

INCLUSION V. FAIRNESS: ADHERING TO DENMARK'S APPROACH FOR TRANSGENDER PARTICIPATION IN WOMEN'S SPORTS

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INTRODUCTION

Nearly a quarter of the way through the twenty-first century, the world of sports is flourishing at an all-time high in terms of popularity and attention.¹ Additionally, the modernized notions of inclusion and fairness have been thoroughly grounded into today's society, specifically in the sports realm.² Most recently, there has been light shed on the controversial issue of inclusion and fairness as they relate to transgender women participating in women's sports.³ Over the last several years, transgender women have been fighting for recognition in this world, which began with the desire to compete in sports with and among biological women.⁴ As such, there have been several policies, proposals, guidelines, and the like laid out in trying to decipher the best way to approach an issue that appears to be a double-edged sword, based on maintaining the balance between inclusion and fairness in women's sports.⁵ Moreover, on one side of things, there lies great emphasis in pursuing maximum efforts to include transgender women in women's sports, while the other side of the spectrum highlights the considerations behind maintaining fairness in women's sports, specifically ensuring biological women have the opportunity to be successful without being disadvantaged at the outset.⁶

There have been several approaches taken regarding transgender women's participation in women's sports both in international legislative arenas, such as

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1. Nicholas Pardini, *Globalization and Sports: An Overview (Part I)*, BLEACHER REPORT (May 28, 2008), <https://bleacherreport.com/articles/25902-globalization-and-sports-an-overview-part-i> [https://perma.cc/G9JQ-H5K9].

2. Donna Lopiano & Mariah B. Nelson, *A Fair and Inclusive Solution for Transgender Women in Sports*, FORBES (Aug. 4, 2022), <https://www.forbes.com/sites/donnalopiano/2022/08/04/a-fair-and-inclusive-solution-for-transgender-women-in-sports/> [https://perma.cc/SE38-7CVG].

3. Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, AMERICAN CIVIL LIBERTIES UNION (Apr. 30, 2020), <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked> [https://perma.cc/JL9B-ZVAN].

4. Eleanor Crooks, *Sport Facing 'Fairness v Inclusion' Issue with Transgender Athletes, Expert Says*, INDEPENDENT (Mar. 24, 2023), [https://perma.cc/S2AC-GYU2].

5. Women in Sport, *Trans Inclusion & Women's Sport*, <https://womeninsport.org/transgender-inclusion-womens-sport/> [https://perma.cc/V2HA-T9R3] (last visited Nov. 13, 2024).

6. Luca Aloï & Sean Ngo, *Transgender Athletes: Inclusion and Fairness*, THE INDEX (June 8, 2023), <https://www.the-independent.com/sport/sport-fairness-caster-semenya-manchester-metropolitan-university-stonewall-b2307517.html> [https://perma.cc/7RQJ-RQTE].

Denmark, and in the United States, respectively.⁷ Denmark is a developed country that, like various United States organizations and associations, has adopted a formal policy, which is unlike most other developed countries.⁸ For example, in dealing with the complex issue of whether or not to allow transgender women to compete in women's sports, the Danish Sports Confederation (the "DIF") of Denmark recently established a framework of principles that will serve as guidance in consideration of transgender women's participation in women's sports through analyzing the sport itself, and determining whether a specific gender would have inherent advantages or disadvantages.⁹ World Athletics ("WA") has recently banned transgender women from competing in women's sports if she has already gone through male puberty, while the International Olympic Committee (the "IOC") has also taken a stance on transgender women in women's sports, encompassing a sport-by-sport analysis.¹⁰ The United States has seen several proposed solutions, beginning with congressional action heavily disfavoring transgender women participating in women's sports, the National Collegiate Athletic Association (the "NCAA") sport-by-sport analysis approach, the inconsistent measures taken by several states of the United States (the "States"), where over half of the States that have taken a position on transgender women participating in women's sports have thus banned transgender women from competing in women's sports, and the positions taken by the National Federation of State High School Associations (the "NFHS") as portrayed through individual state high school associations.¹¹

In light of the inconsistent and differentiating policies and frameworks adopted by organizations in both Denmark and the United States, this Note structures an analysis and recommendation in favor of the United States federally adopting a sport-by-sport, case-by-case determination regarding

7. Jakob Draminsky, *Transgender, Intersex and Non-Binary in Sports*, DIF (Jan. 7, 2022), [https://perma.cc/82EC-EZFF]; Media Ctr., *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [https://perma.cc/Q4NE-7AMJ]; Katie Barnes, *Transgender Athlete Laws by State: Legislation, Science, More*, ESPN (Aug. 24, 2023), https://www.espn.com/espn/story/_/id/38209262/transgender-athlete-laws-state-legislation-science [https://perma.cc/H9QU-2WMU].

8. Emine Saner, *Europe's Terrible Trans Rights Record: Will Denmark's New Law Spark Change?*, THE GUARDIAN (Sep. 1, 2014), <https://www.theguardian.com/society/shortcuts/2014/sep/01/europe-terrible-trans-rights-record-denmark-new-law> [https://perma.cc/5MUT-D5C2].

9. Draminsky, *supra* note 7.

10. Kim Elssesser, *What Makes an Athlete Female? Here's How The Olympics Decide*, FORBES (Jul. 27, 2021), <https://www.forbes.com/sites/kimelsesser/2021/07/27/what-makes-an-athlete-female-heres-how-the-olympics-decide/> [https://perma.cc/CUS5-ZYZF]; Ben Morse, *World Athletics Tightens Rules on Transgender Women Athletes*, CNN (Mar. 24, 2023), <https://www.cnn.com/2023/03/23/sport/world-athletics-transgender-ruling-spt-intl/index.html> [https://perma.cc/BV8R-STEJ].

11. Media Ctr., *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022, 8:41 PM), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [https://perma.cc/Q4NE-7AMJ]; Barnes, *supra* note 7.

transgender women's participation in women's sports, which will require each appropriate sport's governing body (i.e., the NCAA through its legislative processes and state high school associations through the NFHS) to balance various factors, under a totality of the circumstances, including the age of the transgender woman, whether the transgender woman has gone through male puberty, the specific women's sport, and whether the role of biological gender will play an essential role in determining a transgender woman's success in that specific women's sport. Section I of this Note explores the meaning of being transgender, transgender women's breakthroughs over the last century, differentiating policies, frameworks and concerns of Denmark, international organizational action, United States committees and organizations, and a brief dive into scientific considerations. Section II of this Note provides a thorough analysis of Denmark, international, and United States action on allowing transgender women to compete in women's sports, encompassing considerations of inclusion and fairness. Section III of this Note proposes a methodical recommendation that uses Denmark's strategy to promote uniformity among the United States as a whole. Section IV of this Note lays out a conclusion that summarizes the entirety of the Note.

I. THE EVOLUTION OF TRANSGENDER WOMEN COMPETING IN WOMEN'S SPORTS

A. Historical Context

1. Defining Transgender

The term "transgender" is "used to describe an individual whose gender identity differs from the sex they were assigned at birth."¹² The identification as a transgender individual has nothing to do with sexuality, but primarily relates to how an individual identifies his or her gender.¹³ As such, an individual is deemed transgender the moment he or she realizes his or her gender identity is different than his or her gender assigned at birth, encompassing a gender transition, which may require a surgery or medical diagnosis.¹⁴ Thus, a transgender woman, during her gender transition, may seek to change her identification documentation, such as her driver's license or passport, to better reflect her gender.¹⁵ Additional efforts in communicating an individual's gender

12. Clare Mulroy, *What Does the 'T' in LGBTQ Mean? Gender Identity and the Transgender, Nonbinary Communities*, USA TODAY (Mar. 29, 2023), <https://www.usatoday.com/story/news/2022/11/23/what-does-t-in-lgbtq-stand-for/10751668002/> [https://perma.cc/B2VM-U38V].

13. *Id.*

14. *Id.*

15. *Understanding Transgender People: The Basics*, ADVOCATES FOR TRANS EQUALITY (Jan. 27, 2023), <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [https://perma.cc/A5LS-66TP].

transition include both name and pronoun changes and wearing different clothes.¹⁶ For example, a transgender woman “should be referred to as ‘she’ and ‘her.’”¹⁷

2. *The Evolution of Transgender Rights*

Prior to the twentieth century, the transparency and openness surrounding individuals seeking to transition from one gender to another were virtually nonexistent.¹⁸ At the cusp of the twentieth century, German physician Magnus Hirschfeld (“Hirschfeld”) began studying “sexual intermediaries,” a term proposed by Hirschfeld for non-gender conforming individuals, based on an encounter with a homosexual German soldier.¹⁹ During his ongoing studies, Hirschfeld determined, “. . . it was a recognition that people may be born with a nature contrary to their assigned gender.”²⁰ Upon his findings, Hirschfeld “provide[d] sex education and health clinics, advice on contraception, and research on gender and sexuality.”²¹ In 1919, Hirschfeld opened the world’s first transgender clinic, where gender transition surgeries were to take place.²² Shortly thereafter, Hirschfeld performed surgery on Dora Richter, the first transgender woman to undergo the gender transitioning surgery.²³ Post-gender transition surgery, Hirschfeld “sought to provide a safe space for those whose altered bodies differed from the gender they were assigned at birth—including, at times, protection from the law.”²⁴ Despite Nazi-erasing efforts, Hirschfeld’s institute has shaped the history of transgender individuals in a meaningful way, revealed through Hirschfeld’s protocols of “a trans-supportive community of care,” mental and physical healing, and social change.²⁵

Decades later, in 1975, male individual Richard Raskin underwent a gender transitioning surgery, resulting in a new name identity, Renee Richards (“Richards”), and eventually became the first transgender woman to compete in women’s professional sports.²⁶ Richards’ tennis participation in the 1977 US Open was monumental to the trans society as she “weathered a chromosome test, boycotts by her fellow players, the scrutiny of the media, a ban by the

16. Mulroy, *supra* note 12.

17. *Understanding Transgender People*, *supra* note 15.

18. Brandy Schillace, *The Forgotten History of the World’s First Trans Clinic*, SCIENTIFIC AMERICAN (May 10, 2021), <https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/> [https://perma.cc/M9YF-ARRD].

