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Eligibility in Flux: Transgender and Intersex Student-Athletes and Title IX

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ELIGIBILITY IN FLUX: TRANSGENDER AND INTERSEX STUDENT-ATHLETES AND
TITLE IX

By

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ABSTRACT

Historically, sports have generally been divided into a binary system of males and females for purposes of competition. Yet this system does not allow for the spectrum of sexual differences that can occur both physically and mentally. Such individuals include transgender or intersex. Transgender and intersex individuals are not unknown to the sporting world. These individuals have won major sporting titles from amateur awards to Olympic medals. Despite the athletic prowess some have expressed, these individuals are neither guaranteed inclusion into all sporting competitions nor given statutory rights that provide for such inclusion. The potential to include transgender and intersex individuals at the U.S. collegiate level is the focus of this thesis.

There have only been a couple known transgender student-athletes who have competed in the NCAA and none of these student-athletes have yet to challenge or seek out their right to compete in intercollegiate athletics under Title IX. This study analyzes the legal perspective on the eligibility of transgender and intersex student-athletes through hypothetical legal cases. It would not be practical to wait five to twenty years for such a case to manifest in the court system. Although the case would be on-point, legal scholarship does not have the luxury of waiting for a case to present itself. Instead one must use the available precedents to interpret the law. Law is a type of social science, yet it is devoid of experimentation and statistical methodology. Instead, legal methodology surveys cases and legal precedents rather than people or businesses. Describing and explaining what the law is and states is easy but it is more difficult to explain what the law could or should be. This thesis takes a proactive look at transgender and intersex student-athlete’s inclusion under the auspices of Title IX.

Title IX is the federal legislation that is the most influential in collegiate sports. Title IX’s policies and interpretations are the primary focus in this thesis. In addition, the multiple legal precedents that have developed because of Title IX are addressed. Title IX has been the stimulus for female’s inclusion into intercollegiate sports. Despite the historical context, Title VII and Title IX’s scope has broadened beyond just females in the past couple decades due to an expanded definition of the term “sex.”

The other major factor in this proposal is the NCAA, which is the main governing body for intercollegiate athletic programs. The purpose of the NCAA and the binary system in
athletics is largely to maintain an “equal playing field.” It is believed by some that the inclusion of a transgender or intersex student-athlete may alter the playing field, thereby creating an imbalance. It is important to point out that no such thing as an even playing field exists, or else there would not be competition. Differences in culture, finances, genetics, and a myriad of other factors affect the development of an individual and the team; already creating an uneven playing field. The NCAA in the past couple months has published official rules regarding the eligibility for transgender student-athletes. Yet, the NCAA remains silent on intersex student-athlete participation. This small population is therefore left in a state of limbo in regards to intercollegiate eligibility.

A transgender student-athlete’s gender status can vary depending on the state one lives in. Certain states in the US protect gender identity and allow alterations of one’s legal sex status. These states allow protection that federal statutes have yet to cover. In contrast, most states do not recognize gender identity nor allow any changes to one’s legal sex status. The difference in state regulations is a consideration transgender student-athletes need to consider before filing a Title IX claim.

Title IX protects sex discrimination and thus the underrepresented sex. Intersex student-athletes do not lack ‘sex’ and as thus should be under the auspices of Title IX. Intersex is not male or female thus intersexuality could be considered an underrepresented sex. Females may have been the original beneficiaries of Title IX but intersex students could be the new underrepresented class.

The broad definition of “sex” from current transgender case law shows that “sex” is not legally bound to the binary construct of male or female. Thus, Title IX would include protection for those with different gender identities, transsexuals, and intersex student-athletes. Recent athletic sensations and governing body guidelines have expressed interest and questions regarding transgender and intersex eligibility. Inclusion of these individuals can be strengthened by successful litigation through Title IX.
CHAPTER 1
INTRODUCTION

In sports, competitions and competitors are almost always divided into two main categories: male athletes and female athletes. The practice of this mutually exclusive binary division in athletics turned international during the 1900 Paris Summer Games when women were allowed to compete in the Olympics, an event previously reserved for men only. Such divisions seemed “obvious given the physiological differences that exist” (Reeser, 2005). The basic reasons for the binary system are to keep competition fair and disallow an unfair advantage or disadvantage between men and women competitors (Reeser). Women’s emergence into competitive sports occurred over the last one hundred years while men have been actively engaged in competitive sports and physical activities for centuries. In the 1900 Paris Olympic Games, for example women participated in golf and lawn tennis, which attracted a total of twelve women participants (Couturier & Chepko, 2001). In comparison, the recent 2008 Beijing Olympic Games there were 137 women’s events and 4,746 women competitors (Beijing 2008).

While women were allowed their first window into competitive athletics, women were exerting themselves socially for increases in mobility, prosperity, education, and the right to vote (Chepko & Couturier, 2001). The right to vote did not equate to the right to participate in sports. Instead, women across the United States had to prove that they could handle the psychological, emotional, and physical impact of competitive sports.

The global turbulence of the 1930’s and 1940’s empowered women to alter past restrictive social norms. Women could be breadwinners for a family by working in traditionally held male occupations: women could be naval pilots, build planes and assemble cars (Chepko & Couturier, 2001). The displacement of the male population also allowed women chances to compete in new sporting arenas. For example, the professional baseball leagues formed the All American Girls Professional Baseball League as a female substitute to their normally male schedule (Chepko & Couturier). In 1925, Gertrude Ederle swam the 20.6 miles from England to France breaking the previously held male world record by two hours (Cohen, 2001). The 1928 Amsterdam Olympics were the first in which females were allowed to compete in select track
and field events. Amelia Earhart flew solo to many countries in the 1930’s. In 1940, Kathryn Dewey won the all male National Bobsled championships (Cohen). By the 1940’s, women’s involvement in the Olympics was standard. Yet, the road for equal participation in sports had a long way to go.

The bifurcation of the sexes in the United States has been impacted by a number of legal and societal forces, most notably Title IX. Title IX impacts sport participation for all federally funded programs from kindergarten to institutions of higher learning. However, Title IX is silent on intersex and transgender inclusion. Intersex and transgender intercollegiate student-athlete populations are in a grey area on the question of whether or not they fall under Title IX protection, as neither statutory law nor case law has directly addressed the issue.

**Equal Rights and Title IX**

The idea of equality is a relatively new concept. For centuries there has been discrimination based on sex, origin, religion, race, social status, personal appearance, and color. Only in the past two hundred years has the United States been actively engaged in creating a more equal society. The 14th Amendment to the US Constitution passed in 1868 after the U.S. Civil War, assuring all persons equal protection of the law. In 1964, the Civil Rights Act was passed, concluding “separate but equal” does not equate to equality. The Civil Rights Act’s provisions required equal opportunity for all U.S. citizens in employment practices such as in hiring, firing, and promotions. It also forbade anti-discrimination in public facilities, public schools, and in voting practices (Civil Rights Act, 1964). The Civil Rights Act forbade discrimination based on race, sex, color, creed, and age. The passing of the Civil Rights Act gave momentum for women to push for their next cause, equal opportunities in education. Yet, athletics is one of the few remaining institutions where the doctrine of “separate but equal” still legally applies (Adair, 2011).

One female activist, Bernice Sandler finished her doctorate in counseling at the University of Maryland in 1969 (Radcliffe Institute, n.d.); at a time when men were widely considered the most qualified employees in a number of high paying industries. Sandler found it near impossible to find work, despite her doctoral degree. Disgusted at such blatant discrimination, Sandler filed over 250 complaints against the University of Maryland and other
universities for sex discrimination in hiring, firing, promoting, pay rates, and even admissions (NCAA Gender Equity Task Force). Another example of such blatant discrimination in education was admissions in the state of Virginia. Virginia’s higher institutions over a three year period in the 1960’s denied 21,000 female admissions while no men were denied admissions. In the 1960’s and before, this practice was legal (NCAA Gender Equity Task Force).

Bernice Sandler’s complaints were given to the U.S. Department of Labor (Radcliffe Institute, n.d.). The reports found their way to a powerful congresswomen and Chair of the Subcommittee on Higher Education, Edith Green. In 1970, the first Congressional hearings on women in education were heard; spawning the creation of the Education Amendments to the Civil Rights Act of 1964. Congresswoman Green and fellow Congresswoman Patsy Mink authored and sponsored the Amendments (NCAA Gender Equity Task Force).

The 1972 Education Amendments, which include Title IX, were passed by Congress and enacted on June 23, 1972. Title IX of the Education Amendments of 1972 was not passed in order to address the inequities in athletics but rather to promote antidiscrimination in education (NCAA Gender Equity Task Force). Title IX is summed up in this key statutory phrase, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (Title IX, 1972). The entire text of Title IX can be found in Appendix A.

The passage impacted all schools receiving federal funding ranging from kindergarten to institutions of higher learning. Title IX was passed in 1972 but little was done for implementation (United States Commission on Civil Rights, 1980). A divided Congress was attempting to exclude college athletics from Title IX jurisdiction. Such exclusions ultimately failed. Congress accepted regulations regarding implementation from the Department of Health, Education, and Welfare of Title IX in July of 1975 (United States Commission on Civil Rights). Regulations asked for elementary schools to start adhering to Title IX in 1976 and high schools and colleges in 1978. For college students, that was a six year difference between the passing of Title IX and the actual implementation (United States Commission on Civil Rights).
The National Collegiate Athletic Association (NCAA) is the governing body for over 1,000 higher education institution’s athletics programs in the United States. Membership to the NCAA is voluntary, but its prestige, media exposure, and funding opportunities gained by membership are significant enough to attract the vast majority of higher education institutions (Covell & Barr, 2010). The NCAA’s membership institutions can belong to one of three athletic divisions, depending on the institutions athletic goals, academic goals, and the philosophy of the institution.

As the premier governing body for intercollegiate athletics, the NCAA currently has one of the most influential roles in implementation and demonstration of Title IX fulfillment. Since its inception, the NCAA has had a powerful sway over its member institutions. One of the NCAA’s major tenants is creating a “level playing field” for its member institutions (Covell & Barr, 2010). The NCAA has established thousands of rules pertaining to recruiting, amateurism, eligibility, administration, and financial aid issues in an attempt to curb any abuses or unfair advantages for any one institution (Covell & Barr).

Originally, the NCAA governed only male intercollegiate sports. Female intercollegiate sports were under the auspices of the Commission on Intercollegiate Athletics for Women (CIAW) (Chepko & Couturier, 2001). The CIAW was created in 1966 and provided direction and guidance for women’s intercollegiate programs and championships. Female participation in college athletics remained relatively small with an estimated 15,727 participants in the 1966-1967 school year according to the United States Commission on Civil Rights (1980). In 1971, the CIAW created a subsidiary to govern women’s college athletics by creating the Association for Intercollegiate Athletics for Women (AIAW). The AIAW and its predecessor were both run by women officials and executives, believing women should be led by women (Chepko & Couturier).

After Title IX was passed in 1972, women had the legal right for equality in their intercollegiate sporting endeavors. However, Title IX had little effect on women’s sport until the Department of Health, Education, and Welfare issued enforcement regulations three years later (Chepko & Couturier, 2001). Compliance would not be enforced until 1978. The delays were caused by members of Congress who did not want football and certain other men’s sports to be affected; as did college presidents and athletic directors, who worried that their men’s teams
would suffer due to compliance. Revenue-generating sports like football, basketball, and baseball were adamantly against equality in sports due to the lack of funds women’s sports would generate and the eventual money vacuum compliance with Title IX would bring (Covell & Barr, 2010). College programs deliberately moved slowly in their accommodation of female student-athletes.

AIAW championed Title IX, filing lawsuits against those institutions that failed to comply. AIAW’s growing financial resources and strength helped increase women’s participation in intercollegiate athletics. The United States Commission on Civil Rights (1980) reported that by the 1976-1977 school years over 64,000 women participated in intercollegiate athletics. While men’s participation far exceeded women’s participation by a ratio of three to one, the ten year exponential growth gave evidence that women’s sport opportunities were expanding (United States Commission on Civil Rights).

Reluctance to comply and misunderstanding of the policies by a large number of colleges prompted the Department of Health, Education, and Welfare in 1979 to release policy interpretations for Title IX. A three-pronged test was established to determine whether a school was in compliance with Title IX. The first test requires demonstration of “intercollegiate level participation opportunities for male and female students are substantially proportionate to their respective enrollments” (United States Commission on Civil Rights, 1980). The second test mandates institutions to demonstrate expansion of programs for the historically “underrepresented” sex. The third prong questions whether the “interests and abilities of the members of that sex have been fully and effectively accommodated” (United States Commission on Civil Rights). A school is in compliance if they can demonstrate fulfillment of at least one prong (United States Commission on Civil Rights).

The NCAA eventually realized that women’s expansion into sports was becoming a permanent fixture. As the premier sanctioning intercollegiate body, the NCAA initiated their own women’s national championships to rival the AIAWs. In addition, the NCAA professed equal treatment in both men’s and women’s programs for their member institutions (Chepko & Couturier, 2001). By offering women’s championships only, the AIAW was at a severe competitive disadvantage. In 1984 the AIAW went defunct, leaving the NCAA to organize and sanction both men and women’s programs (Chepko & Couturier). The NCAA’s programs follow the binary classification system. However, NCAA regulations do not include rules or
language pertaining to transgender or intersex student-athlete eligibility. Only in September 2011 did the NCAA publish rules regarding transgender student-athlete eligibility. The 2011-2012 academic years will be the first in which these NCAA rules will be in place.

