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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

In Re SELINA SOULE, a minor, by Bianca Stanescu, her mother,
CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother,
ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother, and
ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,
Petitioners.

On Petition from the United States District Court
for the District of Connecticut
Civil Case No. 3:20-cv-00201
(Hon. Robert N. Chatigny)

**PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

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Petitioners request oral argument

CORPORATE DISCLOSURE STATEMENT

Petitioners are four high-school female student athletes, suing by their mothers. Thus, they have no parent corporation or stockholders.

/s/ Roger G. Brooks
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Dated: July 6, 2020

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STATEMENT OF JURISDICTION

Petitioners, four high-school female student athletes, filed suit by and through their mothers in the United States District Court for the District of Connecticut, under Title IX, 20 U.S.C. § 1681, *et seq.* and its interpreting regulations, to vindicate rights protected by federal law.

The district court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Plaintiff-Petitioners claim that a policy allowing male athletes to compete in girls' divisions based on a claim of transgender identity deprived Petitioners of equal opportunities in athletics, in violation of Title IX. The trial judge *sua sponte* ordered counsel for the female athletes not to call biologically male athletes "male" but rather to call them "transgender females," accused counsel of "bullying" for using the word "male," prejudged "what the case is about," and invoked "science" that is nowhere in the record to justify his order.

Petitioners asked the trial judge to recuse himself pursuant to 28 U.S.C. § 455(a), and he denied that motion. This petition asks whether the trial judge's impartiality might reasonably be questioned, and thus whether this Court should direct the trial judge to disqualify himself.

STATEMENT OF THE CASE

Petitioners, four female student athletes, petition this Court for a writ of mandamus to the United States District Court for the District of Connecticut. This petition arises out of the Honorable Robert N. Chatigny’s decision denying the female athletes’ motion to disqualify. Add.001–2. Petitioners seek a writ of mandamus directing Judge Chatigny to disqualify himself because his impartiality “might reasonably be questioned.” 28 U.S.C. § 455(a).

A. The theory of Petitioners’ lawsuit

Selina Soule, Chelsea Mitchell, Alanna Smith, and Ashley Nicoletti are female athletes who compete in interscholastic girls’ track and field at their Connecticut high schools. All four train hard to shave fractions of seconds off their race times—pursuing dreams of competing in state and regional meets, standing atop the winners’ podium, and perhaps even securing college athletic scholarships. But all four are seeing those dreams dashed as their league and their schools force them to compete—and lose—against biologically male athletes.

Under a policy adopted by the Connecticut Interscholastic Athletic Conference (“the Policy”), biologically male athletes can compete in athletic competitions demarked for girls based solely on their “gender identification . . . in current school records and daily life activities” in school. Add.074. In the past three seasons, two male athletes have taken 15 girls’ state-championship titles and more than 85 slots in

exclusive higher-level competitions. Add.075. In seven important state-level events, and considering both boys' and girls' competitions in those events, male runners won 13 out of 14 state championships; a female runner just one. Add.084.

Title IX prohibits federally funded educational programs from discriminating against women, including in athletic offerings. Petitioners filed a lawsuit against five schools and the CIAC alleging that they violate Title IX by providing athletic opportunities separated by sex—and then letting male athletes compete against female athletes in their events and take numerous victory and advancement opportunities from females. Add.055–103. The Policy denies girls equal “opportunities to engage in . . . post-season competition.” *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 289 (2d Cir. 2004) (quoting 44 Fed. Reg. at 71,416). The Policy also “places a ceiling on the possible achievement of the female [athletes],” and “[t]reats girls differently regarding a matter . . . fundamental to the experience of sports—the chance to be champions.” *Id.* at 295.

Factually and scientifically, Petitioners' claim is exclusively about human biology and the substantial advantage in physical capabilities that the bodies of male humans enjoy after passing through even early stages of male puberty. In connection with Petitioners' motion for preliminary injunction, Petitioners submitted an expert declaration that detailed these advantages supported by extensive citations to

scientific literature. Add.147–211. Gender identity is objectively irrelevant to the deprivation of equal opportunity inflicted on women and girls by competition against males because it is irrelevant to the physiological advantages in athletic capability enjoyed by male bodies over comparably gifted and trained female bodies.

Legally, Petitioners contend that gender identity is also irrelevant to the Title IX claim that Petitioners have chosen to bring. This is because—as the United States Department of Justice has explained in detail in a brief signed by the Attorney General, Add.235–47— Title IX and its implementing regulations concern themselves with and protect the rights of what the Supreme Court has recognized are the “immutable” categories of male and female defined by sexual biology, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality), not by felt gender identity, sexual attractions, or social roles.

To present this science and this legal argument coherently, Petitioners must refer to the two athletes who have taken opportunities from girls in Connecticut in the way that is relevant to physiology and to Title IX: by their sex. It is undisputed that biologically, these two individuals are male.

B. The trial judge orders counsel to refer to male athletes as “transgender females.”

The two male athletes who have taken numerous track victories and opportunities from girls in Connecticut sought and were granted permission to intervene, over Petitioners’ objection.

During the intervention hearing, Petitioners’ counsel explained that for three years, his clients had “faced competition from male athletes,” Add.028, and that part of the female athletes’ requested relief was an order requiring school records to be corrected to reflect how the girls would have finished “absent the participation of a male competitor.” Add.025. Following that discussion—acting *sua sponte*, without hearing argument, and rightly predicting that the order would “cause some consternation for [Petitioners],” Add.029—Court ordered that Petitioner’s counsel “*will not refer to the proposed intervenors as ‘males,’*” but rather “as ‘transgender females.’” (Tr. 26, 29 (emphasis added).) (Hereinafter, “the Order.”)

The trial court asserted that Petitioners’ counsel would not “surrender any legitimate interest or position if you refer to them as transgender females,” declaring that “this isn’t a case involving males who have decided to run in girls’ events. This is a case about girls who say that transgender girls should not be allowed to run in girls’ events.” *Id.* “So going forward,” the judge concluded, “we will not refer to the proposed intervenors as ‘males’; understood?” *Id.*

The trial court declared that its Order was “consistent with science, common practice and perhaps human decency,” Add.032, and voiced its view that calling the individual intervenors “male”—although they were born and inevitably remain biologically male—would be “bullying” and “very provocative,” Add.029, 032.

When Petitioners’ counsel twice tried to respond, the judge twice insisted that counsel first acknowledge he understood what had already been ordered. Add.030. When counsel was finally allowed to speak, he explained that “the entire focus of the case has to do with the fact that male bodies have a physiological advantage over female bodies that gives them an unfair advantage [in] competition.” *Id.* Counsel was “happy to use” the proposed intervenors’ preferred names, but he was concerned that he would not be “adequately representing” his clients or “accurately representing their position in this case as it has to be argued” in the trial court “and all the way up” if he “refer[red] to these individuals as ‘female,’ because that’s simply, when we’re talking about physiology, that’s not accurate.” Add.030–31. Counsel was “not sure that [he could] comply with that direction consistent with vigorous representation” of his clients’ position. Add.031.

After confirming that counsel was “done,” the trial judge reaffirmed his Order that counsel “must refer to them as ‘transgender females’ rather than as ‘males.’” “Referring to these individuals as ‘transgender females,’” the judge asserted, was “consistent with science,

common practice and perhaps human decency.” Add.031–32. “To refer to them as ‘males,’ period,” was “not accurate, certainly not as accurate.” *Id.*

“So if you feel strongly that you and your clients have a right to refer to these individuals as ‘males’ and that you therefore do not want to comply with my order,” the judge continued, “then that’s unfortunate.” *Id.* And if counsel continued to believe it was “a problem,” then “maybe we’ll need to do something” about it. *Id.* Finally, the judge suggested, “Maybe you might need to take an application to the Court of Appeals.” *Id.*

In subsequent colloquy, the trial judge acknowledged that counsel was not prohibited from mentioning the fact that the two athletes who have taken victory and advancement opportunities from girls including Petitioners have male bodies, but did not relax his prohibition on referring to them as “male.” Add.034.

C. Petitioners move to recuse based on appearance of partiality.

Petitioners moved to disqualify the trial judge under 28 U.S.C. § 455(a) on the grounds that multiple aspects of the court’s Order and comments evinced prejudgment and partiality for the reasons explained in Section I, below.

D. The trial judge denies the motion in a cursory opinion that further casts doubt on his impartiality.

The trial judge denied Petitioners' motion via a minute order that contained no citation or discussion of relevant legal precedent. Add.001–2. The judge asserted again his belief that ordering counsel not to refer to the male intervenors as male would “entail no concession whatsoever relating to the merits of the case,” and counsel “would still be able to refer to them as ‘biologically male’ with ‘male bodies.’” *Id.* “They just couldn’t refer to them as ‘males, period.’” *Id.* In fact, the court did not use the word “biological” in his order during the hearing, nor state that counsel could refer to the intervenors as “biological males.” App.029, 032–33.

Attempting to side-step Petitioners' contention that—contrary to the court's assertion—their use of the word “male” is indeed the scientifically accurate term for the reproductive sex of these individuals, the court hypothesized that “objective members of the public would readily understand the ‘science’ [he] referred to is not the science relating to [that] issue . . . but the science that tells us calling transgender girls ‘males’ can cause significant mental and emotional distress.”

Continuing, the judge asserted without explanation that it was “unpersuasive” that zealous advocacy or the Constitution required that Petitioners' counsel be allowed to refer to the male intervenors as male.

Add.002. “[O]bjective members of the public,” he asserted, “would agree.” *Id.* No relevant law is cited.

REASONS FOR GRANTING THE WRIT

28 U.S.C. § 455(a) requires recusal if a reasonable person, knowing all the pertinent facts, would question a trial judge’s impartiality. That standard is satisfied here. Petitioners’ factual and legal claims under Title IX are based on physiological differences between male and female athletes and supported by an expert declaration. Nothing in Title IX suggests that Petitioners’ claims—that women have been denied equal opportunities in athletics—turns on someone’s belief about their gender identity. Yet the trial judge requires Petitioners’ counsel to speak in terms of gender identity rather than biological sex.

By prohibiting Petitioners’ counsel from referring to male athletes as male, and requiring counsel to refer to male athletes as transgender females, the trial judge gave the appearance that he had prejudged Petitioners’ scientific evidence and their legal claims. And by asserting that counsel’s reference to male athletes as male constituted “bullying” and violated “common decency,” the trial judge ignored common English usage as demonstrated by numerous scientific and lay dictionaries. A reasonable observer, aware of the judge’s comments and order, would question his impartiality. Accordingly, the Court should grant the

petition and order that this case be assigned to a different judge on remand.

Relevant Legal Standards

A. Recusal

“Title 28, United States Code, section 455(a) provides that ‘[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.’” *Ligon v. City of New York*, 736 F.3d 118, 123 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014) (per curiam). “This statute embodies the principle that to perform its high function in the best way justice must satisfy the appearance of justice.” *Id.* (cleaned up).

“Notably, under § 455(a), recusal is not limited to cases of actual bias; rather, the statute requires that a judge recuse himself whenever an objective, informed observer could reasonably question the judge’s impartiality, regardless of whether he is actually partial or biased.”

United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000). On review,

a court of appeals must ask the following question: Would a reasonable person, knowing all the facts, conclude that the trial judge’s impartiality could reasonably be questioned? Or phrased differently, would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?

Id. (cleaned up).

Recusal is regularly based on a single statement or conversation; no pattern is necessary to create this sort of doubt. *United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995), *overruled on other grounds by Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001) (court mandated recusal though “aware that we are focusing on one sentence out of volumes of transcripts”); *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001) (mandating recusal where judge made short comments to the press defending her order). This “standard is designed to promote public confidence in the impartiality of the judicial process.” *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (cleaned up). “And as other circuits have correctly noted, if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.” *Ligon*, 736 F.3d at 124 (cleaned up).

B. Mandamus

“The common-law writ of mandamus is codified in the All Writs Act.” *In re United States v. Manzano*, 945 F.3d 616, 622 (2d Cir. 2019). The writ has three conditions. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). “First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.” *Id.* at 380–81 (cleaned up). “Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable.” *Id.* at 381 (cleaned up). “Third, . . . the issuing court, in the exercise of

its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Id.*

“These hurdles, however demanding, are not insuperable.” *Id.*

“This court has long since taken the position that there are ‘few situations more appropriate for mandamus than a judge’s clearly wrongful refusal to disqualify himself.’” *In re Int’l Bus. Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) (quotation omitted) (“*IBM I*”).

I. The trial court’s statements and Order so seriously compromised the appearance of impartiality that recusal was required under 28 U.S.C. § 455(a).

Matters pertaining to gender identity are important, complex, and controversial. Indeed, the Supreme Court recently identified this subject as one of “profound value and concern to the public” in which free speech rights are of the highest importance. *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up).

And words matter. References to individuals as “transgender females” obscures and rejects the biological binary that Petitioners contend is the concern of Title IX and central to their injury. More, it is a declaration that, as between subjective gender identity (female) and objective reproductive biology (male), the subjective is the more important and essential “truth.” Petitioners dispute these propositions as a matter of science, law, and philosophy.

The *problem* Petitioners experience is that male athletes competing in the girls' high school track division in Connecticut have taken championships, awards, and advancement opportunities away from girls, including Petitioners. Petitioners' *contention* is that the Policy that allows this denies equal opportunities to girls and thus violates Title IX. The fact that the two male individuals who appropriated these "girls" titles have now voluntarily intervened in Petitioners' lawsuit cannot restrict the right of Petitioners to speak clearly about these things.

To talk clearly about Petitioners' injury and Title IX's structure and requirements, it is necessary to speak clearly and unambiguously about the two sexes. "[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1575 (2020), *quoting Greenlaw v. United States*, 554 U.S. 237, 243 (2008). While judges have the authority to maintain decorum in their courtrooms, the First Amendment protects litigants' rights to speak about "theories and ideas" "vital" to their claims. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). The immutable line between male and female is "vital" to Petitioners' claims.

And Due Process similarly protects the right of parties to be represented in court through "fearless, vigorous and effective advocacy, no matter how unpopular the cause in which it is employed." *Offutt v. United States*, 348 U.S. 11, 13 (1954) (reversing contempt conviction).

Our litigation system’s foundation is that truth “is best discovered by powerful statements on both sides of the question,” delivered through “partisan advocacy” that subjects the positions of both sides to “the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 655-56 (1984) (cleaned up). Here, the Order muzzles one side’s advocacy concerning hotly contested questions surrounding sex and gender identity while protecting the other side’s contentions. In *Holt v. Virginia*, 381 U.S. 131, 137 (1965), the Supreme Court reversed a contempt conviction where “the words used in [Plaintiffs’ briefs and arguments] were plain English, in no way offensive in themselves, and wholly appropriate” to the proposition being advanced. Here, the “word being used”— “male”—is in no way a vulgarity or term of abuse, and it is “wholly appropriate”—indeed essential—to the proposition that Petitioners wish to advance: that competition from male athletes has deprived the Plaintiff girls of equal athletic opportunities.

The Order of the trial court violated these constitutional rights and raised severe doubts about the trial court’s impartiality in the process.

A. The Court’s comments about Petitioners’ use of the word “male” destroyed an appearance of impartiality.

1. The Court’s statement that Petitioners’ use of the word “male” is “bullying” and contrary to “common decency” was unjustified and inconsistent with an appearance of impartiality.

The trial court stated that counsel’s use of the word “male” to refer to individuals who undisputedly were born genetically male and possess male bodies was “very provocative,” possibly inconsistent with “human decency,” and amounted to “bullying.” This demonstrated an *ex ante* endorsement and indeed enforcement of the individual intervenors’ claim of a right to be considered and spoken of as females in this litigation. This fundamentally contradicts the facts and the law as Petitioners believe them to be and wish to present them, and it strikes at the heart of Petitioners’ case. A disinterested observer would reasonably question the trial court’s impartiality.

The trial court was also wrong. Petitioners and counsel are not “bullying,” and they are not violating principles of “human decency.” The use of the word “male” to describe individuals who have been genetically male since conception and possess male bodies is accurate, consistent with timeless use as well as formal definitions of “male,” and follows widespread usage in legal contexts in which accuracy is required.

Numerous formal definitions of “male” and “female” reference reproductive biology, not felt identity or social roles. The Merriam-Webster Medical Dictionary defines “male” as “an individual of the sex that is typically capable of producing small, usually motile gametes (such as sperm or spermatozoa) which fertilize the eggs of a female.” Male, Merriam-Webster.com Medical Dictionary, <https://www.merriam-webster.com/medical> (last visited, April 27, 2020). The Oxford Dictionary of Biology identifies a “male” as “an individual whose reproductive organs produce only male gametes.” Male, Oxford Univ. Press, Oxford Dictionary of Biology (7th ed. 2015). The widely cited DSM-5 psychiatric diagnostic manual identifies “biological indicators of male and female (understood in the context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia.” DSM-5 451.

Dictionaries directed at general usage are in accord. Webster’s New World Dictionary defines a “male” as someone “of the sex that fertilizes the ovum,” Male, Webster’s New World Dictionary of the American Language (1984); the American Heritage Dictionary continues the same focus on reproductive biology: “the sex that has organs to produce spermatozoa for fertilizing ova.” Male, American Heritage Dictionary, <https://ahdictionary.com> (last visited Apr. 27, 2020).

The individual intervenors have not contended—nor has the Court heard evidence—that they are not “male” under every single one of these dictionary definitions. Petitioners’ counsel used the word in its dictionary sense.

As to usage in legal settings, the United States, in its Statement of Interest filed on March 24, cites both Supreme Court precedent and dictionary definitions to observe that (at least as relevant to Title IX), an individual’s sex is “an immutable characteristic determined solely by . . . birth,” and that physical “differences between men and women” are “enduring.” Add.238, 244 (quoting *Frontiero*, 411 U.S. at 686, and *United States v. Virginia*, 518 U.S. 515, 533 (1996).) Accordingly, in this pleading signed by the Attorney General of the United States, the Government consistently refers to those born male as “biological males” rather than “transgender females,” regardless of their subjective gender identity. Add.236, 237, 243, 246.

Likewise, the Fifth Circuit, in a recent, published opinion, declined a request to refer to a male litigant who claims a female gender identity as “she” despite that individual’s assertion that being referred to “simply as a male and with male pronouns based solely on my biological body makes me feel very uneasy and disrespected.” *United States v. Varner*, 948 F.3d 250, 254 (5th Cir. 2020). A district court in another circuit, even while upholding a school policy that admitted students into restrooms based on gender identity rather than sex, did

not hesitate to differentiate clearly between sex and gender identity by referring to the relevant students as “male students with female genders,” rather than as “transgender females.” *Students and Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 906 (N.D. Ill. 2019).

Transgender advocacy organizations like WPATH recognize that the definition of gender dysphoria involves “a discrepancy between a person’s gender identity and that person’s sex assigned at birth.” WPATH Standards of Care, version 7, at 2 (wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf). That requires being able to name and speak of those two different things by different names. Petitioners need to refer to—and indeed emphasize—the objective sex of these individuals. The only proper and accurate word is “male.” To refer to them as “transgender females” is purposefully to *avoid* mention of their sex.

In sum, it was wrong to denounce Petitioners’ use of the word “male” as inconsistent with “common practice” and “human decency.” Yet the trial judge said those words, and they cannot be unsaid. After hearing them, any reasonable observer must “entertain significant doubt[s],” *Bayless*, 201 F.3d at 126, that Petitioners can obtain an impartial hearing of their claims and theories before this judge.

2. The Court’s assertion that referring to the intervenors as “transgender females” is “more accurate” and “consistent with science” was unjustified and inconsistent with an appearance of impartiality.

The Court’s assertion—before hearing any evidence—that referring to individuals who fit every definition of “male” quoted above as “transgender females” is somehow “more accurate” and more “consistent with science,” Add.032, is equally insupportable and irreconcilable with an appearance of impartiality.

Science is concerned with objective, measurable facts. It requires accurate terminology. As noted above, in scientific sources “male” and “female” are defined by the immutable facts of bodily reproductive function. Using words according to this long and widely accepted definition, the individual intervenors are “male.” Such usage is both accurate and consistent with science.

At the time of the Order, Petitioners had already submitted expert evidence that details at length the sex-specific physiological basis of athletic advantages enjoyed by males once male puberty begins, in the Declaration of Dr. Gregory Brown submitted with Petitioners’ Motion for a Preliminary Injunction. Add.147–211. These are not “gender-identity-specific” advantages—they are sex-specific advantages. This is the only “science” thus far introduced into the record by any party. The gender identity of a male athlete is irrelevant to the loss of equal

opportunities that those advantages inflict on girls and women if males are permitted to enter girls' or women's competitions.

Thus, the trial court's assertions concerning "accuracy" and "science" were factually wrong and not based on science or the record. The judge, apparently and perhaps retroactively, justified his order based on "science" he had read in the newspapers. But the point is that to make those statements *before* hearing any evidence evinced a prejudgment that irrevocably corroded the appearance of impartiality.

In its minute order denying Petitioners' motion to disqualify, the trial court asserted that the "science I referred to is . . . the science that tells us calling transgender girls 'males' can cause significant mental and emotional distress." But the court's initial reference to "science" responded directly to counsel's reference to "male and female bodies using the terms as they're understood in science," and immediately followed the court's own reference to "more accurate terminology." Add.031–32. No "science" concerning "mental and emotional distress" was in the record or had even been mentioned by anyone. The trial judge's after-the-fact attempt to justify a biased remark increases a reasonable observer's concern that Petitioners are confronted by a lack of impartiality.

B. The Court’s comments about Petitioners’ legal theories could reasonably be interpreted as disclosing a prejudgment and rejection of those theories inconsistent with an impartial adjudication.

1. The Court’s assertion that the individuals must be referred to as “transgender females” because “[t]hat is what this case is about” creates an appearance of partiality.

The trial court also justified its Order directing Petitioners to refer to the individual intervenors as “transgender females” by asserting that “[t]hat is what the case is about.” Add.029. Petitioners disagree.

Petitioners contend that *gender identity* is irrelevant to the Title IX claim that Petitioners have chosen to bring. The individual intervenors have male bodies. They are not “female” in any sense relevant to Petitioners’ theory of the case. To refer to them as “female,” no matter the preceding adjective, obfuscates Petitioners’ claim and prohibits their clear presentation at the threshold.

Petitioners understand that Respondents wish to frame the case differently and to use words differently. That is not unusual in litigation. But for the trial court to prohibit Petitioners from presenting the case within the legal, biological, and semantic framework they believe to be correct—and to order Petitioners to articulate their case within Respondents’ preferred logical framework and semantics—is, so far as Petitioners can find, unprecedented. *E.g., Varner*, 948 F.3d at 255. Once the trial court made statements that appear to reject

Petitioners’ theory of the law and the case even before Petitioners have presented it, and paired those statements with a ban on Petitioners using words in the way they believe to be most accurate, no reasonable observer would say the proceeding has the appearance of impartiality.