19. *Id.*

20. *Id.*

21. *Id.*

22. Mulroy, *supra* note 12.

23. *Id.*

24. Schillace, *supra* note 18.

25. *Id.*

26. Jon Wertheim, *She’s a Transgender Pioneer, But Renée Richards Prefers to Stay Out of the Spotlight*, SPORTS ILLUSTRATED (June 28, 2019), <https://www.si.com/tennis/2019/06/28/renee-richards-gender-identity-politics-transgender-where-are-they-now> [https://perma.cc/NS2J-UA7A].

sport's officials and a lawsuit to overturn that ban."²⁷ Despite falling short in her first professional competition as a transgender woman, Richards continued her professional career in the women's sports sector, where she set "an example for individuals struggling with their gender."²⁸ While transgender issues continue to loom in the twenty-first century, "people like Renee Richards have had a positive influence to the progress of equality."²⁹

During the summer of 2018, Lia Thomas ("Thomas"), a freshman male swimmer at the University of Pennsylvania, came to the realization that "she was a woman, not a man."³⁰ After determining that she would transition genders from male to female, Thomas "underwent hormone-replacement therapy" ("HRT"), "and went through something like female puberty," where "she noticed some of her muscles softening."³¹ After skipping the 2020-21 swimming season and being on HRT for approximately three years, Thomas subsequently "lost strength and an inch of her height."³² In late 2021, Thomas competed against schools like Cornell University and Princeton University in the NCAA Division I women's swimming championship series, recorded multiple fast times, and beat several biological women.³³ In March 2022, Thomas "became the first transgender woman to win an NCAA swimming championship in Division I."³⁴ As a result of Thomas' success, fellow biological female swimmer Riley Gaines, a University of Kentucky student-athlete, openly "opposed transgender athletes competing in women's sports,"³⁵ and labeled Thomas'

27. Steve Tignor, *Decades Later, Renée Richards' Breakthrough is as Important as Ever: At an Anarchic US Open, The Transgender Tennis Player Made a Pioneering Point*, TENNIS (Mar. 31, 2021), <https://www.tennis.com/news/articles/decades-later-renee-richards-breakthrough-is-as-important-as-ever> [<https://perma.cc/H3AM-56T6>].

28. Hannah Irvine, *Renee Richards: The Journey of a Transgender Athlete*, TENNIS PAL (Aug. 23, 2017), <https://tennispal.com/renee-richards-journey-transgender-athlete/> [<https://perma.cc/TX33-XK2A>].

29. *Id.*

30. Louisa Thomas, *The Trans Swimmer Who Won Too Much*, THE NEW YORKER (Mar. 17, 2022), <https://www.newyorker.com/sports/sporting-scene/how-one-swimmer-became-the-focus-of-a-debate-about-trans-athletes> [<https://perma.cc/DCX3-Z7SS>].

31. *Id.*

32. Io Dodds, *Critics Accuse Trans Swimming Star Lia Thomas of Having an Unfair Advantage. The Data Tells a Different Story*, THE INDEPENDENT (May 31, 2022), <https://www.independent.co.uk/news/world/americas/lia-thomas-trans-swimmer-ron-desantis-b2091218.html> [<https://perma.cc/2SJ7-U242>].

33. Robert Sanchez, *'I Am Lia': The Trans Swimmer Dividing America Tells Her Story*, SPORTS ILLUSTRATED (Mar. 3, 2022), <https://www.si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover> [<https://perma.cc/8TTP-YNT7>].

34. BrieAnna J. Frank, *Lia Thomas is Still NCAA Title Holder; Claim to the Contrary Started as Satire | Fact Check*, USA TODAY (Sept. 5, 2023), <https://www.usatoday.com/story/news/factcheck/2023/09/05/false-claim-ncaa-stripped-transgender-swimmer-lia-thomas-of-title-fact-check/70750166007/> [<https://perma.cc/G7QV-KFVP>].

35. Melissa Goldin, *The NCAA is Not Taking Medals Away From Transgender Athlete Lia Thomas*, ASSOCIATED PRESS NEWS (Dec. 6, 2023), <https://apnews.com/article/fact-check-lia-thomas-riley-gaines-ncaa-573637272452> [<https://perma.cc/MV93-93QG>];

participation in women's swimming as "an utter disregard for women."³⁶ Additionally, Florida Governor Ron DeSantis signed a proclamation declaring Emma Weyant, rather than Thomas, "as the winner of the women's 500-yard freestyle at the NCAA women's tournament."³⁷ Notwithstanding evolving approaches and views of transgender women participating in women's sports, transgender women continue to face inclusivity challenges while biological women continue to face fairness challenges.³⁸

B. Denmark's Progression

1. Danish Parliament Action and Danish Sports Clubs

Prior to 2014, Danish citizens who wished to undergo a gender transition were required to receive surgery, a psychological diagnosis, or official documentation reflecting medical expert statements.³⁹ However, in 2014, the Danish Parliament passed a bill that would allow transgender individuals over the age of eighteen to obtain official documentation reflecting his or her desired gender identification, without having to endure a surgery or receive a medical statement (the "2014 Bill").⁴⁰ Thus, the 2014 Bill provided eighteen-year-old Denmark citizens with the ability to simply self-determine his or her gender, subject to a six-month confirmation waiting period.⁴¹

Halfway through 2018, Danish individuals shared strong concerns regarding Danish sports clubs not being open to all individuals.⁴² For example, LGBTI individuals had been experiencing barriers that consisted of unequal conditions and disparate opportunities in sports.⁴³ In an effort to increase LGBTI inclusion in sports clubs, the Danish Ministry of Culture planned to establish a working group for purposes of ensuring "that minority groups in society are able

36. Ryan Gaydos, *Riley Gaines Pushes Back on Lia Thomas' Remarks About Feminism: 'It Just Blows My Mind'*, FOX NEWS (May 2, 2023), <https://www.foxnews.com/sports/riley-gaines-pushes-back-lia-thomas-remarks-feminism-it-just-blows-my-mind> [https://perma.cc/6EEZ-8538].

37. Associated Press News, *Florida Gov. DeSantis: Transgender Swimmer's Victory a Fraud* (Mar. 23, 2022), <https://apnews.com/article/sports-florida-ron-desantis-emma-weyant-19da3b3551fe95292f957d07aeecab29> [https://perma.cc/6T3G-SEVD].

38. Irvine, *supra* note 28.

39. Saner, *supra* note 8; Emily Tamkin, *Should Denmark's Trans Law Be a Model for the Rest of the World?*, SLATE (Sep. 2, 2014), <https://slate.com/human-interest/2014/09/denmarks-new-trans-law-ends-sterilization-but-still-draws-criticism.html> [https://perma.cc/2PZ2-NR33].

40. Saner, *supra* note 8; Azadeh Ansari, *Transgender Rights: These Countries are Ahead of the US*, CNN (Feb. 23, 2017, 12:28 PM), <https://www.cnn.com/2017/02/23/health/transgender-laws-around-the-world/index.html> [https://perma.cc/D4AB-XFTN].

41. Saner, *supra* note 8.

42. Ministry of Foreign Affairs of Denmark 2018-2021, *Action Plan to Promote Security, Well-Being and Equal Opportunities LGBTI People*, REGERINGEN 1, 5 (Jun. 2018), https://bm.dk/media/17143/153842_lgbti_handlingsplan_uk.pdf [https://perma.cc/F247-QJCJ].

43. *Id.* at 25 (Denmark uses the acronym "LGBTI," which alludes to the same concept that "LGBTQ+" describes.).

to live their lives the way they want and feel safe with their partner, spouse and children and with bodily expression or gender characteristics that they have or aspire to have.”⁴⁴ In March 2023, with safety in sports clubs at the forefront, the Denmark sporting landscape took a progressive leap toward conveying its support for the LGBTI sports group by including the option of “other” when sporting members were choosing to select whether they were “male” or “female.”⁴⁵ Many Danish citizens believe Denmark will continue the trend towards maximizing inclusion for transgender women to have an equal opportunity to compete in women’s sports.⁴⁶

2. The Danish Sports Confederation and The Danish Athletic Chairman

The DIF is a Denmark organization that is tasked with overseeing all Denmark sports, including Olympic Game participation, as it relates to promoting the notions of inclusion, fairness, and diversity.⁴⁷ In or around January 2022, the DIF implemented seven guidelines for Danish sports personnel to follow when approaching situational issues involving transgender participation in sport.⁴⁸ The guidelines denoted by the DIF include the following:

Advice 1: Take a position on the dilemmas surrounding gender identity relationships so that they do not come as a surprise when the situation arises. **Advice 2:** Find out how ‘gendered’ the sport is, and thus how big a role it plays, for example, to be big, strong and enduring. **Advice 3:** Leave the male ranks open to all, as the physical prerequisites of transgender, intersex and non-binary people do not create competitive advantages. **Advice 4:** Let inclusion be a major factor in grassroots and exercise sports, as this is primarily about the social, health and free space rather than the sports result. **Advice 5:** Let inclusion play a major role in children’s and youth sports, as children – regardless of gender identity – usually just want to be with their friends and like-minded people. **Advice 6:** Create an inclusive culture in sports. It is, for example, about setting limits on language use and creating inclusive facilities and environments where everyone is safe. **Advice 7:** Let equal competition be a major factor in women’s elite sports in order to prioritize consideration of the large group that has been assigned the gender of female at birth.⁴⁹

Danish Athletic Chairman Brent Jensen (“Jensen”) had a reaction that may suggest fairness issues after United States transgender woman Lia Thomas, the

44. Ministry of Foreign Affairs of Denmark 2018-2021, *supra* note 42, at 5.

45. Christian Wenande, *Denmark’s Sports Clubs Embrace Third Gender Category*, CPH POST (Mar. 30, 2023), <https://cphpost.dk/2023-03-30/news/denmarks-sports-clubs-embrace-third-gender-category/> [<https://perma.cc/TLM7-ZB53>].

46. *Id.*

47. National Olympic Committee and Sports Confederation of Denmark (DIF), *Tackling the Sustainable Development Goals*, https://www.dif.dk/media/03wcwb5s/verdensm%C3%A5l-rapport-engelsk_k4.pdf [<https://perma.cc/RZN3-ZXWC>] (last visited Nov. 8, 2024).