**Sex and Gender**

Women’s participation in sports didn’t come without its setbacks. Sex segregation creates the opportunity for mistreatment or bias for either sex. In the international arena, sex segregation created the opportunity for sex fraud (Reeser, 2005). In the international arena, rumors and evidence of men masquerading as women in order to win medals started to circulate during the Second World War. The evidence strengthened during the Cold War era as female track and field athletes behind the Iron Curtain seemed strangely masculine. It was believed that the USSR and puppets had been substituting female athletes with male athletes (Boylan, 2008). The International Association of Athletics Federation (IAAF) in charge of international track and field competition reacted to such rumors and in 1966 at the European Track and Field Championship, the organization mandated sex verification testing (Reeser). Six athletes from the Eastern Bloc dropped out of the competition after the announcement of sex verification, creating even more speculation. The 1968 Mexico City Olympic Games were the first games in which sex verification testing was administered to all female athletes. Sex verification continued at all International Olympic Committee (IOC) and IAAF sanctioned events until 2000. The first sex verification tests consisted of a panel of doctors examining naked female athletes to confirm their true sex (Reeser). By the 1968 Olympics, the Barr test was used to save women the embarrassment of the previous method of sex verification (Shy, 2007). The Barr test is a scrapping of cells from the inside of the athlete’s mouth, also called a buccal smear, in which the cells are used as the sample to find chromosomal material (Boylan). Buccal smear scraping was used for almost thirty years.

The 1992 Albertville Winter Olympics used a polymerase chain reaction (PCR) to determine the sex of a female. PCR was a technique noted for its ability to identify uniquely male DNA. However, it did not take long for the IOC to realize that PCR was not the panacea they were seeking. PCR failed to accurately detect genetic variations or intersex conditions. After a series of false positives and improper classifications, sex verification testing came to a
halt before the 2000 Sydney Summer Games (Reeser, 2005). It is a practice still banned by the IOC today.

The IOC and IAAF sex verification tests provided these organizations with a biological standard to determine whether the athlete was sexually a female or male. Yet, these sex verification tests did not take into consideration biological variations of sex. The tests also did not consider whether the athlete considered his or her gender identity as a female or male. What a person is biologically and mentally can socially be two very different constructs.

The terms sex and gender are not interchangeable. Sex is a physical trait and is regarded as a product of nature. Gender is considered part of one’s identity and is rooted in society and culture (Shults, 2005). Athletic competition is divided into two sexes; male and female, so the question remains as to how to categorize an athlete who does not fit into this binary structure.

As modern society and stereotypes change, an increase in awareness has pushed this issue into the spotlight. This uncertain category includes both transgender and intersex athletes. Transgender is used to describe individuals whose physical sex does not match their gender identity or persona; “those who identify as the sex opposite of their natal sex” (Buzuvis, 2011). An individual’s gender is determined by social cues not biological traits. Thus, transgender is anyone who defies the gender that society expects one to possess (Shults, 2005). According to Shelley (2008), transgender is an umbrella term used to describe a broad myriad of sexual orientations including, but not limited to, transsexuals, transvestites, and cross-dressers.

Transsexuals are a minority under the transgender umbrella. Transsexuals are those that are uncomfortable with their bodies and the gender norms associated with their birth sex (Shults, 2005). This category also includes those that do not identify with either the male or female sex. Female-to-male (FTM) are transsexual men and transsexual women are male-to-female (MTF). Transsexual individuals who “want to achieve consonance with their gender identity by transforming their bodies” (Buzuvis, 2011) can seek out a physical transformation. Physical transformation can be accomplished in a number of ways. Hormone treatment of estrogen, progesterone, and testosterone blocking agents for male-to-female transsexuals and testosterone is prescribed for female-to-male transsexuals (Buzuvis). Surgeries are another alternative. Surgical options to transform a male-to-female or female-to-male are very serious and irreversible in nature: mastectomy, hysterectomy, labiaplasty, penectomy, orchiectomy, and many others are all viable options (Buzuvis).
The age that one realizes their dissonance with their gender or body is dependent on the individual. According to autobiographies, awareness of one’s gender or contradictory gender identity occurs as early as two to three years old (Pilgrim, Martin, & Binder, 2003). Transgender identity is often realized prior to adulthood. Young children or preadolescents still under the care of their guardians and family medical providers are not likely to accept hormone treatment or irreversible surgery. Sex change is a huge step and “should be delayed as long as it is clinically appropriate” according to the World Professional Association for Transgender Health (Buzuvis, 2011).

A typical female possesses two X chromosomes while a typical male possess an XY genotype. A female is determined female due to the lack of the Y chromosome. The Y chromosome holds the gene that stimulates male specific growth patterns. The Y gene promotes production of testosterone while the XX genotype inhibits testosterone (Buzuvis, 2011). Testosterone is the primary difference between men and women’s athletic abilities (Shults, 2005). Male’s production of testosterone and the female lack of as much testosterone fits comfortably into the binary construct. Despite this accepted division, there is not always a biological division. Intersex is the term generally used to describe someone who has a disorder of sexual development (DSD) (Adair, 2011). Intersex is different than transgender individuals in that one’s biological sex does not fit into the traditional binary construct.

Fertilization typically produces XX or XY genotypes. However, an abnormality of the genotypes can produce ambiguous external and/or internal genitalia. The variations defy the male and female binary construct. Possible variations include Turner’s Syndrome. Instead of an X or Y, a XO genotype manifests into feminine appearance but without ovaries and other female organs (Pilgrim, Martin, & Binder, 2003). Klinefelter’s Syndrome is characterized by an additional chromosome (XXY), producing an individual with a masculine appearance, small testes, large breasts, and mild learning disabilities. Androgen insensitivity syndrome (AIS) has an XY genotype but the Y chromosome cannot metabolize androgens. Thus, AIS individuals appear as a phenotypical female but without a uterus, ovaries, or cervix. Instead, the individual has a more masculine build and undescended testes (Pilgrim, Martin, & Binder, 2003). Hyperandrogenism genetically appears as XX in females but the male sex hormone, androgen including testosterone, is hyperactive in the endocrine glands. Thus, the female will have a deeper voice, more muscle bulk, an increase in body hair, acne, an irregular menstrual cycle, and
possible infertility. The hyperandrogenism female is not considered an intersex individual but because of the presence of testosterone and masculine physical appearance can be confused as having an intersex condition (American Association of Clinical Endocrinologists, 2001).

It has been estimated that 1.7% of the population is born with a sexual development disorder (Fausto-Sterling, 2000). Developmental disorders lie on a large continuum, some can go unnoticed for one’s entire life or a disorder can be as noticeable as having both male and female biological parts. This 1.7% creates a gray area in the idea of binary athletic competitions (Fausto-Sterling). Due to the varying degrees of developmental disorders, intersex legal and societal issues are only beginning to emerge.

The past century is spotted with examples of ambiguity regarding a competitive athlete’s sex and/or gender. In 1936, Stella Walsh from Poland was beaten in a 100 meter race in the 1936 Berlin Olympics. Helen Stephens, the underdog, won the race which was supposed to have been dominated by Walsh. Walsh demanded a sex test from Stephens, believing only a man could be faster (Boylan, 2008). Stephens’s sex verification proved she was female and the fastest female in the world. In an ironic twist supposedly unbeknownst to Walsh her entire life, Walsh herself was not sexually a female. Walsh had androgen insensitivity syndrome, a type of condition referred to as ‘intersex.’ She had the male XY genes, internal male organs, ambiguous external genitalia, but could not produce testosterone (Shy, 2007). She was raised fully believing herself to be that of the female gender and sex. In 1967, Eva Klobuwska, another female Polish sprinter, failed a sex verification test because she had XXY chromosomes. Just a few years later, she gave birth to a healthy child (Shy).

**Importance of the Study**

Kye Allums was a scholarship athlete who played Division I women’s basketball for George Washington University (GWU) for the 2010-2011 season. Allums is also transgender. Allums is biologically female but psychologically male. During Allums’ sophomore year at GWU, Allums wanted to be referred to and regarded as a male. Therefore, Allums changed her name Kay-Kay to a more masculine name, Kye (Associated Press, 2011). He was the only male on the women’s basketball team. Thanks to Washington DC’s liberal law allowing individuals to utilize facilities and restrooms according to their gender identity, Allums used the men’s
restroom and locker room (Zeigler, 2010). This law does not apply to other cities Allums traveled to, meaning he had to use the female locker room at away games. Allums was not allowed to take testosterone or hormone treatment during the rest of his NCAA eligibility but Allums could obtain a sexual reassignment surgery. According to the Associated Press (2011) he was surrounded by supportive coaches and teammates but that was not always the case. Anonymous coaches complained that they were a women’s team and should not compete against a team with a male. Yet, GWU’s men basketball team did not offer Allums an equivalent scholarship (Ziegler).

For largely undisclosed reasons, Allums quit GWU’s female basketball team prior to the 2011-2012. Ziegler (2011) reported Allums suffered from multiple concussions during the past basketball season. Ziegler alludes to undisclosed reasons as to why Allums quit, “While we can’t discuss specifics…The school put a gag order on Kye since last year…I look forward to some day finally telling Kye’s story of his first season as a guy when college is behind him” (Ziegler, 2011).

Despite his leaving GWU after one season as a male, Kye Allums appears to be the first public transgender Division I basketball player. As the first, he has opened up a Pandora’s Box of questions regarding transgender individuals in collegiate sports. Kye Allums will almost certainly not be the last transgender athlete to compete in NCAA regulated athletics. Allums quit college basketball before any modifications or established standards had been created by the NCAA, state legislation, or the courts. Inevitably, questions and possibly legal action pertaining to transgender and intersex equality will come up in the intercollegiate level. Legal action could pave the way for transgender and intersex student-athlete’s equality.

**Purpose of the Study**

The purpose of this thesis is to examine transgender and intersex athletes in the intercollegiate sports context. College athletics falls under Title IX jurisdiction (20 U.S.C. 1681-1688). Title IX utilizes the term “underrepresented sex” in its determination of whether an institution is in statutory compliance or not. The ambiguity of a transgender or intersex athlete’s sex begs the question whether these populations fall under the term “underrepresented sex.” Historically, women have been the beneficiaries of Title IX cases but with the conflicting terms
of gender and sex, intersex and transgender athletes could be the new beneficiaries of Title IX. Title IX is such a powerful piece of legislation in intercollegiate athletics that it is necessary to understand Title IX’s implications vis-a-vis transgender and intersex athletes.

With the recent example in the collegiate arena, the answer to this issue could potentially be a heated controversy. In accordance with Gratton and Jones (2004), it is important that the research objectives to this project are specific, measurable, achievable, realistic, and time bound. Those who identify themselves as intersex or transgender comprise a small percentage of the population. An even smaller population of intersex or transgender student-athletes in college athletics makes this population very small, manageable, and specific, making it ripe for a pointed analysis as part of this thesis. The culmination of legal issues, federal statutes, court precedents, and secondary source literature will coalesce into a measurable conclusion on the plausibility of Title IX’s inclusion of intersex and transgender student athletes. The time allotted to completing this thesis reasonably allowed for an in-depth and thorough analysis of the specific legal issues surrounding Title IX among transgender and intersex athletes. To achieve a full understanding and create a timely and pertinent discussion of these issues, five distinct areas of study are fully explored.

The first two areas of study are a description and explanation of Title VII and Title IX. Title VII is often used in antidiscrimination and gender identity lawsuits. Title VII’s cases are often used as precedents for Title IX court cases. An in-depth description of court case opinions and precedents at all judicial levels involving Title VII and Title IX were collected and synthesized. The second step is to review the legislative history of Title IX. In order to effectively enforce Title IX, the Department of Health, Education, and Welfare established regulations for the implementation of Title IX in 1975. Further explanation was needed for the correct implementation of Title IX, therefore the Policy Interpretation was pronounced in 1979 (Policy Interpretations, 1979). The Office of Civil Rights and Department of Education currently oversee Title IX’s enforcement.

The third area of importance is gender related litigation outside of Title VII and Title IX cases. The US Equal Protection Clause provides federal antidiscrimination protection and harassment protection. This Clause could provide protection to transgender and intersex individuals in future cases. This section is a brief discussion of transgender athletes who have sued different governing bodies’ in order to receive the right to play in major competitions. Other
transgender athletes have strategized and filed litigation in specific states where gender identity
is protected and/or sexual identification can be legally changed. Finally, transgender individuals
have sought legal rights through disability laws. A discussion of these methods of litigation is
included.

The fourth major source of interest is the rule making of athletic governing bodies. The
policies of prominent organizations such as International Olympic Committee (IOC) and the
International Association of Athletics Federation (IAAF) are of particular importance. All of
these organizations have received international spotlight due to their policies concerning sex and
gender in athletic competition. The NCAA is the prominent intercollegiate governing body in
the United States. The NCAA has had a controversial stance regarding federal individual rights
because as a private entity the NCAA does not have to adhere to Title IX. The NCAA does have
rules regarding transgender student-athletes in collegiate sports, but is silent on intersex student
eligibility.

The fifth source of information is academic research. Transgender and intersex issues in
sports have only recently been a current topic for research and discussion. The justification of
the binary system in athletic competition and the resulting complications of a possible advantage,
make up the bulk of academic literature. The newness of this topic has generated relevant
research important for the study of transgender and intersex collegiate athlete’s eligibility.

**Research Questions**

This thesis focuses on two main research questions,

(i) To what extent, if at all, do transgender student-athletes fall under the protection
    of Title IX?

(ii) To what extent, if at all, do intersex student-athletes fall under the protection of
    Title IX?