2. The Court’s assertion that prohibiting Petitioners from referring to the individual intervenors as “males” does not impair “any legitimate interest or position” conflicts with an appearance of impartiality.

Petitioners contend that Title IX demands equal educational and athletic opportunities for those of the female sex and does not speak to subjective gender identities at all. Petitioners contend that whatever their gender identity, the individual intervenors are male in the sense relevant to Title IX, to Petitioners’ injuries, and to Petitioners’ claim. The trial court’s assertion that an order requiring Petitioners to refer to those individuals as “female” will not impair any “legitimate interest or position,” Add.029, strongly suggests to a reasonable observer that the trial court has rejected as “illegitimate” the heart of Petitioners’ legal contentions before hearing them. To dismiss as “illegitimate” Petitioners position at the threshold—and to prohibit Petitioners from using words in the manner that best represent that position—raises a reasonable question about the impartiality of the trial court towards Petitioners’ claims.

II. Mandamus is appropriate to correct the trial court’s error.

Mandamus is an extraordinary intervention; most errors by trial courts are not corrected until appeal. Nevertheless, “[t]his court has long since taken the position that there are ‘few situations more appropriate for mandamus than a judge’s clearly wrongful refusal to disqualify himself.’” *IBM I*, 618 F.2d at 926 (quotation omitted). The present case well illustrates the reasons for this.

This Court also has noted that “[r]eassigning a case to a different district judge, while not an everyday occurrence, is not unusual in this Circuit. *Ligon*, 736 F.3d at 128. “Nor is reassigning a case to a different district judge an unusual occurrence in [the Court’s] sister Circuits.” *Id.* “Indeed . . . reassignment is simply a mechanism that allows the courts to ensure that cases are decided by judges without even an *appearance* of partiality.” *Id.* at 128–29.

A. Petitioners have no other adequate means of relief.

The first prong of the *Cheney* test for grant of mandamus asks whether there is any other adequate relief—in most cases, a later appeal. *Cheney*, 542 U.S. at 380–82. Where disqualification should have been granted, the answer is no. Both a private and public interest are implicated.

“A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it

should itself terminate the inquiry until an ultimate appeal on the merits.” *IBM I*, 618 F.2d at 926–27. Indeed, it is “for just such an exceptional circumstance that the writ was designed.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1981); accord *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1142 (6th Cir. 1990) (adopting the “unanimous view on this question . . . that ‘mandamus is the proper remedy to vacate the orders of a judge who acted when he should have recused’”) (quoting *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir.1988)).

Further, all the circuits agree that “motions to disqualify for an appearance of bias . . . are suitable for mandamus review because the public injury that arises from an appearance of bias cannot be cured on appeal from a final judgment.” Mandamus Use in Civil Action—Disqualification Orders, 16 FED. PRAC. & PROC. JURIS. § 3935.5 (3d ed.). “In addressing the mere appearance of partiality, section 455 addresses not only fairness to the litigants but also the public’s confidence in the judiciary,” and that confidence “may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.” *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir. 1992), *as amended* (Oct. 23, 1992). “While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent.” *Id.* Thus, “there are few situations more appropriate for mandamus than a judge’s clearly

wrongful refusal to disqualify himself.” *IBM I*, 618 F.2d at 926 (cleaned up).

What’s more, relief is even more appropriate because the trial court is restricting Petitioners’ and their counsel’s speech. Deprivation of First Amendment rights “for even minimal periods” is “irreparable injury” as a matter of law. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996). This is as true when the infringement is inflicted by a court as by another branch of government.

B. The propriety of disqualification is clear from the facts.

The second *Cheney* factor asks whether the right to issuance of the writ is “clear and indisputable.” *Cheney*, 542 U.S. at 381. This factor is not analogous to the test for piercing qualified immunity—requiring that the court below has violated a closely on-point precedent. This Circuit has “never required petitioners to point to binding authority directly on point in order to establish their entitlement to the writ.” *Manzano*, 945 F.3d at 625. “Indeed, imposing such a requirement would mean casting aside one of the ‘touchstones’ of mandamus review—the ‘presence of an issue of first impression.’” *Id.* (quoting *United States v. Amante*, 418 F.3d 220, 222 (2d Cir. 2005)). Instead, the threshold is more pragmatic: the “ultimate question is simply whether, bearing in mind the exceptional nature of mandamus,” the court is “left with the

‘firm conviction’ that the district court’s view of the law was incorrect.” *Manzano*, 945 F.3d at 625.

Here, the “firm conviction” that application of the proper legal standard dictated disqualification is persuasively reinforced by a recent decision of a sister Circuit. In *Varner*, the Fifth Circuit denied a defendant’s motion “to require the district court and the government [the opposing party] to refer to [the defendant] with female instead of male pronouns.” 948 F.3d at 254. In addition to noting that “no authority supports the proposition that [courts] may require litigants . . . to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity,” *id.* at 254–55, that court reasoned that in cases involving “hotly-debated issues of sex and gender identity” “if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality.” *Id.* at 256. “Even this appearance of bias, whether real or not, should be avoided.” *Id.* This is all the more true in light of the Supreme Court’s identification of disagreements surrounding sex and transgender identity as among issues of “profound value and concern to the public” in which free speech rights are of the highest importance. *Janus*, 138 S. Ct. at 2476. A dissent doubted the necessity of addressing the question of a court’s power to order litigants to use “preferred pronouns” against their will, but did not argue that such a power did or should exist. *Varner*, 948 F.3d at 258–60 (Dennis, J., dissenting).

C. Mandamus to compel disqualification is “appropriate under the circumstances.”

The third *Cheney* factor asks the wide question of whether a grant of mandamus is “appropriate under the circumstances.” *Cheney*, 542 U.S. at 381.

Petitioners have already cited the precedents of this Court which emphasize the particular “appropriateness” and indeed necessity of intervening by mandamus where the appearance of impartiality has been compromised. A decision from the Third Circuit further elaborates that importance. In *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992), that court granted the petitioners’ request to “exercise its supervisory powers to remove the district court judge from [the] case” based on statements the trial court made while resolving a discovery dispute, but which bore on the “ultimate issue to be determined.” 975 F.2d at 97–8. The court took this action even though the trial judge had “been a distinguished member of the federal judiciary for almost 15 years,” was “well known and respected,” and the appeals court professed that it had every reason “not [to] agree that [the trial judge] is incapable of discharging judicial duties free from bias or prejudice.” *Id.* at 98.

But, noted the court, “that is not the test”; “rather, the polestar is impartiality and *the appearance of impartiality.*” *Id.* (cleaned up). “Measured against these precepts,” the Third Circuit found it

“impossible . . . to vindicate the requirement of ‘appearance of impartiality’ in view of the statements” in the trial judge’s opinion. *Id.* Thus, the court “conclude[d] that the appearance of impartiality [would] be served only if an assignment to another judge [were] made” and directed reassignment on remand. *Id.*

So too here. The “ultimate issue to be determined” is whether, by allowing male athletes to compete in girls’ events, Respondents have violated Title IX by denying equal athletic opportunities and experiences to girls. By insisting instead that “This is a case about girls who say that transgender girls should not be allowed to run,” and by prohibiting Petitioners from presenting their case in language that reflects their view of the science and of the law, the trial judge created the appearance that he had prejudged the ultimate issue in the case. Add.029. The “appearance of impartiality” has been irrevocably compromised, and as in *Haines*, disqualification and reassignment to a new judge is not merely “appropriate,” but important. The principle that “appearance of bias, whether real or not, should be avoided,” *Varner*, 948 F.3d at 256, “is worthy of [the Court’s] mandamus jurisdiction.” *Manzano*, 945 F.3d at 628.

Finally, in deciding whether to grant a writ of mandamus, this Court considers “whether the petition presents a novel and significant question of law or a legal issue whose resolution will aid in the administration of justice.” *Manzano*, 945 F.3d at 628 (cleaned up).

Petitioners’ motion does present an important question of first impression that will inevitably be presented to other courts in this Circuit. “Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity.” *Varner*, 948 F.3d at 256. The order below both censoring and dictating the presentation of Petitioners’ case was unprecedented in this Circuit and in federal courts across the nation—certainly in any case in which attributes associated with biological sex and a law that specifically addresses citizens according to sex (as does Title IX) were at the center of the controversy. The novel nature of the question presented weighs in favor of granting this petition.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of mandamus directing the trial judge to recuse himself from this case and for the case to be randomly reassigned to a different judge.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. R. 21(d)(1) because, excluding the portions exempted by Fed. R. App. R. 21(a)(2)(C)

this brief contains 6,342 words

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/s/ Roger G. Brooks
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Dated: July 6, 2020

CERTIFICATE OF SERVICE

I certify that on July 6, 2020, this petition and the accompanying addendum were filed electronically with the Clerk of the Second Circuit Court of Appeals through the Court's electronic filing system, which will accomplish service on counsel for all parties.

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Dated: July 6, 2020

ADDENDUM

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From: CMECF@ctd.uscourts.gov
To: CMECF@ctd.uscourts.gov
Subject: Activity in Case 3:20-cv-00201-RNC Soule et al v. Connecticut Association of Schools, Inc. et al Order on Motion to Transfer/Disqualify/Recuse Judge
Date: Tuesday, June 16, 2020 6:38:59 PM

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District of Connecticut

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Case Number: [3:20-cv-00201-RNC](#)

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Docket Text:

ORDER denying [103] Motion to Transfer/Disqualify/Recuse Judge. Plaintiffs have moved for my recusal pursuant to 28 U.S.C. s 455(a) because during a telephone conference I informed plaintiffs' counsel that I wanted them to refrain from continuing to refer to the transgender females involved in this case as "males." In calling on plaintiffs' counsel to accept that limitation going forward, I explained that for plaintiffs' counsel to continue to call these transgender youth "males" would be needlessly provocative, and inconsistent with norms of civility in judicial proceedings, which I want to be careful to maintain. As I further explained, for plaintiffs' counsel to refer to these young people as "transgender females" in accordance with their gender identity would entail no concession whatsoever relating to the merits of the case; plaintiffs' counsel would still be able to refer to them as "biologically male" with "male bodies." They just couldn't refer to them as "males, period." Plaintiffs assert that as a result of my statement the public might reasonably believe that I am partial or biased. Plaintiffs have clarified that what troubles them in particular is my statement that for plaintiffs' counsel to refer to the transgender students involved in this case as "transgender females" rather than "males" would be consistent with "science." Plaintiffs argue that "the public might reasonably conclude that the Court has bias in [this] case where [plaintiffs'] arguments,

claims, and expert testimony are based on the assertion that athletes born male remain male as a matter of scientific fact no matter their gender identity, and that as a result those athletes have 'an unfair competitive advantage to competition' in women's and girls' sports." ECF No. 199, at 3-4. I do not agree that the public might reasonably construe my reference to "science" as a comment on the merits of the issue whether transgender athletes have an unfair competitive advantage in girls' sports. In the telephone conference, I stated that referring to the transgender youth involved in this case as "transgender females" would be consistent with "science, common practice, and perhaps human decency." That statement does not reflect a preconceived conclusion on the issue of unfair competitive advantage presented by this case. In fact, and as I think objective members of the public would readily understand, the "science" I referred to is not the science relating to the issue of unfair competitive advantage but the science that tells us calling transgender girls "males" can cause significant mental and emotional distress. The insight provided by this science has led to a "common practice" of referring to transgender persons by their gender identity, which is viewed by many as a matter of "human decency." Thus, as I said, referring to these transgender youth as "transgender females" would be consistent with "science, common practice, and perhaps human decency." By referring to science in this way, in this context, and for this purpose, I did not state or imply anything about whether the transgender youth in this case do or do not enjoy an unfair competitive advantage when they compete in girls' track. To the extent plaintiffs' counsel argue that they must be able to refer to the transgender girls in this case as "males, period" in order to fulfill their responsibilities as zealous advocates, and that they have an absolute Constitutional right to do so, the argument is unpersuasive. The issue of unfair competitive advantage can be fully and fairly litigated consistent with professional ethics and constitutional protections without referring to the transgender females involved in this case as "males, period." I think objective members of the public would agree. I also think objective members of the public would understand that just because I want plaintiffs' counsel to avoid needlessly calling the transgender females in this case "males, period" does not mean I am partial or biased with regard to any issue in the case. Accordingly, the motion is hereby denied. Signed by Judge Robert N. Chatigny on 6/16/20. (Chatigny, Robert)

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CHERYL RADACHOWSKY, HER MOTHER, :
 :
Plaintiffs, :
 :
vs :
 :
CONNECTICUT ASSOCIATION :
OF SCHOOLS, INC., D/B/A :
CONNECTICUT INTERSCHOLASTIC :
ATHLETIC CONFERENCE, ET AL. :
 : HARTFORD, CONNECTICUT
Defendants. : APRIL 16, 2020
 :
----- x

TELEPHONE CONFERENCE ON MOTIONS

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

DARLENE A. WARNER, RDR
OFFICIAL COURT REPORTER

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10:00 A.M.

1
2
3 THE COURT: Good morning, this is the Judge
4 speaking. The announcement informs me that there are 16
5 people who are participating in this telephone conference.
6 That's quite a large group.

7 Why don't we do a roll call starting with
8 plaintiffs' counsel.

9 Would you please state your appearances for the
10 record?

11 MR. BROOKS: Roger Brooks with Alliance
12 Defending Freedom on behalf --

13 MR. SHAFER: Jeff Shafer --

14 (Telephone interference)

15 THE COURT: Excuse me. I'm having some trouble
16 here.

17 May I suggest that anybody on this call who is
18 not in the process of speaking should mute whatever phone
19 they're using. That may help. So please keep your phone
20 on mute unless I call on you to speak.

21 Let's try again. Let's start with the
22 appearances of counsel for the plaintiffs.

23 MR. BROOKS: Roger Brooks with Alliance
24 Defending Freedom on behalf of the plaintiffs.

25 MR. SHAFER: Jeff Shafer with Alliance Defending

1 Freedom on behalf of the plaintiffs.

2 MS. HOLCOMB: Christiana Holcomb, Alliance
3 Defending Freedom on behalf of plaintiff.

4 MR. HOWARD: James Howard, Fiorentino, Howard
5 Petrone also on behalf of the plaintiffs.

6 THE COURT: Which of you will be speaking on
7 behalf of the plaintiffs in this call?

8 MR. BROOKS: Roger Brooks.

9 THE COURT: All right, thank you.

10 Now let's turn to defense counsel. Why don't we
11 start with counsel for the Connecticut Association of
12 Schools.

13 MS. YODER: Linda Yoder representing the
14 Connecticut Association of Schools and also the Danbury
15 Board of Education.

16 THE COURT: Okay.
17 Counsel for Bloomfield?

18 MS. ZELMAN: Johanna Zelman representing
19 Bloomfield Board of Education and Cromwell Board of
20 Education.

21 THE COURT: And Canton?

22 MR. MONASTERKSY: David Monastersky representing
23 Canton and Glastonbury Board of Educations.

24 THE COURT: Is that everybody on behalf of the
25 school boards?

1 MR. MURPHY: Peter Murphy here, Your Honor, too
2 with Linda Yoder for Connecticut Association of Schools
3 and Danbury.

4 THE COURT: All right, thank you.

5 Now, turning to the proposed interveners.

6 MR. BLOCK: Thank you, Your Honor, this is Josh
7 Block on behalf of proposed interveners Andraya and Terry;
8 and with me on the line also are Chase Strangio and Dan
9 Barrett.

10 THE COURT: Which of you will be speaking on
11 behalf of these proposed interveners during this call?

12 MR. BLOCK: I will be speaking, Joshua Block.

13 THE COURT: All right, thank you.

14 CHRO?

15 MR. ROBERTS: Yes, Your Honor, Michael Roberts
16 for the CHRO.

17 THE COURT: All right. Is there anybody we've
18 missed?

19 (Pause)

20 THE COURT: Hearing nothing, I assume that
21 everyone who wants to enter an appearance has done so.

22 Proceeding from there, this is a telephone
23 conference to address the pending motions to intervene,
24 ECF documents 36 and 43.

25 I have read the papers that you have submitted

1 in support of and in opposition to these motions, and in
2 this telephone conference you will have an opportunity to
3 make any additional presentations you wish.

4 Why don't we start with counsel for the
5 individuals who propose to intervene as defendants
6 Yearwood and Edwards.

7 Is there anything you would like to add to your
8 papers?

9 MR. BLOCK: Thank you, Your Honor. This is
10 Joshua Block. I guess only very, very briefly.

11 We think this is a textbook case for
12 intervention under the Second Circuit's decision in
13 Brennan and Bridgeport Guardians. It's a case where you
14 have two mirror image claims of discrimination and the
15 fundamental question is whether granting the relief to the
16 plaintiffs would cure discrimination or rather inflict
17 discrimination on my client.

18 I think that the Second Circuit's cases are
19 clear that the school or employer is really just a
20 stakeholder in those claims and that our interest
21 fundamentally cannot be adequately represented.

22 And I think that's also confirmed by all the
23 cases we've cited in which transgender students have been
24 allowed to intervene in similar circumstances.

25 And then just on permissive intervention, I

1 think in addition to us needing to protect our own
2 interest, our clients are most directly affected. They
3 have the most knowledge about their own medical treatments
4 and about the races they race in. And this is a situation
5 where our clients are going to be in the middle of
6 discovery, either as witnesses or as parties, and they're
7 going to be subject to a great many discovery requests.

8 And we think that it would be sort of
9 fundamentally unfair to have them so involved in a lawsuit
10 that is fundamentally about them without them having the
11 agency to represent their own interests in that process.

12 So unless the Court has any further questions,
13 that's all we have to say.

14 THE COURT: All right. I do have some follow-up
15 questions.

16 The plaintiffs focus on the adequacy of
17 representation element of the analysis and argue that you
18 have failed to overcome the presumption of adequacy of
19 representation.

20 In the cases that you cite, the one that seemed
21 to me to be most on point, looked carefully at the
22 question whether the proposed intervenors would seek to
23 raise arguments that the existing party had failed to make
24 in a then pending motion to dismiss.

25 The Court concluded that the presumption of

1 adequacy of representation was overcome because there was
2 the significant difference between the arguments the
3 proposed intervenor wished to make and the arguments that
4 had been made at that point in the pending motion to
5 dismiss.

6 With that precedent in mind, can you please
7 explain for me whether your clients would make arguments
8 that the existing parties are not going to make and if so,
9 what are those arguments and how do they differ from the
10 arguments that the existing parties are intending to
11 present?

12 MR. BLOCK: Thank you, Your Honor. I'm happy to
13 address that question; and then I want to say afterwards,
14 I don't think that that's an essential requirement.

15 But to answer the specific question: Our
16 clients, you know, intend to argue that excluding them or
17 excluding transgender girls, especially them, from
18 participating on girls' teams based on their chromosomes,
19 would affirmatively violate Title IX, and that it would
20 affirmatively violate the Equal Protection Clause.

21 And the school boards are not usually in the
22 business of arguing that actions they take will place
23 themselves in legal jeopardy under Title IX or the Equal
24 Protection Clause because, you know, they're often sued by
25 transgender students as well.

1 So I think that is the fundamental set of
2 arguments that we intend to make and we're in the best
3 position to make.

4 I do think that the precedent from -- Meriwether
5 is I think the case you were referencing -- I think in
6 that case the facts that deal with the motion to dismiss
7 that has been filed and was being reviewed, was really
8 icing on the cake, that the standard is whether adequacy
9 of representation is assured. And it's not whether it's
10 already been proven, it's whether there's a substantial
11 risk of lack of adequacy of representation. And I don't
12 think the Court has to wait for motions to dismiss to be
13 filed before making that determination.

14 And I guess the one additional fact I would
15 bring to light is the followup to the Ricci case in which
16 the City of New Haven affirmatively argued that they would
17 be subject to disparate impact liability if they had not
18 set aside the firefighter exam; and nevertheless, after
19 they lost that case, African American firefighters were
20 allowed to bring their counter suit.

21 So even if our interest would otherwise be
22 adequately represented, we're not going to be bound by the
23 judgment unless we are parties. And so the risk of
24 conflicting lawsuits here is inevitable unless we are
25 actually bound to the judgment in this case.

1 THE COURT: Thank you.

2 Picking up on that last point, by way of
3 clarification with regard to the risk of future lawsuits,
4 as we all know, sadly, Connecticut is in lockdown and it
5 appears that Connecticut is likely to remain in lockdown
6 for some significant period of time, making it highly
7 unlikely that your clients will be given an opportunity to
8 run yet again as high school athletes, unfortunately; and
9 so I'm wondering, what is the risk of a future lawsuit by
10 your clients if the plaintiffs in this case managed to
11 prevail?

12 As a practical matter, how would their interest
13 in the case be impaired? What is the claim for relief
14 that remains of concern to them personally, given the
15 indefinite suspension of the track season and how would
16 that interest be impaired if they weren't permitted to
17 intervene as parties now?

18 MR. BLOCK: Well, Your Honor, for their request
19 for injunctive relief, plaintiffs are seeking an order
20 requiring the school to expunge all records of our
21 clients' past accomplishments on the girls sports team.

22 So not only records in their possession, it also
23 is to seek out and seek to amend any other records, so
24 their scores, their rankings, their medal awards; and so
25 that is a form of injunctive relief that they're

1 continuing to seek that is targeted directly at our
2 clients.

3 And I believe that they're continuing to seek
4 that form of injunctive relief, you know, precisely
5 because of the standards for injunctive relief and damages
6 can be different under Title IX. And so they -- my
7 understanding is that they are continuing to seek those
8 orders. And I think expunging the records of our clients'
9 competition would be an Article III injury in fact and,
10 you know, would plainly give rise to our own sets of
11 claims.

12 THE COURT: Let me ask you to please pause for a
13 moment, Mr. Block, and call on Mr. Brooks to tell us
14 whether in fact the plaintiffs do intend to continue to
15 seek injunctive relief in the form of expunging records.

16 Mr. Brooks, do they or do they not?

17 MR. BROOKS: Your Honor, the answer to that is,
18 yes, we will continue to seek that relief. That is part
19 of the relief requested.

20 THE COURT: So your point is, Mr. Block, that if
21 the plaintiffs were to prevail on that claim, your clients
22 would be in a position to bring a future lawsuit to seek
23 to have the expungement of the records reversed?

24 MR. BLOCK: That's correct, Your Honor.

25 THE COURT: Okay, is there anything other than

1 the expungement of the records that is at issue here that
2 you think could provide the basis for a future lawsuit if
3 the plaintiffs were to prevail?