48. Draminsky, *supra* note 7.

49. *Id.*

aforementioned University of Pennsylvania student-athlete, swam her way to victory, breaking several women's records in 2021-22.⁵⁰ Moreover, Jensen, a known supporter of individuals having a right to decide their own gender, came to the realization that allowing a complete opening of transgender women having the opportunity to participate in women's sports may create serious issues for women's sports as a whole.⁵¹ Jensen noted he would feel "'weird if a transgender athlete won an elite-level athletics competition' in Denmark."⁵² As such, Jensen believes that fairness plays an important role in transgender sport participation. Jensen favors the idea of a sport-by-sport balancing test, which will likely provide some solution in construing where, when, and how the line will be drawn between allowing and disallowing transgender women to compete in women's sports.⁵³

3. *Danish Societal Concerns Moving Forward*

Historically, Denmark has been one of the more progressive countries when it comes to promoting inclusion and diversity regarding transgender individuals.⁵⁴ As such, Danish researchers believe that the people of Denmark who identify as transgender, tend to have higher suicide attempts based on being "bullied, discriminated against, socially excluded or faced with general prejudice for who they are."⁵⁵ Further, recent research, as revealed by Carsten Overby, has shown that a rather high rate of transgender individuals do not feel included in the sporting environment, experience derogatory slurs, and have stopped participating in sports altogether, based on negative connotations and experiences.⁵⁶ With that being said, the aforementioned Danish organizations, backed by Danish officials, have prioritized the inclusion of transgender women in sports to promote mental health and well-being among Danish citizens.⁵⁷

50. Delaney Parks, *Year in Review: Penn women's swimming's Lia Thomas makes history as first transgender NCAA Division I champion*, THE DAILY PENNSYLVANIAN (Dec. 11, 2022), <https://www.thedp.com/article/2022/12/lia-thomas-swimming-penn-2022-year-review>; Ben Hamilton, *Transwoman Swimmer's Victory in US Sparks Concerns Among Elite Sport Bodies*, CPH POST (Mar. 22, 2022), <https://cphpost.dk/2022-03-23/news/transwoman-swimmers-victory-in-us-sparks-concerns-among-elite-sport-bodies/> [<https://perma.cc/X2VG-WJVZ>].

51. *Id.*

52. *Id.*

53. *Id.*

54. *World Must Follow Denmark's Example After Landmark Transgender Law*, AMNESTY INT'L (June 12, 2014), <https://www.amnesty.org/en/latest/news/2014/06/denmark-transgender-law/> [<https://perma.cc/D42W-NARU>].

55. Jen Christensen, *Transgender People Face Significantly Higher Suicide Risk, Danish Study Finds*, CNN (June 28, 2023, 6:18 PM), <https://www.cnn.com/2023/06/28/health/transgender-suicide-risk/index.html> [<https://perma.cc/LD7V-BGZX>].

56. Carsten F. Overby, *Report Highlights Discrimination Against Danish LGBTI+ Athletes*, COPENHAGEN (Feb. 23, 2021), <https://copenhagen2021.com/report-highlights-discrimination-against-danish-lgbti-athletes/> [<https://perma.cc/C8PP-BZPG>].

57. Ministry of Foreign Affairs of Denmark 2018-2021, *supra* note 42.

C. World Athletics Resolution

1. Governance

World Athletics (“WA”) is comprised of a “Council,” consisting of “26 elected members, including the President, four Vice-Presidents, six Area Presidents, the Chair of the Athletes’ Commission and one other member of the Athletes’ Commission and thirteen Individual Council Members.”⁵⁸ Council is tasked with governing “the sport of athletics” and “is responsible for all decisions related to the sport of athletics, as well as for the conduct and management of the sport and its disciplines.”⁵⁹ More specifically, “Council has the powers and responsibilities . . . to adopt, amend and repeal rules and regulations and decide all matters relating to the competition calendar and World Athletics competitions, world records, bidding procedures and selection of host cities.”⁶⁰ Further, Council has the ability to execute and “update the eligibility regulations for transgender athletes to compete in the female category.”⁶¹

2. Policy Implementation

In March 2023, WA took a stance on transgender women participating in women’s sports.⁶² Specifically, WA “prohibits athletes who have gone through what WA called ‘male puberty’ from participating in female world rankings competitions.”⁶³ Moreover, WA said, “the exclusion would apply to ‘male-to-female transgender athletes who have been through male puberty.’”⁶⁴ In addition, WA ruled, “to compete as a woman, athletes with differences of sexual development (DSD), who have congenital conditions that cause atypical sex development, must have a testosterone level below 2.5 nanomoles per liter (nmol/L) for at least 24 months before an international competition.”⁶⁵ Per WA

58. *Council*, WORLD ATHLETICS, <https://worldathletics.org/about-iaaf/structure/council> [https://perma.cc/AYZ5-XD3Z] (last visited Nov. 7, 2024).

59. *Id.*

60. *Id.*

61. *World Athletics Council decides on Russia, Belarus and female eligibility*, WORLD ATHLETICS (Mar. 23, 2023), <https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility> [https://perma.cc/CT2T-LDWV].

62. *Eligibility Regulations for Transgender Athletes*, WORLD ATHLETICS (Mar. 23, 2023), <https://worldathletics.org/download/download?filename=c50f2178-3759-4d1c-8fbc-370f6aef4370.pdf&urlslug=C3.5%20%E2%80%93%20Eligibility%20Regulations%20Transgender%20Athletes%20%E2%80%93%20effective%2031%20March%202023> [https://perma.cc/4CRZ-NQ62]; Morse, *supra* note 10.

63. Morse, *supra* note 10.

64. *Id.*

65. Rodrigo P. Ortega, *World Athletics Banned Transgender Women From Competing. Does Science Support the Rule?*, SCIENCE (Apr. 4, 2023), <https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule> [https://perma.cc/EQA8-8QDN].

President Sebastian Coe, “fairness for female athletes” must be maintained “above all other considerations.”⁶⁶ Despite the recent decision by WA, WA executives and decisionmakers have pledged to conduct additional research in the future to further evaluate transgender women participating with biological women in women’s sports.⁶⁷

D. The International Olympic Committee Approach Governance

The IOC is comprised of an Executive Board, which consists of the “IOC President, four Vice-Presidents and ten other members.”⁶⁸ The IOC affairs are managed by the Executive Board, in which the Executive Board is responsible for, among several other duties, enacting “all regulations necessary to ensure the proper implementation of the Olympic Charter and the organisation [sic] of the Olympic Games.”⁶⁹ For purposes relevant to the matter at hand, the executive board assumes the role of identifying “the best ways to support trans athletes and athletes with sex variations to compete in sport in ways that affirm their identity and well-being, while also ensuring meaningful and fair competition.”⁷⁰

1. Policy Implementation

For the last twenty or so years, the IOC has adopted multiple policies and frameworks for purposes of allowing transgender individuals to compete in the Olympic Games.⁷¹ In 2004, the IOC adopted its first position on transgender athlete participation, in which it “required surgery for transgender athletes if they wished to compete in a manner consistent with their gender identity.”⁷² In 2015, the IOC updated its 2004 guidelines, allowing men to transition to female without being required to have the testes surgically removed “if their testosterone levels were below ten nanomoles per liter for at least 12 months before the competition.”⁷³

On or about November 16, 2021, the IOC structured a new framework

66. Morse, *supra* note 10.

67. *Id.*

68. IOC, *IOC Executive Board*, OLYMPICS, <https://olympics.com/ioc/executive-board> [https://perma.cc/2ZJT-NZAJ] (last visited on Nov. 7, 2024).

69. *Id.*

70. IOC, *Fairness, Inclusion and Non-Discrimination in Olympic Sports*, OLYMPICS, <https://olympics.com/ioc/human-rights/fairness-inclusion-nondiscrimination> [https://perma.cc/Z7SB-5X6L] (last visited on Nov. 7, 2024).

71. Katie Barnes, *IOC Provides Framework for International Federations to Develop Their Own Eligibility Criteria for Transgender, Intersex Athletes*, ESPN (Nov. 16, 2021), https://www.espn.com/olympics/story/_/id/32645620/ioc-provides-framework-international-federations-develop-their-own-eligibility-criteria-transgender-intersex-athletes [https://perma.cc/9MX3-DEFZ].

72. *Id.*

73. Elssesser, *supra* note 10.

surrounding the participation of transgender individuals in Olympic Games.⁷⁴ The framework was issued for purposes of highlighting ten nonbinding principles, accompanied by descriptors and specific details, that were to be considered when deciphering whether transgender women may compete in women's Olympic games, which include: (1) inclusion, (2) prevention of harm, (3) non-discrimination, (4) fairness, (5) no presumption of advantage, (6) evidence-based approach, (7) primacy of health and bodily autonomy, (8) stakeholder-centered approach, (9) right to privacy, and (10) periodic reviews.⁷⁵ The 10-factor review is subject to the discretion of International Federations and other sports organizations that carry the responsibility of establishing, implementing, and carrying out the rules.⁷⁶

E. United States Endeavors

1. Congressional Action

On April 10, 2023, the United States House of Representatives, comprised of majority Republicans, passed House Bill 734 ("HB734"), which sought to reiterate and strengthen Title IX by adding, "[s]ex shall be recognized based solely on a person's reproductive biology and genetics at birth," and otherwise disallow men from competing in women's sports.⁷⁷ The language of HB734 reads, "[a]llowing men to compete in women's athletic activities undermines the progress made by women and girls since Title IX's enactment and uses a groundbreaking antidiscrimination statute to discriminate against the very people it was designed to protect."⁷⁸ HB734 bolsters its 'leveling the playing field' argument through use of real-life examples involving biological women athletes missing out on opportunities to compete and win due to competing against transgender women with advantageous biological differences.⁷⁹ In demonstrating support for HB734, the aforementioned student-athlete Riley Gaines spoke out in favor of HB734, and stressed, "[e]qual opportunity,

74. Matt Laviates, *International Olympic Committee Issues New Guidelines on Transgender Athletes*, NBC NEWS (Nov. 16, 2021), <https://www.nbcnews.com/nbc-out/out-news/international-olympic-committee-issues-new-guidelines-transgender-athl-rcna5775> [https://perma.cc/SM4C-FNEC].

75. IOC, *supra* note 70.

76. IOC, *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, OLYMPIC CHARTER, <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf> [https://perma.cc/WAY6-2E7J] (last visited Nov. 7, 2024).

77. Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. § 2(d) (2023).