Transgender and intersex student-athletes are not explicitly guaranteed protection under Title IX
nor has there been any federal case which addresses this issue. The answers to these questions
are hypothetical in that no student-athlete has brought suit or fought for Title IX protection. This
thesis is looking at the scenario from a proactive viewpoint, because it is only a matter of time
before these issues come to the forefront.
CHAPTER 2
LITERATURE REVIEW

Title VII

To put Title IX in historical context, one must first look at prior legislation designed to prevent discrimination. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of race, color, religion, national origin, and sex. Title IX passed in 1972 and took this legislation one step further by prohibiting discrimination in educational institutions. Title IX is the piece of legislation crowned as “giving women the right to participate in sports” due to the prohibition of sex discrimination in intercollegiate sports. The term “sex,” as it is used in Title VII jurisprudence, has created controversy in the legal setting. The definition of sex, however, is not universal. Title IX legal cases regarding the term “sex discrimination” have been based on past precedents in Title VII sex discrimination cases regarding the breadth and definition of sex (Buzuvis, 2011; Currah, 2006; Phadke, 2006; Shults, 2005). Therefore, a description of the evolution of the term sex in Title VII is a starting point for the more thorough discussion of case law regarding Title IX and sex discrimination.

The first cases in which transsexual plaintiffs sought protection under the sex discrimination statutes of Title VII occurred in 1975. In January 1975, Charles Franklin Voyles, a hemodialysis technician informed his employers that he was going to undergo sex reassignment surgery. Shortly after, Voyles was fired on the claim that the reassignment surgery would be distracting and cause “adverse effects” to Voyles’ co-workers and the patients (Voyles v. Davies Medical Center). Charles Voyles now Carol Lynn Voyles, believed she was being discriminated against under the sex discrimination statutes of Title VII “to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual…because of such individual’s…sex.” The court denied Voyles claim, declaring that the term “sex” under Title VII does not include change of sex, sexual identity, or “transsexuals, homosexuals, or bisexuals” (457). The court posited that Title VII was enacted to protect solely women not any other combination or permutation of sex (Broadus, 2006).
A similar verdict was arrived at in *Grossman v. Bernards Township* only a few months before Voyles. Grossman was a tenured elementary school teacher that underwent sex reassignment surgery and was consequently fired shortly thereafter. The court declared Grossman’s sudden change was unbecoming of a teacher which could ultimately be considered harmful to the young and impressionable students. The courts again declared that the legislative history of Title VII does not indicate any intent to include transgenders.

For the next decade, *Voyles* and *Grossman* were considered precedent for transgenders seeking protection under Title VII. Time and time again, the courts declared that Title VII was not created to protect transgenders. In 1989, the Court’s definition of sex discrimination broadened in *Price Waterhouse v. Hopkins*. Hopkins was being considered for partnership in an accounting firm. Ann Hopkins was praised for being a highly motivated employee yet was considered abrasive and had bad interpersonal skills. Hopkins was seen by a counselor in order to work on employee relation skills. The court states that supervisors admitted to describing Hopkins as a “macho” lady who seemed to overcompensate for being a woman. Hopkins was asked by her employers to conform to her gender by dressing and acting more feminine. When Hopkins was denied the partnership, Hopkins filed suit under the sex discrimination statutes of Title VII. Although Hopkins did not win the case, the Supreme Court did broaden the definition of “sex”. The US Supreme Court rejected the past notions of the term “sex” as only male or female. Sex does not only refer to the biological sex but also to stereotypical assumptions of gender, “forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” (251).

The broadened definition of “sex” in *Price Waterhouse v. Hopkins* has been cited in other cases in an attempt for Title VII’s sex discrimination scope to specifically include transgender individuals. In 2004, the Sixth Circuit Court of Appeals decided that Title VII allowed a transsexual police officer to ask for redress due to sex discrimination (*Smith v. City of Salem*). In *Smith v. City of Salem*, the court included transgender persons as being entitled to protection under Title VII citing sex stereotyping again as a form of discrimination:

“As such, discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in
sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity" (1201).

In a recent review of transgender case law, Broadus (2006) concluded that current legal perspective is more accepting of the broader definition of “sex” which includes not only the biological and anatomical definitions but also the spectrum of gender identity. However, Broadus notes, a single US Supreme Court case decision that limits or denies sexual discrimination could end the gains of the past few decades.

**Title IX**

The court cases mentioned above have focused on sex discrimination and the definition of “sex” under the auspices of Title VII. The following section focuses on the second major piece of legislation that is vital for this study, Title IX. Title IX of the Education Amendments was passed into law in 1972 to help create more opportunities for women. In the passing of Title IX, Congress admitted that women had been restricted in their educational opportunities and consequently their employment. Historically women had been steered toward vocations by their educational institution based on their sex, such as being a teacher or nurse. One of the major tenants of Title IX was to eliminate such practices. Title IX expressly prohibits against discrimination in any education program or activity receiving federal financial aid. Educational institutions that fall under Title IX are vocational institutions, professional education, graduate higher education and public institutions of undergraduate higher education (20 U.S.C. 1681-1688). Public institutions that prior to 1972 historically and traditionally only admitted students of a certain sex for undergraduate higher education are exempt, such as the Citadel and military training schools (20 U.S.C. 1681-1688).

The bill was originally designed in committee by Congresswoman Edith Green and her female activist staff member Bernice Sandler. The bill was introduced in the Senate as a specific piece of legislation aimed at protecting women from discrimination (United States Commission of Civil Rights, 1980). The House and Senate passed the bill despite nervous Senators who worried that women would infiltrate the football field. Their worries have never fully manifested
but these congressmen did try to amend the bill to specifically exclude football, ultimately failing to do so.

Originally the Department of Health, Education, and Welfare (HEW) oversaw Title IX compliance. In 1975, HEW released Title IX regulations that provided institutions with guidelines on how to implement Title IX in their educational and athletic programs. Despite the simple objective of providing equal athletic opportunities for members of both sexes, there was confusion and reluctance among institutions on implementing the regulations (Covell & Barr, 2010). A follow-up set of interpretations were released in 1979 by HEW. The Title IX Policy Interpretations of 1979 were more specific regarding equal opportunities in college athletics, specifying 13 areas for athletic equality and assessment;

- Athletic financial assistance
- Accommodation of interests and abilities
- Equipment and supplies
- Scheduling of games and practice times
- Travel and per diem allowance
- Tutors
- Coaches
- Locker rooms and practice and competitive facilities
- Medical and training facilities and services
- Publicity
- Support services
- Recruitment of student-athletes

As a federal statute, compliance to Title IX and the thirteen specific areas of equality are mandated (Policy Interpretations, 1979). Consequences of being found not in compliance generally include withdrawal of important federal funding (United States Commission on Civil Rights, 1980; Covell & Barr, 2010).

The Office for Civil Rights (OCR) within the Department of Education (DOE) took over for HEW. The OCR is responsible for the oversight of Title IX compliance (Carpenter, 2001). The newly organized DOE and OCR were initially limited in their ability to enforce and investigate Title IX claims. In 1984, the *Grove City College v. Bell* lawsuit limited Title IX’s application to athletic programs. The Court declared that Title IX is only applicable to programs
who receive direct federal funding. According to *Grove City*, athletic programs receive federal funding indirectly. Therefore collegiate athletic programs did not need to comply with Title IX. The outcome of *Grove City* stagnated any improvement in athletic opportunities that Title IX had initially begun.

The DOE and OCR’s scope broadened again after the passage of the Civil Rights Restoration Act (CRRA) of 1987. The Act specified Title IX’s direct involvement with college athletics and effectively overruled *Grove City*. Furthermore, the Act stated that any program which receives federal funding, directly or indirectly, is under the auspices of Title IX. This Act gave the DOE and OCR its reinforced investigative and enforcement powers back (Covell & Barr, 2010). It is important to remember that the OCR is the investigative and enforcement agency for Title IX; it is not an advocate of Title IX (Carpenter, 2001).

There has been a plethora of court cases and suits involving Title IX in both the academic and athletic settings. Generally Title IX court cases are based on equal opportunities at an academic institution, but Title IX covers more than just equal opportunities for females. Title IX has been used to protect gender identity, gender expression, and sexual orientation. The court cases that are most pertinent for this thesis are gender identity and gender identity protection sought under Title IX.

The first significant court case, *Miles v. New York University*, in 1993 won a small victory for gender identity rights. Jennifer Miles was a female student at New York University (NYU) and eventually sued NYU because one of her professors made frequent and unwanted sexual advances upon her (Phadke, 2006). Claiming sexual harassment under Title IX, Miles won the suit. The court decision noted its past reliance on the meaning of “sex” within Title VII as the definition for “sex” in a Title IX suit (*Miles v. New York University*). Miles won a case of sex discrimination under the protection of Title IX. However, Miles was a male to female transsexual student. It had been argued by NYU that Miles was a male therefore Title IX does not protect male-on-male harassment. The argument was rejected because Miles identified herself as a female student. The court decided that as a perceived female, Miles was sexually harassed by her professor. This case did not broaden the rights of transgender or transsexuals but it did leave open a loophole for perceived sex to be considered protected under sexual discrimination. Miles was protected because she was perceived as a female thus future
transgender or transsexuals could be protected due to being perceived as female regardless of their biological sex under the protection of sexual discrimination.

One of the landmark court cases involving Title IX is *Cohen v. Brown University* in 1996. A class action lawsuit was brought against Brown University charging Brown as going against Title IX’s anti-discrimination against women. Women student-athlete’s felt they were being penalized due to the elimination of certain female sports teams. Brown contended that because of Title IX, women’s teams were being treated better than men because of women’s past exclusions in the educational setting. The outcome of this case is not necessarily pertinent to the discussion of transgender and intersex student-athletes but rather the discussion of the case contains necessary information. The Court applied the three prong test described in The Policy Interpretations of Title IX to Brown University’s athletic program.

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes and the institutional cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program (166).

These prongs were designed specifically for intercollegiate athletics. The Policy Interpretations made a distinction between varsity teams and club teams; club teams are not considered in the calculation of participant opportunities for the athletic program in question (Policy Interpretations, 1979). As long as one of the three prongs is satisfied, Title IX permits gender-segregated teams. Single sex teams are the norm in intercollegiate athletics and Title IX mandates that resources are allocated between the sexes in a nondiscriminatory manner. The Court noted that female students deserve equal opportunity in sporting endeavors regardless of any assertion that the female students lack interest in athletics, participation opportunities are necessary for both sexes. The Court in *Cohen v. Brown* specifically stated that Title IX was
enacted to remedy past discrimination of women. The Court’s decision also discussed the
unnecessary comparison of Title VII’s and Title IX’s definition of the term “sex” as being the
same. Title VII’s precedents are important but the crossover between the two statutes is
“explicitly limited” (176). Historically Title VII and Title IX shared the same definition of the
term “sex”. With the possibility of Title VII and Title IX definition’s of “sex” being different,
one is not guaranteed a certain outcome under either statute. Transgender individuals have found
certain legal protection under Title VII but the crossover to Title IX is uncertain. To date, there
have not been any transgender or intersex lawsuits concerning Title IX.

A university whether public or private must illustrate that the student body’s gender
composition is proportionate to the athletic program in order to satisfy prong one. It is important
to note for future discussion that the athletic program composition must be comparable to that of
the student body’s gender although no specific gender is mentioned. According to Fausto-
Sterling (2000), 1.7% of the United States population is comprised of intersex individuals. The
spectrum of intersex is vast. Many intersex individuals are not even aware of their intersex
conditions. In contrast, the rarest cases can place an individual in the middle of the spectrum
between male and female. The intersex population according to Fausto-Sterling study could
potentially leave 1.7% unaccounted for in athletic programs. Shults (2005) cites the US
population of intersex and transgender individuals to be somewhere in between 0.5% to 4.0%,
which strengthens Fausto-Sterling’s intersex estimate of 1.7%.

Sykes (2006) posits that Title IX’s antidiscrimination policy will ultimately provide
greater access in athletics for male to female transgender athletes in college. Sykes continues to
suggest that for female to male and intersex student athletes, Title IX could actually be hurtful to
their cause since the gender protection of Title IX is very specific. At the same time, Sykes
believes Title IX has provided a legal mechanism to expand the category of woman to potentially
include transsexual and intersex athletes. It has provided more marginalized opportunities for
female to male transsexual intercollegiate athletes but the male to female transsexual athlete is
still subject to suspicion, due to the possible advantages a male athlete would have in a female
competition (Sykes).

Shults (2005) believes the lack of Title IX court cases surrounding transgender and
intersex individuals to be promising. There is no specific precedent or distinction made which
prohibits a transgender or intersex athlete from benefiting from Title IX. Since the meaning of
sex and gender are different, the courts would likely have to broaden the definition of sex to include gender identity for a potential transgender or intersex case to be successful. Title IX was enacted to eliminate “both stereotypical and real differences on the basis of sex in education” thus in order for this statute to live up to its objectives, a broadened definition of sex is imperative to eliminate sex discrimination in education (Shults).

**Gender Related Litigation**

Gender based discrimination and harassment at the federal, state, and local level is under the protection of the US Equal Protection Clause of the Constitution. The Equal Protection Clause and Title IX are at the federal level. State level protection for gender identity varies across the states. State level legislation is beyond the scope for this research proposal but it is important to note the different views states have on gender identity. Florida introduced a safe school bill which would address issues of gender based harassment and discrimination, but the bill was blocked. Louisiana also introduced a similar bill but the bill was withdrawn due to the references of gender identity and gender expression. In contrast Washington DC and California schools are required to protect students from discrimination and harassment based on gender identity (Sykes, 2006). A lawsuit made in California or Washington DC would be the ideal places for a transgender or intersex individual to file suit against entities which do not bar gender identity discrimination.

**Equal protection litigation.** In 2003, the Equal Protection Clause was broadened to protect those from intentional sexual harassment due to their actual or perceived sexual orientation. Morgan Hill Unified School District in California was brought to suit by the plaintiff Flores. *Flores v. Morgan Hill Unified School District* is a class action lawsuit comprised of homosexual, bisexual, and lesbian students who claimed that Morgan Hill’s teachers and personnel ignored blatant sexual harassment directed at them. The plaintiffs received harsh name calling, physical abuse, and sexual harassment without receiving any protection from the faculty. Instead the plaintiffs were told to stop making others feel “uncomfortable” (1133). The court declared that Morgan Hill acted with an “unconstitutional motive” by intentionally discriminating against the plaintiffs (1135). It was also decided that the failure to enforce anti-harassment and anti-discrimination policies, caused physical and emotional harm to the plaintiffs (1135). Thus *Flores v. Morgan Hill* created a precedent that protects students from anti-
discrimination based on their actual or perceived sexual orientation, both from fellow students, personnel, and faculty.

