CATCH-22* (Simon & Schuster 2004); *Catch-22*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed., 1993).



E. Build It: “They/Them” Will Come

When Title IX was enacted in 1972, men participated in intercollegiate varsity and recreational programs at nearly five times the rate of women.¹³¹ Because of the protections provided under Title IX, the participation of women in athletics has increased steadily over the last several decades.¹³² Women began to take advantage of the opportunity to participate in athletic competition because institutions were required under Title IX to provide such opportunities. There is no reason to believe that the *interest* of female athletes increased merely because of the enactment of Title IX; a similar level of interest in participation and competition among female athletes likely existed well before 1972. However, without the opportunities required under Title IX, female athletes had fewer options for participation, whether they were interested or not.

Inclusion of transgender nonbinary athletes will require similar and forward-thinking change to Title IX requirements. It is not enough that the guidance require that transgender male and transgender female athletes are permitted to participate on a team that aligns with their gender identity.¹³³ The requirement that transgender nonbinary athletes must participate only on a team that aligns with the gender they were assigned at birth is discriminatory and excludes them from an educational activity on the basis of their sex.¹³⁴ The Title IX requirement that an institution must only sponsor a separate team for an excluded sex if a reasonable expectation of competition exists perpetuates this discrimination, and it is in direct conflict with the inclusive goals of the statute itself.¹³⁵

The text of Title IX clearly prohibits discrimination “on the basis of sex” and the recent OCR interpretation reiterates that the prohibition extends to discrimination based on an individual’s failure to conform with stereotypical ideals

¹³¹ Welch Suggs, *Title IX at 30*, 48 CHRONICLE OF HIGHER EDUCATION (June 2002) (stating “That year, there were just under 30,000 women in college varsity and recreational programs, according to the National Collegiate Athletic Association, compared with 170,000 men.”).

¹³² *Id.*

¹³³ Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, 86 Fed. Reg. 13803–4 (Mar. 8, 2021); Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637–40 (Jun. 16, 2021).

¹³⁴ *See generally* Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637–40 (Jun. 16, 2021); *Model Policy #1: Transgender and Nonbinary Athlete Inclusion*, ATHLETE ALLY, <https://www.athleteally.org/model-policy-transgender-inclusion/> (last visited April 1, 2021).

¹³⁵ *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.



of masculinity and femininity.¹³⁶ Yet, the existing OCR guidance continues to reinforce only a binary gender option when it requires that educational institutions provide equal opportunities to members of “both sexes.”¹³⁷ This requires a transgender nonbinary athlete to make a choice between “both sexes” and is inherently discrimination “on the basis of sex.”¹³⁸

The recent Department of Education guidance applying the interpretation of the *Bostock* Title VII analysis to Title IX does not go far enough by simply ensuring that the OCR will begin an investigation of allegations of discrimination based on gender identity.¹³⁹ The inclusive goals of Title IX, the stipulation that Title IX prohibits “discrimination against all students for not conforming to stereotypical notions of masculinity and femininity,” and the interpretation of the *Bostock* analysis require that the OCR issue revised guidance embracing transgender nonbinary athletes.¹⁴⁰

Revising the language of Title IX compliance requirements is necessary to be more inclusive of the spectrum of gender identity, including transgender nonbinary athletes. These revisions are not only necessary to achieve the inclusive and nondiscriminatory goals of the statute itself but also provide the opportunity for transgender nonbinary athletes to participate in athletics without emotional injury that comes from the persistent misgendering experienced by Leo and Abby. As they look forward to a more inclusive landscape within athletics, Leo recognizes that the “reality of the situation is that the public existence of non-binary/trans athletes in sports is so new that the system has no idea how to handle it ... leaving non-binary/trans athletes to wander aimlessly in the middle.”¹⁴¹

The enactment of Title IX was an undeniably important milestone in moving forward in the fight for equality for women.¹⁴² The expansion of women’s sports allowed more women to participate in intercollegiate athletics and dramatically

¹³⁶ Education Amendments of 1972, 20 U.S.C. § 1681(a) (2019); Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*.

¹³⁷ Education Amendments of 1972, 34 C.F.R. § 106.41 (2020) (emphasis added).

¹³⁸ *Id.*

¹³⁹ Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*.

¹⁴⁰ *Id.*; *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 41.

¹⁴¹ Bellows & Ross, *supra* note 1.

¹⁴² See generally Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX.*, 102 ACADEME 69 (American Association of University Professors Jul.–Aug. 2016), https://www.aaup.org/sites/default/files/TitleIXreport_0.pdf; Welch Suggs, *Title IX at 30*, 48 CHRONICLE OF HIGHER EDUCATION (June 2002).



increased the visibility and placement of women in our culture.¹⁴³ These inclusive changes are likely to encourage more transgender nonbinary athletes to participate in intercollegiate athletics and dramatically increase the visibility of transgender nonbinary individuals in our culture.

¹⁴³ Suggs, *supra* note 131.