78. *Id.*

79. *Id.*

privacy and safety in our sports shouldn't be controversial.'"⁸⁰ Thus, HB734 has caught the attention of several athletes, which has sparked various levels of support.⁸¹

2. The National Collegiate Athletic Association Solution

a. Governance

The NCAA is governed by "legislative bodies made up of volunteers from member schools."⁸² Specifically, the NCAA legislative bodies "govern each division and set Association-wide policy," which includes committee management of "topics affecting sports rules, championships, health and safety, matters impacting women in athletics and opportunities for minorities."⁸³ The NCAA's highest governing body is the Board of Governors, which is tasked with providing "strategic planning for the Association as a whole, such as adopting and implementing policies to resolve core issues and other Association-wide matters."⁸⁴ Further, "[a]ll Association-wide governing bodies are charged with upholding and advancing the Association's core values of fairness, safety and equal opportunity for all student-athletes."⁸⁵ Suffice it to say that "[n]either the Association-wide committees nor the Board of Governors has authority to enact legislation directly, but they can influence and provide guidance by recommending legislation to each division, where it can be reviewed through the divisions' legislative processes."⁸⁶

b. Policy implementation

In 2016, NCAA Board of Governors adopted a new requirement for sites hosting NCAA events "to demonstrate how they will provide an environment that is safe, healthy, and free of discrimination, plus safeguards the dignity of everyone involved in the event."⁸⁷ The 2016 NCAA decision arrived at a time where speculation was afloat regarding Mississippi and North Carolina recently passing "laws that critics say can allow discrimination against gay and

80. Brandon Gillespie, *Riley Gaines Shreds Biden Promise to Veto Bill Protecting Women's Sports: 'Catering to a Radical Minority'*, FOX NEWS (Apr. 18, 2023), <https://www.foxnews.com/politics/riley-gaines-shreds-biden-promise-veto-bill-protecting-womens-sports-catering-to-a-radical-minority> [https://perma.cc/996X-T2XE].

81. *Id.*

82. NCAA, *Governance*, <https://www.ncaa.org/sports/2021/2/9/governance.aspx> [https://perma.cc/3UXJ-EWNA] (last visited on Nov. 7, 2024).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Media Ctr., *Board of Governors Approves Anti-Discrimination Process for Championship Bids*, NCAA (Apr. 27, 2016), <https://www.ncaa.org/news/2016/4/27/board-of-governors-approves-anti-discrimination-process-for-championships-bids.aspx> [https://perma.cc/U6VV-PDA4].

transgender people.”⁸⁸ Justifications supporting anti-discrimination measures at NCAA host sites included the treatment of individuals that recognized themselves pursuant to various sexual orientations or gender identities.⁸⁹ An inclusive sporting atmosphere surrounding collegiate sports was heavily prioritized by the NCAA Board of Governors in 2016, paving a path for future changes regarding inclusion in sports.⁹⁰

In 2022, the NCAA Board of Governors updated its transgender participation policy.⁹¹ The NCAA Board of Governors “voted in support of a sport-by-sport approach to transgender participation that preserves opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete.”⁹² The determination of transgender participation in a certain sport will be made by the national governing body (the “NGB”) of that specific sport, “subject to ongoing review and recommendation by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports to the Board of Governors.”⁹³ Absent a NGB policy pertaining to a specific sport, the international federation policy of that specific sport is to be followed. However, if there is not an international federation policy in place for that specific sport, “previously established IOC policy criteria would be followed.”⁹⁴ Additionally, it is of the utmost importance to recognize that the NCAA requires transgender student-athletes to “document sport-specific testosterone levels beginning four weeks before their sport’s championship selections.”⁹⁵ As of the beginning of 2022-23, transgender student-athletes are required to document testosterone levels at the start of their sports season and provide a second testosterone documentation six months after the first testosterone documentation.⁹⁶

3. Differences Among the States

In the majority of the States that have taken a position on transgender women’s participation in women’s sports, the importance appears to be placed specifically on maintaining fairness within and among women’s sports.⁹⁷ For

88. The Associated Press, *N.C.A.A. Board Approves Anti-Discrimination Measure*, THE NEW YORK TIMES (Apr. 28, 2016), <https://www.nytimes.com/2016/04/28/sports/ncaa-board-approves-anti-discrimination-measure.html> [https://perma.cc/MDV9-S8RE].

89. Media Ctr., *supra* note 87.

90. *Id.*

91. Media Ctr., *Board of Governors Updates Transgender Participation Policy*, NCAA (Jan. 19, 2022), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> [https://perma.cc/6XKT-QNA7].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Barnes, *supra* note 7; The Associated Press, *On The First Day of Pride Month, Florida Signed A Transgender Athlete Bill Into Law*, NPR (June 2, 2021), <https://www.npr.org/2021/06/02/1002405412/on-the-first-day-of-pride-month-florida-signed-a-transgender-athlete-bill-into-l> [https://perma.cc/GVM6-M4XF].

example, in Alabama, HB 391 was signed into law in 2021, establishing “sports categories fixed by sex in K-12 public schools and barring athletes assigned male at birth from participating in the girls’ category.”⁹⁸ Further, in 2023, Alabama HB 261 was signed into law, extending the barring of “athletes assigned male at birth from participating in the girls’ category . . . to public two- and four-year colleges.”⁹⁹ Similarly, in Florida, aforementioned Governor Ron DeSantis signed SB 1028, which provided that “those assigned male at birth may not participate in girls’ and women’s sports.”¹⁰⁰ In addition, the Indiana General Assembly, through HB 1041, “made it illegal for athletes assigned male at birth to participate in girls’ sports from kindergarten through high school graduation.”¹⁰¹

The minority view of the States that have taken a position on transgender women’s participation in women’s sports seems to surround an approach and belief that inclusion in sports should be heavily prioritized.¹⁰² For example, in 2013, California legislators passed AB 1266, requiring “public schools to allow transgender students to access bathrooms and sports teams in accordance with their gender identity,” which is echoed by the California Interscholastic Federation policy.¹⁰³ Additionally, in Connecticut, the Connecticut Interscholastic Athletic Conference provides “guidance that the district should make those decisions based on the gender identity reflected in school records and the students’ daily activities,” which does not entail any legal or medical requirements.¹⁰⁴ Further, the Massachusetts Interscholastic Athletic Association focuses on a student’s gender identity, rather than sex, when viewing sports.¹⁰⁵ A Massachusetts regulation states, “a student shall not be excluded from participation on a gender-specific sports team that is consistent with the student’s bona fide gender identity.”¹⁰⁶

4. The United States High Schools

a. The National Federation of State High School Associations

The National Federation of State High School Association (“NFHS”) is the promoter of “amateur sports participation and athletics programs at the high school level,” in which it “writes playing rules for high school sports and

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

provides guidance on a multitude of national issues.”¹⁰⁷ While NFHS has increased its efforts to educate itself regarding transgender participation in sport, the actual participation of transgender individuals in high school sports is largely governed by a mixture of state statutes, school policies, and decisions by local leaders (i.e., a high school principal).¹⁰⁸

Recently, the NFHS Summer Meeting workshop presented by Dr. Lungarini, Connecticut Interscholastic Athletic Conference Executive Director, who presented statistics indicating that despite multiple transgender women running faster times than biological women in track races, “the ranking results do not appear to suggest an unfair advantage.”¹⁰⁹ Dr. Lungarini believes interscholastic activities and sports primarily serve an education-based purpose, rather than placing too much importance on the exposure opportunities and winning championships.¹¹⁰ Further, the health and safety of high school individuals seems to be of the utmost priority, which would include opening high school sports to everyone that wants to play.¹¹¹ After analyzing the IOC and the NCAA transgender policies as previously described in this Note, Dr. Lungarini shows great concern in the area of testosterone testing, especially as it relates to young high school students, and concluded that testosterone testing can lead to chemical alterations, and chemical alterations to younger individuals are not ideal.¹¹² The NFHS officials are in the process of maximizing their knowledge regarding transgender participation, which includes efforts to serve all potential athletes in a consistent, inclusive, and fair manner.¹¹³

b. High school associations of each respective state

The majority of United States high schools belong to their respective state high school association, in which each of these high school associations are members of the NFHS as member or affiliate associations.¹¹⁴ For example, the Indiana High School Athletic Association (the “IHSAA”), an NFHS Member State Association governed by a Board of Directors, “regulates, supervises and administers interschool athletic activities among . . . any high school in the state, or any junior high school offering ninth grade, whether public, private, parochial, or institutional, if accredited by the Indiana Department of

107. NFHS, *About Us*, <https://nfhs.org/who-we-are/aboutus> [<https://perma.cc/Z7VD-6HKH>] (last visited on Nov. 7, 2024).

108. Luke Modrovsky, *Transgender Athletes – Participation, Equity and Competition*, NFHS (May 12, 2022), <https://www.nfhs.org/articles/transgender-athletes-participation-equity-and-competition> [<https://perma.cc/2F6N-KCML>].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. NFHS, *State Association Listing*, <https://www.nfhs.org/resources/state-association-listing/> [<https://perma.cc/62R2-RKY9>] (last visited on Nov. 7, 2024).

Education.”¹¹⁵ Further, the IHSAA Board of Directors “establishes standards for eligibility, competition and sportsmanship while providing protection against exploitation of schools or students.”¹¹⁶ All NFHS member and associate state associations, including the IHSAA, are working diligently, through various committees and boards, to provide high school student-athletes with an inclusive and fair sporting atmosphere.¹¹⁷

5. *Distress in the US*

While denying United States transgender women from competing in women's sports may appear to promote fairness in women's sports, there are concerns that relate to both societal and mental health issues, which are continuing to be considered by aforementioned United States sports organizations and personnel.¹¹⁸ In her argument concerning United States transgender women inclusion, Title IX attorney Kimberly A. Yuracko quotes Tobin and Levi, “[d]enying equal access to school facilities for transgender students effectively singles them out, apart from all others in the community, with a stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl . . .”¹¹⁹ Aside from the pain resulting from disallowing transgender women to compete in women's sports, there are also concerns surrounding the attitudes when transgender women compete with biological women in sports, in which Yuracko stresses, “[e]xcluding transgender girls from female sports teams causes pain, yet their inclusion causes pain as well.”¹²⁰

F. *Scientific Contemplation and Perspective*

1. *Leaning Toward Inclusion*

Given that transgender athletic participation is a fairly new issue to be resolved, scientists and geneticists have reported that little research exists regarding transgender women having advantages or disadvantages over biological women in women's sports.¹²¹ Having conceded that “. . . boys and men have an advantage in performance over girls and women, and that disadvantage increases after puberty,” Dr. Eric D. Vilain, a pediatrician and

115. IHSAA, *Purpose & History*, <https://www.ihsaa.org/about-us/purpose-history> [https://perma.cc/6Y5D-BPKF] (last visited on Nov. 7, 2024).

116. *Id.*

117. *Id.*; Barnes, *supra* note 71.

118. Kimberly A. Yuracko, *The Culture War Over Girls' Sports: Understanding the Argument for Transgender Girls' Inclusion*, 67 VILL. L. REV. 717 (2022).

119. *Id.* at 732; Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J OF L. GENDER & SOC'Y 301, 309 (2013).