Sykes (2006) claims that it is assumed that under the Equal Protection Clause and *Flores v. Morgan Hill*, schools have a duty to protect students from harassment on an equal basis with all other students. No gender distinction is made, thus it would seem that both transgender and intersex students apply. Discrimination based on gender non-conformity would be protected under Equal Protection Clause. For example, Sykes claims that if the school mandates a dress code, a pre-operative male to female student should be allowed to wear female attire. In the collegiate setting, if a biological female athlete has a male gender identity and chooses to participate as a male, hypothetically then the athlete could find protection under the Equal Protection Clause (Sykes).

The most significant legal case involving an intersex individual and an anti-discrimination claim is *DiMarco v. Wyoming Department of Corrections*. An intersex woman, Miki DiMarco, was incarcerated in a female correctional facility. Her ambiguous genitalia was revealed during a routine search and DiMarco was moved from being a minimum security risk to a maximum security risk (1187). DiMarco was placed in solitary confinement. DiMarco filed suit against the correctional facility claiming the conditions of her confinement violated her constitutional rights. The court concluded that an intersex individual is not privy to protection under the Equal Protection Clause (1197). According to the court, the lack of resources at Wyoming Department of Corrections legitimized DiMarco’s segregation (1197).

The lack of discrimination cases involving intersex individuals leaves a question mark as to how the courts would decide a future case. Zaccone (2010) suggests that despite the lack of precedents, intersex individuals would likely obtain similar rulings to that of transgender individuals.

**Gender and sex eligibility litigation.** In the sporting arena, transgender athletes have been making legal progress in the professional and elite circuit. Starting as early as 1977, Renee Richards, a male to female tennis player was chastised as having an unfair advantage in women’s tennis competitions (Fee, Brown, & Levi, 2003). Richards was told she had to undergo a sex verification test to determine her true sex (Shy, 2007). Her sex verification would be through a chromosome test to determine her ‘true’ sex. Richards argued that chromosomes would not determine her status as a woman thus the test was discriminatory. Richards sought a preliminary
injunction prohibiting the United States Tennis Association from administering a Barr test. Such a test violated New York State Human Rights Law and the Fourteenth Amendment according to Richards (Shy, 2007). The New York Supreme Court decision favored Richards, declaring Richards a legal female (*Richards v. USTA*). Richards went on to reach the women’s doubles final at the 1977 US Open (Fee et al.). *Richards v. USTA* is the first case to declare that being a legal female is not dependent on being a biologically born female. Transgender individuals in sports won a major case through *Richards v. USTA* but little to no litigation followed for almost three decades in which to further their protection in sports.

Almost thirty years later, another male to female athlete filed suit for sex discrimination in sports, but this time against the Ladies Professional Golf Association (LPGA). In October 2010, Lana Lawless, a post-operative male to female challenged the LPGA’s eligibility law. At the time, the LPGA mandated a “female at birth” competition rule. Lawless was recognized legally as a female in the state of California and sought entry to the LPGA qualifying rounds in California (Rodenberg, 2010). Only thirteen states including California and Washington DC have laws barring gender identity discrimination (Robson, 2010). In contrast, Kansas, Ohio, Texas, Florida and several others just to name a few, solely recognize an individual’s birth sex as their legal sex for life (Currah, 2006). In the case of Lawless, in these states Lawless will forever be a male despite undergoing sex reassignment. The LPGA denied Lawless’ entry on the fact that female participants must be female at birth (Rodenberg). Lawless filed suit against the LPGA in the state of California claiming the ‘female at birth’ eligibility rule contrasts California civil rights law. The LPGA quickly responded to the suit by removing the “female at birth” rule (Rodenberg); realizing that transgender and intersex athlete eligibility rules is an issue to handle as more and more transgender and intersex athletes have come into the spotlight. Despite the *Richards v. USTA* and *Lawless v. LPGA*, there is no legal precedent that specifically bars gender identity discrimination in athletic competition.

**Disability antidiscrimination litigation.** Transgender individuals have not found a consistent statute that protects their rights as equal citizens in the United States legal system. Instead, they have created creative litigation strategies in which to pursue their rights (Currah, 2006). Although the following discussion is not directly relevant in the sporting arena, it illustrates the inconsistent manner transgender individuals have sought legal protection. One
example of creative litigation is the success of transgender individuals who have successfully brought suit on the basis of discrimination due to a having a disability.

There is no single agreed upon definition of a disability or impairment, instead its definitions are broad and flexible (Levi & Klein, 2006). The disability nondiscrimination laws are intended to protect individuals with physical and or a mental health condition from being discriminated against. Disabilities can take many forms. Transgender falls under the title gender identity disorder (GID) as an official diagnosis included in the psychological flagship manual the Diagnostic and Statistical Manual of Mental Disorders (DSM). A DSM diagnosis is considered a medical condition and even a disability (Currah, 2006). It has been argued in court that it is medically necessary to be able to express one’s gender identity (United States v. Happy Time Day Care Center). Restrictions on expressing one’s gender identity can be described as discrimination (Levi & Klein). It is important to note that the disability claim cannot be made under the American Disabilities Act unless the gender identity disorder is a result of physical impairments. The majority of state laws do not have an explicit exclusion against GID individuals thus providing GID individuals with the opportunity to make a legitimate disability claim (Levi & Klein).

While it may be legally acceptable to file suit under antidiscrimination disability law there are setbacks to this legal approach. There is a social stigma attached with the word disability and a proportion of transgender individuals do not want to be considered “disabled.” Claiming to have GID for medical or legal purposes is tantamount to admitting that there is something wrong with being an actual transgendered individual. Disability or mental conditions generally require medicine or treatment to cure the ailment, which implies being transgender is abnormal and potentially wrong. By claiming a disability, transgender individuals could have strong legal protection in state and federal antidiscrimination laws aimed at protected those with a disability.

The literature is void of any mention of an intersex individual claiming a disability in a legal case. Despite this, intersex individuals can also call an intersex condition a disorder of sex development (DSD). Fausto-Sterling (2000) and Levy (2009) believe such diagnosis might secure an intersex individual’s legal protection while neutralizing the intersex individuals feelings of being an outlier, “Oddly enough, it does normalize it in a certain way,” (Fausto-
Sterling). Both authors claim the DSD label is not advocating a third sex, rather wanting to bring awareness to the physical abnormalities.

**Governing Bodies**

Transgender and intersex athlete’s participation rights vary depending on the governing body and country of participation. On the international level, the IOC and the IAAF have responded to recent lawsuits and events concerning gender identity. Both organizations have made policies regarding transgender and intersex athlete participation.

**International sport policies.** In May 2004, IOC adopted a policy that will enable transsexual athletes to compete in the Olympic Games. The policy is referred to as the Stockholm Consensus. Male athletes who had sex reassignment surgery before puberty are eligible to compete in the Olympics as females. Those that transitioned after puberty are held to a stricter standard. One of the main standards is whether or not the athlete is legally recognized in their country as their new sex. The athlete must have had genital reassignment surgery. The athlete must have had hormonal therapy for at least two years in order to reduce gender-related advantages. Finally, the athlete must have lived in the new gender for at least two years. Each case will be individually assessed by the IOC. The IOC reserves the right to carry out a sex verification test if it chooses what Pilgrim, Martin, & Binder (2003) referred to as ‘suspicion based testing.’ The purpose of the above mentioned hormone therapy is to negate the male advantage due to levels of testosterone (Cavanagh & Sykes, 2006). The IOC Medical Commission is quoted saying that the Stockholm Consensus was designed “to protect the athlete who has not been sex reassigned than to help the person who is...” (Cavanagh & Sykes).

Although the IOC’s policy was established before the current wave of transgender policy creation, there is not an official IOC intersex policy. The IOC Medical Commission publicly announced in April 2011 the need to establish rules regarding intersex eligibility. The goal is to adopt rules regarding intersex conditions prior to the 2012 London Olympic Games next year.

The IAAF published new eligibility rules on May 1, 2011. The new rules include eligibility standards for athletes who have undergone male to female sex reassignment. Males who have undergone sex reassignment and have acquired official legal recognition as a female may be allowed to compete in IAAF sanctioned events as a female. Before competition, the male to female must have her case heard by the IAAF along with a list of other stipulations. The
male to female athlete must submit thorough evidence of the newly acquired legal sex including details of any sex reassignment procedure, details of post reassignment treatment, a urine sample, and a blood serum sample. The urine sample will be tested for an exhaustive list of hormones including androgenic hormones and testosterone. The blood sample will be analyzed for testosterone and sex hormone binding globulin and potentially any other hormones or substances deemed appropriate. An expert medical panel will assess each male to female’s case and recommend to the IAAF whether the athlete should be allowed to compete as a female (IAAF.org, 2011).

Female to male sex reassignment athletes are not required to submit a case before the IAAF. Female to male athletes need only to prove legal recognition of their new sex in order to compete as a male (IAAF.org, 2011). The IAAF finds no advantage for a female to male athlete in competition.

The IAAF is the first international sport federation to approve rules regarding the eligibility of females with hyperandrogenism. The new rules and regulations were amended on May 1, 2011. The IAAF’s new rules for females with hyperandrogenism were established to keep the playing field level for women competition. The female athlete in question must have her case presented to the IAAF prior to competition. An undiagnosed individual may be called into question at the IAAF’s discretion. The female must disclose her entire medical history to the IAAF and their medical panel. The cases will be investigated according to three levels of assessment. Level one is a clinical examination of the athlete including data such as the physical appearance of the athlete, deepness of voice, body hair, and sex characteristics. Level two encompasses a urine and blood test. The urine sample will be sent to a lab and analyzed for androgenic hormones and testosterone. Androgen levels need to be below male normal levels or within the male range as long as the androgen is resistant to testosterone. The blood sample will be tested for the levels of testosterone and sex hormone binding globulin. Other hormones and substances will be recorded and tested at the IAAF’s request. The third level is a full examination and diagnosis including physical tests, psychological assessments, and diagnosis from an expert in disorders of sex development. The expert medical panel will determine whether the female athlete has an advantage over other female competitors and decided whether or not she may compete (IAAF.org, 2011).
The main stimulus for the rule amendments was due to the recent case of track star, Caster Semenya. Semenya competed in the 2009 World Championships in Berlin and blew past the field in her first senior competition in the 800 meters (Levy, 2009). The impressive win only created controversy around Semenya. Prior to the World Championships, Semenya underwent sex verification tests administered by the IAAF. Rumors of her deep voice, her strong jaw line, her lack of hips, and her well developed muscles led some to wonder whether Semenya is a man or a woman (Levy). On multiple occasions Semenya claims to have been sent to the restroom prior to competitions with competitors to prove her sex (Levy). The IAAF administered sex verification tests but they also leaked the results which are supposed to be confidential. Semenya has androgen insensitive syndrome which means she lacks ovaries or a uterus (Levy). Instead, she has undescended testes and has three times the amount of testosterone than the average female (Levy). The testosterone is an advantage in a women’s track and field competition. Almost a year after her 800 meter race in Berlin, Semenya had been sidelined from competition until further notice. On July 6, 2010 the IAAF announced Semenya could compete as a woman again (Clarey, 2010). Even with the official status as a woman, her competitors are unconvinced of her sex status (Clarey). The IAAF’s ruling was released without test results or details of the methodology to their decision (Clarey). The IAAF’s current eligibility amendments were added to eliminate a similar controversial situation in the future.

The biggest international governing bodies, the IOC and IAAF, have recently developed rules and regulations specifically regarding transgender and intersex athletes. In contrast, some international governing bodies do not have specific rules and regulations regarding transgender and intersex. For example, Sarah Gronert is a current female professional tennis player from Germany. What makes Gronert’s case special is that she was born intersex. The details of Gronert’s intersex condition at birth are unknown, as she has kept information about her past condition as private as possible. At the age of 19, Gronert underwent sex reassignment surgery to be considered a biological and legal female (Robson, 2009). Gronert entered into the tennis spotlight at the age of 22 in 2008 by winning four International Tennis Federation (ITF) titles. Both the ITF and Women’s Tennis Association (WTA) confirmed Gronert’s eligibility to play as a female. The ITF and WTA declared Gronert eligible. So far, neither the ITF nor the WTA have received any public complaints about Gronert. Professional tennis player Nadia Petrova is cited as stating “But I think we all should have a chance to do what we want to do…give her the
green light” (Robson). Amelie Mauresmo a former number one tennis player said “Good for her to make the choice about how she feels inside” (Robson). This acceptance level might be different if Gronert breaks into the elite level of pro tennis and is ranked in the top 50. For now though, Gronert is an example of an intersex athlete successfully competing in the international professional sports arena.

Mianne Bagger, a male to female golfer, was not initially allowed to play in international professional sports. Therefore, Bagger focused her attention directly on creating policy change. Bagger played golf growing up but was not very successful, but she took up golf again after her sex reassignment when she was 29. Shortly thereafter became a player for the state team of South Australia. She achieved the rank of being one of the ten best amateur women in Australia (Love, Lim, & DeSensi, 2009). Bagger fully participated in amateur Australian events but was limited in international play and professional events due to gender eligibility restrictions. In 2004, Bagger began lobbying women’s golf tours and organization around the world to change their gender eligibility requirements. Bagger involved the media as much as possible to gain an audience and stir interest for transgender participation rights (Love et al.). Many golf organizations resisted Bagger’s attempts to amend the rules. Despite the resistance, Bagger provided the catalyst for the Ladies Golf Union of England, the Ladies European Tour, the Australian Ladies Professional Golf Tour, and the United States Golf Association to remove requirements that all women competitors must be female at birth (Love et al.).