4 MR. BLOCK: I don't think there is another thing
5 that would provide us with an Article III injury in fact,
6 no. I think that we would still qualify as having a
7 legally protectable interest, which is a different
8 standard, and permissive intervention would also still be
9 justified. But I don't think there's another basis for a
10 dueling lawsuit.

11 THE COURT: Again, let me ask you to please
12 pause, Mr. Block, and let me call on counsel for the
13 existing defendants to clarify whether they agree or
14 disagree with your argument that adequacy of
15 representation is not assured.

16 On that point, I'd like to hear first from
17 Attorney Yoder.

18 MS. YODER: Yes, Your Honor. We do support the
19 proposed intervention in this matter. We feel very
20 strongly that the CIAC does not represent individual
21 athletes. In fact, their structure is such that
22 individual athletes address their issues with the public
23 school and the public schools address issues with the
24 CIAC. And one of the original claims raised in this
25 matter was that the CIAC would not speak directly to the

1 parents of one of the plaintiffs.

2 We really feel strongly that we are in the
3 middle here, that the claims have said, you know, on the
4 plaintiffs' side, Title IX is clear and it's preemptive.
5 The guidance from the prior administration was you look to
6 state law and state law is clear and supports the
7 plaintiffs' position.

8 So CIAC believes that all of the proposed
9 interveners are necessary parties here and that we do
10 not -- and in fact have somewhat different interests than
11 the CIAC.

12 THE COURT: What about in your capacity as
13 counsel for Danbury? Do you see a difference of interest
14 that justifies intervention to the individuals?

15 MS. YODER: I do think for Danbury, Danbury
16 feels that it's not a proper party to this action at all
17 because it simply participates in a league that allowed
18 one of the plaintiffs to participate in track.

19 So to ask it to take some action with regard to
20 what another school did with regards to who they put on
21 their roster, Danbury's feeling that it's not in a
22 position to represent any of the claims by the proposed
23 interveners. Because again it simply is a school that
24 participates in the CIAC and allowed one of the plaintiffs
25 through that process to have participated on the track

1 team.

2 So Danbury feels that its position in this case
3 is very different and it would have no -- in defending the
4 claim against it, it is not in any position to defend
5 either of the two individual athletes from the other
6 school. It had no input into their participation, and
7 that's really not the direct claim against it, and it's
8 not in any position to redact any records or change any
9 records.

10 So I think it's in a very different position and
11 very strongly feel that it is not representing the
12 interests of these two individual athletes given the
13 posture of the case.

14 THE COURT: Okay, thank you.

15 Let me call next on Attorney Zelman, please.

16 MS. ZELMAN: Sure, Your Honor, and good morning.

17 So both of the proposed intervenors do attend my
18 clients' school, one in Bloomfield and one in Cromwell.
19 Cromwell and Bloomfield, although will defend this
20 lawsuit, neither believe that they are in or out of the
21 position to completely protect the rights of the two
22 individual athletes.

23 Both strongly agree and support the intervention
24 of them. There are multiple scenarios under which the
25 rights of the individuals in Danbury -- I'm sorry, in

1 Cromwell and Bloomfield could diverge.

2 For example, if Bloomfield and Cromwell could
3 agree to potentially settle the case -- I don't think it
4 would happen, but hypothetically could agree to that --
5 and the individual intervenors, their rights could be
6 affected by any kind of settlement. And certainly that
7 would be something that they would need to participate in
8 to protect their own rights.

9 I also, similar to what Attorney Yoder was just
10 saying, we do not believe Bloomfield or Cromwell are
11 proper parties. We do not believe that the plaintiffs
12 have standing to sue them. And none of the plaintiffs
13 attended either one of these schools. So there is a
14 number of situations under which neither Bloomfield nor
15 Cromwell could adequately represent the interest of the
16 proposed intervenor.

17 I also would say that, in terms of the record, I
18 could foresee a situation where Bloomfield and Cromwell
19 are required to strike a record and we would be under
20 court order to do that, and both intervenors would have
21 their own set of rights to then oppose that. Those would
22 be rights that Bloomfield and Cromwell could not protect.

23 And I will certainly answer any questions that
24 Your Honor may have.

25 THE COURT: Thank you.

1 By way of clarification, what records do your
2 clients have that reflect the accomplishments of the
3 individuals who seek to intervene?

4 MR. ZELLNER: Well, I believe the records are --
5 may be held by the CIAC. I'm not 100 percent sure at this
6 point -- we haven't done discovery -- where all the
7 records are held.

8 But there are acknowledgments in the school
9 records about the winnings of both intervenors. Those
10 would be those tossed. And other acknowledgments that
11 occurred within the school.

12 THE COURT: But as you point out, none of the
13 plaintiffs have attended Bloomfield or Cromwell?

14 MR. ZELLNER: Correct. Bloomfield and Cromwell
15 are where the two proposed intervenors attend school.

16 THE COURT: Right. So if none of the plaintiffs
17 has attended either of your clients' schools, Bloomfield
18 or Cromwell, for them to seek expungement of your records
19 would have to be predicated on something that would give
20 them a particular stake in those records?

21 MR. ZELLNER: Correct. I think there's a
22 fundamental standing issue under Title IX.

23 Title IX does not require my clients to protect
24 the rights of students in attending other schools.

25 THE COURT: With regard to Title IX, is it your

1 intention to argue that Title IX compels your client
2 schools, Bloomfield and Cromwell, to permit the individual
3 interveners to participate as they have done in girls
4 track?

5 MR. ZELLNER: Certainly. And I certainly think
6 that we would argue that state law requires that as well.

7 THE COURT: Would you also invoke their rights
8 under the Equal Protection Clause?

9 MR. ZELLNER: At this point I don't believe so.

10 THE COURT: Okay.

11 MR. ZELLNER: I'm not sure that my clients in
12 the district have standing to invoke the equal --
13 individual equal protection rights of two students that
14 attend those schools.

15 THE COURT: All right, thank you.

16 MR. ZELLNER: Sure, my pleasure.

17 THE COURT: Mr. Monastersky?

18 MR. MONASTERSKY: Yes, Your Honor.

19 So Canton and Glastonbury are essentially in the
20 same position that Danbury is in in the fact that two of
21 the plaintiffs attend those districts respectively.

22 My clients certainly are not going to be
23 asserting the individual rights of the intervening
24 plaintiffs, and we are not in a position to be arguing for
25 their -- certainly their equal protection rights or even

1 their Title IX rights.

2 I'm simply going to be defending my clients'
3 actions in this matter, and which were simply as Attorney
4 Yoder explained, were simply permitting plaintiffs to
5 participate on track teams.

6 So I don't -- I am not in the position, and my
7 clients are not in the position, of asserting the rights
8 of the individuals. And, frankly, we're not concerned
9 about protecting the rights of the individuals.

10 THE COURT: All right, thank you.

11 (Pause)

12 THE COURT: Mr. Block, coming back to you at
13 this point, we have talked a bit about the plaintiffs'
14 request for an injunction expunging records. Are you in a
15 position to tell me this morning what records would be of
16 interest to your clients in that regard?

17 In other words, if they were to find themselves
18 in a position whereby records were at risk for being
19 expunged, can you tell me what records would be of concern
20 to them in particular?

21 MR. BLOCK: Well, Your Honor, I don't have as
22 much insight into the recordkeeping practices and what
23 specifically plaintiffs are seeking to expunge. I think
24 in addition to, you know, trophies, history of awards,
25 there's the -- every runner's times for every race they've

1 run is publicly available and posted on these websites for
2 track and field teams, and that website is cited
3 repeatedly in the complaint.

4 I read the requested injunction as requiring
5 CIAC to seek out and attempt to correct those records as
6 well. It's essentially to whatever extent possible,
7 taking all steps to erase the records of, you know, my
8 clients' times.

9 And if you look up on this website, it shows,
10 you know, they ranked this number at the state level, they
11 ranked stat number of New England. It's just a public
12 record of all their races and their best scores.

13 And so I -- maybe plaintiffs can clarify the
14 scope of the injunction they're requesting, but because I
15 think their claims are tied to an injury from lack of
16 public recognition, that they are seeking not just to
17 affect the internal recordkeeping of CIAC, but to, you
18 know, erase the public manifestations of their
19 accomplishment to the extent that CIAC can make those
20 requests or seek corrections from third parties.

21 THE COURT: Let me follow up by once again
22 turning to Attorney Brooks.

23 Mr. Brooks, please be as helpful as you can be
24 this morning in explaining what your clients would be
25 seeking with regard to expungement of records.

1 What records do you have in mind and what basis
2 would they have for seeking expungement of those records?

3 MR. BROOKS: Well -- and for the court reporter,
4 this is Roger Brooks speaking.

5 For the CIAC itself -- and again, as a lot of my
6 colleagues said earlier, we've not had discovery and what
7 I say today may not be fully accurate because I do not
8 have it. My understanding is the CIAC itself, and to a
9 lesser extent, individual schools, maintain records of
10 awards and championships in publicly available forms which
11 may be boxed on the wall, or more commonly this day and
12 age it's online on websites. And certainly part of our
13 request would be that the defendant organizations, schools
14 and CIAC correct those records to reflect what should have
15 been the achievements of various girls and young women in
16 various races.

17 It is also true that times, results from races,
18 are maintained -- well, of course they're published in the
19 press sometimes -- and they are maintained by a private
20 service, as Mr. Block mentioned. Nobody can tell the
21 press what to print and we wouldn't seek that.

22 And as for the private organization, they're not
23 a party, and I think the limit of what we would seek would
24 be asking that CIAC send corrected and accurate
25 information to that organization, or those organizations

1 if there are more than one, and then what they do with
2 that, of course they would be directly subject to an order
3 of this Court, and that would be in their hands.

4 THE COURT: So if we take each of your
5 plaintiffs in turn, we start with the first named
6 plaintiff, Ms. Soule, what record would she seek to have
7 altered, expunged or corrected?

8 I gather from what you have just said that she
9 would call on CIAC to do something by way of altering
10 records to reflect that but for the participation of the
11 proposed interveners, she would have won or placed?

12 MR. BROOKS: We put all that in great detail in
13 the complaint, and I don't have that memorized or in front
14 of me at the moment.

15 But, yes, if there's a record that says that she
16 came in third and absent the participation of a male
17 competitor, she would have come in second, then the
18 request would be that the records be corrected to reflect
19 that reality. And on a race-by-race basis followed by a
20 time-by-time basis, perhaps not exhaustively, but
21 extensively, put those details in the complaint.

22 I apologize it, I don't have it at my fingertips
23 this morning.

24 THE COURT: Okay. Given the impact of the
25 lockdown on the reality of our lives in Connecticut,

1 including the reality of this case, the request for
2 injunctive relief with regard to records seems to loom
3 larger at this point than it did before, and I would very
4 much appreciate a statement from the plaintiffs to be
5 filed on the docket setting out exactly what that request
6 for injunctive relief entails.

7 I understand that you haven't had discovery,
8 that's certainly fair for you to point out, but there must
9 be some basis for this claim, and given its centrality to
10 this case at this point, it would be most helpful to me if
11 I had such a statement from you; and it would be
12 particularly helpful if you could set forth each
13 individual plaintiff's request for injunctive relief.

14 If a plaintiff did not attend a defendant
15 school, I'd be interested to know what records that
16 plaintiff would ask that school to alter; and if there is
17 no such request being made, then would you please tell me
18 that so there's no misunderstanding.

19 MR. BROOKS: Your Honor, we can certainly do
20 that within the bounds of our present understanding.

21 I will say that our focus definitely at this
22 point is -- and this is, of course, assuming that there's
23 no tag in spring season that gets active, our focus is on
24 protecting the winter season, which may require us to
25 return to the question of a preliminary protection.

1 So our primary focus right now is on protecting,
2 for the plaintiff who will be at school next year,
3 protecting a season, and correcting records is -- it's
4 important, but it doesn't have the same immediate urgency.

5 But we're happy to provide what you request to
6 the best of our present understanding.

7 THE COURT: And when could you provide that?

8 I'd like to have it as soon as reasonably
9 possible.

10 MR. BROOKS: Well, is the end of next week
11 workable, Your Honor?

12 THE COURT: Yes, that's fine.

13 Then we'll look forward to seeing that on the
14 docket before the end of the business day a week from
15 tomorrow.

16 In the meantime, and I don't want to prolong
17 this unduly, but I think it's helpful when we're all on
18 the phone if we take advantage of the opportunity to try
19 to get a clear idea of what we're dealing with here.

20 You refer to the winter season. I understand
21 that two of the three plaintiffs will be graduating and
22 both of the interveners, the proposed intervenors, are
23 graduating. Where does that leave this case with regard
24 to the so-called winter season?

25 MR. BROOKS: Well, as far as impact on the

1 plaintiffs' impact, essential impact would be on Alanna
2 Smith.

3 With regard to the graduation of the two
4 proposed intervenors, that leaves us in the situation
5 where over the last three years, plaintiffs, including
6 Alanna, when she arrived in high school has faced
7 competition from male athletes. In at least one of those
8 cases, really by a surprise, an athlete from the previous
9 season had competed in boys track and field.

10 So absent discovery and given the way the CIAC
11 policy works of confidentiality and non-disclosure, we
12 don't know, but the reality of the last experience is this
13 is a real and impending threat to next season as well. We
14 need discovery to find out, and we need to find out if the
15 situation we face indicates preliminary relief.

16 So obviously I anticipate a dispute about that.
17 But that's -- if we wait until the season starts, as it's
18 been very clear, it will be too late to get through a
19 process to get relief. So we can't realistically wait
20 until the season starts and see who shows up on the
21 starting line.

22 THE COURT: What grade is Alanna in at the
23 moment?

24 MR. BROOKS: She's in tenth grade this year, so
25 she'll be a junior next year.

1 THE COURT: Is she aware, to your knowledge, of
2 any other participant in female track who is transgender
3 besides the people who are named in the complaint?

4 MR. BROOKS: To my knowledge, she is not aware,
5 just as Selina was not aware, of transgender athletes
6 until she abruptly met them on the track.

7 THE COURT: All right, thank you.

8 Let me raise a point that undoubtedly will cause
9 some consternation for you, Mr. Brooks, and your
10 colleagues, but I exercise my prerogative as the presiding
11 judge in this instance and I hope you will forgive me.

12 I don't think we should be referring to the
13 proposed intervenors as "male athletes." I understand
14 that you prefer to use those words, but they're very
15 provocative, and I think needlessly so. I don't think
16 that you surrender any legitimate interest or position if
17 you refer to them as transgender females. That is what
18 the case is about. This isn't a case involving males who
19 have decided that they want to run in girls' events. This
20 is a case about girls who say that transgender girls
21 should not be allowed to run in girls' events.

22 So going forward, we will not refer to the
23 proposed intervenors as "males"; understood?

24 MR. BROOKS: Your Honor, I hear what you're
25 saying. If I may respond?

1 THE COURT: No, no, I just want to be sure you
2 understand what I'm saying.

3 MR. BROOKS: May I respond?

4 THE COURT: If you first tell me you understand
5 what I'm saying.

6 MR. BROOKS: I do understand what you're saying.

7 THE COURT: All right, then go ahead. If you
8 want to respond, go right ahead.

9 MR. BROOKS: Your Honor is right that this is
10 exactly what the case is about.

11 The entire focus of the case has to do with the
12 fact that male bodies have a physiological advantage over
13 female bodies that gives them an unfair advantage to
14 competition.

15 The entire focus of the case is the fact that
16 the CIAC policy allows individuals who are
17 physiologically, genetically male to compete in girls'
18 athletics.

19 But if I use the term "females" to describe
20 those individuals -- and we've said in our opening brief,
21 we're happy to use their preferred names, because
22 names are not the point to the case. Gender identity is
23 not the point of this case. The point of this case is
24 physiology of bodies driven by chromosomes and the
25 documented athletic advantage that comes from a male body,

1 male hormones, and male puberty in particular.

2 So, Your Honor, I do have a concern that I am
3 not adequately representing my client and I'm not
4 accurately representing their position in this case as it
5 has to be argued before Your Honor and all the way up if I
6 refer to these individuals as "female," because that's
7 simply, when we're talking about physiology, that's not
8 accurate, at least in the belief of my clients.

9 So I believe --

10 THE COURT: I'm fairly --

11 MR. BROOKS: I --

12 THE COURT: Go ahead, I'll let you finish.

13 MR. BROOKS: So I believe, consistent with
14 vigorous representation of my clients, I am not -- as I
15 sit here right now, Your Honor, this is a serious thing to
16 say -- I am not sure that I can comply with that direction
17 consistent with vigorous representation of the position
18 that my clients are putting forward here.

19 If you see Dr. Brown's expert report that we put
20 in in support of the preliminary injunction, you will see
21 that it's all about male and female bodies using the terms
22 as they're understood in science, and we can't get away
23 from that.

24 THE COURT: Mr. Brooks, are you done?

25 MR. BROOKS: I am.

1 THE COURT: Okay, thank you.

2 I'm not asking you to refer to these individuals
3 as "females." I know that you don't want to do so. What
4 I'm saying is you must refer to them as "transgender
5 females" rather than as "males." Again, that's the more
6 accurate terminology, and I think that it fully protects
7 your client's legitimate interests. Referring to these
8 individuals as "transgender females" is consistent with
9 science, common practice and perhaps human decency.

10 To refer to them as "males," period, is not
11 accurate, certainly not as accurate, and I think it's
12 needlessly provocative; and, for me, civility is a very
13 important value, especially in litigation.

14 So if you feel strongly that you and your
15 clients have a right to refer to these individuals as
16 "males" and that you therefore do not want to comply with
17 my order, then that's unfortunate. But I'll give you some
18 time to think about it and you can let me know if it's a
19 problem. If it is, gosh, maybe we'll need to do
20 something. I don't want to bully you, but at the same
21 time, I don't want you to be bullying anybody else.

22 Maybe you might need to take an application to
23 the Court of Appeals. I don't know. But I certainly
24 don't want to put civility at risk in this case. Quite
25 the opposite. My goals for this case include, very

1 importantly, the goal of maintaining civil discourse,
2 respectful, humane, intelligent, civil discourse in the
3 course of the case. Nothing more, nothing less.

4 Beyond that, let me turn now to Mr. Block and
5 ask: Is there anything more that you want to say in
6 support of your application to intervene?

7 MR. BLOCK: Your Honor, this isn't on the merits
8 of the application, but if we could have some guidance
9 about in terms of upcoming deadlines, whether we should
10 tender a request for a prefiling conference or any other
11 stuff while we, you know, wait for either a future filing
12 or an order, that would be helpful for us in just figuring
13 out how to proceed.

14 THE COURT: Whoever is pressing buttons on their
15 phone, please don't do that.

16 Let me now come back to Mr. Brooks.

17 Mr. Brooks, this is your opportunity to make
18 whatever presentation you want to make this morning in
19 opposition to the motion to intervene filed on behalf of
20 the transgender females.

21 Is there anything you would like to add to your
22 papers?

23 MR. BROOKS: Yes, Your Honor, briefly; but may I
24 ask a follow-up question on your earlier instruction?

25 THE COURT: Sure.

1 MR. BROOKS: Do you have any objection to our
2 referring to those intervenors simply as transgender
3 athletes?

4 THE COURT: That's fine. That's fine with me.

5 MR. BROOKS: Am I correct that you also have no
6 objection to our discussing, as need be to make argument,
7 the fact that they have male bodies and, in at least one
8 case, don't deny that they went through male puberty?

9 THE COURT: That is your prerogative, certainly.
10 As you say, that's what the case is about.

11 MR. BROOKS: Thank you, Your Honor. That's very
12 helpful, and I appreciate it.

13 So on the position of the proposed -- individual
14 proposed interveners, let me emphasize that the challenge
15 of this lawsuit is against a policy and the authorities,
16 not against the individuals. We don't accuse, have never
17 accused them, those individuals, of doing anything at all
18 wrong. They are simply following the policy, and that's
19 not an accusation against them, and we're not seeking to
20 bind the individuals by judgment in any way.

21 I'd also like to point out that an intervention
22 by affected individuals in a Title IX athletics-related
23 case would be, so far as we have been able to find in the
24 case law, and there's 50 years of case law, it would be
25 unprecedented.

1 Athletics Title IX cases often involved some
2 solutions. The McCormick case is one example where if the
3 girls won then the boys teams had to be scheduled off
4 season and miss out on championships.

5 We're all aware of those many cases in the
6 college level, men's varsity teams have had to be
7 eliminated or reduced in status to achieve the merits and
8 funding balance requirements of Title IX. And in both
9 cases, the boys or the men are directly impacted.

10 And that's not a defect, that's not a wrong,
11 that's a legislative choice that Congress made in passing
12 Title IX.

13 As I say, we don't see a single case out there
14 with the affected boys or affected men, as the case in
15 most of the Title IX athletic litigation, are thought of
16 or are treated as either necessary parties or are in the
17 case as intervenors.

18 Now, I don't want to repeat our -- but I think
19 we've spelled out in some detail -- about the burden on
20 the intervener to show not to speculate, not to
21 hypothesize, but to show inadequate representation.

22 We've heard this morning a few different
23 arguments. It's been suggested that the CIAC is just a
24 stakeholder caught in the middle here. But CIAC is not
25 behaving like a stakeholder caught in the middle.

1 There are litigations where an institution comes
2 forward and says, we don't care, we're a stakeholder.

3 That's not how CIAC is behaving. They have
4 adopted this policy and vigorously defended it publicly.
5 More than that, they have and all the defendant schools
6 have maintained the defense of the policy in the face of
7 findings by the Department of Education that they need to
8 change the policy, they're violating Title IX, and that
9 process is whatever it leads to.

10 But my point is simply that they're not acting
11 like stakeholders, they're acting like parties who intend
12 to vigorously defend the policy. And as one of my
13 esteemed colleagues said earlier, certainly she intends to
14 make the argument that Title IX and state law require the
15 policies.

16 So what we hear is organizations that adopted
17 the policy, they believe in the policy, they have retained
18 competent counsel to defend the policy, and they're in
19 fact vigorously defending the policy before the Office of
20 Civil Rights and before this Court.

21 One of my colleagues said, well, the adequacy of
22 representation is not ensured and put forth hypotheticals
23 about possible settlement, possible arguments that might
24 or might not be made. I think we've cited the case law
25 that says that just doesn't meet the threshold of the

1 burden with regard to a demonstration of an adequate
2 representation. It's all hypotheticals.

3 And the Butler case we cited to Your Honor from
4 the Second Circuit is quite strong and says it's even more
5 strong when the entity defending the law is governmental.
6 It takes an even stronger showing to overcome the
7 presumption of adequacy.