120. Yuracko, *supra* note 118, at 738.

121. Ortega, *supra* note 65.

geneticist at the University of California, Irvine, reported a lack of definitive information showing advantages transgender women have over biological women in women's sports.¹²² Moreover, Dr. Vilain pondered whether an individual's certain athletic advantages, such as height, better nutrition, and coaching, even matter if the individual is a transgender athlete.¹²³ With several questions and very few answers regarding transgender athletes and unfair advantages, Dr. Vilain's stance surrounds favoring inclusion as "there are already so much inequity of sports participation that comes from all sorts of other issues."¹²⁴

In 2015, athlete and scientist Joanna Harper, a transgender woman, conducted a study, finding that "transgender women who received treatment to lower their testosterone levels did no better in a variety of races against female peers than they had previously done against male runners."¹²⁵ Through her extensive experimental work, Harper showed "athletes' age grades before and after hormone therapy remained nearly the same. That is, the women were as competitive with their age- and sex-matched peers as they had been when competing against men."¹²⁶ In a rather controversial conclusion, Harper maintained, "[t]rans women also have disadvantages in sport. Our larger bodies are being powered by reduced muscle mass and reduced aerobic capacity, and can lead to disadvantages in quickness, recovery and a number of other factors."¹²⁷

2. *Leaning Toward Fairness*

Among more recent studies, Dr. Gregory Brown, an exercise science professor at the University of Nebraska, reported that the effects of male puberty, which cannot be reversed, pose advantages for athletic performance in terms of bone size and configuration.¹²⁸ Despite efforts to implement

122. *Id.*; see also Scott Detrow, *Arguments That Trans Athletes Have an Unfair Advantage Lack Evidence to Support*, NPR (Apr. 9, 2023), <https://www.npr.org/2023/04/09/1168858094/arguments-that-trans-athletes-have-an-unfair-advantage-lacks-evidence-to-support> [https://perma.cc/DP6T-PKYZ].

123. Detrow, *supra* note 122.

124. *Id.*

125. Katherine Kornei, *This Scientist is Racing to Discover How Gender Transitions Alter Athletic Performance-Including Her Own*, SCIENCE (Jul. 25, 2018), <https://www.science.org/content/article/scientist-racing-discover-how-gender-transitions-alter-athletic-performance-including> [https://perma.cc/6KUD-3R7K].

126. *Id.*

127. Karleigh Webb, *New Research Paints a More Complex Picture of Transgender Sports Advantage*, OUTSPORTS (Mar. 9, 2021), <https://www.outsports.com/2021/3/9/22321015/joanna-harper-transgender-athlete-research> [https://perma.cc/Q4NR-DC8Z].

128. Grant Atkinson, *Why Male Athletes Who Identify as Transgender Should Not Compete in Women's Sports*, ALLIANCE DEFENDING FREEDOM (Aug. 21, 2024), https://adflegal.org/article/why-male-athletes-who-identify-transgender-should-not-compete-womens-sports?sourcecode=10016058_r500&gclid=Cj0KCQjwpc-oBhCGARIsAH6ote9rhLfK17I77dYFvrbPoOU1

testosterone blockers, Dr. Brown's report shows that, "puberty creates height and mass differences that provide a significant athletic advantage for males."¹²⁹ In his conclusion, Dr. Brown stated, "[i]t's hard to say that there can be fair competition between trans women and cis-gender women when at this point in time we cannot say that the legacy male advantages are eliminated in any individual sport or in terms of the physiology of sport overall."¹³⁰

In an effort to provide clarified guidance on how to approach cases involving transgender women participating in women's sports, sports medicine scientists, Emma Hilton and Tommy Lundberg, conducted experimental studies. Hilton and Lundberg found that in or around the early childhood stages, before the puberty process begins, "sporting participation prioritises [sic] team play and the development of fundamental motor and social skills, and is sometimes mixed sex. Athletic performance differences between males and females prior to puberty are often considered inconsequential or relatively small."¹³¹ However, once individuals seek a gender transition post-puberty, "[t]he reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables, and thus, there are major safety implications in sports where these attributes are competitively significant."¹³² While being mindful of the desirable inclusion, fairness, and safety among all student-athletes, Hilton and Lundberg "argue against universal guidelines for transgender athletes in sport and instead propose that each individual sports federation evaluate their own conditions for inclusivity, fairness, and safety."¹³³

II. ANALYSIS

The current concern regarding transgender participation in sports, specifically transgender women, predominantly revolves around maintaining a symmetrical balance between inclusion and fairness as they relate to women's sports.¹³⁴ Further, various solutions enacted around the world, such as sport-by-sport determinations, disallowing transgender women from competing in women's sports altogether, and allowing all transgender women to compete in

NqTRgOhIUhIyBvGHwUxYIsOZ5M24ifAaAo5gEALw_wcB&utm_source=grant&utm_medium=ppc&utm_campaign=Blog [https://perma.cc/52GT-R83J].

129. *Id.*

130. Gregory Brown, *Gregory Brown: We Can't Have Fair Competition Between Trans and Cis-Gendered Women*, THE HUB (Aug. 2, 2021), <https://thehub.ca/2021-08-02/gregory-brown-we-cant-have-fair-competition-between-trans-and-cis-gendered-women/> [https://perma.cc/GPD4-ZTU3].

131. Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51(2) SPORTS MED. 199, 200 (2021).

132. *Id.* at 211.

133. *Id.*

134. See generally Julie Tamerler, *Transgender Athletes and Title IX: An Uncertain Future*, 27 JEFFREY S. MOORAD SPORTS L. J. 139, 146 (2020).

women's sports with no limitations, pose certain problems and merely lack consistency.¹³⁵ Despite the different complexities behind measures adopted by Denmark, several international organizations, and many United States institutions and committees, it seems as if there is a sense of uniformity among officials and organizations in the realm of identifying that there is a problem with transgender women, such as Lia Thomas, participating in women's sports where success is strongly correlated to biological gender genetic makeup.¹³⁶

A. The Danish Parliament and The 2014 Bill

When the Danish Parliament passed the 2014 Bill, it became "the first European country to allow legal change of gender without a medical expert statement."¹³⁷ Unlike many other European countries and the United States, which required either gender-transitioning surgeries, psychological diagnoses, or medical expert statements, the 2014 Bill generated an expedited six-month process that allowed an eighteen-year-old biological male to transition to a female without surgery or a medical expert statement, eliminating prior restrictions.¹³⁸ Thus, the 2014 Bill was among the first steps Denmark took in prioritizing and promoting an inclusive environment for its people, impacting Danish sports participation.¹³⁹

Additionally, not only did the 2014 Bill provide an expedited process, but it also saved individuals from personally incurring the heavy costs stemming from gender transition surgery, which were not typically covered by insurance or government health benefit programs.¹⁴⁰ For example, as a biological male, Danish native Nadia Jacobson ("Jacobson") did not feel a sense of comfort when playing volleyball with other males.¹⁴¹ Thus, Jacobson decided to transition from male to female pursuant to the 2014 Bill, which embodied a quick, cheap, and painless process of self-determining and recognizing her new gender, allowing her to play women's volleyball as a transgender woman.¹⁴² Nonetheless, consideration of the relationship between biological gender and success in a specific sport would need analysis pursuant to Danish transgender women participating in women's sports post-2014.¹⁴³

135. *Id.*

136. Draminsky, *supra* note 7; Hamilton, *supra* note 50; Media Ctr., *supra* note 87; IOC, *supra* note 76.

137. Saner, *supra* note 8.

138. *Id.*

139. *Id.*

140. Constance Johnson, *Denmark: Changing Legal Sexual Identity Simplified*, LIBR. CONG. (July 3, 2014), <https://www.loc.gov/item/global-legal-monitor/2014-07-03/denmark-changing-legal-sexual-identity-simplified/> [https://perma.cc/38XK-7UHW].

141. Karleigh Webb, *How trans athletes and allies are aiding Denmark's drive for inclusion*, OUTSPORTS (Jan. 21, 2022), <https://www.outsports.com/2022/1/21/22883133/denmark-trans-inclusion-nadia-jacobsen-maia-kahlke-lorentzen/>.

142. *Id.*

143. *Id.*

Despite a positive step forward, some of the 2014 Bill's critics found restriction and fault with eighteen being the minimum age requirement and the six-month waiting period from application to confirmation.¹⁴⁴ For example, Transgender Europe ("TGEU") believed "the mandatory waiting period and age requirement might prove detrimental to those who need their documents changed quickly for reasons ranging from relocation to new employment."¹⁴⁵ The eighteen-year-old age requirement and the six-month waiting period were included by Danish lawmakers to "prevent people from 'making hasty decisions they would later regret,'" requiring would-be transgender individuals to obtain an initial mature level of thinking and be allotted a necessary amount of time to ponder his or her decision, which may be seen as imperative.¹⁴⁶

The end result of the 2014 Bill may encompass effects that lead to less genuine and irrational gender transitions due to the rather uncomplicated process that accompanies a gender transition, leading to abuse of the 2014 Bill.¹⁴⁷ Moreover, the Danish Parliament's rationale behind the 2014 Bill sought to decrease restrictions on individuals longing to transition genders, which served an important governmental interest.¹⁴⁸ However, this rationale may have left the door open for biological men to abuse the expedited gender transition process by seeking to become women for purposes other than 'not fitting in' or 'not feeling comfortable in one's own body.'¹⁴⁹

B. Danish Sports Clubs' Inclusive Action

In 2023, when Danish sports clubs announced "other" would be an additional option to "male" and "female" as Danish individuals were selecting a gender for sport participation, this marked an additional leap into a progressive movement that sought to eliminate the Danish concerns of prejudice and discrimination against transgender individuals in sports.¹⁵⁰ Moreover, the regime of adding "other" was seen as a matter of great importance from the standpoint of Danish sports clubs heavily pursuing inclusion among Danish citizens seeking to participate in sports, regardless of gender identity.¹⁵¹ While the 2023 decision on behalf of the Danish sports clubs constitutes a sector of progression that seeks to promote inclusion among transgender individuals, the fairness aspect is something for Danish sports clubs to consider moving

144. Tamkin, *supra* note 39.

145. *Id.*

146. *Id.*

147. *Denmark: X in Passports and New Trans Law Works*, EQUAL EYES (Sept. 30, 2014), <https://equal-eyes.org/database/2014/9/30/denmark-x-in-passports-and-new-trans-law-works> [<https://perma.cc/25BX-8E5W>]; *Spanish MPs Approve New Bill on Transgender Rights*, FRANCE 24 (Dec. 22, 2022), <https://www.france24.com/en/europe/20221222-spanish-mps-approve-new-bill-on-transgender-rights> [<https://perma.cc/A4HV-V5AR>].

148. *Denmark: X in Passports and New Trans Law Works*, *supra* note 147.