NCAA. In the international arena, the IOC and IAAF have made steps to provide rules and regulations establishing eligibility and participation standards for transgender and intersex individuals. Meanwhile, some of the national governing bodies in the United States have been sued and pressured to establish regulations regarding transgender and intersex individuals. Lawsuits from transgender athletes such as Lawless and Richards have forced certain governing bodies to make changes. Other governing bodies have yet to act despite the growing pressure and media attention surrounding recent transgender and intersex athletes. One of the most influential governing bodies in the United States is the NCAA. The NCAA published rules regarding transgender student-athlete eligibility on September 7, 2011. The NCAA, like many other governing bodies, has yet to adopt a policy regarding intersex student athletes.

The NCAA’s reluctance to create rules regarding participation of transgender ended only recently due to a widely disseminated report called “On the Team” authored by Dr. Pat Griffin
and Helen J. Carroll in October 2010. The report was sent out to all educational institutions and school based athletic bodies in the United States in order to pass on knowledge and expertise regarding this newly recognized population. The report suggested the stance collegiate athletic programs should take to ensure “fair, respectful, and legal access” to sports (Griffin & Carroll, 2010). The report given to the NCAA by Griffin and Carroll was co-sponsored by the Women’s Sport Foundation and the National Center for Lesbian Rights of which Griffin and Carroll are on the board of directors. The report specifically notes that the suggestions are for transgender athletes and not intersex, “there may be some similar issues related to sports participation between transgender and intersex individuals, there are also significant differences. This response will focus on the participation of transgender people in sports” (Griffin & Carroll). Griffin and Carroll admit that the number of transgender students is small, but they believe this population is growing. As awareness and acceptance grows of various spectrums of gender identity, the more likely that children, teens, and adults will “come out” as transgender (Griffin & Carroll). A chapter of “On the Team” is dedicated to best practices for transgender student athlete inclusion. Huge emphasis is placed on learning and taking the time to become knowledgeable about transgender identity and the process of “coming out” and transitioning.

The NCAA responded to the report with its “Current NCAA Position.” The 16 page document was more specific than Griffin and Carroll’s “On the Team.” The formally established rules on transgender student-athletes were published on September 7, 2011. The rules are slightly different than the previous “Current Position.” The NCAA rule does not prohibit transgender student-athletes from competing, but the student-athlete must compete in the “gender classification that matches their state classification as determined by their institution” (NCAA.org). The transgender student-athlete must also be in compliance with the existing NCAA policies and medical standards concerning hormone therapy. In sum, a transsexual male taking testosterone may compete on a male team or female team, but the female team would change to mixed team status and, in turn, would not be allowed to compete in the women’s championship tournaments. A transsexual female taking testosterone suppression can compete as a male but cannot compete on a woman’s team until after a year of documented testosterone suppression treatment (Lawrence, 2011). The NCAA’s rules regarding mixed teams and championships make the transgender question complicated. Despite the NCAA’s allowance of
transgender student-athletes taking hormone treatment, the addition of such an athlete on an intercollegiate team could put that team at a disadvantage during championship season.

A transgender student-athlete not taking hormone therapy still has to abide by NCAA rules. For example a male who considers himself female and but retains his male legal sex status can play on a women’s team but the team will be considered a mixed women’s team for championship purposes (NCAA.org). Once classified as being a women’s mixed team, the team will remain a mixed team for the rest of the academic year. A mixed team is not eligible to compete in women’s NCAA championship, but is allowed to compete in the men’s NCAA championships. The institution will decide on the student-athlete’s gender status based on the driver’s license, tax forms, voter registration, birth certificate, and state law. An institution’s athletic program has discretion in allowing a male-to-female transgender to play on the women’s intercollegiate team because such team will automatically be disallowed from the women’s NCAA championship

In contrast, a male team with a female or biological male who considers himself female can still play in the NCAA’s male championship (NCAA.org). The NCAA is assuming that a male or an identified male gives an entire female team an advantage, while a female or an identified female on a male team is neutral or a disadvantage. The “Current NCAA Position” report states that no statistics are kept on the actual number of transgender student athletes competing in the NCAA. The report points out that no policy fully enables a transgender athlete to compete in their “preferred gender” (NCAA.org).

The NCAA considers itself to be a private entity that is not bound by the rules and laws that govern its member institutions. By taking the position that they do not have to comply with Title IX, the NCAA does not have to include benefits to the “underrepresented sex” nor are they mandated to conform to any state or federal law. In fact, the NCAA has on multiple occasions been brought to court for not following the rules and regulations of Title IX and other individual rights. An important case that strengthens the NCAA’s private entity position is NCAA v. Tarkanian. Jerry Tarkaninan was a highly successful male basketball coach at the University of Nevada, Las Vegas (UNLV). The NCAA placed the UNLV basketball team under probation due to multiple NCAA infraction. The NCAA also ordered UNLV to sever all ties with Tarkanian by firing him as head basketball coach. Tarkanian, attempting to save his coaching career, filed suit against UNLV and the NCAA claiming he had been deprived of his due process
rights under the Fourteenth Amendment (182). The court found that UNLV is organized and operated under “the provisions of Nevada’s State Constitution, statutes, and regulations…UNLV unquestionably act(s) under color of state law” (183). Therefore, as a state actor, UNLV cannot legally deprive Tarkanian from due process. According to the court, individual rights under the Fourteenth Amendment though, do not extend to private entities, such as the NCAA. Therefore, Tarkanian argued that the NCAA’s involvement with UNLV made the NCAA a state actor.

A central tenant to NCAA v. Tarkanian was whether or not the NCAA could be considered a state actor because of the direct involvement with a public university. Tarkanian argued that the rules and recommendations that the NCAA makes to its member institutions, which are state actors, could vicariously translate to the NCAA as being a state actor as well (190). The court disagreed, declaring the NCAA as a private entity only able to threaten sanctions on an institution (191). The NCAA as a private entity is rather a representative of all of its member institutions. As that representative, the NCAA can be at odds with the state when it represents the interests of its members. Thus, the NCAA does not have to follow due process or any individual rights claim. The court believed UNLV, although influenced by the NCAA, does not have to comply with all NCAA ruling or recommendations. The court believed that if UNLV did not want to comply with the NCAA, it could simply have withdrawn membership (198).

The decision on whether or not the NCAA is subject to federal individual rights was brought to court again in NCAA v. Smith. Renee Smith was an undergraduate volleyball player at St. Bonaventure, a NCAA member institution. Smith graduated early and attended a different school, Hofstra for her graduate degree. The following year, Smith changed graduate schools by attending the University of Pittsburgh. Since Smith had not used up her NCAA eligibility as an undergraduate student, she intended to continue playing volleyball at both of her graduate schools. The NCAA denied Smith’s eligibility (154). Smith filed a complaint, claiming the NCAA’s refusal to allow her to participate was a sex violation under Title IX. The complaint argued that the NCAA is subject to Title IX because the NCAA has “controlling authority” over its member institution’s athletic programs (155). The member institutions are federally funded which means the institutions must comply with Title IX. Since the NCAA is comprised of federally funded institutions who pay dues to the NCAA, thus the NCAA “is within scope of Title IX as a recipient of federal funds” (155).
The Supreme Court disagreed with Smith’s claims. The Court stated that despite the NCAA receiving dues from federally funded institutions, it does not equate to the NCAA being a direct recipient of federal funds (155). The decision in *NCAA v. Smith* reaffirmed *Tarkanian*, stating that the NCAA is a private entity that does not have to comply with federal individual rights or Title IX.

Court cases, statutes, and governing bodies’ stances surrounding antidiscrimination and sport eligibility have been discussed. These primary sources of information are the basis for answering the research questions posited in this thesis. The above mentioned primary sources are rich in information but for a more thorough literature review, a discussion of secondary sources is vital. The following section gives a brief overview of the academic and popular press literature covering the justification for the binary classification and its relationship with transgender and intersex athletes.

**The Binary Classification**

Females have historically been stereotyped as the “weaker” sex (Cohen, 2001; Frick, 2011; Reeser, 2005). Despite this, certain types of competition have been dominated by women. For example, coed endurance races between male and females are no stranger to crowning a woman champion. A woman holds the record time in the Iditarod, a woman holds the record for both bicycling and running across the county, and women tend to win 24-hour long running competitions (Shy, 2007). Even though women might dominate in these events, women and men generally compete in different categories.

Adair (2011) notes sex segregation in sport is justified through physical and biological differences between the sexes. These differences are believed to make for an unfair advantage in competitions. For example, female sweat glands are more uniformly distributed across the body and body fat is stored on the thighs, glutes, and breasts. These attributes are the reasons why women are better in endurance running and long distance swimming. Men in comparison are on average ten percent larger than females, with longer arms, bigger legs, larger heart and lungs, and more muscle fiber (Adair). In athletic competitions, the male physical make-up is more conducive for most sporting competitions. Inside this binary classification, male and female, it is ideally believed that there is a level playing field within the male versus male and female versus female based competitions (Coggon, Hammond, & Holm, 2008).
There are four principal reasoning’s for the binary division in athletic competitions stated in Coggon, Hammond, & Holm (2008):

(i) Makes results less predictable
(ii) Potential backlash if females started beating males
(iii) Females would almost always lose and would thus be discouraging for female athletes
(iv) Female and male sports have different nuances

Regardless of these reasons, no athlete or team are or ever can be completely equal, or else little “would be derived from competition” (Coggon, Hammond, & Holm, 2008). Differences in culture, finances, competition, genetics, and a myriad of other factors affect the development of an athlete and a team. According to Adair (2011), there is more variance within each sex than between the sexes.

The potential differences between individuals within the gender can make the lines murky when deciding whether or not a transgender or intersex athlete can compete and in which sex. If a transgender individual wants to transition to their believed physical sex, Reeser (2005) claims that these individuals are transitioning without the motivation of athletic gain. Multiple studies have tested the affects of hormone treatment on individuals who have undergone a sex change and whether or not it creates an unequal playing field. The science behind transitioning is outside the scope of this thesis. Additionally, the literature is too vast to explain the entire physical and biological process of transitioning. Rather, it is just necessary to restate that female to males take testosterone and female to males take androgen deprivation and estrogen supplements for at least two years (Reeser). Testosterone for female to male transsexuals will promote the building of muscle mass and promote fat burning. The testosterone will help aid in creating the lean and muscular physique usually likened to males (Teetzal, 2006).

Male to female transsexuals take androgen deprivation and estrogen supplements which works to store more visceral and subcutaneous fat and decrease muscle mass. It is undetermined whether or not past testosterone effects are muted by hormone therapy. Teetzal (2006) argues that while it may be possible to gain an advantage in elite sporting events after transitioning, “conclusive evidence based on long term scientific studies has not yet been done or fails to show any unfair advantages at the elite level with statistical significance.” Male to female Canadian cyclist Michelle Dumaresq claims she lost twenty pounds during hormone therapy and her blood
testosterone levels were that of the average female (Pilgrim, Martin, & Binder, 2003; Sykes, 2006).

The discussion of the binary classification is relevant in collegiate athletic programs. This thesis focuses on the rights of transgender and intersex student-athletes who are trying to fit into this either/or classification. The past section gave a brief discussion of the justification of the ingrained binary system in athletics. The research questions of this proposal, which are answered in the affirmative, could smear the two different sex’s classification leaving a gray area. Such uncertainty includes transgender and intersex athletes who want the right and protection to fully participate in college athletics. The following section explains and details the methodologies used to answer and discover the answers to the research questions posed.
CHAPTER 3
METHODOLOGY

This thesis was researched and analyzed through legal scholarship. Legal scholarship can be broadly defined as research in law which combines both legal studies and social studies. Such scholarship is distinct from other forms of research methodology in that it is not based on empirical or quantitative data. Legal scholarship distinguishes two main legal research categories: doctrinal and interdisciplinary (Chynoweth, 2008, p. 28). The two categories are not mutually exclusive but rather both lie on a continuum of which legal research can be categorized; at one end is doctrinal research and the opposite end is interdisciplinary research. Both of these methodologies are necessary for a thorough legal analysis. This thesis incorporates both the main legal scholarship methodologies; with the emphasis placed on doctrinal research (Chynoweth, p. 29).

Doctrinal Research

Doctrinal research functions as the source of research that describes law explanations, predictions, and connected human behavior. Legal rules are normative, meaning they are a mandate prescribing what the average person is expected to do or not to do (Chynoweth, 2008, p. 29). Such rules do not predict, or explain human behavior, rather law “dictates how individuals ought to behave” (Chynoweth, p. 29). Thus legal rules are not a moral code or an ethical code but rather a code created by empowered individuals and groups.

Doctrinal research focuses on the question “what is the law?” (Chynoweth, 2008, p. 30). In asking the question “what is the law,” subsequent questions inevitably follow. Such as “why was the law created,” “how was the law agreed upon,” “who the law affects,” and “in what historical context was the law established” (Volokh, 2007). This thesis poses two research questions; (i) “To what extent, if at all do transgender athletes fall under the protection of Title IX?” and (ii) “To what extent, if at all, do intersex athletes fall under the protection of Title IX?” From these two main questions, inevitable subsequent questions follow, such as “how is Title IX connected with athletic programs,” “who does Title IX affect,” “why was Title IX enacted,” and “what is the historical context and justification of Title IX.”
To answer these questions, one must interpret and analyze the legal texts. The three legal texts requisite for this study are Title VII, Title IX, and the Policy Interpretation of 1979. Court cases involving the two main statutes were also included; Voyles v. Davies Medical Center, Grossman v. Bernards Township, Price Waterhouse v. Hopkins, Smith v. City of Salem, Grove City College v. Bell, Miles v. NYU, Kelley v. Board of Trustees, DiMarco v. Wyoming Department of Corrections, NCAA v. Tarkanian, and Cohen v. Brown University.