8 Mr. Block spent some time saying his clients
9 have distinct factual information not directly available
10 to the schools and such. He does say in his brief, and
11 I'm not aware of any case law that suggests that's a basis
12 for intervention. That's a basis for putting witness on
13 the stand or for taking discovery.

14 Your Honor, the last thing I would say is,
15 speaking to permissive intervention, I'm aware that
16 there's obviously more discretion in that area. But
17 multiplication of parties does increase the burden on
18 plaintiffs. Generally plaintiffs are allowed to choose
19 the jurisdiction, the lawsuit that they want to structure.
20 Of course, absent the type of tests and burdens that we've
21 just been discussing.

22 And when you look at the precedent that we've
23 cited in our brief on this matter where they go through
24 adequacy of representation, what they don't do is say,
25 well, you didn't demonstrate inadequate representation,

1 but you know what, come on in through permissive
2 intervention anyway. That's just not the path of what the
3 courts do when they find a demonstration of inadequate
4 representation has not been made, is to deny intervention.
5 I think you'll see that in case after case.

6 And the final thing I'll say, Your Honor, and I
7 don't want to seem to concede anything, but this is the
8 burden point: If permissive intervention were granted, we
9 would strongly urge the Court to not be structured in a
10 way that minimizes increased burden; that is that the
11 discovery limitations are structured per size so that
12 adding interveners doesn't increase the burden on
13 plaintiffs, and that interveners are -- I mean, their
14 claimed point is that they have different additional
15 arguments to make. And we would suggest that if they're
16 permitted to intervene, which I've indicated as strongly
17 as I can they shouldn't be, that they be permitted to have
18 separate briefs and separate page limits only for the
19 purpose of advancing argument that in fact the CIAC for
20 instance and other defendants generally are not making.

21 And with that, Your Honor, I will stop.

22 THE COURT: Thank you.

23 Putting aside the points you just made about
24 limitations on intervention, which I think are fair, do
25 you want to comment on the argument heard earlier that

1 permitting intervention by these individuals avoids the
2 risk of future litigation were your clients to prevail on
3 the request for expungement of records?

4 MR. BROOKS: Well, Your Honor, in our system
5 there's always a risk, there's so many contexts. There is
6 a risk of future litigation, and obviously adjudication
7 from this Court that either Title IX requires what my
8 clients believe it requires or doesn't require what my
9 clients believe it requires. It's going to be appealed,
10 we're going to get authoritative word from the Second
11 Circuit, and at that point, that's very likely, depending
12 on what the Second Circuit says, that's likely to
13 forestall a follow-up lawsuit or end this lawsuit one way
14 or the other.

15 So I think there's going to be an appeal. I'm
16 not giving away trade secrets here to say that what this
17 Court decides is almost certain to be appealed. And after
18 that authoritative instruction is out there, anybody who
19 chooses to file a follow-on lawsuit is very speculative.

20 THE COURT: All right, then, thank you.

21 Mr. Block, you get the last word on this, and
22 then I'm going to turn to Mr. Roberts.

23 MR. BLOCK: Sure, thank you, Your Honor. I want
24 to respond to this assertion that this is unprecedented in
25 Title IX lawsuits to intervene.

1 I'm not aware of any Title IX lawsuit that has
2 been brought to exclude someone from participating. That,
3 under my understanding, is what's unprecedented here.

4 The Title IX lawsuits that I'm aware of are
5 either people suing to either join a team or people suing
6 to contest the elimination of their team.

7 The Mamaroneck case, the relief they were
8 seeking was to move the girls team to the fall to be
9 treated equally. And there are certainly cases where a
10 school on its own in perceived need to comply with Title
11 IX has eliminated a boys team.

12 Those aren't lawsuits brought by a private
13 individual seeking relief requiring a school to eliminate
14 another team. Those are often suits where the school
15 eliminates a team and then the boys team then sues.

16 So I agree, it's unusual to have intervention in
17 an athletics Title IX lawsuit, but that's because this is
18 a very unusual fact pattern in which the alleged
19 participation of a specific identified individual that is
20 causing the plaintiffs' alleged injury.

21 The second point I just want to make is, I think
22 the constitutional arguments are really central here, that
23 what happens with respect to Title IX or the statute is
24 not even close to being the full ballgame of the arguments
25 that need to be made.

1 And then the third point is, I think that, you
2 know, in this specific context in Brennan and in
3 Bridgeport Guardians, the Second Circuit could not have
4 been clearer about why intervention is necessary in this
5 specific type of fact pattern.

6 This is not a party seeking to intervene to
7 suspend the constitutionality of a law that affects the
8 citizenry at large. This is a unique fact pattern in
9 which the government is an employer, in this case a school
10 district, and I think that the Second Circuit cases,
11 Brennan and Bridgeport Guardians, are directly on point.

12 And similarly in the Ricci case, things went all
13 the way up to the Supreme Court and the Supreme Court
14 ruled in favor of Ricci with really broad language. And
15 the Second Circuit said, even though this case from the
16 Supreme Court, it still didn't find for the other
17 firefighters with their disparate impact suit, because
18 that would be fundamentally inconsistent with the idea
19 that everyone is entitled to their own representation and
20 their own interests aren't virtually represented by
21 someone else.

22 So those are just the brief points on the
23 intervention aspect right.

24 For permissive intervention, I can -- I know
25 many, many cases where intervention, as a right is denied,

1 but then permissive intervention is granted.

2 We are obviously very eager and willing to
3 reduce any added duplicative briefing or any added burden.
4 I think that some sort of formal requirement of separate
5 briefs with discrete issues will add to the burden and
6 complication rather than simplify things.

7 To the extent we have common arguments, we will
8 not be seeking to lay them out differently. I don't know
9 if Your Honor prefers that all the arguments be
10 consolidated into a single brief. But would we are happy
11 to do whatever sort of filing is necessary to reduce
12 burdens.

13 But we just want our clients to be able to have
14 a place at the table in representing their own legal
15 interests here.

16 THE COURT: All right, thank you.

17 Let me turn now to the motion submitted by the
18 CHRO.

19 Let me call on Mr. Roberts at this time to make
20 whatever additional presentation you would like to make in
21 support of that submission.

22 Mr. Roberts.

23 MR. ROBERTS: Good morning, Your Honor, Michael
24 Roberts for the commission.

25 Just briefly, we lay out the substance of all of

1 our points in what we have submitted already.

2 We -- the commission is the state agency that
3 enforces Connecticut antidiscrimination statutes. This
4 lawsuit is making, in essence, a discrimination claim.

5 Among the statutes that the commission enforces
6 are: State statutes that require the quality of
7 opportunity in the education context; that there be full
8 and equal accommodations in places that include public
9 schools; and that those provisions be fulfilled on the
10 basis of both sex and gender identity and expression.

11 The commission enforces Connecticut General
12 Statutes Section 46a-58 which converts deprivations of
13 federal rights into a violation of that statute that the
14 commission enforces.

15 So I think that the commission's interests and
16 our motion for intervention is guided by what occurred in
17 Boy Scouts of America v. Wyman, where -- even though the
18 claims in that case included constitutional arguments, you
19 know, and the commission does not directly enforce the
20 United States Constitution -- we had an interest because
21 our ability to carry out our enforcement mandate and
22 ensure the integrity of our decision-making process would
23 be impacted by the claims that were at issue there.

24 It didn't matter in that case that there were
25 other state entities that were already defendants. The

1 Comptroller's Office, the State of Connecticut, were
2 already present in that case as named defendants and were
3 being ably represented. But the commission had a unique
4 and distinct interest and it was granted the ability to
5 intervene.

6 We have a unique lens through which we view this
7 case that is not otherwise represented by the named
8 defendants who are the other proposed intervenors. My
9 sense is, just from what's been submitted and in
10 discussions with counsel so far, that while we may on
11 those that are -- are seeking to be on the side of the "v"
12 in this case, see a similar final destination for this
13 case that we would hope to achieve.

14 The path by which we would reach that
15 destination varies and that the Commission would approach
16 this case and this argument with the goal of having a
17 cohesive enforcement scheme between Title IX -- that could
18 then be enforced through 46a-58 -- and the state statutory
19 scheme as they all apply to this situation.

20 And so I think that the standards for
21 intervention are met by the commission and that our motion
22 should be granted.

23 THE COURT: Okay, thank you. Let me follow up
24 very briefly.

25 Would your interest in this matter be fully

1 served if you were to participate as an amicus?

2 MR. ROBERTS: I think not, Your Honor, because
3 we --

4 THE COURT: Go ahead.

5 MR. ROBERTS: I think not because we would be
6 largely beholden to the arguments raised by the parties.

7 There have been instances before where the
8 commission has been an amicus and the Connecticut Supreme
9 Court, among other courts, has noted that the commission
10 has raised, in the court's language, very interesting
11 questions but because they were not raised by the parties,
12 the court declined to address them. In other instances,
13 the court has decided to address our questions and then
14 found a way to do so.

15 But, you know, we would be limited in that way.
16 We would be beholden to the arguments raised by parties
17 who do not share our interests in the cohesiveness of the
18 statutory schemes.

19 And so while I think that there are certainly
20 arguments that we could make as an amicus, it would not be
21 the same and our approach to the case and the arguments
22 that we would raise and the way they would be reflected in
23 the proceedings would not be the same.

24 THE COURT: Okay, thank you.

25 Mr. Brooks, this is your opportunity to make any

1 additional points you wish to make with regard to this
2 motion to intervene by the CHRO.

3 MR. BROOKS: Your Honor, thank you.

4 What I've heard is new today. Much of this is
5 new. There's details in our briefing.

6 I do believe CHRO is interested but has no legal
7 interest, and I will call the Court to the case that we've
8 cited in our brief.

9 The Sixth Circuit, *Brewer v. Republic Steel*
10 case, obviously not binding authority by this Court, but
11 it is by far the most on point in the nation which dealt
12 with a very similar situation in the Ohio Civil Rights
13 Commission that wanted to intervene in a Title VII
14 lawsuit, and the Court concluded and explained in some
15 detail that that was not the type of interest -- the
16 Commission didn't have the type of interest contemplated
17 by Rule 24.

18 CHRO simply has no rights, no claims, no
19 obligations under Title IX, and those are the things --
20 and it also doesn't have an interest under the Second
21 Circuit's teaching and tests as articulated in *Our Best*
22 *Produce* case that we cite.

23 And I would emphasize to your court -- to Your
24 Honor, that everything Mr. Roberts said about the nature
25 of their interests which has to do with cohesiveness

1 between the state regime and a federal regime and federal
2 law interpreted the way they would like to interpret it,
3 well, given that federal law is a uniform thing across the
4 country, what CHRO is articulating is an interest that
5 justifies intervention, then representatives of every one
6 of the 50 states has an absolute, equal and identical
7 interest in intervention. And that clearly isn't the law
8 and it's not the right answer. They have no particular
9 interest.

10 The other thing I would just flag, as we pointed
11 out in our brief, that CHRO is a very specific statute
12 created independent commission created with certain and
13 limited authority, and it has statutory authority to
14 conduct administrative proceedings. It has very specific
15 statutory authority about when to bring enforcement
16 actions in Connecticut Superior Court, and it has no
17 statutory authorization to seek to intervene to
18 participate in federal litigation.

19 It is not, in any statutory place, authorized as
20 the voice of the State of Connecticut. It is an
21 independent commission, which is a very different
22 thinking.

23 The general authority to litigate on behalf of
24 Connecticut, it is invested in the Attorney General, who
25 is not here today seeking to intervene.

1 So we do believe, Your Honor, that like any
2 other party that is interested but doesn't have a legal
3 interest, the right solution for CHRO is to file an amicus
4 brief, which certainly an initial statement of their views
5 on the important legal issues here, a request to file that
6 amicus, the plaintiffs would not oppose. And I wouldn't
7 even rule out that there may be later stages in the
8 proceeding where they would seek leave to file a
9 subsequent amicus brief.

10 And we believe that, in general, that's where
11 they should be standing procedurally.

12 THE COURT: All right. Thank you.

13 Mr. Roberts, you get the last word on this one.

14 MR. ROBERTS: Just very briefly, Your Honor.

15 I think in our reply memorandum we dispatched
16 pretty summarily the arguments based on Brewer and the
17 possibility of everyone in the nation being interested in
18 this case simply through 46a-58, which is a unique among
19 state statutes, and the commission's relation to that
20 statute is unique among state civil rights agencies and
21 sets the commission apart, particularly where we are in
22 Connecticut and the commission is the state civil rights
23 agency charged by statute with enforcing Connecticut's
24 civil rights and antidiscrimination protections.

25 To the extent that the plaintiffs have

1 challenged the commission's authority to be here, I would
2 simply say that neither the district courts nor the Second
3 Circuit were -- felt impeded by the commission's
4 intervention in Wyman, which is of course a federal action
5 dealing with constitutional claims.

6 And in that case, there's no indication that the
7 State of Connecticut, the Attorney General's Office, the
8 state defendants that were named separately from the
9 commission were impeded or otherwise objected to the
10 commission's participation as an intervenor.

11 THE COURT: With regard to the option of
12 granting amicus status, I think I probably need to focus
13 very specifically on your point earlier that the CHRO has
14 the freedom to raise issues on its own. It could find
15 itself called on or even sought out on important points
16 during the litigation.

17 So directing that particular concern, why would
18 it be a problem or a risk in that regard if I were to
19 specifically invite the CHRO to submit one or more briefs
20 addressing issues that CHRO could helpfully address in
21 order to provide me with a better understanding of the
22 case?

23 If I were to do that, would you be satisfied to
24 participate as an amicus?

25 MR. ROBERTS: I would have a couple of concerns

1 with that, Your Honor.

2 One would be our access to discovery. We have
3 made clear that we do not intend to notice any depositions
4 or propound the discovery in this case. We have asked for
5 the ability to participate and have access to what comes
6 out of discovery. And in Wyman, that participation led to
7 the commission filing a separate motion for summary
8 judgment, separate from the state defendants.

9 The other concern that I would have, as Your
10 Honor will -- of course we hope, that anything we submit
11 as either an amicus or intervenor would be of help to the
12 Court, I guess I would just be concerned with the specific
13 questions that would be posed to the commission as an
14 amicus.

15 In the sense that there are specific questions
16 that are raised and the commission's participation and
17 briefing as an amicus is limited to the specific questions
18 rather than perhaps, you know, the expertise and
19 experience that we bring to the table, we may see
20 something a little differently or have a specific nuance
21 to particularly our enforcement scheme, the state
22 framework and the potential impact on some of what occurs
23 in this case on that framework, that the ability to make
24 our own motions and submit our own materials or briefing
25 or whatever other arguments that we may raise ourselves to

1 this case may -- you know, we would have more latitude to
2 do that as a party, as an intervenor party, than we would
3 as an amicus.

4 We simply would not wish there to be issues left
5 unaddressed or that we would be impeded from addressing as
6 an amicus that we might be able to based on our own and
7 make sure our presence as an intervenor.

8 THE COURT: Okay, thank you.

9 It's been a long call, I thank Darlene Warner
10 our court reporter.

11 MS. YODER: Your Honor, I'm sorry to interrupt,
12 this is Attorney Yoder.

13 At the risk of not bringing forward information
14 that may be relevant to your decision since we have
15 everybody here on the call, I just wanted to bring to your
16 attention: In addition to CIAC's argument that it is
17 concerned about being sued in multiple forums with
18 multiple outcomes, with different outcomes, the Court has
19 given us a deadline of April 20, I believe, to file a
20 motion to join necessary parties. And CIAC intends to
21 file at this time a motion to join the Department of
22 Education as a necessary party.

23 And I know we're not arguing that today, but I
24 didn't want -- given that it's related to some of the
25 arguments we've heard today, I didn't want today's session

1 to pass without alerting the Court and the other parties
2 of our intent to do so.

3 THE COURT: You're referring to the Federal
4 Department of Education?

5 MS. YODER: Yes.

6 THE COURT: Okay. Well, I appreciate your
7 bringing that to our attention.

8 As I said, it's been a long call, and I know
9 it's not easy for the court reporter even when we're doing
10 things in the courtroom much less when she has to cope
11 with so many people on the phone.

12 So thank you, Darlene.

13 THE COURT REPORTER: You're welcome, Judge.

14 THE COURT: With regard to the timing of this, I
15 know that we have done a tailored scheduling order that
16 requires the existing defendants to submit any request for
17 a prefiling conference in connection with a motion to
18 dismiss on or before a date in the near future. I don't
19 have that date in front of me. Is it next Friday?

20 MR. ZELLNER: It's the 20th, Your Honor; Monday,
21 I believe.

22 THE COURT: Okay. I think what I will do is
23 move that date to the 24th and I will try to have rulings
24 for you on these motions to intervene in the next couple
25 of business days. I want to think about what we have

1 talked about this morning.

2 Not by way of complaint at all, but just so you
3 know, the Court is receiving on a daily basis multiple
4 emergency motions by detained persons, both pretrial
5 detainees and sentenced defendants, seeking immediate
6 release based on their fear of contracting this virus.

7 So it may not be feasible for me to get a ruling
8 to you in the next couple of days, although I will do my
9 very best; and in any case, I will do it next week.

10 I think in the meantime anybody, proposed
11 intervenors included, who might want to file a motion to
12 dismiss should endeavor to prepare a prefiling conference
13 request in connection with any such motion so that in the
14 event intervention is granted and it permits motion
15 practice by intervenors, you'll be in a position to go
16 ahead with that part of this pretrial on or before a week
17 from tomorrow.

18 All right, thank you all very much. We'll
19 adjourn.

20 (Proceedings adjourned at 11:30 a.m..)

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C E R T I F I C A T E

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In Re: SOULE, ET AL vs. CIAC, ET AL

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ _____

DARLENE A. WARNER, RDR-CRR
Official Court Reporter
450 Main Street, Room #223
Hartford, Connecticut 06103
darlene_warner@ctd.uscourts.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

SELINA SOULE, a minor, by Bianca Stanescu,
her mother; CHELSEA MITCHELL, a minor, by
Christina Mitchell, her mother; ALANNA SMITH,
a minor, by Cheryl Radachowsky, her mother;
ASHLEY NICOLETTI, a minor, by Jennifer
Nicoletti, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS
d/b/a CONNECTICUT INTERSCHOLASTIC
ATHLETIC CONFERENCE; BLOOMFIELD
PUBLIC SCHOOLS BOARD OF EDUCATION;
CROMWELL PUBLIC SCHOOLS BOARD OF
EDUCATION; GLASTONBURY PUBLIC
SCHOOLS BOARD OF EDUCATION; CANTON
PUBLIC SCHOOLS BOARD OF EDUCATION;
DANBURY PUBLIC SCHOOLS BOARD OF
EDUCATION,

Defendants.

Case No.: 3:20-CV-00201-RNC

**AMENDED VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES**

JURY TRIAL REQUESTED

Dated: April 17, 2020

INTRODUCTION

1. The Plaintiffs are four high school girls who compete in interscholastic girls' track and field in Connecticut. Like large numbers of female athletes around the nation, each Plaintiff has trained much of her life—striving to shave mere fractions of seconds off her race times—in order to experience the personal satisfaction of victory, gain opportunities to participate in state and regional meets, gain access to opportunities to be recruited and offered athletic scholarships by colleges, and more.

2. Unfortunately for Plaintiffs and other girls in Connecticut, those dreams and goals—those opportunities for participation, recruitment, and scholarships—are now being

directly and negatively impacted by a new policy that is permitting students¹ who are biologically male to compete in girls' athletic competitions if they claim a female gender identity.

3. This discriminatory policy is now regularly resulting in boys displacing girls in competitive track events in Connecticut—excluding specific and identifiable girls including Plaintiffs from honors, opportunities to compete at higher levels, and public recognition critical to college recruiting and scholarship opportunities that should go to those outstanding female athletes.

4. As a result, in scholastic track competition in Connecticut, more boys than girls are experiencing victory and gaining the advantages that follow, even though postseason competition is nominally designed to ensure that equal numbers of boys and girls advance to higher levels of competition. In the state of Connecticut students who are born female now have materially *fewer* opportunities to stand on the victory podium, fewer opportunities to participate in post-season elite competition, fewer opportunities for public recognition as champions, and a much smaller chance of setting recognized records, than students who are born male.

5. This reality is discrimination against girls that directly violates the requirements of Title IX: “Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX’s mandate of equal

¹ Because Title IX focuses on equal opportunities between the sexes, because this Complaint is precisely concerned with effects of *biological* differences between males and females, because the terms “boys” and “men” are commonly understood to refer to males, and to avoid otherwise inevitable confusion, we refer generally in this complaint to athletes who are biologically male as “boys” or “men,” and to athletes who are biologically female as “girls” or “women.”

opportunity for both sexes.” *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004).

I. JURISDICTION AND VENUE

6. This action pursuant to Title IX, 20 U.S.C. § 1681, *et seq.* and its interpreting regulations, raises federal questions and seeks redress for deprivation of rights protected by federal law.

7. This Court has original jurisdiction over the claims asserted in this Complaint under 28 U.S.C. § 1331, which provides jurisdiction for claims raising questions of federal law, and 28 U.S.C. § 1343(a), which provides jurisdiction for claims seeking vindication of civil rights protected by federal law.

8. This Court has authority to award the requested declaratory relief under 28 U.S.C. § 2201. This Court has authority to award the other relief requested under 28 U.S.C. § 2202.

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this District and all Plaintiffs and Defendants reside or have their principal place of business in Connecticut.

II. PARTIES

A. Plaintiffs

10. Plaintiff Selina Soule is a twelfth-grade female student and varsity track and field athlete at Glastonbury High School. Because Selina Soule is a minor, she brings this action by her mother, Bianca Stanescu.

11. Plaintiff Chelsea Mitchell is a twelfth-grade female student and varsity track and field athlete at Canton High School. Because Chelsea Mitchell is a minor, she brings this action by her mother, Christina Mitchell.

12. Plaintiff Alanna Smith is a tenth-grade female student and varsity track and field athlete at Danbury High School. Because Alanna Smith is a minor, she brings this action by her mother, Cheryl Radachowsky.

13. Plaintiff Ashley Nicoletti is a tenth-grade female student and varsity track and field athlete at Immaculate High School in Danbury, Connecticut. Because Ashley Nicoletti is a minor, she brings this action by her mother, Jennifer Nicoletti.

14. Selina Soule, Bianca Stanescu, Chelsea Mitchell, Christina Mitchell, Alanna Smith, Cheryl Radachowsky, Ashley Nicoletti, and Jennifer Nicoletti all reside within the District of Connecticut.