149. *Spanish MPs Approve New Bill on Transgender Rights*, *supra* note 147.

150. Wenande, *supra* note 45.

151. *Id.*

forward.¹⁵² Further, Danish sports clubs have been seemingly transparent through highlighting inclusion as the main rationale for adding a third category to gender in sports signups, which has consequently sparked inevitable future conversation regarding the balance between inclusion and fairness.¹⁵³ For example, the fairness aspect would need relevant consideration in a situation involving a transgender woman selecting “other” during sports signups, specifically in the realm of whether to place the transgender woman in men’s or women’s sports.¹⁵⁴ Ultimately, the aforementioned DIF guidelines would lend a helping hand in balancing inclusion and fairness regarding transgender women competing against biological women throughout the Danish sports clubs and organizations.¹⁵⁵

C. The Guidelines Adopted by The Danish Sports Confederation

The 2022 DIF action sought to provide desirable clarity on the rising issue of whether transgender women may have the opportunity to participate in women’s sports. In essence, the DIF pursued a balancing test between inclusion and fairness by denoting the aforementioned list of guidelines, in which each of the pieces of advice would be analyzed and scrutinized by appropriate sporting officials on a case-by-case, sport-by-sport basis.¹⁵⁶ While the DIF list of guidelines is not deemed a ‘bright-line rule,’ it does furnish relevant considerations for Danish sporting organizations to be mindful of when deciding whether or not to allow specific transgender women to participate in women’s sports.¹⁵⁷ By adopting and dispensing a list of nonbinding guidelines, the DIF demonstrated the need for some type of law-like intervention pertaining to the glaring issue of transgender women’s participation in women’s sports.¹⁵⁸

The DIF demonstrates a great method for Danish sporting officials to make decisions in either allowing or disallowing transgender women to participate in women’s sports, but the DIF may have lacked specificity in its guidelines.¹⁵⁹ Moreover, while the DIF did place great emphasis on the need to establish how “gendered” the specific sport is, as well as considering “equal competition” to be a major factor in women’s sports, the DIF did not find it necessary to include any language about puberty as it relates to the amount of testosterone present in an individual.¹⁶⁰ Although it may be assumed that the determination of how “gendered” the sport is takes puberty and testosterone into consideration, there may be instances where a transgender woman possesses a smaller build, but has

152. *Id.*

153. *Id.*

154. Draminsky, *supra* note 7.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

athletic abilities, such as a high vertical jump or a quick first step, related to going through puberty as a biological male.¹⁶¹ Thus, allowing this specific transgender woman to participate in women's sports may be unfair, despite following the DIF guidelines.¹⁶² As such, it may be of interest for the DIF to add puberty and testosterone considerations to its framework.¹⁶³

D. Danish Athletic Chairman Jensen's Thoughts and Concerns

The trajectory of Denmark and its proposed and enacted solutions have displayed great importance surrounding inclusivity in sports.¹⁶⁴ Nevertheless, aforementioned Danish Athletic Chairman Jensen, a strong advocate for individuals having easy access to change his or her gender identity, revealed his concerns regarding fairness in terms of transgender women competing against biological women, where biological gender plays an impactful role in success.¹⁶⁵ Jensen, like most Danish sports administrators and officials, believes the DIF guidelines may help remedy the meticulous balance between inclusion and fairness in Danish sports, especially in scenarios where individuals like United States' transgender woman Lia Thomas are competing and winning against biological women.¹⁶⁶

E. The Route Taken by World Athletics

In contrast with the DIF, the IOC, and the NCAA, WA executed a prohibition on transgender women, who have gone through male puberty, from participating in women's running sports.¹⁶⁷ Additionally, WA, similar to past IOC action, ruled transgender women's participation in women's running sports would be contingent on meeting a certain testosterone threshold.¹⁶⁸ On its face, WA's action appears to give more deference to fairness when balancing inclusion and fairness, predominantly based on its sole consideration of puberty and testosterone levels when determining the eligibility of transgender women in women's running sports.¹⁶⁹

Despite the grave importance of considering puberty and testosterone when making decisions on whether a transgender woman may participate in a women's running sport, WA may find it beneficial, from a standpoint of

161. *Id.*

162. *Id.*

163. *Id.*

164. Webb, *supra* note 141.

165. Hamilton, *supra* note 50.

166. *Id.*

167. Morse, *supra* note 10.

168. Ortega, *supra* note 65.

169. Juliana Kim, *Transgender Track and Field Athletes Can't Compete in Women's International Events*, NPR (Mar. 24, 2023), <https://www.npr.org/2023/03/24/1165795462/transgender-track-and-field-athletes-cant-compete-in-womens-international-events> [https://perma.cc/5DKX-6G5V].

properly balancing inclusion and fairness, to consider adding additional factors to its analysis, similar to those outlined by the IOC.¹⁷⁰ Although running sports appear to be gendered in the sense that biological males have inherent genetic advantages over biological females, the notion of inclusion should warrant heavy consideration.¹⁷¹ Thus, while it is important for WA to ensure fairness in women's running sports, WA ought to implement some type of framework that entails the consideration of properly including transgender women in women's running sports.¹⁷² If WA seeks to adopt an evidence-based approach, similar to the IOC, it may notably demonstrate that while WA does value fairness in women's sports, WA also seeks to maximize efforts to promote the inclusion of transgender women.¹⁷³

F. Intricacies of The International Olympic Committee

The 2021 IOC decision to adopt a set of ten nonbinding principles, which are to be evenly considered in determining the eligibility of transgender women in women's Olympic games, made monumental breakthroughs for transgender women's participation in women's sports.¹⁷⁴ Since 2004, the IOC had been working to regulate and promulgate some type of legal-based solution that would not only serve to include transgender women in women's Olympic Games, but would also maintain fairness on behalf of biological women in the women's Olympic Games.¹⁷⁵ Thus, the ten-factor promulgation can best be summarized as an effort to promote inclusion and diversity in sports through allowing "everyone, irrespective of their gender identity . . . [to] practice [sic] sport in a safe, harassment-free environment that recognises [sic] and respects their needs and identities," while maintaining the fairness aspect.¹⁷⁶ More specifically, the IOC seeks to analyze transgender women's participation in women's sports on a sport-by-sport basis, which revolves around balancing whether a biological male-turned transgender female would have an advantage or disadvantage in a specific sport and whether that advantage or disadvantage is unfair to biological women.¹⁷⁷

Following the precedential IOC guideline implementation, the DIF and the NCAA introduced a variation of the IOC principles.¹⁷⁸ As mentioned earlier in this Note, the DIF generated a framework consisting of seven pieces of advice,

170. *Id.*; see also IOC, *supra* note 76.

171. Kim, *supra* note 172.

172. Sean Ingle, *World Athletics Proposals to Preserve Path for Trans Women in Female Category*, THE GUARDIAN (Jan. 21, 2023), <https://www.theguardian.com/sport/2023/jan/21/world-athletics-proposals-preserve-path-trans-women-female-category> [<https://perma.cc/ZSX4-BJBD>].

173. *Id.*

174. IOC, *supra* note 76.

175. Lavietes, *supra* note 74.

176. *Id.*

177. *Transgender Student-Athlete Participation Policy*, NCAA (May 2024), <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> [<https://perma.cc/77JG-ZCV4>].

178. Draminsky, *supra* note 7; Media Ctr., *supra* note 91; Barnes, *supra* note 71.

substantively similar to the IOC principles, despite lacking specific details, for Danish sports personnel to be mindful of when determining the eligibility of a transgender woman in a women's sport.¹⁷⁹ Although a progressive development, the DIF may find it useful to add further details to ensure maximum compliance with its framework, thus maintaining consistency with the IOC.¹⁸⁰ The abovementioned NCAA, in its sport-by-sport approach, left much of the discretion regarding transgender women participating in women's sports to the NGB of each NCAA women's sport, allowing each NGB to create policy on the basis of subjective considerations, which "represents a stark contrast to the IOC's current approach."¹⁸¹ Despite adopting a sport-by-sport approach, the NCAA may find it necessary to exert more control as a governing body by creating a uniform framework similar to the IOC principles, which would convey consistency and transparency regarding efforts to balance inclusion and fairness as they relate to transgender women participating in women's sports.¹⁸²

Notwithstanding the thoroughly elaborate factors and ancillary in-depth descriptors, which continue to represent a prolific set of guidelines in balancing inclusion and fairness regarding transgender women participating in women's Olympic games, the IOC, unlike WA, did not mention 'puberty' or 'testosterone' specifically.¹⁸³ While the IOC does seem to imply the need to consider 'puberty' and 'testosterone' through the principles of "fairness" and "evidence-based approach," the lack of specificity may lead to a lack of consideration thereof, which may in-turn disrupt the balance between inclusion and fairness.¹⁸⁴ Thus, in an effort to increase the clarity and efficiency of its meticulously drafted guidelines, the IOC, following the decision of WA, may consider the use of specifics, such as 'puberty' or 'testosterone,' in one or more of its principles for transparency purposes related to determining whether a transgender woman may participate in women's Olympic games.¹⁸⁵

G. House Bill 734 United States Legislative Action

In 2023, the United States House of Representatives passed HB734, which, if passed by a majority of the United States Senate, would bar any and all biological males from competing against biological females in women's sports.¹⁸⁶ Similar to the majority of the States that have passed legislation on

179. Draminsky, *supra* note 7.

180. *Id.*

181. Media Ctr., *supra* note 91; Erin Buzuvis, *What's Wrong with the NCAA's New Transgender Athlete Policy?*, 29 WM. & MARY J. RACE, GENDER, & SOC. JUST. 155, 174 (2022).

182. Buzuvis, *supra* note 184, at 193.

183. IOC, *supra* note 76; Karolos Grohmann, *Puberty Not Sole Factor in Transgender Eligibility Says IOC*, REUTERS (July 29, 2021), <https://www.reuters.com/lifestyle/puberty-not-sole-factor-transgender-eligibility-says-ioc-2021-07-29/> [<https://perma.cc/QRD5-85JS>].