The legal texts listed above are the most significant sources for this study. Due to the fact that the situation in question is collegiate athletics, it is important to consider the rules and regulations that govern collegiate athletics published by the NCAA. The NCAA’s governance of college athletics has resulted in a complicated set of rules for all institutions to follow. Recently the NCAA released published rules on how to integrate and acknowledge transgender athletes. NCAA’s rules and guidelines were examined and analyzed in a way analogous to a legal text.

The analysis of legal texts in doctrinal research is interpretive and qualitative in nature. It relies on interpretations and qualitative data which are more similar to studies in the humanities. In fact, doctrinal research is neither contingent upon nor validated by empirical outcomes. Chynoweth (2008) describes the differences between the sciences and legal scholarship regarding qualitative data:

Scientific research, in both the natural and social sciences, relies on the collection of empirical data, either as a basis for its theories, or as a means of testing them. In either case, therefore, the validity of the research findings is determined by a process of empirical investigation. In contrast, the validity of doctrinal research findings is unaffected by the empirical world.” (Chynoweth, 2008, p. 30).

Doctrinal research is done through a thorough analysis of legal rules that can be found in statutes and legal cases. Legal rules are then applied to a specific situation or area of study. The legal texts themselves are the main sources of data and research needed to complete a doctrinal study (Chynoweth, 2008, p.29). This research in law attempts to clarify and break down the law in a logical manner. The court cases relevant to this thesis and the statutes listed above are examined to clarify and relate their connection with the specific population in question—transgender and intersex student-athletes.
Interdisciplinary Research

Interdisciplinary research is the combination of two or more schools of thought or academic disciplines. In many types of scholastic research it is necessary to include different perspectives or to integrate different definitions of the same terms. Interdisciplinary research is the type of research which believes multiple perspectives are needed to fully understand information (Chynoweth, 2008, p.30). Therefore, it is often necessary in certain legal scholarship to understand both the legal and social context of the situation in question. This thesis requires an understanding of historical and social context for many of the statutes and laws being analyzed. A full understanding and the purposes of the law will assist in interpreting the law correctly. The law may have been narrowly viewed in the past but has expanded its scope for social reasons. Thus, an external view is often necessary to properly research and understand legal scholarship. In taking ‘what is the law’ and adding research ‘in the law,’ the legal scholar will likely gain a better understanding of the law in question (Chynoweth, p.31).

Interdisciplinary research was taken into consideration in connection with this thesis proposal. Multiple perspectives are useful outside of the specific legal texts. In recent decades, controversial transgender and intersex athletes have emerged into the spotlight giving a perspective only they themselves could tell. Renee Richards, a transsexual tennis player, sued the USTA for her right to play in professional tennis. Years later, Lana Lawless followed Richards’s example and sued the LPGA. Mianne Biagger took a different route by expressing her thoughts to the media and becoming an activist. More recently, 800 meter track sensation Caster Semenya, was questioned by the IAAF for her masculine appearance. Such profiles are needed to add practical examples to this study because this thesis is not just a hypothetical research proposal- transgender and intersex athletes are going to be a part of athletic competition. It is just a question as to how and when they will emerge. In the case of Title IX, the question is whether or not these athletes will receive legal protection in their quest for athletic participation in the US college arena.

Given its emerging nature, the topic of transgender and intersex athleticism has only recently developed into a defined subfield for research inquiry. Peer reviewed journals and press articles will be treated like qualitative data that will help build context and support that the legal texts will not be able to provide. Relevant academic literature and press articles were identified
through searches on SPORTDiscuss, Google Scholar, LexisNexis, and HeinOnline databases. Keywords and phrases used during the search were sex, gender, transgender, transsexual, intersex, gender identity, women in sports, sex verification, Caster Semenya, Kye Allums, Lana Lawless, Mianne Biagger, Sarah Gronert, and Renee Richards. The resulting searches were condensed and screened for only the most relevant and pertinent articles.

**Doctrinal Methodology**

Legal rules can sometimes be vague and ambiguous. Therefore it is hard to have a prescribed and concrete methodology for legal scholarship. As stated above, doctrinal research does not utilize empirical or qualitative data. Chynoweth (2008) argues that legal research methodology is a subjective and argument based type of research that is hard to put in definitive terms. The interpretive nature of legal research that relies on logic and common sense is “rather than in the formal application of a methodology as understood by researchers in the scientific disciplines” (Chynoweth, p. 31). Chynoweth describes three main forms of logic and common sense exercises that can be translated as doctrinal research methodology are deductive reasoning, analogies, and inductive reasoning.

The first main form of logic and common sense is deductive reasoning. For this exercise, the law is applied to a hypothetical situation that can be broken down into deductive logic (Chynoweth, 2008, p.32). In the legal context, deductive reasoning is comprised of a major premise, a minor premise, and a conclusion. The major premise identifies the law and the legal outcome that coincides with the specific situation or research question. The minor premise describes the specific situation or research question. The conclusion states whether or not the law in the major premise applies to the situation in the minor premise and if so, what the hypothetical outcome and effects would be (Chynoweth, p. 32).

The second exercise is the application of analogies. Analogies are probably the most widely used because of their obvious relationship with precedents (Chynoweth, 2008, p.33). Precedents are past legal rulings that are applied to subsequent legal cases. No two cases are ever the same but many can be similar in its argument. Analogy uses the line of reasoning from one specific legal case and applies it to the next similar legal case. The subjective nature of justices of legal cases does not mandate that a similar case will be following the same line of
reasoning. It can be surmised that a case will follow the same thought pattern but it is not necessary, rather precedents and analogy create a framework for the case in question.

The third method is the use of inductive reasoning (Chynoweth, 2008, p.34). Inductive reasoning is used to fill in the blanks when a law does not necessarily address the specific situation. Inductive reasoning usually involves the recognition of the law’s application to the case, even if the law has not previously been applied in the same manner.

The three methods, deductive, analogies, and inductive reasoning, have been applied to the court cases, statutes, and legal texts identified earlier. The main differences are the beneficiaries, who are transgender and intersex athletes. A detailed description of the line of reasoning applied to the different situations and cases is given.

This research study attempts to consider transgender and intersex athletes’ rights in a proactive sense. The emergence of these populations in collegiate athletics will eventually spill over into a potential controversy if precedents have not yet been established through NCAA rulings and federal or state jurisprudence. Thus, the findings here are relevant and timely.

The legal conclusions derived from this research are predominantly a prescriptive claim (Volokh, 2007, p.9). A prescriptive claim suggests how a law should be interpreted, what new statute should be enacted, and how a statute should be changed. A prescriptive conclusion answers the “so what?” question that a reader might ask. In contrast, a descriptive claim suggests how the world is or was, how a law has historically been interpreted, and the laws effectiveness (Volokh, p.9). Mixtures of the two types of conclusions have a better chance of persuading a reader of the importance of the topic. Volokh (p.10) believes that even if the readers disagree with the prescriptive claim, the descriptive conclusion can still be valid and thus “given credit for making the discoveries” (Volokh, p.11). The prescriptive nature of the conclusions to this thesis is applied to transgender and intersex student-athletes and their connection to Title IX. Title IX is the greater power but the NCAA’s role in student-athletes’ rights will be given consideration in the conclusions.

The conclusions drawn from both doctrinal and interdisciplinary research satisfy Volokh’s (2007, p.11) four steps in which to create a legal conclusion, also called a claim. The four steps ask that the claim be (i) novel, (ii) nonobvious, (iii) useful, and (iv) sound. A claim is not highly valued if it does not satisfy the listed criterion. Female student protection under Title IX is an obvious claim because Title IX legal cases explicitly detail the rights and protections
provided to females. By adding twists to such an obvious claim, one can create a nonobvious topic and conclusion. The addition of transgender and intersex students adds a new dimension to Title IX inquires because both populations have been given little to no attention in this regard. There has not been a known legal case in which a transgender or intersex student has asked for Title IX protection. Additionally, the even smaller population of transgender and intersex student-athletes makes this topic unique and nonobvious. This is not to suggest it is impractical or useless but rather the topic has yet to be in the legal spotlight. There is little reason to think that such a case will not be brought to the courts within the next decade.

Transgender and intersex student-athletes and Title IX is a new topic. Thus, the claim analyzed here is hypothetical. Given the lack of precedent, no case law has left the topic unresolved or devoid of loop holes. Rather, it is open to interpretation. This thesis helps fill the dearth. The recent issues regarding transgender and intersex professional athletes outside the US university context will eventually crossover to collegiate athletics. Transgender and intersex student athlete’s connection to Title IX has yet to be explored, leaving room for analysis and relevant arguments to be created.

The usefulness of the topic and conclusions are valuable in both a professional and practical sense. Since the research questions and the resulting conclusions are proactive, the claim is important and valuable to future considerations of Title IX applicability. Volokh (2007, p.1) claims that the courts cite, on average, 500 student-written law review articles per a year. Also, law review articles cite student articles at a rate of 15,000 per a year (Volokh, p. 6). This statement suggests the importance and consideration given to student legal scholarship.

Any claim, descriptive or prescriptive, needs to be sound. Volokh (2007, p.22) suggests using a test suite to validate and to eliminate errors in legal scholarship. A test suite for this thesis composed of hypothetical cases and instances in which transgender student-athletes are claiming protection under Title IX. During the research for this thesis, a list of such instances and plausible cases was generated. The proposed conclusions are tested against these cases to see if the claim is valid and applicable. Past cases, legal precedents, and hypothetical cases test the underlying principles (Volokh, p.25) of Title IX and gender identity case law that is applicable to the research questions in this thesis. The cases need to be plausible, practical, and realistic. Each case will be unique and touch on the different nuances of the research questions posited. It is important to note that challenging cases were developed to test the real strength of
the claims and conclusions reached. These hard cases are the most important in establishing viability and to strengthen the conclusions of this thesis (Volokh, p.26). The three methods of logic and the use of a testing suite were used to establish the conclusions for this thesis. Test cases and the underlying logic of legal scholarship is the primary focus of legal research. However, it is not tantamount to what the actual legal outcome is. The rules, parameters, and nuances of a law or legal case make each case unique. Even an agreed upon understanding of the law can change over time. A caveat in legal scholarship is that judicial opinions and policy decisions can change depending on political situations, changing social norms, and popular opinion. Still, academic legal writing and legal precedents are the main tools used to anticipate a legal or judicial decision (Chynoweth, 2008, p. 35).
CHAPTER 4

ANALYSIS

It should not be presumed that transgender and intersex student-athletes are completely analogous in their pursuit of inclusion under Title IX. Similarities have been drawn but there are obvious differences between the two groups. Transgender is often perceived as a psychological condition in which individuals are born with (Currah, 2006). Transgendered individuals have to undergo physical and hormonal treatment to completely change into their identified sex. Postoperative transsexuals did not exist until very recently while intersex individuals have always been around (Shults, 2005). Intersex individuals are born with an intersex condition while transgender individuals do not have a biological ambiguity. The following legal analysis is divided into transgender and intersex categories, although there is some overlap between the two categories there will be certain differences.

Transgender

A set of hypothetical transgender and Title IX cases was created in order to give examples of possible suits and claims. These examples are important because they illustrate the litigation strategies, the legal precedents, and the possible results that could come forward in such cases. Included in the analysis of these possible cases are the methods described earlier which include inductive and deductive reasoning and analogies. The introduction of the NCAA Transgender Policy and the recent NCAA transgender basketball player, Kye Allums, begs the question whether or not this population of student-athletes garners legal protection. The unknown of such a question makes this analysis timely and feasible.

Male to female student-athlete. A transgender male to female, Sarah, argues that as a self identified female and as a legal female in her home state, she should be allowed to play on the university’s female intercollegiate volleyball team. This young lady has not had sex reassignment surgery or hormone treatment but her state has allowed her to change her gender identity from that of a male to a female on both her driver’s license and birth certificate. Title IX protects the underrepresented sex, which have historically been females. Sarah is legally
considered a female and it would appear that Sarah would be protected under Title IX since she is female. According to *Miles v. NYU*, being transgender and being perceived as a female can grant protection for a transgender male to female student. Although *Miles v. NYU* is set in the academic setting instead of the athletic setting, both are educational institutions that receive federal funding. Sarah, as a female, can receive the benefits and inclusions of being of the protected female class.

Not all states acknowledge gender identity nor recognize any alteration of an individual’s birth sex. As a female in a protected class, it could be surmised that Sarah could legally claim protection under Title IX. States such as California, New York, Washington D.C., New Jersey, Ohio, and Connecticut protect individuals from transgender discrimination both in the court system and through state statutes. For example, New Jersey’s circuit court declared in *Enrique v. West Jersey Health Systems* that “A person who is discriminated against because he changes his gender from male to female is being discriminated against because he or she is a member of a very small minority whose condition remains incomprehensible to most individuals (372).” The court continues by declaring the term “sex” as broader than just biological or anatomical.

In comparison, Renee Richards and Lana Lawless both sued national governing bodies in states that protected their gender identity and won their claim. Had they filed suit in a different state, the outcome might have been quite different. In an unprotected state, Sarah would likely lose her case at the state level because the state does not recognize gender identity or protect transgender individuals. If Sarah filed suit in one of the aforementioned states, she would likely find easier access to protection. A state that recognizes gender identity will give Sarah better access and protection in that state. In federal court, being considered a female in her home state will establish a stronger platform than being a resident in a state where Sarah is still considered male. There is not a federal law or statute that protects gender identity so state level recognition is vital for any state or legal claim.