B. Defendants

15. Defendant Bloomfield Public Schools Board of Education is located in Bloomfield, Connecticut, and has entered and continues to enter T.M. —a student born male and possessed of a male body— in Connecticut Interscholastic Athletic Conference (CIAC) girls’ athletic competitions.

16. Defendant Cromwell Public Schools Board of Education is located in Cromwell, Connecticut, and has entered and continues to enter Andraya Yearwood—a student born male and possessed of a male body—in CIAC girls’ athletic competitions.

17. Defendant Glastonbury Public Schools Board of Education is located in Glastonbury, Connecticut, and provides opportunities for interscholastic competition for its students only through events sanctioned by and subject to the discriminatory policies of CIAC.

18. Defendant Canton Public Schools Board of Education is located in Canton, Connecticut, and provides opportunities for interscholastic competition for its students only through events sanctioned by and subject to the discriminatory policies of CIAC.

19. Defendant Danbury Public Schools Board of Education is located in Danbury, Connecticut, and provides opportunities for interscholastic competition for its students only through events sanctioned by and subject to the discriminatory policies of CIAC.

20. On information and belief, each of Bloomfield Public Schools, Cromwell Public Schools, Glastonbury Public Schools, Canton Public Schools, and Danbury Public Schools (collectively, “the Defendant Schools”), receives federal financial assistance.

21. All programs at the Defendant Schools are therefore subject to the requirements of Title IX.

22. Defendant Connecticut Association of Schools, Inc., which operates and is referred to herein under the name of the Connecticut Interscholastic Athletic Conference (CIAC) is a Connecticut not-for-profit corporation with its headquarters in Cheshire, Connecticut. CIAC is the “sole governing body for inter-scholastic athletic activities in Connecticut,” and “directs and controls” all high school athletics for boys and girls in Connecticut.

23. CIAC is funded by dues from member schools that are subject to the obligations of Title IX. According to CIAC, “[v]irtually all public and parochial high schools in Connecticut are dues-paying members.”

24. All Defendant Schools are dues-paying members of the CIAC.

25. On information and belief, all public schools in Connecticut receive federal funds covered by Title IX, and thus are subject to the requirements of Title IX.

26. CIAC is subject to the obligations of Title IX because it indirectly receives federal funding from its public member-schools, *see* 34 C.F.R. § 106.2(i).

27. CIAC is also controlled by member schools that are subject to the obligations of Title IX. The CIAC Board of Control is elected by the member schools, and a majority of the

CIAC Board of Control are principals or other senior administrators of member schools. CIAC policies are established by the principals of the member schools, through the CIAC Legislative Body which is made up of the principals of all member schools.

28. On information and belief, the majority of CIAC member schools receive federal funds and are subject to the obligations of Title IX.

29. CIAC is separately subject to the obligations of Title IX because, on information and belief, it receives and accepts federal grant monies. For example, in 2018 CIAC received a grant of more than \$350,000 from Special Olympics Connecticut, Inc., which on information and belief was funded in whole or in substantial part by a grant from the United States Department of Education to Special Olympics, Inc., the national parent organization of Special Olympics Connecticut, Inc. for the purpose of funding state-level organizations such as CIAC. On information and belief CIAC continues to receive and accept federal grant monies up to the present.

30. CIAC controls and governs competition in 27 sports across three seasons each year, including Winter Indoor Track and Spring Outdoor Track. CIAC designates some sports only for boys (e.g. football and baseball), different sports only for girls (e.g. softball), and other sports for both boys and girls (e.g. swimming and track).

31. For the latter sports, though, CIAC and its member schools have historically separated teams and competitions at the high school level by sex, or at least prohibited boys from competing in the girls' events.

32. Each Defendant School actively works with and assists CIAC to schedule and organize interscholastic athletic competitions, including track and field meets, that are conducted subject to CIAC rules including the CIAC policy at issue in this litigation. Each defendant board

of education causes the schools and athletic programs under its authority to abide by the rules, regulations, and qualifications of CIAC concerning eligibility, competition rules, and tournament policies and procedures.

III. FACTUAL BACKGROUND

A. The Goals and Requirements of Title IX, and Its Impact on Women's Athletics.

33. In 1972, Congress enacted Title IX, 20 U.S.C. § 1681, which forbids education programs or activities receiving federal financial assistance from discriminating against persons based on their sex. It provides:

“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” 20 U.S.C. § 1681(a).

34. Title IX was designed to eliminate significant “discrimination against women in education.” *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999).

35. According to one of its primary sponsors, Senator Birch Bayh, Title IX promised women “an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for work.” 118 Cong. Rec. 5808 (1972).

36. Before the enactment of Title IX in 1972, schools often emphasized boys' athletic programs “to the exclusion of girls' athletic programs,” *Williams v. School District of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993), and vastly fewer girls participated in competitive interscholastic athletics than did boys.

37. Many have argued that the competitive drive and spirit taught by athletics is one important educational lesson that carries over and contributes to lifetime success in the

workplace. Certainly, implementing regulations make clear that Title IX applies in full force to athletic programs sponsored by recipients of federal financial assistance:

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.” 34 C.F.R. § 106.41(a).

38. In the statute, Congress expressly delegated authority to the United States Department of Health, Education and Welfare (HEW) to promulgate regulations interpreting Title IX. 20 U.S.C. §1682. In 1975, HEW promulgated regulations that are codified at 34 C.F.R. Part 106 (collectively, the “Regulations”). Further, in 1979, the Department of Education Office for Civil Rights (OCR) issued a policy interpretation of Title IX and the Regulations to provide recipients with more specific guidance about the statute’s application to intercollegiate athletics. This policy interpretation is found at 44 Federal Register 71,413 (1979) (the “Policy Interpretation”). Courts have recognized that the Policy Interpretation is also applicable to high school athletic programs. The Policy Interpretation was further clarified by OCR through issuance of OCR’s 1996 *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (the “OCR Clarification”).

39. Title IX and its implementing regulations and guidance require that, if an entity subject to Title IX provides athletic programs or opportunities separated by sex, then it must do so in a manner that “provide[s] equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c).

40. As one aspect of equal athletic opportunity, implementing regulations and guidance state that provided athletic opportunities must “effectively accommodate the interests and abilities” of girls, as well as of boys. 34 C.F.R. § 106.41(c). Here, the “governing principle”

is that “the athletic interests and abilities of male and female students must be equally **effectively accommodated.**” *Policy Interpretation*, 44 Fed. Reg. at 71,414. More specifically, the institution must accommodate the physical abilities of girls and women “to the extent necessary to provide equal opportunity in . . . levels of competition,” and competitive opportunities “which equally reflect their abilities.” *Policy Interpretation*, 44 Fed. Reg. at 71,417-418.

41. As another aspect of equal athletic opportunity, implementing regulations and guidance state that male and female athletes “should receive **equivalent treatment**, benefits and opportunities.” *Policy Interpretation*, 44 Fed. Reg. at 71,415. The “equal treatment” to which girls and women are entitled includes equal “opportunities to engage in . . . post-season competition,” *id.* at 71,416, equal opportunities for public recognition, 34 C.F.R. § 106.41(c), and the right to be free of any policies which are “discriminatory in . . . effect” or that have the effect of denying “equality of athletic opportunity.” 44 Fed. Reg. at 71,417.

42. Title IX has been strikingly successful towards its intended goals. “For example, between 1972 and 2011, girls’ participation in high school athletics increased from approximately 250,000 to 3.25 million students.” U.S. Dept. of Educ., OCR, *Protecting Civil Rights, Advancing Equity* 33 (2015), <https://bit.ly/2VF516Q>. In college, women’s numbers have grown almost as steeply, from 30,000 to more than 288,000 in 2017-18.² Following the United States’ famed 1999 Women’s World Cup win, the Ninth Circuit wrote that:

“The victory sparked a national celebration and a realization by many that women’s sports could be just as exciting, competitive, and lucrative as men’s sports. And the victorious athletes understood as well as anyone the connection between a 27-year-old statute [Title IX] and tangible progress in women’s athletics.” *Neal*, 198 F.3d at 773.

² Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, Duke Journal of Gender Law Policy (forthcoming February 2020), available at SSRN: <https://ssrn.com/abstract=3523305>, citing <https://ope.ed.gov/athletics/#/>.

B. Equal Opportunities in Athletics and the Physiological Differences Between the Sexes.

43. What Title IX does not require—or even permit—is that recipients blind themselves to students’ sex when developing their athletic programs. Sponsors of the statute made that much clear during the debates in Congress,³ and implementing regulations expressly permit schools to sponsor sex-specific teams “where selection for such teams is based on competitive skill or the activity involved is a contact sport.” 34 C.F.R. 106.41(b).

44. In fact, ignoring the physical differences between the sexes would in many sports make it impossible to “accommodate the . . . abilities” of girls and women, and to provide athletic opportunities of equal quality to girls and women. In 1975, Dr. Bernice Sandler—who is frequently recognized as “the Godmother of Title IX”—told the House Subcommittee on Postsecondary Education, while testifying in support of regulations implementing Title IX, that to operate an entirely coed athletic program, ignoring differences in male and female physiology, would for many sports “effectively eliminate opportunities for women to participate in organized competitive athletics. For these reasons, such an arrangement would not appear to be in line with the principle of equal opportunity.” Statement of Dr. Bernice Sandler, Director, Project on the Status & Education of Women, Ass’n of American Colleges, June 25, 1975, Hearings on Sex Discrimination Regulations at 343.

45. Dr. Sandler was correct. Permitting males to compete in girls’ or women’s athletic events doesn’t merely add a new level of challenge for determined girls and women. Victory over comparably talented and trained male athletes is impossible for girls and women in the vast

³ S. Ware, Title IX: A Brief History with Documents, at 13 (2007).

majority of athletic competitions, because of inherent and biologically dictated differences between the sexes.

46. While boys and girls have comparable athletic capabilities before boys hit puberty, male puberty quickly increases the levels of circulating testosterone in healthy teen and adult males to levels ten to twenty times higher than the levels that occur in healthy adult females, and this natural flood of testosterone drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females.

47. The athletic performance-enhancing effects of testosterone are well known, and the anabolic steroids too often used by athletes to gain an unfair and prohibited advantage are often synthetic modifications of testosterone. Basically, from puberty on, boys and men have a large, natural, and equally unfair “doping” advantage over girls and women.

48. Physiological athletic advantages enjoyed over girls and women by similarly fit males after puberty include:

- a. Larger lungs and denser alveoli in the lungs, enabling faster oxygen uptake;
- b. Larger hearts and per-stroke pumping volume, and more hemoglobin per unit of blood, all enabling higher short-term and sustained levels of oxygen transport to the muscles;
- c. An increased number of muscle fibers and increased muscle mass (for example, men have 75%-100% greater cross-sectional area of upper arm muscle than do comparably fit women, while women have 60-70% less trunk and lower body strength than comparably fit men);
- d. Higher myoglobin concentration within muscle fibers, enabling faster transfer and “cellular respiration” of oxygen within the muscle to unleash power;
- e. Larger bones, enabling the attachment of greater volumes of muscle fiber;
- f. Longer bones, enabling greater mechanical leverage thus enabling males to unleash more power, e.g., in vertical jumps;

- g. Increased mineral density in bones resulting in stronger bones, providing superior protection against both stress fractures and fractures from collisions;
- h. And, of course, U.S. adult males are on average 5 inches taller than U.S. adult women.

49. Meanwhile, female puberty brings distinctive changes to girls and women that identifiably impede athletic performance, including increased body fat levels which—while healthy and essential to female fertility—creates increased weight without providing strength, as well as wider hips and different hip joint orientation that result in decreased hip rotation and running efficiency.

50. These are inescapable biological facts of the human species, not stereotypes, “social constructs,” or relics of past discrimination.

51. As a result of these many inherent physiological differences between men and women after puberty, male athletes consistently achieve records 10-20% superior to comparably fit and trained women across almost all athletic events, with even wider consistent disparities in long-term endurance events and contests of sheer strength such as weight-lifting.

52. The basic physiological differences between males and females after puberty have long been recognized and respected by the different standards set for boys and girls in a number of athletic events. For example:

- a. The net height used for women’s volleyball is more than 7 inches lower than that used for men’s volleyball.
- b. The standard weight used in high school shot put is 4 kilograms for girls, and 5.44 kilograms (36% heavier) for boys.
- c. The hurdle height used for the high school girls’ 100-meter hurdle event is 33 inches, whereas the standard height used for boys’ high school 110-meter hurdle is 39 inches.
- d. The standard women’s basketball has a circumference of 28 1/2 to 29 inches and a weight of 20 oz, while a standard basketball used in a men’s

game has a circumference between 29 1/2 to 30 inches and a weight of 22 oz.

53. In track and field events that do not use equipment, the physiological differences between males and females after puberty are stark in the record books. No one doubts that top male and female high school athletes are equally committed to excelling in their sport, and train equally hard. Yet boys and men consistently run faster and jump higher and farther than girls and women.

54. For example, in 2017, thousands of men and boys achieved times in the 400m faster than the best lifetime performances of three women Olympic champions in that event. Each year, thousands of men—and dozens or hundreds of high school boys under the age of 18—achieve times (or heights or distances) in track events better than the world's single best elite woman competitor that year.

55. As Duke Law professor and All-American track athlete Doriane Lambelet Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote:

The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science.

Team USA sprinter Allyson Felix has the most World Championship medals in history, male or female, and is tied with Usain Bolt for the most World Championship golds. Her lifetime best in the 400 meters is 49.26 seconds. In 2018 alone, 275 high school boys ran faster on 783 occasions. The sex differential is even more pronounced in sports and events involving jumping. Team USA's Vashti Cunningham has the American record for high school girls in the high jump at 6 feet, 4½ inches. Last year just in California, 50 high school boys jumped higher. The sex differential isn't the result of boys and men having a male gender identity, more resources, better training or superior discipline. It's

because they have androgenized bodies.⁴

56. As Professor Lambelet Coleman further explained in testimony before the House Judiciary Committee on April 2, 2019, in track events even the world’s best women’s Olympic athletes “would lose to literally thousands of boys and men, including to thousands who would be considered second tier in the men’s category. And because it only takes three male-bodied athletes to preclude the best females from the medal stand, and eight to exclude them from the track, it doesn’t matter if only a handful turn out to be gender nonconforming.”⁵

57. This stark competitive advantage is equally clear at the high school level. To illustrate, the charts below show the best boys’ and girls’ times in the nation across five different high school track events during the 2019 indoor and outdoor season:

Table 1: Best High School Outdoor 100m Times in 2019⁶

Boy	Time	Girl	Time
Matthew Boling	9.98s	Briana Williams	10.94s
Micah Williams	10.21s	Semira Killebrew	11.24s
Langston Jackson	10.23s	Thelma Davies	11.25s
Joseph Fahnbulleh	10.23s	Tamari Davis	11.27s
Ryan Martin	10.26s	Arria Minor	11.31s
Kenan Christon	10.26s	Tianna Randle	11.32s
Lance Broome	10.27s	Taylor Gilling	11.32s
Tyler Owens	10.29s	Kenondra Davis	11.36s
Ryota Hayashi	10.29s	De’anna Nowling	11.40s

⁴ Doriane Lambelet Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don’t Abandon Title IX*, *Washington Post* (Apr. 29, 2019), <https://wapo.st/2VKINN1>.

⁵ Testimony and illustrating graphic at <https://docs.house.gov/meetings/JU/JU00/20190402/109200/HHRG-116-JU00-Wstate-LambeletColemanP-20190402.pdf>, last visited February 11, 2020.

⁶ Results listed in this table are publicly available online at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Top.aspx?DivID=97967> (boys), and at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Top.aspx?DivID=97967&gender=f> (girls). These results were last visited February 11, 2020.

Marquez Beason	10.30s	Jacious Sears	11.41s
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Table 2: Best High School Outdoor 200m Times in 2019⁷

Boy	Time	Girl	Time
Matthew Boling	20.30s	Briana Williams	22.88s
Kenney Lightner	20.48s	Thelma Davies	22.95s
Cameron Miller	20.52s	Tamari Davis	22.96s
Kenan Christon	20.55s	Kayla Davis	23.08s
Kennedy Harrison	20.60s	Taylor Gilling	23.10s
Joseph Fahnbulleh	20.67s	Arria Minor	23.10s
Lance Broome	20.69s	Aaliyah Pyatt	23.11s
Devon Achane	20.69s	Rosaline Effiong	23.16s
Daniel Garland	20.73s	Jayla Jamison	23.19s
Langston Jackson	20.73s	Dynasty McClennon	23.28s

Table 3: Best High School Outdoor 400m Times in 2019⁸

Boy	Time	Girl	Time
Justin Robinson	44.84s	Kayla Davis	51.17s
Myles Misener Daley	45.62s	Jan'Taijah Ford	51.57s
Emmanuel Bynum	46.24s	Athing Mu	51.98s
Jayon Woodard	46.26s	Britton Wilson	52.06s
Alex Collier	46.33s	Ziyah Holman	52.12s
Jonah Vigil	46.43s	Kimberly Harris	52.16s
Zachary Larrier	46.49s	Aaliyah Butler	52.25s
Omajuwa Etiwe	46.51s	Caitlyn Bobb	52.79s
Sean Burrell	46.52s	Talitha Diggs	52.82s
Edward Richardson	46.55s	Aaliyah Butler	52.87s

⁷ Id. These results were last visited February 11, 2020.

⁸ Id. These results were last visited February 11, 2020.

Table 4: Best High School Indoor 60m Times in 2019⁹

Boy	Time	Girl	Time
Micah Williams	6.60s	Tamari Davis	7.27s
Lance Lang	6.62s	Briana Williams	7.28s
Marcellus Moore	6.65s	Thelma Davies	7.30s
Mario Heslop	6.70s	Moforehan Abinusawa	7.32s
Langston Jackson	6.74s	Jacious Sears	7.33s
Javonte Harding	6.77s	Semira Killebrew	7.34s
LaCarr Trent	6.79s	Alexa Rossum	7.40s
Justin Robinson	6.79s	Aliya Wilson	7.42s
Bryan Santos	6.79s	Kaila Jackson	7.44s
Tre Tucker	6.80s	Aja Davis	7.44s

Table 5: Best High School Indoor 800m Times in 2019¹⁰

Boy	Time	Girl	Time
Alfred Chawonza	110.57s	Athing Mu	123.98s
Malcolm Going	110.85s	Roisin Willis	125.70s
Miller Anderson	111.54s	Michaela Rose	126.93s
Luis Peralta	112.21s	Victoria Vanriele	127.24s
Jake Renfree	112.33s	Maggie Hock	127.68s
Liam Rivard	112.42s	Lily Flynn	128.15s
Conor Murphy	113.25s	Victoria Starcher	128.32s
Miguel Parrilla	113.41s	Aleeya Hutchins	128.52s

⁹ Results listed in this table are publicly available online at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Event.aspx?DivID=102510&Event=42> (boys), and at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Event.aspx?DivID=102510&Event=42> (girls), last visited February 11, 2020.

¹⁰ Results listed in this table are publicly available online at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Event.aspx?DivID=102510&Event=4> (boys), and at AthleticNET, <https://www.athletic.net/TrackAndField/Division/Event.aspx?DivID=102510&Event=22> (girls), last visited February 11, 2020.

Darius Kipyego	113.43s	Sarah Trainor	128.60s
Theo Woods	113.53s	Makayla Paige	128.97s

58. In 2016, Vashti Cunningham set the high school American record in the girls' high jump at 6 feet, 4½ inches, and went on to represent the United States at the Olympics in that same year. Yet to quote Professor Lambelet Coleman again, if the 2016 girls' high school track competition had been open to males, "Cunningham would not have made it to her state meet, she would not be on the national team, and we would not know her name other than as a footnote on her father's Wikipedia page." And for the vast number of girls who benefit from the experience of competitive athletics even if they are not future champions, "if sport were not sex segregated, most school-aged females would be eliminated from competition during the earliest rounds." (Coleman 2020 at 20-21.)

59. Plaintiffs do not know whether or if so at what time the students with male bodies who are competing in girls' CIAC track events began taking cross-sex hormones. Nor does this matter. Administering testosterone-suppressing drugs to males by no means eliminates their performance advantage. Some physiological advantages—such as bone size and hip configuration—cannot be reversed once they have occurred. And suppressing testosterone in men after puberty also does not completely reverse their advantages in muscle mass and strength, bone mineral density, lung size, or heart size.

60. This reality is evident in the performance of male athletes who have competed as women after taking cross-sex hormones. For example, CeCe Telfer, a male who ran as Craig Telfer throughout high school and the first two years of college, certified compliance with the NCAA requirement of one year on testosterone-suppressing drugs and began competing in female track events in CeCe's senior collegiate year, for the 2019 indoor and outdoor track and

field seasons. CeCe’s “personal best” did not go down substantially in *any* event following at least a year on testosterone suppressing drugs, and in a number of events instead *improved*:

Table 6: Comparison of “Craig” and “CeCe” Telfer Performance Times Before and After Hormone Suppression

Event	“Craig” Telfer	“Cece” Telfer
Indoor 200 Meter Dash	24.64s (2017)	24.45s (2019)
Indoor 60 Meter Hurdles	8.91s (2018)	8.33s (2019)
Outdoor 100 Meter Dash	12.38s (2017)	12.24s (2019)
Outdoor 400 Meter Hurdles	1:02.00s (2017)	57.53s (2019)

61. Not surprisingly, while *Craig* Telfer ranked 212th and 433rd in the 400-meter hurdles among men’s Division II athletes in 2016 and 2017 respectively, *CeCe* Telfer took the Division II national championship in *women’s* 400 meter hurdles in 2019.

62. Minna Sveard, the fastest female runner, finished almost a full two seconds behind Telfer, and was recognized only as coming in second.

63. In short, if males compete in girls’ events after puberty, equally gifted and dedicated female athletes simply can’t win.

C. Increasing Numbers of Girls Are Losing Athletic Victories and Opportunities to Transgender Competitors Today.

64. In the past, it has been argued that the unfair impact of males competing in girls’ and women’s categories would be trivial, because few males will wish to do so. But over just the last few years, the problem of boys and men taking opportunities from girls and women has grown very rapidly.

65. As increasing numbers of males are in fact competing in girls’ and women’s events each year, girls are in fact losing, and males are seizing one “girls’” or “women’s” championship and record after another.

66. Meanwhile, multiple sources report that the percentage of children identifying as transgender has multiplied rapidly within just the last few years.

67. As a larger wave of males claiming transgender identity as girls and women hits high school and college, the number of girls losing out on varsity spots, playing time, medals, advancement to regional meets, championship titles and records, and recognition on the victory podium, will also multiply. Indeed, given that it only takes three males to sweep the titles at local, regional, and national competitions entirely, and given the hard physiological facts reviewed above, if increasing number of males compete in girls' and women's athletics, those born female—girls—will simply vanish from the victory podium and national rankings.