184. *Id.*

185. *Id.*

186. Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. § 2(d) (2023).

transgender women competing in women's sports, HB734 would require a transgender woman's biological gender to be the determining factor in whether or not to allow them to compete in women's sports.¹⁸⁷ However, HB734 would likely be vetoed by the United States Senate due to heavy opposition from those who share similar beliefs to the minority of the States that have passed legislation regarding transgender women participating in women's sports.¹⁸⁸ Thus, even if HB734 did pass the United States Senate, "President Biden has said he would veto the bill should it defy the odds and survive in the Democrat-controlled Senate."¹⁸⁹

Consistent with most issues in the United States legislative branch, transgender women's participation in women's sports is a very divisive matter between the Republican and Democratic political parties.¹⁹⁰ The Republican Party, who currently comprises the majority of the United States House of Representatives, tends to resonate with the belief that biological gender, rather than gender identity, should determine whether a transgender woman has the opportunity to participate in women's sports.¹⁹¹ Thus, through HB734, the Republican Party appears to oppose any situation or scenario which would allow a transgender woman to compete against biological women in sports.¹⁹² Conversely, the Democratic Party, who currently maintains a majority of the United States Senate, believes "every child regardless of gender identity deserves the opportunity to belong to a team and that preventing competitors from doing so sends the message that they don't matter."¹⁹³ Therefore, the Democratic Party completely disfavors HB734 premised on HB734's lack of inclusive considerations.¹⁹⁴

Regardless of political party, the issue of transgender women participating in women's sports is growing into a major United States concern.¹⁹⁵ Rather than working as a collective to formulate a solution, the efforts of the Republicans and Democrats have created a polarized environment surrounding transgender women participating in women's sports.¹⁹⁶ Whether it means coming together or simply meeting at the middle, it may be in the best interest of United States citizens for the Republicans, perhaps too traditional, and the Democrats,

187. *Id.*

188. Benjamin S. Weiss, *Bill That Would Bar Trans Kids from Public School Sports Passes House*, COURTHOUSE NEWS SERVICE (Apr. 20, 2023), <https://www.courthousenews.com/bill-that-would-bar-trans-kids-from-public-school-sports-passes-house/> [<https://perma.cc/6BD4-GUXN>].

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *House passes GOP bill to bar trans athletes on girls and women's teams*, CBS NEWS (Apr. 20, 2023), <https://www.cbsnews.com/news/transgender-athletes-house-bill-republicans-girls-womens-sports-teams/> [<https://perma.cc/SQ3M-VFB5>].

194. Weiss, *supra* note 191.

195. See Daniela Altimari, *House Passes Bill to Bar Transgender Athletes From Sports*, ROLL CALL (Apr. 20, 2023), <https://rollcall.com/2023/04/20/house-prepares-vote-on-barring-transgender-athletes-from-sports/> [<https://perma.cc/JD5N-7T3S>].

196. *See id.*

conceivably too progressive, to set aside their stark differences and work toward resolving the issue of transgender women participating in women's sports.¹⁹⁷ Thus, similar to Title IX's preemptive effects within the States, it may be absolutely necessary for the United States legislative branch to consider and adopt a federal legal framework of factors or guidelines, like the DIF, the IOC, or the NCAA, which would provide some type of resolution in considering whether or not to allow transgender women to participate in women's sports, without singling out transgender women or creating an unequal playing field to the detriment of biological women.¹⁹⁸

H. Methodology of The National Collegiate Athletic Association

In dealing with the issue of transgender women participating in women's sports, the NCAA, in 2022, adopted the most consistent approach with the DIF and the IOC, which surrounds the emerging notion of a sport-by-sport determination or analysis.¹⁹⁹ However, in contrast with both the DIF and the IOC, the NCAA, rather than denoting a list of factors or guidance, established that, in the event a transgender woman seeks to participate in a specific women's sport, the determination and ultimate decision would be subject to the discretion of the NGB of that specific women's sport.²⁰⁰ Nonetheless, the concept of the NCAA sport-by-sport determination approach is progressively appealing to those yearning for a solution to the issue of transgender women participating in NCAA women's sports, which aims to properly balance inclusion and fairness as the amount of NCAA cases involving transgender women participating in women's sports continues to increase.²⁰¹

While the NCAA may have taken a step in the right direction through implementing a sport-by-sport approach, concerns surrounding disparity may be foreseeable.²⁰² As previously discussed in this Note, the DIF executed its own sport-by-sport approach, which included multiple pieces of guidance and advice for Denmark sports personnel to consider when making determinations on

197. Katherine Fung, *The Striking Change in Americans' Views of Transgender Athletes*, NEWSWEEK (June 12, 2023), <https://www.newsweek.com/stiking-change-americans-view-transgender-athletes-1806110> [<https://perma.cc/RS2P-VDGD>].

198. See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) (Title IX requires that all elementary, secondary and postsecondary schools, which receive federal funding from the U.S. Department of Education, comply with the regulations underlying Title IX, regardless of state law); see Libby Stanford, *Federal Rule on Trans Athletes Is Delayed. Here's What That Means for Schools*, EDUCATION WEEK (June 2, 2023), <https://www.edweek.org/leadership/federal-rule-on-trans-athletes-is-delayed-heres-what-that-means-for-schools/2023/06> [<https://perma.cc/WK8E-ABHU>].

199. Media Ctr., *supra* note 91.

200. NCAA, *supra* note 180.

201. See Matt Foster, *Protest Over Inclusion of Transgender Athletes in Women's Sports Held Outside NCAA Convention*, CNN (Jan. 13, 2023), <https://www.cnn.com/2023/01/13/sport/transgender-athlete-protest-ncaa-spt-intl/index.html> [<https://perma.cc/7FA3-MB39>].

202. *Id.*

whether a specific Danish transgender woman may participate in a specific Danish women's sport.²⁰³ The DIF approach, although subject to different discretionary interpretations, created uniformity in the sense that all cases of transgender women participating in women's sports would be determined through analyzing the same set of guidelines.²⁰⁴ At first glance, the NCAA's decision to establish a sport-by-sport approach appears to mimic the DIF's idea.²⁰⁵ However, an in-depth analysis reveals the NCAA, in its decision to omit a uniformly applicable list of factors and considerations related to the adoption of its sport-by-sport approach, may open itself up to issues down the road regarding inconsistent NGB decisions.²⁰⁶

There is no question that, under the NCAA's sport-by-sport approach, each NCAA women's sport would be analyzed differently on the basis of expected physicality and athleticism; however, there may still be room for inconsistent interpretations stemming from the seemingly large amount of discretion delegated to each women's sport's NGB in its policymaking.²⁰⁷ For example, the NGB of women's volleyball may create a policy that places more emphasis on inclusion, rather than fairness, establishing that any transgender woman may play women's volleyball, despite having physical advantages over biological women.²⁰⁸ In a contrasting scenario, the NGB of women's basketball may implement a policy that prioritizes fairness over inclusion, subsequently barring all transgender women, even if lacking any biological male advantage, from competing in women's basketball.²⁰⁹ Suffice it to say that the NCAA may want to reconsider its omission of a sport-by-sport set of guidelines for purposes of not only maximizing consistency related to the balance of inclusion and fairness in women's sports, but proactively depleting future issues that may arise in cases surrounding transgender women seeking to participate in women's sports.²¹⁰

I. Different Approaches Adopted by The States

The lawmakers in the majority of the States that have legislated the issue of transgender women's participation in women's sports tend to prioritize fairness over inclusion, specifically believing biological gender should trump gender identity for purposes of determining whether transgender women should have the opportunity to participate in women's sports.²¹¹ Similar to supporters of HB734, Alabama, Florida, and Indiana legislators and governors appear to share customs and beliefs closely tied to the Republican Party viewpoints.²¹²

203. Draminsky, *supra* note 7.

204. *Id.*

205. *Id.*; Media Ctr, *supra* note 87.

206. Buzuvis, *supra* note 185.

207. *Id.*

208. *Id.* at 168.

209. *Id.*

210. *Id.* at 192-93.

211. Barnes, *supra* note 71.

212. *Id.*

Moreover, each of Alabama, Florida, and Indiana have passed or enacted some type of legislation that completely bars biological males, who have transitioned to and identify themselves as female, from competing with and against biological females in sports.²¹³ Clearly, fairness serves as the main rationale for states similar to Alabama, Florida, and Indiana in making decisions regarding transgender women's participation in women's sports.²¹⁴ As a result, there have been growing concerns regarding the lack of inclusion of transgender women, which may have adverse effects on the mental health of such individuals.²¹⁵

In the minority of the States that have legislated the issue of transgender women's participation in women's sports, the notion of inclusion appears to be at the forefront of justifying decisions regarding transgender women competing against biological women in sports.²¹⁶ Like the HB734 opponents, state legislators and governors in California, Connecticut, and Massachusetts tend to echo the beliefs shared by the Democratic Party.²¹⁷ For example, California, Connecticut, Massachusetts, and a few other states have passed laws or laid out frameworks that seek to eliminate efforts of excluding or singling out transgender women from competing against biological women in sports.²¹⁸ However, due to prioritizing inclusion, there has been a presence of concern related to fairness in terms of biological women having a fair opportunity to compete and win.²¹⁹

It appears that the lawmakers in each of the States that have legislated the issue of transgender women's participation in women's sports differ on the basis of political party.²²⁰ More specifically, each state's governor has large discretion in controlling the implications of transgender women participating in women's sports in his or her respective state.²²¹ For example, while Florida, through Governor DeSantis, has enacted strong legislation disfavoring any kind of participation by transgender women in women's sports, California, through Governor Newsom, has provided little barriers to those women who seek to go through the process of a gender transition and desire to play women's sports.²²² The aforementioned states, similar to the Republican and Democratic parties,

213. *Id.*

214. The Associated Press, *supra* note 97; Barnes, *supra* note 71.

215. Kiara Alfonseca, *Mom of Trans Athlete at Center of Florida Sports Controversy Speaks Out*, ABC NEWS (Dec. 5, 2023), <https://abcnews.go.com/US/mom-trans-athlete-center-florida-sports-controversy-speaks/story?id=105375794> [https://perma.cc/8QY7-ZKNM]; Yuracko, *supra* note 118.

216. The Associated Press, *supra* note 97; Barnes, *supra* note 71.

217. Barnes, *supra* note 71.

218. *Id.*

219. Yuracko, *supra* note 118.

219. The Associated Press, *supra* note 97.

220. Barnes, *supra* note 71.

221. The Associated Press, *supra* note 97; Devan Cole, *Florida Becomes 8th State to Enact Anti-Trans Sports Ban This Year*, CNN (June 2, 2021), <https://www.cnn.com/2021/06/01/politics/florida-transgender-sports-ban-ron-desantis/index.html> [https://perma.cc/EPM3-UDEX].