Being transgender is not fatal to a discrimination case, regardless of the location, as cited in *Smith v. City of Salem*, “a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as
"transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity” (1201). The Smith case was won in the state of Ohio. Smith and its predecessor Price Waterhouse v. Hopkins broadened the definition of sex to include gender identity and transsexuals in Title VII cases. Although the definition of sex under Title IX has not been broadened, Title VII cases are often considered precedents to Title IX cases. With the expansion of the term “sex”, Sarah could be considered a female and thus federally protected.

A relevant second claim could also be made under Title IX against the NCAA. Athletics is one of the few realms where separate but equal still applies. The majority of court decisions, sporting federations, and cultural standards still believe that males would dominate female teams, therefore legitimizing the separation of the sexes allowing for a more equal playing field. The NCAA remains stringent on keeping female teams fully female. To include a male or an individual outside of the ‘traditional’ definition of a female would put the female team at a disadvantage under NCAA rulings. The NCAA does not promote allowing a biological male athlete to compete on a female team but the NCAA has openly allowed a female student-athlete to compete on a male team without the male team receiving any athletic disadvantages. Including Sarah on the female team, according to NCAA guidelines would make the team ineligible for postseason competition. Therefore, the NCAA could be liable for sex discrimination against the entire female volleyball team; the volleyball team and the included transgender female player would be discriminated against because of the team’s non-conformity to the traditional definitions of sex. The NCAA has not been mandated in federal court to adhere to Title IX, yet the NCAA does publicly promote its compliance to Title IX, which implies that they promote discrimination free opportunities for all student-athletes.

Sarah and other transgender and intersex student-athletes may successfully win a claim under Title IX because public and private colleges and universities are a state actor, and government actors are held to stricter standards regarding discrimination (Adair, 2011; NCAA v. Tarkanian). The NCAA maintains it is not a state actor and such position has been reaffirmed multiple times in court since the 1989 Tarkanian case. Yet, both a public and private university can be considered a state actor and thus must comply with federal regulations such as Title IX. A suit against the university claiming sex discrimination could be a successful course of action. It has been successful in the academic setting but not yet in the athletic environment. The NCAA still
positions itself as a private entity that does not have to comply with Title IX (Adair, 2011; *Smith v. NCAA*). Other governing bodies, like the NCAA, have had analogous cases proving themselves to be a private not state entity such as in *San Francisco Arts & Athletics v. United States Olympic Committee*. In court, a transgender student-athlete would have to file suit against the university in order to receive due process laws. The fine line of what defines a state actor or private entity could eventually blur, leaving the NCAA and more governing bodies applicable to due process requirements under constitutional laws.

If the scenario changed, Sarah this time is undergoing hormonal therapy to aid her physical transition into a female. The results of this case would be fairly similar, as Sarah is taking medicine that suppresses her supposed advantages. Again, Sarah is a legal female in her home state. She is also undergoing semi-permanent treatment to transition herself to the gender she identifies herself with. Hormone treatment will decrease any supposed advantage a male might have in athletic competition. Sarah is considered a legal female and under Title IX can still claim anti-discrimination, if she is not allowed to compete on the collegiate female volleyball team. Again, according to *Smith* and *Waterhouse*, her non-conformity to gender stereotypes could allow her to compete on the volleyball team. Her use of hormone treatment would only strengthen her case, as she is seeking to conform to sex stereotypes. According to the recent NCAA rules, Sarah is not eligible to compete in postseason play as a female until after a full calendar year of testosterone suppression treatment. Sarah would have to document her medical treatment to both become and remain eligible for post season play. Including Sarah during her year of testosterone suppression treatment would also make the female volleyball team ineligible for postseason female championships because of the included transgender team member.

**Female to male student-athlete.** The next example involves a female to male transgender, Steve, who wants to play on a male intercollegiate team. Steve wants to play on the basketball team as a male student-athlete. Steve has not started hormone therapy nor has he gone through sex reassignment surgery. Kye Allums was the recent George Washington basketball player who changed his gender identity and legal sex from female to male. Yet, Allums was still a member of the female basketball team. Allums was not taking hormones nor had sex reassignment surgery so the NCAA made no known stance against his full participation. If Steve joined any female team prior to claiming his transgender identity, he would likely find success in whichever
team he played for. As illustrated by Allums, Steve could officially change his gender identity while being on a female team without restrictions.

In a circumstance where Allums or the fictitious Steve wanted to join the male basketball team there would be NCAA conflicts. Since GWU and Steve’s assumed university have both a female and male basketball team, it might for safety purposes be asked that Steve be a member of the female team versus the male team. If Steve’s transition and legal sex status change occurred prior to college, then Steve’s chances of being accepted by the NCAA and the university would increase. If the change occurred during his intercollegiate athletic career, like Allums, it would be more difficult to persuade the crossover from a female to male team.

In reference to Title IX, Steve is a biological female and could, under the current definition of sex, be considered a female and thus receiving Title IX protection. Yet this protection would not likely hold if Steve was attempting to play on a male basketball team or any school where there is also a female team. The Policy Interpretations of Title IX do allow students of one sex to try out for a sport only offered to the opposite sex (Buzuvis, 2011). This is limited to noncontact sports and to the “underrepresented sex.” For example if Steve was trying out for football where there is not a female team, Steve would have a chance to try out but could be excluded due to safety concerns. There have only been a handful of female NCAA football players. It is a safety and health concern for a female player to be on the field. Although Steve maintains his male gender identity, until his physical features and abilities line up with his gender, Steve probably would not have a chance to play football.

As a member of the male gender, Steve’s chances of being under the auspices of Title IX are questionable. Although Title IX is an anti-discrimination piece of legislation, males have not won Title IX lawsuits (Kelley v. Board of Trustees). While males have been the winners of Title VII cases; they have yet prevailed in Title IX litigation. The original purpose of Title IX was to improve and allow opportunities for the underrepresented sex in the education setting, leaving males yet to benefit from Title IX.

Steve may undergo hormone treatment and still be a member of any male intercollegiate team according to the NCAA. His exclusion from a male team could legitimately be based on skill level, fitness level, and safety concerns. Any other reason would be sexually discriminatory and liable for recourse under Title IX. Once Steve undergoes hormone treatment, he is not
allowed to be a part of any female collegiate team because of the possible advantages testosterone would give Steve and thus the team.

Finally both Steve and Sarah could receive a DSM IV diagnosis of gender identity disorder (GID) and therefore claim anti-discrimination according to their mental health not physical disabilities. GID is not protected federally from either the Americans with Disabilities Act (ADA) or the Federal Rehabilitation Act (FRA). Most state legislation and courts follow the interpretation of these two Acts both of which exclude GID. Four states consider GID a disability and protect transgender individuals with an official diagnosis (Phadke, 2006). Yet, claiming GID will not allow Steve or Sarah to claim sex discrimination under Title IX rather their focus would have to rely on disability discrimination which Title IX does not include.

**Intersex**

Intersex student-athletes will have certain similarities in their legal claims. Not all intersex student-athletes will receive the same media attention that Caster Semenya or Sarah Gronert has received. Most intersex conditions offer little athletic physical advantages or disadvantages in competition. The majority of conditions affect sexual organs and processes which do not directly affect physical feats. Yet, because there can be significant physical and hormonal differences which will attract attention and possible sex based discrimination, intersex student-athletes will have to claim Title IX protection in court.

In the only known court case directly involving an intersex female, the court did not allow the intersex prisoner to be granted constitutional protection because this person was of “quasi-suspect” class in *DiMarco v. Wyoming Department of Corrections*. On a larger spectrum, it could be possible for an intersex individual to claim analogous with that of females in past court precedents. Being a born female is determined solely without choice, it is an “accident of birth” of which the courts have in the past few decades have upheld antidiscrimination cases because of this lack of choice in birth sex (Adair, 2011). Intersex conditions are also without choice and are an “accident of birth” in which past legal precedents enlarging the scope of female rights could pass on to intersex individuals.

Due to the lack of any intersex federal, state, or local litigation other than *DiMarco*, it is daunting in trying to attempt to explain legal strategies of an intersex student-athlete. Yet there are certain claims which appear relevant and feasible. The addition of an intersex student-athlete
is not likely to skew a female or male team’s dominance. Any exclusion of an intersex student-athlete would be sexual discrimination. An intersex individual is by definition not fully male or not fully female. Yet, sex is not biologically just either or. Intersexual conditions have been around since the beginning of time. Chromosomal and sexual development differences are natural and not socially constructed. The binary structure of male and female is socially constructed. It lies outside oneself if he or she is determined to have an intersex condition.

Title IX protects sex discrimination and thus the underrepresented sex. Intersex student-athletes do not lack “sex” and as thus should be under the auspices of Title IX. Increasing the chance for protection is the fact that being intersex is not male or female thus intersexuality could be considered an underrepresented sex. Intersex is a sex but not a socially recognized sex which makes them underrepresented. Females may have been the original beneficiaries of Title IX but intersex students could be the new underrepresented class.

The courts are not in concord on what constitutes “sex.” Historically, only the clear-cut binary model has been upheld in court. Although, occasional transgender individuals have found small legal successes in court by broadening the scope of “sex” with the Title VII cases of Waterhouse and Smith. Title VII has protected transgender individuals because of their lack of conformity to any one sex. This reasoning could apply to intersex individuals as well; since intersex individuals to not biologically conform to the binary system. Their gender identity also may be incongruent with their phenotypical appearance. Sexual discrimination on either their biological or gender identity differences would make an intersexual student-athlete prime for a Title IX claim.

A creative litigation strategy could be used combining Title VII’s employment protection and Title IX educational protection. Title VII’s definition of sex and its associated legal precedents are similarly used in Title IX cases. Title VII specifically dictates it is illegal to discriminate against sex by any employer. According to Naismith v. Professional Golfers Association (PGA), an employer can be an athletic federation, which would allow an athlete participant to sue regarding discriminatory conduct (Phadke, 2006). For example, in Richards v. United States Tennis Association (USTA), it was held that USTA’s discrimination violated not only Title VII but New York’s similarly worded employment discrimination statute (274). Like PGA and USTA, the NCAA is a large athletic governing body. It is has not been legally determined whether or not a student-athlete who is participatory athlete, could sue on the grounds of
employee discrimination. A university is held to Title VII and Title IX rulings and would likely be a more successful suit for employee discrimination than the NCAA. Student-athletes are not paid employees but do receive monetary benefits and payments from being a student-athlete at a NCAA member university. Like an employee, a student-athlete must abide by rules and regulations such as an attendance policy, mandatory meetings and tutoring hours, volunteer service, strict dress codes, and adherence to practice hours set forth by the school and NCAA. Scholarship and partial scholarship athletes can receive tuition coverage, books, rent, laptop, and living stipends, free healthcare, clothing and shoes, and discretionary travel funds. Such payments for attending practice and competing in collegiate athletics could translate into the student-athlete being considered an employee from the participating university. As an employee, a student-athlete can obtain protection from Title VII for sex discrimination. The scope of Title VII often transfers to Title IX, as long as the setting is in education and there is a sex discrimination claim, thus a possible claim could be made by an intersex student-athlete under Title IX.

Adair (2011) believes that the courts could not reasonably bar intersex athletes “in the name of preserving fair competition for women.” Discrimination against intersex student-athletes is not as obvious as discrimination against females because the intersex population is posited at 1.7% in the United States (Fausto, 2000). Even with this small percentage, the individuals who actually are cognizant of their condition or those that have an extreme intersex condition is a significantly smaller percentage. Such a small percentage would make anyone with an intersex condition a minority and in Title IX terminology, underrepresented in the educational setting.

Like transgender individuals, intersex individuals could claim a disability. Intersex individuals could claim disability discrimination because of their development sexual disorder (DSD), although this claim will not likely further any student-athlete participatory claim. Intercollegiate sports and NCAA participation is not a right but rather a privilege given to those that are athletically gifted. Try-outs and recruiting evaluates the talent and only those that are physically capable are selected. The right to participate in athletics is not a fundamental right (Adair, 2011) so a disability claim would not be as advantageous in a Title IX claim. By admitting to a physical disability, an intersex individual is likely decreasing their chances of full participation. Again, a disability claim is not protected under Title IX; instead one would have to try to make a claim under a disability act such as the ADA or FRA.
In *DiMarco v. Wyoming Corrections*, the plaintiff DiMarco used the US Equal Protection Clause in her defense. This claim failed in court and would likely fail if used in an intersex or transgender student-athlete case. In order for an equal protection claim to be viable, there must be proof that one is being “treated differently from others similarly situated” (1196). An equal protection claim requires that the plaintiff suffered an interference of one’s fundamental rights. Additionally, the plaintiff must be of a suspect class and their needs to be legitimate state interest. In such a case, it would be difficult to prove that one is being discriminated against because sport participation is a recreational hobby and intercollegiate sports are only for very talented individuals. Intercollegiate sport participation is limited due to try-outs, academic standing, financial situations, skills, team needs and limitations, all which equate to a small portion of students who can participate. The evaluation and recruiting necessary to get on a team can leave someone suspect of discrimination but it would be difficult to prove. Sport participation is not a right, it is a privilege. Being denied participation is not infringing on an individual’s rights and it also not of the state interest. Intersexuality according to *DiMarco*, is not a suspect class. The court believed there was no proof that having an intersex condition is a disability nor is it a class that has been historically discriminated against, thus being a part of the intersex population, despite its minority status, is not a member of a suspect class (1197). Instead intersex and transgender individuals are considered a part of a quasi-suspect class, which does not have the same legal protection as a true suspect class. A transgender student-athlete case would follow the same line of reasoning and would not be granted protection under the equal protection clause.
CHAPTER 5
CONCLUSION

This thesis asked whether or not transgender and intersex student-athletes fall under the protection of Title IX. The answer after a thorough review of literature and case law is yes these individuals do garner protection from Title IX. The broad definition of “sex” from current transgender case law shows that “sex” is not legally bound to the binary construct of male or female. Thus, Title IX would include protection for those with different gender identities, transsexuals, and intersex student-athletes. Such a case has yet been decided in court but these questions are ripe for disposition. Recent athletic sensations and governing body guidelines have expressed interest and questions regarding transgender and intersex eligibility. Inclusion of these individuals can be strengthened by successful litigation through Title IX.