68. This wave of lost opportunities and lost equality for girls is all the more inevitable when males are not merely permitted to take girls' slots and girls' titles, but are praised by schools and media as “courageous” and hailed as “female athlete of the year” when they do so.

69. Perhaps worse, if the law permits males to compete as girls in high school, then there is no principled basis on which colleges can refrain from recruiting these “top performing girls” (in reality genetically and physiologically male) for their “women's teams” and offering them the “women's” athletic scholarships.

70. In sum, because schools are permitting students possessing male physiology to compete against girls and women, girls and women are losing competitive opportunities, the experience of fair competition, and the opportunities for victory and the satisfaction, public recognition, and scholarship opportunities that can come from victory. More, girls and young women are losing their dreams. To American girls the message is, “Give up. You can't win.”

IV. THE DISCRIMINATORY CIAC POLICY AND ITS IMPACT ON GIRLS

A. **CIAC Adopts a New Policy Allowing Boys to Compete in Girls' Events.**

71. CIAC rightly deems athletics an “integral” part of the state’s “total educational program.”

72. CIAC declares that it seeks to offer athletic experiences that satisfy the highest “expectations for fairness, equity, and sportsmanship for all student-athletes and coaches” in order to maximize high school students’ “academic, social, emotional, and physical development.”

73. However, at some time before 2017, CIAC adopted a policy (“the CIAC Policy” or “the Policy”) pursuant to which CIAC and member schools began allowing boys who identify as girls to compete in girls’ athletic events.

74. The CIAC Policy determines—and requires member schools to determine—eligibility to compete in sex-specific athletic competitions solely based on “the gender identification of that student in current school records and daily life activities in the school”

75. As detailed later in this Complaint, CIAC and its member schools have permitted male students to switch, from one season to the next, from competing in boys’ events to competing (and winning) in girls’ events.

76. At the time that the CIAC adopted the CIAC Policy, all Defendants were aware that after puberty, a male who competes in girls’ events gains an “unfair advantage in competitive athletics” (CIAC By-Laws Article IX, Section B) due to physiological changes that occur during male puberty.

B. CIAC's Policy Has Resulted in Unequal Opportunities for Girls in Track and Field Competitions in Connecticut.

77. As a result of CIAC's policy, two students who were born genetically and physiologically male and have male bodies, T.M. and Andraya Yearwood, were permitted to compete in girls' athletic competitions beginning in the 2017 track season.

78. Between them, T.M. and Andraya have taken 15 women's state championship titles (titles held in 2016 by nine different Connecticut female athletes) and have taken more than 85 opportunities to participate in higher level competitions from female track athletes in the 2017, 2018, and 2019 seasons alone. In this section, we detail this adverse impact on girls and young women.

79. To understand how opportunities to participate in higher levels of athletic competition are determined for student athletes, it is necessary to understand how CIAC has organized interscholastic track and field competition in Connecticut. First, based on performance throughout the season, including in both regular and invitational meets, students may qualify to participate in state "Class" championships, with schools grouped by size (S, M, L, and LL). Thus, for example, a student might win the "Class M Women's Outdoor Track 100m" State championship. Next, the top-performing students within each State Class championship qualify to participate in the State Open championships, in which the top athletes in the state compete against each other regardless of the size of the school that they attend. And finally, the top performers in the State Open championships qualify to participate in the New England Championship.

80. All names, times, and other information provided in this section are taken from public sources, including Connecticut high school track records available on AthleticNET, at the

web addresses indicated. The records of male athletes competing in women's events are indicated with gray shading.

81. In 2017, Andraya's freshman season, Andraya won CIAC's Class M state championship in both the women's outdoor 100m and 200m events:

Table 7: 2017 CIAC Class M Women's Outdoor Track 100m Results (May 30, 2017)¹¹

Place	Grade	Sex	Name	Time	High School
1*	9	M	Andraya Yearwood	12.66s	Cromwell
2*	11	F	Kate Hall	12.83s	Stonington
3*	11	F	Erika Michie	12.93s	Woodland
4*	10	F	Raianna Grant	13.17s	Waterbury Career Academy
5*	9	F	Se-rya Steward	13.18s	Kaynor Tech
6	12	F	Jon-yea McCooty	13.30s	Northwest Catholic
7	12	F	Libby Spitzchuh	13.35s	Valley Regional

* Qualified for the State Open.

Table 8: 2017 CIAC Class M Women's Outdoor Track 200m Results (May 30, 2017)¹²

Place	Grade	Sex	Name	Time	High School
1*	9	M	Andraya Yearwood	26.08s	Cromwell
2*	11	F	Erika Michie	26.38s	Woodland
3*	11	F	Kate Hall	26.65s	Stonington
4*	11	F	Zora LaBonte	26.80s	Waterford
5*	11	F	Victoria Bower	27.05s	Rocky Hill
6	10	F	Raianna Grant	27.26s	Waterbury Career Academy
7	10	F	Sheena Wolliston	27.30s	Northwest Catholic

* Qualified for the State Open.

¹¹ AthleticNET, <https://www.athletic.net/TrackAndField/MeetResults.aspx?Meet=306447&show=all>, last visited February 11, 2020.

¹² *Id.*

82. But for CIAC's policy that allows biological males to compete in girls-only events, Kate Hall and Erika Michie would each have won first place in the Class M championship in one of these events in 2017.

83. In 2016, two different girls did win these Class M state championship titles.

84. Because only the top five finishers in each event qualified to participate in the Outdoor State Open championship, the decision of CIAC and Defendant Cromwell Board of Education to permit Andraya Yearwood to compete in these girls' events deprived Jon-yea McCooty and Raianna Grant of the opportunities that they had rightfully earned to compete in the State Open championship.

85. When one female athlete was asked about her loss, she said, "I can't really say what I want to say, but there's not much I can do about it."

86. It is starkly contrary to the terms, spirit, and goals of Title IX to tolerate a policy which first deprives a girl of an opportunity to participate in elite competition which she has rightfully earned, and then additionally intimidates her into silence about the injustice she has suffered. Nevertheless, Plaintiffs, too, have felt both the injustice and the sense of intimidation and silencing that this girl expressed.

87. Under CIAC's Policy, Andraya advanced to the 2017 State Open Women's Outdoor Track competition, where—still a freshman—Andraya again deprived a girl of a statewide title and opportunity to advance to still higher levels of competition that she had rightfully earned. But for CIAC's policy, Plaintiff Chelsea Mitchell—then a fourteen-year-old freshman—would have had the nearly unprecedented opportunity to qualify as a freshman for the New England Regional Championships:

Table 9: 2017 CIAC State Open Women's Outdoor Track 100m Results (June 5, 2017)¹³

Place	Grade	Sex	Name	Time	High School
1*	12	F	Caroline O'Neil	12.14s	Daniel Hand
2*	12	F	Kathryn Kelly	12.36s	Lauralton Hall
3*	9	M	Andraya Yearwood	12.41s	Cromwell
4*	11	F	Tia Marie Brown	12.44s	Windsor
5*	12	F	Kiara Smith	12.59s	Jonathan Law
6*	11	F	Kate Hall	12.62s	Stonington
7	9	F	Chelsea Mitchell	12.69s	Canton
8	12	F	Tiandra Robinson	FS	Weaver

* Qualified for the New England Championship.

88. In the Winter 2017, Spring 2017, and Winter 2018 seasons, T.M. competed in boys' indoor or outdoor track events and did not advance to any state class or open championships in individual events. Just weeks after the conclusion of the Winter 2018 indoor season, T.M. abruptly appeared competing in the girls' events in the Spring 2018 outdoor track season.

89. T.M.'s switch to competing in the girls' events immediately and systematically deprived female athletes of opportunities to advance and participate in state-level competition. According to AthleticNET records, T.M. never lost a women's indoor 55m or 300m final in the 2018 or 2019 track seasons. Nor has T.M. lost a women's outdoor 100m final in which T.M. competed.

90. T.M. has also displaced a girl in numerous elimination track events in which T.M. competed. At the 2018 outdoor State Open, for example, T.M. won the women's 100m event by

¹³ AthleticNet, <https://www.athletic.net/TrackAndField/meet/306453/results/f/1/100m>, last visited February 11, 2020.

a wide margin, while Andraya finished second. But for CIAC's policy, Bridget Lalonde would have won first place statewide in that event, Chelsea Mitchell would have won second place statewide, and Tia Marie Brown and Ayesha Nelson would have qualified to compete in the New England Championship:

Table 10: 2018 CIAC State Open Championship Women's Outdoor Track 100m Results (June 4, 2018)¹⁴

Place	Grade	Sex	Name	Time	High School
1*	10	M	T.M.	11.72s	Bulkeley
2*	10	M	Andraya Yearwood	12.29s	Cromwell
3*	11	F	Bridget Lalonde	12.36s	RHAM
4*	10	F	Chelsea Mitchell	12.39s	Canton
5*	11	F	Maya Mocarski	12.47s	Fairfield Ludlowe
6*	10	F	Selina Soule	12.67s	Glastonbury
7	12	F	Tia Marie Brown	12.71s	Windsor
8	11	F	Ayesha Nelson	12.80s	Hillhouse

* Qualified for the New England Championship.

91. The 2019 State Indoor Open saw similar results and a similar impact. T.M. and Andraya finished first and second respectively in both the preliminary and final Women's 55m races, each time defeating the fastest girl by a wide margin:

Table 11: 2019 CIAC State Open Championship Women's Indoor Track 55m Preliminary Results (February 16, 2019)¹⁵

Place	Grade	Sex	Name	Time	High School
1*	11	M	T.M.	7.00s	Bloomfield
2*	11	M	Andraya Yearwood	7.07s	Cromwell

¹⁴ AthleticNet, <https://www.athletic.net/TrackAndField/meet/334210/results/f/1/100m>, last visited February 11, 2020.

¹⁵ AthleticNet, <https://www.athletic.net/TrackAndField/meet/352707/results/f/1/55m>, last visited February 11, 2020.

3*	12	F	Cori Richardson	7.24s	Windsor
4*	11	F	Chelsea Mitchell	7.27s	Canton
5*	12	F	Kate Shaffer	7.27s	Conard
6*	12	F	Ayesha Nelson	7.29s	Hillhouse
7*	12	F	Maya Mocarski	7.34s	Fairfield Ludlowe
8	11	F	Selina Soule	7.37s	Glastonbury
9	10	F	Kisha Francois	7.41s	East Haven

* Qualified for the women's 55m final.

Table 12: 2019 CIAC State Open Championship Women's Indoor Track 55m Final Results (February 16, 2019)¹⁶

Place	Grade	Sex	Name	Time	High School
1*	11	M	T.M.	6.95s	Bloomfield
2*	11	M	Andraya Yearwood	7.01s	Cromwell
3*	11	F	Chelsea Mitchell	7.23s	Canton
4*	12	F	Kate Shaffer	7.24s	Conard
5*	12	F	Ayesha Nelson	7.26s	Hillhouse
6*	12	F	Maya Mocarski	7.33s	Fairfield Ludlowe
7	12	F	Cori Richardson	7.39s	Windsor

* Qualified for the New England Championship.

92. But for CIAC's policy, Plaintiff Selina Soule as well as Kisha Francois would have advanced to the next level of competition in the indoor state championship 55m preliminary race and competed for a spot at the New England Championship. (Table 11)

93. But for CIAC's policy, Plaintiff Chelsea Mitchell would have placed first in the 55m at the indoor state championship, been named State Open Champion, received a gold medal instead of a bronze medal, and received public recognition of her achievements. (Table 12)

¹⁶ *Id.*

94. But for CIAC's policy, Kate Shaffer would have won second place in the 55m at the indoor state championship; and seventh-place senior Cori Richardson would have qualified for the New England Championship. (Table 12)

95. But for CIAC's policy, Chelsea Mitchell would have made her school's history as the first female athlete from Canton High School indoor ever to be named State Open Champion, and the first ever Canton High School track athlete to be named a State Open Champion.

96. State Open Champions are recognized as All State Athletes, an award listed on college applications, scholarship applications, and college recruiting profiles. State Open Champions are also invited to the All-State Banquet and have their achievements celebrated with a banner in their high school gym.

97. But instead of receiving the accolades and publicity she earned, Chelsea Mitchell was repeatedly referred to in the press as the "third-place competitor."¹⁷

98. Following T.M.'s sweep of the CIAC's Indoor Class S, State Open, and New England titles in the 55m dash and 300m, this student—genetically male and enjoying the athletic advantages bestowed by male physiology—was named "All-Courant girls indoor track and field athlete of the year" by the Hartford Courant newspaper.¹⁸

99. In the Spring 2019 track season, T.M. and Andraya Yearwood continued to displace girls including Plaintiffs from victory positions and opportunities to advance to elite levels of competition.

¹⁷ See, e.g., <https://www.washingtontimes.com/news/2019/feb/24/terry-miller-andraya-yearwood-transgender-sprinter/>, last visited February 11, 2020.

¹⁸ <https://www.courant.com/sports/high-schools/hc-sp-terry-miller-all-courant-20190410-36bj/>, last visited February 11, 2020.

100. For example, in the Class S Women's Outdoor Track 100m qualifying race, T.M. and Yearwood took second and third place, excluding two girls from the opportunity to advance to the next level of competition. But for CIAC's policy, Plaintiff Ashley Nicoletti as well as Annabelle Shanks would have advanced to the next level of competition in the outdoor Class S state championship 100m preliminary race and competed for a spot at the State Open Championship:

Table 13: 2019 CIAC Class S Women's Outdoor Track 100m Preliminary Results (May 30, 2019)¹⁹

Place	Grade	Sex	Name	Time	High School
1*	11	F	Chelsea Mitchell	12.14s	Canton
2*	11	M	T.M.	12.18s	Bloomfield
3*	11	M	Andraya Yearwood	12.50s	Cromwell
4*	10	F	Alisia Munoz	12.73s	Kolbe-Cathedral
5*	11	F	Brianna Westberry	13.05s	Capital Prep
6*	12	F	Olivia D'Haiti	13.08s	Kolbe-Cathedral
7*	9	F	D'Jior Delissir	13.16s	Bloomfield
8*	12	F	Sheena Wolliston	13.22s	Northwest Catholic
9	9	F	Ashley Nicoletti	13.27s	Immaculate
10	10	F	Annabelle Shanks	13.30s	Litchfield

* Qualified for the women's 100m final.

101. In that outdoor Class S state championship, T.M. and Andraya Yearwood placed first and third respectively in the Women's 100m race. But for CIAC's policy, Plaintiff Chelsea Mitchell would have placed first in the 100m at the Class S outdoor state championship, been

¹⁹ AthleticNet, <https://www.athletic.net/TrackAndField/meet/365961/results/f/1/100mm>, last visited April 9, 2020.

named State Champion, received a gold medal instead of a silver medal, and received public recognition of her achievements:

Table 14: 2019 CIAC Class S Women’s Outdoor Track 100m Final Results (May 30, 2019)²⁰

Place	Grade	Sex	Name	Time	High School
1*	11	M	T.M.	11.93s	Bloomfield
2*	11	F	Chelsea Mitchell	12.02s	Canton
3*	11	M	Andraya Yearwood	12.28s	Cromwell
4*	11	F	Brianna Westberry	12.82s	Capital Prep
5*	10	F	Alisia Munoz	12.86s	Kolbe-Cathedral
6	12	F	Sheena Wolliston	13.13s	Northwest Catholic
7	12	F	Olivia D’Haiti	13.14s	Kolbe-Cathedral
8	9	F	D’Jior Delissir	13.31s	Bloomfield

* Qualified for the State Open.

102. Similarly, T.M. easily won the Women’s 200m race at the 2019 State Outdoor Open. But for CIAC’s policy, Cori Richardson would have won the state championship in this event, Plaintiff Alanna Smith—as a freshman—would have finished runner-up, and Olivia D’Haiti would have advanced to the New England Championship:

Table 15: 2019 CIAC State Open Championship Women’s Outdoor Track 200m Final Results (June 3, 2019)²¹

Place	Grade	Sex	Name	Time	High School
1*	11	M	T.M.	24.33s	Bloomfield
2*	12	F	Cori Richardson	24.75s	Windsor
3*	9	F	Alanna Smith	25.01s	Danbury
4*	11	F	Chelsea Mitchell	25.24s	Canton

²⁰ *Id.*

²¹ AthleticNet, <https://www.athletic.net/TrackAndField/MeetResults.aspx?Meet=364088&show=all>, last visited February 11, 2020.

5*	12	F	Nichele Smith	25.38s	East Hartford
6*	12	F	Bridget Lalonde	25.55s	RHAM
7	12	F	Olivia D'Haiti	25.63s	Kolbe-Cathedral

* Qualified for the New England Championship.

103. Considering the nine important state-level competitive events summarized in the tables above (including seven finals and two preliminary races) together with the parallel boys' competitions in these same events at these same meets, the result of the CIAC Policy was that girls received only one first place recognition out of 14 state championship events (Caroline O'Neil in the 200m State Open Women's race on June 5, 2017), while students born with male bodies captured 13 championships.

104. Students born male, and gifted with male bodies, captured 22 out of 28 first and second place awards in those seven state-level championship events.

105. And from these competitions, students born male were awarded 68 opportunities to participate in a higher-level state competition, while girls were awarded only 40 such opportunities—little more than half as many as went to boys.

106. In short, in these events girls received radically fewer opportunities to participate in elite post-season competition than did those born male.

107. Nor are these isolated examples. The operation of the CIAC Policy has now deprived many female athletes in Connecticut of opportunities to achieve public recognition, a sense of reward for hard work, opportunities to participate in higher level competition, and the visibility necessary to attract the attention of college recruiters and resulting scholarships. The impact summary below identifies over 50 separate times in competitions since 2017 that specific, identifiable girls have been denied the recognition of being named state-level first-place champions, and/or have been denied the opportunity to advance to and participate in higher-level

competition, in CIAC-sponsored events as a result of the unfair participation of T.M. and Andraya Yearwood in girls' track competitions pursuant to the CIAC Policy.

108. In sum, the real-world result of the CIAC Policy is that in Connecticut interscholastic track competitions, while highly competitive girls are experiencing the no doubt character-building “agony of defeat,” they are systematically being deprived of a fair and equal opportunity to experience the “thrill of victory.” A transgender athlete advocate recently wrote in an op-ed that this should be accepted because part of competitive sports is “learning to lose.” A policy such as the CIAC Policy that ensures that girls get *extra* lessons in losing, however, cannot be reconciled with Title IX.

Table 16: CIAC’s Policy Impact Summary

2019 Outdoor Track Season					
Athlete	School	Meet	Event	Denied State Championship	Denied Participation
Chelsea Mitchell	Canton	Class S	100m	X	
Ashley Nicoletti	Immaculate	Class S	100m		X
Annabelle Shanks	Litchfield	Class S	100m		X
Olivia D’Haiti	Kolbe-Cathedral	Class S	100m		X
Sheena Wolliston	Northwest Catholic	Class S	100m		X
Chelsea Mitchell	Canton	Class S	200m	X	
Brianna Westberry	Capital Prep	Class S	200m		X
Shelby Dejana	Wilton	Open	100m		X
Alisia Munoz	Kolbe-Cathedral	Open	100m		X
Carly Swierbut	Newtown	Open	100m		X
Cori Richardson	Windsor	Open	200m	X	
Olivia D’Haiti	Kolbe-Cathedral	Open	200m		X

2019 Indoor Track Season					
Chelsea Mitchell	Canton	Class S	55m	X	
Sheena Wolliston	Northwest Catholic	Class S	55m		X
Audrey Strmiska	Griswold	Class S	55m		X
Jillian Mars	Bloomfield	Class S	300m	X	
Chelsea Mitchell	Canton	Open	55m	X	
Cori Richardson	Windsor	Open	55m		X
Selina Soule	Glastonbury	Open	55m		X
Jillian Mars	Bloomfield	Open	300m	X	
Shante Brown	Bloomfield	Open	300m		X
2018 Outdoor Track Season					
Nikki Xiarhos	Berlin	Class M	100m	X	
Kate Hall	Stonington	Class M	100m		X
Magnalen Camara	Amisted	Class M	100m		X
Noelle Konior	Berlin	Class M	100m		X
Nikki Xiarhos	Berlin	Class M	200m	X	
Kate Hall	Stonington	Class M	200m		X
Nyia White	Hillhouse	Class M	200m		X
Addie Hester	Northwestern	Class M	400m		X
Jada Boyd	Hillhouse	Class M	400m	X	
Bridget Lalonde	RHAM	Open	100m	X	
Tia Marie Brown	Windsor	Open	100m		X
Ayesha Nelson	Hillhouse	Open	100m		X
KC Grady	Darien	Open	100m		X
Nikki Xiarhos	Berlin	Open	100m		X
Bridget Lalonde	RHAM	Open	200m	X	
Jillian Mars	Bloomfield	Open	200m		X

Dominique Valentine	Immaculate	Open	400m		X
2018 Indoor Track Season					
Patricia Jurkowski	Seymour	Class S	55m	X	
Ahyvon Evans	Grasso Tech	Class S	55m		X
Chelsea Mitchell	Canton	Class S	300m		X
Haley Bothwell	Sacred Heart	Class M	55m		X
Patricia Jurkowski	Seymour	Open	55m		X
Bridget Lalonde	RHAM	Open	55m		X
Camille McHenry	Windsor	Open	300m		X
2017 Outdoor Track Season					
Kate Hall	Stonington	Class M	100m	X	
Jon'yea McCooty	Northwest Catholic	Class M	100m		X
Carly Gable	Northwestern	Class M	100m		X
Erika Michie	Woodland	Class M	200m	X	
Raianna Grant	WCA	Class M	200m		X
Erica Marriott	North Haven	Open	100m		X

109. These charts are examples, and do not include over 40 more missed championships, recognitions, and participation opportunities for girls in Connecticut who did not advance to or receive runner-up recognition in statewide competitions including major invitational meets, as well as girls who did not win or receive runner-up recognition in conference championships.

110. The harm inflicted on girls by the CIAC policy, however, goes far beyond specific lost victories and lost opportunities to participate in elite meets, and far beyond the

specific girls who have been deprived of that recognition and those opportunities. Instead, the harm extends at least to all girls who participate in track and field events under the CIAC Policy, and indeed to girls—including young girls—who may now or someday *aspire* to become track and field athletes.

111. The cumulative effect of the CIAC Policy is that *all* girls in Connecticut do not receive equal athletic opportunities. Whether or not a girl is the one who loses out to a biological male in a particular race, the quality of competitive opportunities provided to *all* girls does not equally reflect the quality of competitive opportunities provided to boys, because—in contrast to boys—girls are forced to face a level of competition that does not equally reflect and accommodate girls’ different physiological characteristics and abilities.