222. *Id.*; see also Barnes, *supra* note 71.

either heavily favor fairness or place the most emphasis on inclusion.²²³ The ramifications of these two approaches continues to create division among the States and yield the same, ongoing problem of lack of balance between inclusion and fairness in the realm of transgender women participating in women's sports.²²⁴

While the issue of transgender women's participation in women's sports continues to emerge and loom in each of the States, the States may need to come together to create a sense of uniformity, even if it means giving up some ground, so that a balance between inclusion and fairness can be properly attained.²²⁵ For example, the States that place emphasis on fairness may need to put forth a better effort to give deference to inclusion for purposes of equal opportunity in sports, while the States that prioritize inclusion may need to further consider fairness so that biological women still have the chance to be successful in women's sports.²²⁶ With that being said, an adoption of some type of framework of factors or guidance, like that of the DIF, the IOC, or the NCAA, may not only help balance inclusion and fairness, but would ultimately provide a further sense of uniformity among the States.²²⁷ Thus, the lack of enacted federal congressional action is an indication of how important state action is, which should be uniformly similar in terms of application so that there is a sense of cohesion among the United States as a whole.²²⁸

J. Inconsistencies Among United States High Schools

When contemplating the issue of whether transgender women may participate in women's sports, the groundwork undoubtedly starts with grades K-12 ("grade schools").²²⁹ Moreover, grade schools in the United States serve as the foundation for amateur student-athletes looking to compete in sports for purposes, including, but not limited to, learning about teamwork and leadership, seeking pleasure, or pursuing a collegiate or professional athletic career.²³⁰

223. The Associated Press, *supra* note 97; Barnes, *supra* note 72.

224. The Associated Press, *supra* note 97.

225. John Hanna, *More States Expect Schools to Keep Trans Girls Off Girls Team as K-12 Classes Resume*, ASSOCIATED PRESS NEWS (Aug. 14, 2023), <https://apnews.com/article/transgender-athletes-k12-schools-state-restrictions-ec0b1d2ea162855131264c88bb992e2e> [<https://perma.cc/WR3R-UR3W>].

226. Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021), <https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124> [<https://perma.cc/8FPC-U7P7>].

227. Ray Sanchez, *NCAA's 'Sport-By-Sport Approach to Transgender Participation' Stirs Debate*, CNN (Jan. 23, 2022), <https://www.cnn.com/2022/01/22/sport/ncaa-lia-thomas-transgender-policy/index.html> [<https://perma.cc/96FK-7W5M>].

228. Hanna, *supra* note 228.

229. U.S. Department of Education, *FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams* (Apr. 6, 2023), <https://www.ed.gov/about/news/press-release/fact-sheet-us-department-of-educations-proposed-change-its-title-ix> [<https://perma.cc/V8WT-DK7X>].

230. *Id.*

Thus, it is crucial for United States grade schools to uniformly maintain a proper balance between inclusion and fairness so that young student-athletes, regardless of biological gender or gender identity, have an equal opportunity to both participate in sports and win in an even playing field environment, without having to withstand discrimination or societal exclusion.²³¹ With that being said, per Dr. Lungarini's research, inclusion may need to be prioritized slightly more than fairness as equal opportunity tends to be highly regarded, especially when discussing student-athletes in elementary school.²³² However, as young student-athletes begin to get older and mature, especially post-puberty, the role of fairness may need expanded in scenarios involving transgender women for purposes of ensuring biological women receive the opportunity to reach success in women's sports.²³³

Despite the number of United States grade schools that have been affected pursuant to a state law or policy, or a decision by a grade school administrator regarding transgender women participating in women's sports, the action taken by other United States grade schools, or the lack thereof, indicates the need for a uniform decision.²³⁴ As such, absent federal legislation and cohesion among the States, it may be necessary for the NFHS to adopt some variation of the DIF, the IOC, or the NCAA sport-by-sport analysis, which would require consideration of various factors or guidelines, on a case-by-case basis, to determine whether a specific transgender woman may have the opportunity to participate in women's sports.²³⁵ Regardless of what the NFHS chooses to do, the main focus should be balancing inclusion and fairness for purposes of ensuring that transgender women have the opportunity to compete in women's sports as the NFHS deems necessary through upholding fairness for biological women playing women's sports.²³⁶

In the event the NFHS adopts guidelines or a set of factors for purposes of balancing inclusion and fairness as it relates to transgender women's participation in women's sports, individual state high school associations, such as the IHSAA, should diligently attempt to carry out the wishes of the NFHS.²³⁷ State high school associations play an important role in facilitating high school sports throughout the United States, and it is important for all high school sports-related policy to be carried out similarly, which may be properly accomplished through deferring to the NFHS on matters regarding transgender women participating in women's sports.²³⁸

231. *Id.*; Yuracko, *supra* note 118.

232. Modrovsky, *supra* note 108.

233. U.S. Department of Education, *supra* note 232.

234. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Nov. 29, 2023), https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans [https://perma.cc/SV3E-V83H].

235. Barnes, *supra* note 71; Draminsky, *supra* note 7; Media Center, *supra* note 87; IOC, *supra* note 76.

236. U.S. Department of Education, *supra* note 232.

237. NFHS, *supra* note 107.

238. *Id.*

K. Scientific Research

Notwithstanding the fact that many independent and organizational scientists and geneticists have reported a lack of determinative research related to transgender women having athletic advantages over biological women, there have been multiple recent experimental studies, which present findings that both support and oppose the premise of transgender women possessing an inherent sports advantage.²³⁹ In opposing the notion that transgender women have physical and athletic advantages over biological women, Joanna Harper presented findings which showed that transgender women, who received treatment to lower their testosterone levels, performed no better against biological women than they would have performed against biological men.²⁴⁰ Conversely, Dr. Gregory Brown, a believer of transgender women possessing athletic advantages over biological women, performed studies which revealed inevitable advantages on behalf of transgender women due in large part to going through male puberty.²⁴¹ In comparing, contrasting and appreciating the findings of both Harper and Brown, Emma Hilton and Tommy Lundberg, as sports medicine scientists, proposed and recommended a sport-by-sport analysis for purposes of considering transgender women's potential advantages, being mindful of pre- and post-puberty effects.²⁴²

As the issue of transgender women participating in women's sport continues to become more prevalent, the scientific research will undoubtedly quantitatively and qualitatively increase, providing supplemental support or opposition to any of Harper, Brown, Hilton, or Lundberg.²⁴³ Scientific and genetic considerations fulfill an important role in any type of consideration involving a transgender woman seeking to participate in women's sports.²⁴⁴ As such, while the aforementioned research is not necessarily binding by any means, it is important to be mindful of when creating and implementing factored analyses for purposes of determining eligibility of transgender women in women's sports.²⁴⁵ Thus, scientific contemplation may always warrant deliberation when federal action is being enacted and sports organizations and personnel are making decisions related to allowing or disallowing a specific transgender woman to participate in a specific women's sport.²⁴⁶

239. Detrow, *supra* note 122.

240. Kornei, *supra* note 125.

241. Atkinson, *supra* note 128.

242. Hilton & Lundberg, *supra* note 131.

243. Bethany A. Jones, et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competition Sport Policies*, 47(4) SPORTS MED. 701-716 (2016).

244. *Id.*

245. *Id.*

246. *Id.*

III. RECOMMENDATION

A sport-by-sport analysis or determination balancing regime, which has been embraced in some form by the DIF, the IOC, and the NCAA, appears to target the dynamic notion of promoting inclusion, while maintaining fairness in women's sports. With that being said, I would recommend the United States, as a whole, adopt a federally applicable sport-by-sport, case-by-case determination regarding transgender women's participation in women's sports, which would carry the preemptive effects of Title IX's federal application within the States. Specifically, relevant personnel from all United States sports associations, organizations, and institutions (i.e., the NCAA through its legislative processes and state high school associations through the NFHS) will be required to exercise discretion in balancing various factors, under a totality of the circumstances, including the age of the transgender woman, whether the transgender woman has gone through male puberty, the specific women's sport, and whether the role of biological gender will play an essential role in determining a transgender woman's potential success in that specific women's sport. For example, if a transgender woman seeks to play women's basketball, the NCAA, through its legislative processes, or the appropriate state high school association, through the NFHS, otherwise in compliance with federal anti-discrimination laws, will be federally required to determine the relevance of the transgender woman's age; discover whether the transgender girl went through male puberty before the gender transition; and ultimately decide whether an initial presence of biological male genetics would give the transgender girl inherent advantages over biological females in playing women's basketball.

IV. CONCLUSION

The issue of whether or not transgender women should be able to compete in women's sports is one of complexity that involves scrutinizing details surrounding the balance of inclusion and fairness.²⁴⁷ Despite several forms of inaction related to transgender women's participation in women's sports, one solution, as adopted in some form by the DIF, the IOC, and the NCAA, involves a sport-by-sport analysis, encompassing an in-depth determination by each appropriate sport's governing body to balance various factors in considering whether a specific transgender woman may have the opportunity to participate in a specific women's sport.²⁴⁸ A second solution, favored by the majority of the United States House of Representatives, through HB734, and a large number of the states that have passed legislation regarding transgender women participating in women's sports, entails a complete bar which would disallow transgender women to participate in women's sports under any

247. Lopiano & Nelson, *supra* note 2.

248. Draminsky, *supra* note 7; Media Ctr., *supra* note 87; IOC, *supra* note 76.

circumstances.²⁴⁹ Additionally, the opponents of HB734, as well as the minority of the states that have passed legislation related to transgender women's participation in women's sports, seek to allow, without any restriction, transgender women to participate in women's sports.²⁵⁰

While all three solutions and viewpoints place different levels of importance on inclusion and fairness respectively, the sport-by-sport approach appears to be favorable as it constitutes a maximum effort in balancing inclusion and fairness regarding transgender women's participation in women's sports.²⁵¹ Moreover, from an inclusive standpoint, a sport-by-sport approach and analysis provides transgender women the opportunity to get their foot in the door with competing against biological women in women's sports.²⁵² The fairness aspect will come into play when deciphering the role gender plays in a specific women's sport, coupled with mindfulness of the age of the transgender woman and whether the transgender woman went through the stages of male puberty before the gender transition took place.²⁵³ Thus, the United States's federal adoption of the aforementioned recommended sport-by-sport, case-by-case determination, similar to the DIF, the IOC, and the NCAA, will maximize an equal balance between inclusion and fairness by providing a uniformly applicable framework for relevant United States sports personnel and governing bodies (i.e., the NCAA through its legislative processes and state high school associations through the NFHS) to consider when deciphering whether or not to allow a specific transgender woman to compete in a specific women's sport.²⁵⁴

249. Protection of Women and Girls in Sports Act of 2023, H.R. 734, 118th Cong. § 2(d) (2023); Barnes, *supra* note 71.

250. Weiss, *supra* note 191; Barnes, *supra* note 71.

251. Lavietes, *supra* note 74.

252. *Id.*

253. *Id.*; Kim, *supra* note 172.

254. *Id.*