Phadke (2006) declares that it is likely for a court to “legitimately interpret its provisions to extend to protection to transgender students” in accordance with Title IX. Yet, it is unclear how the most influential transgender case, Smith, will impact future litigation. It can be suggested that because of the broad interpretation of sex discrimination in Smith, that eventually Title VII and Title IX will include protection for transgender individuals. The outcome of Smith furthers the purposes of Title IX by guaranteeing student protection and supporting anti-discrimination practices. Therefore, following the precedent set by Smith; the courts could further and even expand the protected population of Title IX recipients.

The lack of precedent in a transgender and intersex case reaffirms the power the courts have in interpreting laws and statutes. Limiting transgender and intersex protection would only diminish the power and decrease the scope of Title IX. Phadke (2006) states that excluding a population such as transgender or intersex students only “frustrates its (Title IX) stated purposes.” True, the original purposes of Title IX were to protect females but laws are not stagnant. Rather, they are dynamic and changing in their purpose. Such purpose can and does change over time as new challenges and questions are raised in an ever-changing society. There is no reason to think that Title IX is excluded from the current changing society.
The courts should follow the precedent set in *Smith*. However, no court since *Smith* in 2004 has upheld or broadened the interpretation of the term sex. Hopefully new court cases will strengthen and broaden this precedent. Transgender and intersex individuals will garner more protection when Title IX comes to include multiple classes of individuals, not just females.

Failed bills have been introduced to Congress in an attempt to amend the paramount anti-discrimination Civil Rights Act, the Act in which Title VII and Title IX fall under, to prohibit discrimination against gender identity, sexual orientation, and sexual preference. All attempts have failed and none have been enacted. Leaving the judicial branch and individual state governments to enact and protect this minority of individuals. Until further federal protection is offered, transgender and intersex student-athletes should seek out Title IX protection and other legal protection at local or state levels where gender identity is protected (Phadke, 2006).

California is one of the few states in the country where an individual can change their legal sex status as well as their birth certificate sex. California legislation also protects the rights of transgendered individuals. Primarily, California’s Unruh Civil Rights Act includes gender identity, transgender, and postoperative transsexuals as a protected class. Lana Lawless brought suit to the LPGA in the state of California, declaring the LPGA violated the Unruh Act by excluding her from competition, denying Lawless’ from full and equal access to accommodations, advantages, and privileges because of her transgender status (*Lawless v. LPGA*). Similarly, if a transgender student-athlete felt he/she was being discriminated against, it could be brought to court that the NCAA or university in question was unlawfully discriminating. A successful case would strengthen the transgender claim to Title IX protection because of the shared anti-discrimination the two acts share.

In contrast to California’s liberal take on transgender and sex status, many states provide examples of negative case law concerning transgender rights. Utah’s District Court has shot down cases involving transsexual discrimination declaring that Title VII was never meant to include transgenderism or sexual orientation. Utah like Texas, Ohio, and Florida interpret the term sex narrowly. The precedents set forth by *Smith* and *Waterhouse* are not being followed (Phadke, 2006). These states would not be the ideal place for a successful transgender anti-discrimination case. Picking a more liberal state will increase the likelihood of transgender protection under Title IX or any other anti-discrimination statute.
The courts have rarely had the chance to address the issue of an intersex individual’s protection much less the chance to explore intersex student-athlete protection under Title IX. It has been suggested by some articles (Adair, 2011; Frick, 2011; Phadke, 2006) to eradicate sex segregated sports that are based on “arbitrary gender distinctions” (Adair). In a utopian world, a lack of sex distinction in sports would erase the troubles surrounding sex discrimination in athletics. Inclusion of transgender and intersex individuals would be assumed (Buzuvis, 2011; Phadke). In reality, doing away with separate sporting spheres would eventually lead to a decrease of women participating in coed sports because inevitable rules would be created by teams around the country allowing only the fastest and strongest to earn a spot on a team. This system would most likely be rigged to exclude many female athletes.

It has also been written that the gender gap in track and field is shrinking (Frick, 2011). Frick states that the decreasing gap is not due to biological differences or psychological predispositions but rather the socialization of boys and girls is more similar today than ever in the past. These conditions, increased opportunities for women in athletics, and significant rewards for women athletes have motivated women to train just as hard as male athletes (Frick). If the gender gap continues to shrink as Frick posits, it is not out of reach to believe that in the future, sex segregation in sports will become antiquated. Instead divisions might be based on athlete weight and size. The gap may be shrinking but currently, there is still a large enough gap that most would not consider desegregating sports.

The NCAA remains one of the most important forces in intercollegiate athletics. The organization created a Transgender Policy in September 2011. This policy is new, and thus it remains unseen how this policy will be enacted at the member institutions across the country. Encouragingly, the previous “Current Transgender Policy” released in 2009, prior to the official policy, explains the grounds for the future creation of the policy and the contacts in which information and questions can be directed. The NCAA Office of Inclusion has created Gender, LGBT, and Minority officers but these offices were established prior to the official policy and it is unknown whether new offices and what procedures are in place to guarantee the inclusion of transgender student-athletes in response to the new policy. The official policy does not detail the specifics of inclusion nor how enforcement will be handled. It will be interesting to see how the first year of this policy is handled and if there is any increase in transgender student-athletes participants.
If the NCAA or any athletic governing bodies decides to conduct gender verification in the future, it should adopt clear cut policies that incorporate chromosomal characteristics, physical features, and the athlete’s gender identity. Inclusion of the athlete’s gender identity is important so that the athlete is competing and training with his/her like gender. Broadening the definitions of male and female gender identity should not be an intimidating task, rather it should be welcomed. Everyone has the right to express themselves accordingly in a safe and healthy manner. The past century has been marked with expanded rights for females; maybe the current century will mark the protection of gender identity, intersex, and transgender individuals.

Transgender student-athletes have the ability, thanks to modern medicine, to physically and hormonally change their body to the gender they align to. It should never be mandated or expected that surgery or hormonal treatment be administered. There are risks with any type of physical alterations; sex reassignment surgery is no different. Male to female surgery can cause loss or reduction of sexual feelings due to severed nerves. Fee, Brown, and Laylor (2003) suggest counseling before any sort of altercation be undertaken. In fact, not every transgender individual wants to undergo sexual reassignment surgery. The cost and the irreversible social, physical, and emotional changes are not for everyone. Gender dissatisfaction and being transgender is not a one size fits all. Each individual has different degrees of transgender. For some, the sex reassignment surgery is satisfying. The famous Renee Richards found success in her transsexual status but she told Fee, Brown, and Laylor (2003) that the decision for surgery was not easy, “I made the decision after a lot of soul searching. Hopefully, with the progress being made in psychopharmacology, such drastic moves as sex reassignment surgery will not be necessary for everyone.”

Mike Penner, a long time sportswriter for the Los Angeles Times, fully transitioned to a female in 2007 (Friess, 2009). Penner transitioned into Christine Daniels. Daniels’s new public identity shocked the sport journalism world and her story was featured in Sports Illustrated. Daniels seemed to be a success story for those who want to socially transition to a different gender. Daniels admitted to SI (Friess, 2009) that the urge to be female began as a child, “We are born with this. We fight it as long as we can, and in the end, it wins.” Yet, only a year later, Daniels returned to work as Mike Penner once again. An estimate from the Community Counseling Center in Las Vegas reports 5% of their transgender patients revert back (Friess).
Penner did not undergo irreversible sex reassignment surgery; rather he had only privately and publicly changed his gender. Fully transitioning from one gender to another, whether surgically or not, can be accompanied by a loss of friends, family, and jobs. For those that do officially change their gender, they are taking a great risk and step in their life. It is not an easy decision and is one that should be respected. The last thing a transgender individual needs to stress about is his/her athletic status. A transgender student-athlete who has changed their gender identity should be respected and given the opportunity to compete and practice with those in their new gender. It is part of the process of transitioning and should be welcomed by those in administrative positions. The legal system that protects individual’s rights should honor this change in status and protect the individual whether the individual is considered a male or female. Any person in society and any student attending an institution of higher education should receive the protection given to others, regardless of gender identity.

Acceptance and understanding of the growth of transgender is necessary for athletic governing bodies and for the courts. The best solution is to accept a greater scope of gender identity. This population will only grow with the increase of states including gender identity into protected classes and sex discrimination laws. Intersex individuals need to be accepted and understood socially, legally, and in the athletic world. Although their prevalence in the athletic setting is small, they are a force not to be ignored. This population of individuals deserves to receive the same protection as any other gender or sex receives. If an intersex student-athlete finds themselves legally challenging exclusion from intercollegiate competition, the court should “seize the opportunity to incorporate intersex people” into a protected class from sex discrimination (Adair, 2011). The coming 2012 Olympics will most likely cast media attention to Caster Semenya who is again eligible to compete. The results of her first potential Olympic appearance will garner attention both to herself and to her intersex condition. Such spotlight could help change the perception and acceptance of intersex athletes and their pursuit to compete as their identified gender.

It would behoove the courts and legal system to be proactive concerning both transgender and intersex individuals. The courts should take the first chance possible to strengthen and broaden the rights of transgender and intersex individuals in the future. Title IX is such a powerful piece of legislation that receiving protection under Title IX will cross over into other
Title IX is the best piece of legislation to protect both transgender and intersex student-athletes.

Despite the careful analysis of legal precedents and history utilized in the research for this thesis, there are weaknesses and a few missing pieces. The lack of transgender and Title IX cases creates a lot of forecasting in how a claim would actually be decided and argued in court. The only known case involving individual rights and intersex is DiMarco v. Wyoming Corrections. Being the only case, makes it daunting to predict how a very specific Title IX and intersex sex discrimination case would be argued. Although an acknowledged part of legal scholarship is conjecture and predictions based on past precedents, there is no guarantee that a legal case’s outcome will be similar to these predictions. When in the future such a case comes about, the social and legal situation of transgender or intersex student-athletes might be different thus making this conclusion void. This dearth of legal precedent and acknowledged rights to this segment of the population makes it hard and overwhelming to predict the future.

Additionally, there is such a large spectrum of individuals that fall under the transgender and intersex category that it is hard to imagine a single clear cut rule that will fairly be applied. Despite the ideal of a simple and encompassing rule, it is likely that these individuals will be dealt with in the athletic, academic, and legal system on a case by case basis. The varying legal rights that are afforded in different states, the technological advances in medicine, and social stigmas are so broad that it is hard to imagine that one rule or law will elevate these individuals to the same legal rights as the general population. The United States has been overcoming racial and female discrimination for over a century and although discrimination is less than it ever has been, it is still an issue in certain environments. Gender identity, transgender, and intersex individuals despite any legal arguments, have a long way to go to end discrimination.

Finally, a weakness lies in the educational background of the author of this thesis. Despite immersing herself in transgender and intersex law, she is not a law student. This admission means that most likely there are points and ideas which are not valid enough to be considered a legitimate claim in court. This research paper could have been strengthened by the knowledge a law student would have in supporting and fleshing out any argument and identifying loopholes.

A future extension of this thesis should be done after the 2011-2012 academic year. This will be after the first year of the NCAA’s official Transgender Policy implementation. It will be
interesting to see the outcome of this policy; whether there was an acknowledged increase of transgender student-athletes and how their integration was handled. Also, it will be interesting to see if there is any increase in awareness of intersex student-athletes as an aftereffect of the transgender policy. Another future extension of this thesis would be ideal after more conclusive legal precedents have occurred in both the transgender and intersex category. A specific sex discrimination Title IX case involving athletics is not eminent in the near future but a case in the academic setting or involving Title VII can strengthened future transgender and intersex claims and thus establish more backbone to this thesis’ argument.
APPENDIX A

Title IX, Education Amendments of 1972

(Title 20 U.S.C. Sections 1681-1688)

--- Privacy and Security Statement ---

--- DISCLAIMER ---

Section 1681. Sex

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both
sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets
this section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine
this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy
in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations
this section shall not apply to membership practices --

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association; Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences
this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institutions of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex
participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined.

For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college or department.

Section 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned
has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 1683. Judicial Review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Section 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity; but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Section 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.
Section 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Section 1687. Interpretation of "program or activity"

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributed such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section2854(a)(10) of this title, system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (l), (2) or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 if this title to such operation would not be consistent with the religious tenets of such organization.

Section 1688. Neutrality with respect to abortion

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.
REFERENCES


Kelley v. Board of Trustees. 35F. 3d 265 (1994).


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BIOGRAPHICAL SKETCH

Dena Welden was born in San Diego, California but was raised in Las Vegas, Nevada. Like all Las Vegas families, the Welden family lived in one of the large and glitzy casinos on Las Vegas Boulevard. Dena’s family was very religious, thus she was baptized in the Bellagio fountain and attended Sunday School at the Hard Rock every Sunday night. Education was very important to the family too, Dena and her sister started bartending school while being tutored in card-dealing at night. Adolescence was spent learning the ropes out on the Strip itself such as which pawn shops to go to, learning the difference between techno, jungle, trance, and house music, listening to Wayne Newton, and finally perfecting Elvis impersonations. Although Dena had a wonderful gig dealing blackjack at the Sands, she passed it all up to go to college. She graduated from the University of Nevada, Reno with a degree in History and Spanish. Two very useful subjects, of which Dena soon realized she would have to go back to school and learn something a little more practical. Dena is graduating from Florida State University in the Fall of 2011 with her MS in Sport Management. This fall semester and beyond, she will be the new Assistant Track Coach at UNR.