112. Compared to boys, girls competing subject to the CIAC policy lose not only victories and post-season slots, they lose even an equal *hope* of victory, success and recognition. They do not have an equal chance to be champions; they cannot equally dream that if they train hard, they have at least the potential to stand on the victory podium.

113. Instead, when an athlete who is genetically and physiologically male is competing in the girls’ division, Plaintiffs and other girls are forced to step to the starting line thinking, “I can’t win.” “I’m just a girl.”

114. The Plaintiffs’ personal and attainable goals of victory are being taken from them season after season, and meet after meet.

115. Plaintiff Alanna Smith knows before she gets to the track that she has little hope of winning the top spot against a biological male—she and her fellow female competitors are simply competing for second or third place.

116. The Plaintiffs are demoralized, knowing that their efforts to shave mere fractions of a second off of their race times in the hopes of experiencing the thrill of victory could all be for naught, and lost to mid-level male athletes.

117. For Plaintiff Chelsea Mitchell and many other female athletes, they also feel stress, anxiety, intimidation, and emotional and psychological distress from being forced to compete against males with inherent physiological advantages in the girls' category. While important races always involve some element of stress, Chelsea has felt physically sick before races in which she knew she would have to race against a biological male, while Plaintiff Selina Soule suffered depression after being excluded from participation in State finals because top places in the girls' rankings were occupied by biological males.

118. And they are told to shut up about it. As another female Connecticut track athlete who was too afraid to let her name be used told a reporter:

“There’s really nothing else you can do except get super frustrated and roll your eyes, because it’s really hard to even come out and talk in public, just because . . . just immediately you’ll be shut down.”²²

119. Chelsea Mitchell was instructed by officials of Canton High School to respond “no comment” if asked about running against male athletes.

C. The CIAC Policy Creates Additional and Unequal Risks of Injury for Girls.

120. The CIAC Policy also applies in full, and with no additional limitations or safeguards, to sports that include bodily contact between players, or contact between players and balls or other equipment, such as soccer, basketball, and lacrosse.

²² Quoted in Kelsey Bolar, *8th Place: A High School Girl's Life After Transgender Students Join Her Sport*, The Daily Signal (May 6, 2019), <https://www.dailysignal.com/2019/05/06/8th-place-high-school-girls-speak-out-on-getting-beat-by-biological-boys/>, last visited February 11, 2020.

121. In these sports, the basic facts of physiology after puberty reviewed above, along with the on-average greater height, weight, and body mass index of males as compared to females, mean that on average, collision with males, or with balls hit or thrown at higher velocity by generally stronger males, create a higher risk of injury for girls and women than they would experience playing against only females.

122. Studies show that girls and women already suffer a higher rate of concussions than do boys and men when playing the same sports, and that girls suffer longer-lasting negative effects from concussions than do boys. On information and belief, all Defendants are aware of this well-established medical science. On information and belief, already, significant numbers of girls are excluded from participating in athletics in Connecticut each season because they suffer or have suffered a concussion. By exposing girls to yet greater risk of concussion and other injury by permitting males to compete in girls' sports that involve body-to-body or ball-against-body collision, the CIAC Policy fails to appropriately accommodate the physiological capabilities and abilities of girls, and fails to provide equal athletic opportunities for girls.

123. On information and belief, CIAC has in fact permitted males to compete in CIAC-sponsored competition in girls' sports in addition to track and field. According to a CIAC executive, the Policy "has been applied to teams on several occasions."

D. Defendants Are on Notice of Their Violations of Title IX and Have Refused to Take Corrective Action.

124. The CIAC and its member schools, including Defendant Schools, have been informed of the ways in which the Policy violates Title IX, and have been informed in detail about the actual impact that the Policy has had and is having on the quantity and quality of competitive opportunities for girls since well before June 18, 2019, on which date Plaintiffs filed

a complaint concerning the Policy with the U.S. Department of Education Office for Civil Rights (OCR), and publicly posted that complaint online (the “OCR Complaint”).

125. The OCR Complaint disclosed all facts concerning the impact of the Policy on female athletes in Connecticut that are gathered in this Complaint through the conclusion of the Spring 2019 Outdoor Season.

126. Since receiving the OCR Complaint, Defendants have taken no steps to change the Policy, to correct official records and publicity materials to give accurate credit to girls who would have been recognized as victors but for Defendants’ violations of Title IX, or to cease and correct their violations of Title IX in any way whatsoever.

127. In fact, long before filing the OCR Complaint, parents of Plaintiffs had repeatedly warned senior officials of CIAC and of Defendant Schools that the Policy was denying girls equal competitive opportunities and public recognition in track and field. For example, on February 21, 2018, Christina Mitchell, mother of Plaintiff Chelsea Mitchell, sent a letter to the Executive Director of CIAC explaining in detail how the Policy deprives girls of fair and equal opportunities for competition.

128. After that time, Mrs. Mitchell and Bianca Stanescu, mother of Plaintiff Selina Soule, met and requested to meet repeatedly with responsible officials of CIAC and Defendant Schools to discuss their concerns about unfairness to girls, and to request that the Policy be changed.

129. In response to these warnings and complaints from parents concerning the effect of the Policy on girls, Defendants took no steps whatsoever to change the Policy, to correct official records and publicity materials to give accurate credit to girls who would have been

recognized as victors but for Defendants' violations of Title IX, or to cease and correct their violations of Title IX in any way whatsoever.

130. Instead, when in March 2019—a year after her first letter—Mrs. Mitchell sent a third detailed letter on the same topic to the Mr. Glenn Lungarini, then Executive Director of CIAC, Mr. Lungarini informed her that CIAC would no longer accept any communications from her, effectively retaliating against her for her prior complaints of discrimination against girls by imposing a gag order and denying her right to complain of sex-based discrimination against her daughter and other girls in Connecticut schools.

131. On information and belief, by no later than on or about October 4, 2019, the OCR informed all Defendants that OCR found the allegations of the OCR Complaint sufficiently serious that OCR had initiated a formal investigation of those allegations against all Defendants.

132. Since receiving notice that the OCR had initiated a formal investigation of Defendants' alleged violations of Title IX, Defendants have taken no steps whatsoever to change the Policy, to correct official records and publicity materials to give accurate credit to girls who would have been recognized as victors but for Defendants' violations of Title IX, or to cease and correct their violations of Title IX in any way whatsoever.

V. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

133. All four Plaintiffs intend to compete in the Spring 2020 track and field season. While that season has been seriously disrupted by school closures resulting from the COVID-19 virus, the CIAC has recently announced that “CIAC will explore every possibility for providing student-athletes with a spring [2020] sports experience,” and “will make every effort to provide student-athletes experiences that bring closure to their high school sports careers,” “includ[ing] consideration of activities beyond graduation and into July.”

134. If genetically and physiologically male athletes are permitted to compete in girls' track and field competitions governed by the CIAC Policy in the Spring 2020 season, then Plaintiffs will likely lose victory, recognition, and advancement opportunities in the spring season.

135. Plaintiff Chelsea Mitchell intends to compete in the CIAC Outdoor Class S Championships currently scheduled for June 3, 2020, in the 100m and 200m events. CIAC has established 2020 Class S qualifying standards at 13.74s for the 100m, and 28.94s for the 200m. Based on Chelsea's performance in the 2019 Outdoor track season, in which she achieved a time of 11.67s in the 100m and 24.79s in the 200m, Chelsea expects to qualify for the CIAC 2020 Outdoor Class S Championship.

136. Chelsea has a chance of being the fastest girl in the CIAC Class S Championship in the 100m and 200m for the 2020 Spring season.

137. Plaintiff Ashley Nicoletti also intends to compete in the CIAC Outdoor Class S Track Championship in the 100m and 200m. Based on Ashley's performance in the 2019 Outdoor track season, in which she achieved a time of 13.01s in the 100m and 26.78s in the 200m, Ashley expects to qualify for any Outdoor 2020 Class S Championship.

138. But T.M. is also expected to meet the 2020 Outdoor Class S Championship qualifying standards for the girls' 100m and 200m races. In the 2019 Outdoor season, T.M. achieved an 11.64s in the 100m, and 24.18s in the 200m. In fact, T.M. took first place in the girls' 100m and 200m in the 2019 CIAC Outdoor Class S Championship.

139. T.M. has repeatedly achieved times faster than the elite girls' times in Connecticut in the 100m and 200m. T.M. has never lost a girls' CIAC outdoor 100m or 200m final.

140. If T.M. is permitted to compete in the girls' 100m and 200m events, it is likely that T.M. will deprive Chelsea and Ashley of a victory position that each girl has earned in the CIAC Class S Championship.

141. Andraya Yearwood is also expected to meet the 2020 Outdoor Class S Championship qualifying standards. During the 2019 Outdoor season, Andraya achieved 12.20s in the 100m and 25.94s in the 200m.

142. If Andraya is permitted to compete in the girls' 100m and 200m event, it is likely that Andraya will deprive Chelsea and Ashley of a victory position that each girl has earned in the Class S Championship.

143. Plaintiffs Selina Soule and Alanna Smith intend to compete in the 2020 Outdoor CIAC Class LL Championship, and based on their 2019 Outdoor track performance, both girls expect to meet the event qualifying standards: 13.54s in the 100m, and 28.24s in the 200m. Selina achieved a 12.46s in the 100m and 26.30 in the 200m during the 2019 Outdoor season. Alanna achieved 12.04s in the 100m and 24.98s in the 200m during the 2019 Outdoor season.

144. The top five finishers in each class championship will advance to the CIAC State Open Championships currently scheduled for June 8, 2020.

145. Chelsea has a chance of being the fastest girl in the State Open in the 100m and 200m for the 2020 Outdoor season and securing a spot to advance to New England Regional Championships.

146. Selina, Alanna, and Ashley have a chance of competing for a top spot in the State Open in the 100m and 200m for the 2020 Outdoor track season and competing for a top spot to advance to New England Regional Championships.

147. But if T.M. and Andraya Yearwood are permitted to compete in the girl's 100m or 200m event, it is likely that one or both of these athletes with male physiology will deprive each of the Plaintiffs of a victory position she has earned at the State Open Championship.

148. As Chelsea and Selina are seniors, the Spring 2020 track season is their final opportunity to compete in high school track and field events, to improve their scores, to win championships, to receive public recognition of their achievements, and to experience the thrill of victory.

149. Plaintiff Alanna Smith is a sophomore and expects to compete in CIAC track and field competitions next year and throughout her high school years. Specifically, Alanna plans to compete in track and field events in both the winter and spring seasons of 2021. As noted in paragraph 102 above, Alanna has already been pushed down from an earned second place victory in a 2019 State Championship when T.M. took first place.

150. Plaintiff Ashley Nicoletti is a sophomore and expects to compete in CIAC track and field competitions next year and throughout her high school years. Specifically, Ashley plans to compete in track and field events in both the winter and spring seasons of 2021. As noted in paragraph 100 above, Ashley has already been excluded from participation in elite competition when participation by two genetically and physiologically male athletes denied Ashley the opportunity to advance to compete for a spot at the State Open Championships.

151. Plaintiffs do not know which or how many biological males will wish to compete in CIAC girls' track and field events in the Spring 2020 season, or the coming 2020-2021 academic year. In fact, the CIAC Policy denies them the ability to know that until the season starts, as illustrated by the fact that T.M. competed in the boys' events in the Winter 2018 indoor

season and just weeks later started competing in the girl's events in the Spring 2018 outdoor season, with no prior notice to other athletes or their parents.

152. Each track season lasts only a few weeks. If Alanna and Ashley wait until the start of the next season to seek injunctive relief, the season will be over before there can be any realistic hope of legal redress.

153. Because of the multiple different negative impacts on girls detailed in this Complaint, Plaintiffs are entitled to injunctive relief prohibiting all Defendants from permitting boys to participate in girls' track and field competitions.

154. Failure to grant the requested relief will cause irreparable harm to Plaintiffs by continuing to deny them the experience of fair competition that reflects the athletic capabilities of female athletes, as well as the experience of victory and the recognition that can come from victory. Each meet, once over, cannot be redone. Each opportunity lost for participation in an elite meet cannot be recovered. There is no adequate remedy at law for this harm.

155. The continuing, irreparable harm caused by Defendants' failure to provide equal competitive opportunities for girls in track and field far outweighs any cognizable harm that granting the injunction might cause Defendants, because the requested injunctive relief is already mandated by federal law.

156. CIAC publicly posts results of past State Championship meets on their website going back at least three years, and on information and belief maintains those records in publicly accessible archives in perpetuity. In addition, schools including at least Defendant School Canton publicly post lists of championships won by their students, going back many years. As a result of competition by male athletes in girls' events in violation of Title IX, female athletes including

Plaintiffs have been denied accurate public recognition of their athletic achievements and victories in these postings.

157. Plaintiffs are entitled to injunctive relief requiring all Defendants to correct all league or school records, public or private, to accurately reflect the achievements of these girls only in competition against other girls.

158. Failure to grant this requested relief will cause irreparable harm to Plaintiffs by continuing to deprive them of public recognition for their hard-earned athletic accomplishments. There is no adequate remedy at law for this harm.

159. The continuing, irreparable harm caused by Defendants' posting of inaccurate records resulting from the unlawful CIAC Policy outweighs any cognizable harm that granting the harm might cause Defendants, because the requested injunctive relief is already mandated by federal law.

COUNT I: TITLE IX

Sex Discrimination by Failing to Provide Effective Accommodation for the Interests and Abilities of Girls

160. Plaintiffs reallege and incorporate by reference all of the foregoing paragraphs of this Complaint.

161. All Defendants are subject to the obligations of Title IX.

162. Defendants have chosen to provide athletic opportunities in track and field separated by sex.

163. As a result, Defendants have an obligation to provide competitive opportunities for females that accommodate the physical abilities of girls in a manner that ensures that female athletes face competitive opportunities "which equally reflect their abilities" and which provide

“equal opportunity in . . . levels of competition” as compared to the competitive opportunities enjoyed by boys.

164. As a result of profound physiological differences between the sexes after puberty, the athletic abilities of girls relevant to track and field competitions are not equal to those of comparably fit and trained boys.

165. As a result of this inescapable difference, by permitting students who were born male and possess the athletic advantages bestowed by male bodies to compete in girls’ track and field events, all Defendants have violated their duty to provide competitive opportunities for female athletes that accommodate their abilities and provide equal opportunities in levels of competition, as illustrated by the fact that in events where students born male have actually been permitted in elite post-season competitions, students born male have been awarded far more first place victories and recognitions than girls, and far more opportunities to advance to state finals.

166. All Plaintiffs are harmed by Defendants' failure to provide competitive opportunities that fairly and effectively accommodate the athletic abilities of girls.

167. Such harm includes loss of the experience of fair competition; loss of victories and the public recognition associated with victories; loss of opportunities to advance to higher-level competitions; loss of visibility to college recruiters; emotional distress, pain, anxiety, and other damages to be proven at trial.

168. Accordingly, Plaintiffs are entitled to the relief requested herein.

COUNT II: Title IX

Sex Discrimination by Failing to Provide Equal Treatment, Benefits and Opportunities for Girls

169. Plaintiffs reallege and incorporate by reference all of the foregoing paragraphs of this Complaint.

170. All Defendants are subject to the obligations of Title IX.

171. Defendants have chosen to provide athletic opportunities in track and field separated by sex.

172. As a result, all Defendants have an obligation to ensure that female athletes receive equivalent treatment, benefits and opportunities in athletic competition as compared to boys.

173. Equivalent treatment and opportunities require equal opportunities to engage in post-season competition, and more broadly the right to be free of any policies which are “discriminatory in language or effect” or have the effect of denying “equality of athletic opportunity.”

174. As detailed herein, the CIAC Policy deprives female athletes, including Plaintiffs Chelsea Mitchell, Selina Soule, Alanna Smith, and Ashley Nicoletti, of equal opportunities to engage in post-season competition, is discriminatory in effect, and denies girls equality in athletic opportunities, including equal opportunities to achieve and be recognized for victory.

175. By providing track and field competitive opportunities for girls subject to the CIAC policy that permits males to participate in girls’ events and be recognized as winners of girls’ events, all Defendants have violated their obligation under Title IX to provide equal treatment, benefits and opportunities in athletic competition to girls.

176. All Plaintiffs are harmed by Defendants' failure to provide competitive opportunities that fairly and effectively accommodate the athletic abilities of female athletes. Such harm includes loss of the experience of fair competition; loss of victories and the public recognition associated with victories; loss of opportunities to advance to higher-level

competitions; loss of visibility to college recruiters; emotional distress, pain, anxiety, and other damages to be proven at trial.

177. Accordingly, Plaintiffs are entitled to the relief requested herein.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment against Defendants and grant

Plaintiffs the following relief:

- (A) A declaration that Defendants have violated Title IX by failing to provide competitive opportunities that effectively accommodate the abilities of girls;
- (B) A declaration that Defendants have violated Title IX by failing to provide equal treatment, benefits, and opportunities for girls in athletic competition;
- (C) An injunction prohibiting all Defendants, in interscholastic athletic competitions sponsored, organized, or participated in by the Defendants or any of them, from permitting males from participating in events that are designated for girls, women, or females;
- (D) An injunction requiring all Defendants to correct any and all records, public or non-public, to remove male athletes from any record or recognition purporting to record times, victories, or qualifications for elite competitions designated for girls or women, and conversely to correctly give credit and/or titles to female athletes who would have received such credit and/or titles but for the participation of athletes born male and with male bodies in such competitions;
- (E) An injunction requiring all Defendants to correct any and all records, public or non-public, to remove times achieved by athletes born male and with male bodies from any records purporting to record times achieved by girls or women;
- (F) An award of nominal and compensatory damages and other monetary relief as permitted by law;
- (G) An award of Plaintiffs' reasonable attorneys' fees and expenses, as authorized by 42 U.S.C. § 1988;
- (H) Such other and further relief as the Court deems appropriate.

Respectfully submitted this 17th day of April, 2020.

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VERIFICATION OF AMENDED COMPLAINT

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I have read the foregoing Amended Verified Complaint, and the factual allegations thereof, and that to the best of my knowledge the facts alleged therein are true and correct. Due to the COVID-19 pandemic, I am unable to have this verification notarized; however, I will do so as soon as conditions safely permit.

Executed this 16th day of April, 2020.



Christina Mitchell, Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, a copy of the foregoing Amended Complaint was filed electronically with the Clerk of Court. Service on all parties will be accomplished by operation of the court's electronic filing system.

s/ Roger G. Brooks

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**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants.

Case No. 3:20-cv-00201-RNC

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dated: February 12, 2020

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs move this Court for a preliminary injunction against Defendants, as set out below. Plaintiffs request oral argument on their Motion.

Plaintiffs Selina Soule, Chelsea Mitchell, and Alanna Smith are elite level interscholastic track and field athletes. In this Motion, Plaintiffs challenge the Defendants' discriminatory Transgender Participation Policy that has enabled biological male athletes to displace them (along with other girls in competitive track and field events) from earned victories, honors, and opportunities for championship competition, as well as proper public recognition of their performances.

Plaintiffs request an injunction against Connecticut Association of Schools d/b/a Connecticut Interscholastic Athletic Conference (CIAC), and the Boards of Education for the Bloomfield, Cromwell, Glastonbury, Canton, and Danbury Public Schools, who have together acted to facilitate and enforce the discriminatory Policy that enables male athletes to participate in and dominate interscholastic girls' track and field competitions in Connecticut.

As presented more fully in their Memorandum in Support of Preliminary Injunction filed concurrently with this Motion, the design and effect of the Policy has denied and continues to deny equal athletic opportunity for female athletes including Plaintiffs, in violation of Title IX, 20 U.S.C. § 1681, and its implementing regulations. Absent equitable relief, each of the Plaintiffs will suffer further injury as a result of the Policy during the 2020 track and field season. The requested preliminary injunction is needed pending entry of a final order in this case due to

the irreparable harm attending the Plaintiffs' unrecoverable losses of athletic opportunity and attainment during the brief remaining portion of their high school athletic careers.

Plaintiffs submit that their petition for relief meets the standards for a preliminary injunction: Their case presents a likelihood of success on the merits; Plaintiffs will be irreparably harmed without the equitable relief they seek from this Court; the balance of hardship tips decisively in their favor as Defendants will not be harmed in any cognizable way by the requested injunction; and the injunction serves the public interest, as it would ensure conformity with a federal law serving an important public purpose.

Because a preliminary injunction presents no monetary risks to the Defendants, Plaintiffs request that no bond be required. Fed. R. Civ. P. 65(c).

Respectfully submitted this 12th day of February, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion Preliminary Injunction, which was electronically filed in this case on February 12, 2020, will be served on all Defendants by service of process with the Verified Complaint and its accompanying documents.

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**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

SELINA SOULE, a minor, by Bianca Stanescu, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants.

Case No.: 3:20-cv-00201-RNC

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Dated: February 12, 2020

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Introduction

For decades, Connecticut schools, coordinating through the Connecticut Interscholastic Athletic Conference (CIAC), have provided separate track and field meets, selective post-season competitions, and championship recognitions for girls and boys. Sometime before 2017, however, the schools acting through the CIAC enacted a new policy that permits males to enter, win, and be awarded victories and championships in the “girls” competitions if that male claims a transgender female gender identity (the “Policy”). In 2017, a male student, Andraya Yearwood, began to compete in the girls’ division of CIAC-sponsored track events; in 2018 a second male competitor—Terry Miller—followed.¹

Whatever the intentions behind the Policy, on the track and on the victory podium it is having a devastating effect on girls—those born with XX chromosomes. It is rendering their athletic opportunities and experiences far inferior to those enjoyed by boys. As a result, the Policy violates the requirements of Title IX, a law specifically enacted to ensure that girls and women receive athletic opportunities and experiences in the educational setting *equal* to those available to boys and men.

Between them, these two male competitors have taken 15 girls’ state championship titles formerly held by nine different Connecticut female athletes—often setting records far faster than the best times ever achieved in Connecticut by

¹ Because Title IX focuses on equal opportunities between the sexes, because this litigation is precisely concerned with physical and legal effects of biological differences between males and females, because the terms “boys” and “men” are commonly understood to refer to males, and to avoid otherwise inevitable confusion, we refer in this complaint to athletes who are biologically male variously as “boys,” “men,” or “males,” and to athletes who are biologically female as “girls,” “women,” or “females.” We use the names preferred by each student rather than legal names.

a girl. They have displaced girls from at least 40 separate opportunities to advance to participate in higher level competitions in the 2017, 2018, and 2019 seasons. Verified Complaint (“V.C.”) ¶¶ 64–79. Repeatedly, the top two positions on the victory podium in girls’ statewide competitions have been occupied by these two male athletes, leaving room for just one girl in the “third place” slot. V.C. ¶¶ 73, 74. In the seven major state-level competitive events across these three years in which males ran in girls’ races, and looking at both the boys’ competitions and the girls’ competitions for these events, males captured first place in 13 out of 14 events, and 23 out of 28 first and second place awards, leaving nothing but crumbs for students who had the misfortune to be born female. V.C. ¶¶ 67–76. It is literally true, as one of the Plaintiffs said, that when girls step up to the starting line to compete against a comparably gifted and trained male, “I can’t win.” Female athletes in Connecticut are being deprived not just of victories, but of hope and aspiration.

It could hardly be otherwise. Athletics is about physical bodies and physical capabilities, not about subjective identities. The length of leaps is measured, the speed of sprints is clocked, wrestling and tackling is gauged and rewarded. Indisputable science documents that, after puberty, male bodies have radical physiological advantages over comparably gifted and trained females, including larger muscle mass, greater oxygen transport capabilities, and longer and stronger bones, all together providing consistent performance advantages totaling 10%–20% or more in most athletic events—an insurmountable margin in elite competition. V.C. ¶¶ 48. In athletic competition, males have—as even the CIAC Policy itself

recognizes—an “unfair advantage.” V.C. ¶ 73. As a result, as Professor Coleman of Duke University has testified before Congress, the world’s best women’s Olympic athletes “would lose to literally thousands of boys and men.” V.C. ¶ 45. Needless to say, the math is even worse for female high school athletes. And as is now actually being seen in Connecticut, “because it takes only three male-bodied athletes to preclude the best females from the medal stand, . . . it doesn’t matter if only a handful turn out to be gender nonconforming.” V.C. ¶ 45.

Each of the Plaintiffs has been personally impacted by this unfair competition, being denied championships, pushed off the victory podium, pushed down the rankings, and/or eliminated from eligibility for an elite meet. V.C. ¶¶ 70–78. Each of the Plaintiffs will almost certainly suffer further injury as a result of the Policy during 2020 winter season state-level competition and/or during the 2020 spring track and field season.

All of this is directly contrary to the goals of Title IX, and irreconcilable with its requirements. The Defendants’ desire to affirm the gender identity asserted by a student grants no exemption to the requirements of Title IX, no license to deprive girls in Connecticut of equal opportunities for fair competition, victory, and recognition.

A track season lasts just a few weeks. Victories that girls have worked towards for years are either won or lost, with no chance for a “do-over.” Accordingly, Plaintiffs bring this motion for a preliminary injunction to protect their right to

equal athletic opportunities in the remaining months of this academic year, as well as opportunities for Plaintiff Alanna Smith in the coming academic year.

Factual Background

A. The Plaintiffs

Plaintiffs Selina Soule, Chelsea Mitchell, and Alanna Smith are female high school students and varsity track and field athletes in Connecticut who compete in interscholastic girls' track and field competitions. Each of the Plaintiffs has trained hard for much of her life, striving for excellence in performance in her sport, and competes at an elite level in Connecticut. Each has been or hopes to be recruited to run as a varsity women's athlete in college, and likewise hopes to be awarded scholarship grants that will assist in making college affordable for her family. Each Plaintiff has lost titles and/or competitive opportunities as a result of the CIAC policy at the center of this lawsuit, V.C. ¶¶ 86-99, and each will almost certainly lose further titles and/or competitive opportunities in the coming Spring track season unless this Court grants the relief requested. Accordingly, the Plaintiffs have standing to bring this claim pursuant to Title IX. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

B. The CIAC Policy

In 2017, pursuant to the Policy adopted by the CIAC, CIAC and member-schools including Defendant Schools began allowing males who claim a transgender identity to compete in girls' athletic events. V.C. ¶ 76. In brief, the CIAC Policy determines—and requires member-schools to determine—eligibility to compete in

sex-specific athletic competitions solely based on “the gender identification of that student in current school records and daily life activities in the school.” V.C. at ¶ 71.

The Policy on its face recognizes that a male competing in female events enjoys “an unfair advantage in competitive athletics” (an advantage that self-evidently does not exist where a girl seeks to compete in a boys’ team or event), yet it is oddly indifferent to this “unfair advantage” over girls so long as the claim of a cross-gender identity is made in good faith. V.C. ¶ 73.

C. Sex-Specific Physiology and Athletic Performance

Of course, the “unfair advantage” that males enjoy over females flows from physiology, and depends not at all on “bona fide” intent or subjective gender identity. Dr. Gregory Brown, an expert in exercise physiology and the impact of testosterone on athletic performance, details with scientific precision what everyone knows from common experience: After puberty, boys and men enjoy measurable and large advantages in athletic capability over comparably gifted and fit girls and women. These advantages flow from identifiable and well-understood physiological differences produced by male puberty and circulating testosterone levels fifteen times higher than the upper range of circulating testosterone in healthy females. Declaration of Dr. Gregory Brown ¶¶ 68-72 (attached as Exhibit A). These measurable advantages detailed by Professor Brown include:

- a. Larger lungs and denser alveoli in the lungs, enabling faster oxygen uptake;
- b. Larger hearts and per-stroke pumping volume, and more hemoglobin per unit of blood, all enabling higher short-term and sustained levels of oxygen transport to the muscles;

- c. An increased number of muscle fibers and increased muscle mass (for example, men have 75%-100% greater cross-sectional area of upper arm muscle than do comparably fit women, while women have 60-70% less trunk and lower body strength than comparably fit men);
- d. Higher myoglobin concentration within muscle fibers, enabling faster transfer and “cellular respiration” of oxygen within the muscle to unleash power;
- e. Larger bones, enabling the attachment of greater volumes of muscle fiber;
- f. Longer bones, enabling greater mechanical leverage thus enabling males to unleash more power, for instance, in vertical jumps;
- g. Increased mineral density in bones resulting in stronger bones, providing superior protection against both stress fractures and fractures from collisions;
- h. U.S. adult males are on average 5 inches taller than U.S. adult women.

Indeed, the athletic performance-enhancing effects of testosterone are well known, and the anabolic steroids too often used by athletes to gain an unfair and prohibited advantage are often synthetic modifications of testosterone. V.C. ¶ 44. Basically, from puberty on, boys and men have a large and natural “doping” advantage over girls and women.

Meanwhile, female puberty brings distinctive changes to girls and women that identifiably *impede* athletic performance, including increased body fat levels which—while healthy and essential to female fertility—create increased weight to be carried without providing strength, as well as wider hips and different hip joint orientation that result in decreased joint rotation and running efficiency. Brown Decl. ¶¶ 67, 89-90.

As a result of these many inherent physiological differences between men and women after puberty, male athletes consistently achieve performance records 10%–20% better than comparably fit and trained women across almost all athletic events, with even wider consistent disparities in long-term endurance events and in contests of sheer strength such as weight-lifting. Brown Decl. ¶¶ 25-28, 30, 36-46, 48-50, 63-64. These are inescapable biological facts of the human species, not stereotypes, “social constructs,” or relicts of past discrimination. As Justice Ginsberg has written, “Physical differences between men and women . . . are enduring: ‘[T]he two sexes are not fungible.’” *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The athletic significance of these “enduring physical differences” is written in bold type in the record books, as Dr. Brown also details. For example, in 2017 alone, thousands of men and boys achieved times in the 400 meter faster than the best lifetime performances of three women Olympic champions in that event. Each year, thousands of men—and dozens or hundreds of high school boys under the age of 18—achieve times (or heights or distances) in track events better than the world’s single best elite woman competitor that year. Brown Decl. ¶ 14. In 2018, 275 high school boys ran the 400 meter faster than the lifetime best of Olympic Team USA member and world-record holding sprinter Allyson Felix, while in 2017 thousands of men ran the 400 meter faster than any of the world’s three fastest women. V.C. ¶¶ 52; Brown Decl. ¶¶ 14.

The same pattern holds true here in Connecticut. As documented in the Complaint, in event after event, the fastest boys in Connecticut outpace the fastest girls by 10–15%, and *numerous* boys would beat the very fastest girl in each event if track and field were a co-ed sport. V.C. ¶ 46.

But again, it did not require modern science to know this. Testifying in 1975 in support of the Department of Health, Education and Welfare (“HEW”) regulations implementing Title IX, Dr. Bernice Sandler—who has been called the “Godmother of Title IX” and credited as the driving force behind its passage—cautioned that ignoring differences in male and female physiology would for many sports “effectively eliminate opportunities for women to participate in organized competitive athletics. For these reasons, such an arrangement would not appear to be in line with the principle of equal opportunity.”. V.C. ¶ 35. (citing Statement of Dr. Bernice Sandler, HEARINGS BEFORE THE SUBCOMMITTEE ON POSTSECONDARY EDUCATION OF THE COMMITTEE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES at 343 (June 1975), <https://bit.ly/39rvo2H> (last visited Feb. 10, 2020).

D. The Impact of Male Competition on Female Athletes in Connecticut

Dr. Sandler was correct, and the real-world impact of just two male athletes on the opportunities and experience of girls in track and field competition is evident in Connecticut today. As summarized above and detailed in the Complaint, these two male athletes are taking slots in elite girls’ championship meets away from girls, sweeping first and second place “girls” titles in almost every event in which they enter, and by their very presence denying to all girls even the *hope* of a

championship victory. *Supra* pp. 1-2; V.C. ¶¶ 77-99; Declaration of Chelsea Mitchell ¶¶ 11-37 (attached as Exhibit C). Quite simply, in Connecticut today, those born female have radically fewer opportunities for success, victory, and recognition in high school track and field competition than do those born male. If just one more reasonably competitive male in Connecticut were competing in girls' track events, it is very likely that in some events, all three victory positions in both the "boys" and "girls" categories will be taken by males. Girls will simply vanish from the victory podium and national rankings, erased from their own sports.

And given the recent rapid increases in the numbers of young people identifying as transgender, there is every reason to expect that—if the CIAC Policy is permitted to stand—this is what the future holds. This is a present, and a future, that strikes at the heart of Title IX.

E. The Defendants' Responsibility for the Policy and Failure to Correct the Denial of Equal Opportunities to Girls

Defendant Schools are "recipients" of federal funds subject to Title IX. V.C. ¶¶ 19-20.² Member schools including all Defendant Schools control CIAC through the CIAC Board of Control, and adopt CIAC Policies through the CIAC Legislative Body which is made up of the Principals of all member schools. V.C. ¶ 22. CIAC in

² While much case law and guidance relevant to Title IX is articulated in the context of collegiate athletics, Title IX applies with equal force to secondary schools. *See* 34 C.F.R. § 106.41(c) ("[a] recipient which operates or sponsors interscholastic... athletics shall provide equal athletic opportunity for members of both sexes"); *Elimination of Sex Discrimination in Athletic Programs*, 40 Fed. Reg. 52,655 (Nov. 11, 1975) (the "1975 Elimination of Sex Discrimination Memorandum". (Available at <http://cdn.loc.gov/service/ll/fedreg/fr040/fr040218/fr040218.pdf>); OCR Policy Interpretation, 44 Fed.Reg. at 71,413 (describing the scope of application of its general principles, which "often apply to ... interscholastic athletic programs, which are also covered by regulation."); *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 290 (2d Cir. 2004) (applying Policy Interpretation standards to high school sports).

turn coordinates and governs essentially all High School interscholastic athletic competition in Connecticut, including the track competitions that are the subject of this Complaint. V.C. ¶ 23. In short, there is no doubt that the CIAC is so thoroughly entangled with the recipient schools that it is subject to Title IX. *See* V.C. ¶¶ 21-27; 34 C.F.R. § 106.2(i); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303–305 (2001); *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982).

CIAC and its member schools have chosen to provide track and field competition through separate teams and separate competitions for the two sexes. CIAC and its member schools including Defendant Schools are responsible for the adoption of the Policy. Despite repeatedly being made aware of the fact that the Policy is severely unfair to female athletes and violates Title IX, the CIAC has failed to take any steps whatsoever to change the Policy or in any other way cure the violation, and the Defendant Schools have refused to use their influence to press CIAC to change the Policy and cure the violation. The Defendant Schools have chosen to provide opportunities for track and field competition to their students through events governed by the CIAC policies including the Policy, despite being repeatedly warned that the CIAC Policy is unfair to girls and violates Title IX.

Argument

I. The CIAC Policy Violates Title IX

A. The goals and achievements of Title IX

Title IX is concerned with the status and treatment of the sexes. It was designed to eliminate significant “discrimination against women in education.” *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999) (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523–24 & n.13 (1982)). Before the enactment of Title IX in 1972, schools often emphasized boys’ athletic programs “to the exclusion of girls’ athletic programs,” *Williams v. School District of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993), and vastly fewer girls participated in competitive interscholastic athletics than did boys. Many have argued that the competitive drive and spirit taught by athletics is one important educational lesson that carries over and contributes to lifetime success in the workplace, and Title IX applies as rigorously to athletic programs of schools as to academic programs. 34 C.F.R. § 106.41(a).

Title IX has been strikingly successful towards its intended goals in the realm of athletics. “For example, between 1972 and 2011, girls’ participation in high school athletics increased from approximately 250,000 to 3.25 million students.” PROTECTING CIVIL RIGHTS, ADVANCING EQUITY 33 (U.S. Dept. of Educ. Office of Civil Rights, 2015), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf> (last visited Feb. 10, 2020). In college, women’s numbers have grown almost as steeply, from 30,000 to more than 288,000

in 2017–18. V.C. ¶ 39. Title IX is regularly given substantial credit for this change. Following the United States’ famed 1999 Women’s World Cup win, the Ninth Circuit wrote that:

“The victory sparked a national celebration and a realization by many that women’s sports could be just as exciting, competitive, and lucrative as men’s sports. And the victorious athletes understood as well as anyone the connection between a 27–year–old statute [Title IX] and tangible progress in women’s athletics.”

Neal, 198 F.3d at 773.

B. Title IX, the 1975 Regulations, and Sex-Segregated Athletics

What Title IX requires in the realm of athletics is complicated . . . yet at the end of the day it is simple fairness.

1. The Text of Title IX.

Title IX itself is brief, and does not mention athletics specifically:

“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”

20 U.S.C. § 1681(a).

Plaintiffs believe that the facts reviewed above unambiguously establish that they are being denied the enjoyment of equal benefits in interscholastic athletic competition “on the basis of [their] sex,” but this is all the more clear in light of subsequent implementing regulations as well as regulatory and judicial interpretations of Title IX, as Plaintiffs discuss in detail in Subsection I.B below.

From the start, it has been recognized that Title IX does not require that all athletic teams and competitions be co-ed. On the contrary, as discussed later below,

multiple voices have recognized that in many sports, Title IX’s goal of non-discrimination could *not* be achieved with sex-blind programs. In this, Title IX is quite different from the civil rights statutes that are concerned with race. Indeed, The DOE Office of Civil Rights in a 1996 “Dear Colleague” letter accompanying a formal “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (the “1996 Clarification”), noted that Title IX is “unique” in this respect and in “contrast” to Title VI, which would prohibit without exception “separate athletic programs on the basis of race or national origin.”³

2. The 1975 HEW Regulations

In 1975, at Congress’ explicit behest, the Department of Health, Education and Welfare promulgated implementing regulations (the “Regulations”) that have been recognized as authoritative by all Circuit courts that have considered the question, including the Second Circuit. *McCormick*, 370 F.3d at 288–90. The Regulations made explicit Title IX’s application to school athletic programs. Section (a) of the Regulations declares that:

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

³ Available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (last visited Feb. 10, 2020). The Second Circuit identifies the OCR 1996 Clarification Letter as “entitled to substantial deference under *Auer v. Robbins*, [519 U.S. 452, 461 (1997)]”, as it “reflect[s] reasonable agency interpretations of ambiguities in its own regulation, and there is no reason to think that the agency’s interpretations do not reflect its ‘fair and considered judgment on the matter in question.’” *Biediger v. Quinnipiac University*, 691 F.3d 85, 97 (2d Cir. 2012) (citation omitted).

34 C.F.R. § 106.41(a). Like the text of Title IX itself, the Regulation is sex-neutral on its face, but “it would require blinders to ignore that the motivation for the promulgation of the regulation was to increase opportunities for girls.” *Williams*, 998 F.2d at 175.

Section (b) of the Regulations authorizes “separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” The reason for this “athletic exception” to the general civil rights and Title IX principle of non-discrimination is, of course, the physiological difference between male and female bodies—the fact that women are on the whole not as fast, strong, tall, or heavy as comparably gifted and trained men. *Supra* pp. 5-8; V.C. ¶¶ 43-55; Brown Decl. ¶¶ 11-113.

Section (c) of § 106.41, for its part, requires that all subject entities “shall provide equal athletic opportunity for members of both sexes,” and goes on to provide a non-exhaustive list of 10 factors to be considered in evaluating whether opportunities for both sexes are indeed equal. These include whether the program provides “levels of competition” that “effectively accommodate the . . . abilities of [girls],” and whether the program provides equal opportunities for public recognition or “publicity” to both sexes. 34 C.F.R. § 106.41(c)(1), (10) (emphasis added).

Importantly, multiple courts have held that if a school chooses to provide sex-separated athletic opportunities, then that intentional segregation satisfies the “intent” element of a Title IX violation, leaving only the objective question of

whether the opportunities provided are equal. This is because the relevant legal “intent” is the intent to treat persons differently according to sex; proof of animus or *malicious* intent is not required. See *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Communities for Equity v. Mich. High Sch. Athletic Ass’n.*, *Haffer v. Temple Univ.*, 678 F. Supp. 517, 527 (E.D. Pa. 1987) (university’s “explicit classification of intercollegiate athletic teams on the basis of gender” demonstrated discriminatory intent).

Because the necessary intent to differentiate by sex is established by the simple fact of separate teams, “[a] school’s decision to provide students with athletic participation opportunities through separate sports programs for each sex thus necessarily raises a disparate treatment rather than disparate impact claim in that the school decides which athletic opportunities are available to particular students ‘on the basis of sex;’” once a school has decided to segregate athletics by sex, the question is not whether a particular policy is facially neutral or has a “disparate impact,” but whether opportunities accorded one sex “constituted unlawful discrimination under Title IX.” *Biediger*, 691 F.3d at 97–98; see also *Neal*, 198 F.3d at 772 & n.8 (9th Cir. 1999) (“Because men are not ‘qualified’ for women’s teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance.”). Thus, for example, when Brown University applied a gender-neutral across-the-board percentage reduction to the funding and programs for both men and women, the First Circuit analyzed (and rejected) this measure under a

disparate treatment analysis. *Cohen v. Brown Univ.*, 991 F.2d 888, 895–900 (1st Cir. 1993).

C. As a result of the Policy, CIAC and the Defendant Schools do not provide equal athletic opportunities for girls.

Subsequent regulatory guidance and case law have broken out the “equal athletic opportunity” requirement of 34 CFR § 106.41(c) into two separate evaluations. This division is embodied in the “Policy Interpretation” issued by the Department of Education Office of Civil Rights (“OCR”) (successor to HEW) in 1979, 44 Fed. Reg. at 71,413 (the “Policy Interpretation”).⁴ The Second Circuit has found the Policy Interpretation to be “both persuasive and not unreasonable,” and so has accorded it deference in construing Title IX and the Regulations. *McCormick*, 370 F.3d at 289–91.

Starting from the overarching requirement of “equal athletic opportunities” for both sexes, the Policy Interpretation gathers and categorizes non-exhaustive factors 2 through 10 listed in 34 CFR § 106.41(c) as concerned with ensuring that girls receive “equivalent treatment, benefits, and opportunities” in athletics; claims asserting that this is not being achieved are commonly referred to as “equal treatment” claims.

The Policy Interpretation presents a separate analysis for claims based on the requirement of the first factor (34 CFR § 106.41(c)(1)) that separate programs “effectively accommodate the . . . abilities of both sexes;” these are commonly

⁴ The Federal Register version of the Policy Interpretation is difficult to access, so is provided as Exhibit B hereto. The document is also available on the Department of Education website at <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (last visited Feb. 10, 2020).

referred to as “effective accommodation” claims. *McCormick*, 370 F.3d at 291 (citing Policy Interpretation and 34 C.F.R. §106.41(c)(1)).

The CIAC Policy violates both of these prongs.

1. The CIAC Policy denies girls equal treatment in athletic opportunities and experience.

The Regulation, authoritative regulatory interpretations, and courts have provided a variety of articulations of what makes up the “equal treatment” required by Title IX. None of these articulations are exhaustive; none are inconsistent with basic intuition about fairness and equality. The CIAC Policy runs afoul of one after another.

The Policy Interpretation does not lose track of the big picture, summarizing in an “Overall Determination of Compliance” that the Department will “base its compliance determination . . . upon an examination of . . . whether the policies of an institution are discriminatory in language or effect.” *McCormick*, 370 F.3d at 292 (citing Policy Interpretation, 44 Fed.Reg. at 71,417). Elsewhere in that document the OCR similarly framed the question as whether “program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability” between the sexes. *Id.* (citing Policy Interpretation, 44 Fed.Reg. at 71,415).

Given the physiological facts and real-world impacts on girls in Connecticut reviewed above and at more length in the declaration of Dr. Brown and in the Verified Complaint, it is inescapable that the Policy is at the very least “discriminatory in . . . effect” and that the competitive opportunities provided to

girls in track and field in Connecticut are not remotely equivalent in “kind, quality or availability.”

Descending to more specificity, the Policy Interpretation states that “equal treatment” requires equal “opportunities to engage in . . . post-season competition,” *McCormick*, 370 F.3d at 289 (quoting 44 Fed.Reg. at 71,416), and the Second Circuit has agreed that “opportunities” must be “real, not illusory.” *Biediger v. Quinnipac Univ.*, 691 F.3d 85, 93 (2d Cir. 2012). When girls are excluded from post-season and State-level competition because a male has occupied one of their limited qualifying slots, V.C. ¶¶ 104-05—while of course males also occupy all such slots in the boys’ division—then female athletes are not receiving equal opportunities to participate in post-season competition.

More, where girls do get an “opportunity” to compete, in its 1996 Clarification the OCR emphasized that this is not just a game of numbers: the program must provide girls an equal “*quality* of competition.” 1996 Clarification (emphasis added). When even the fastest girls in the state must step to the starting line knowing that “I can’t win,” this is a frankly degraded, illusory, and unequal *quality* of competition. See Mitchell Decl. ¶¶ 12, 15, 23-25, 47. And for *all* girls—confronted with male competitors whose participation imposes a “ceiling . . . [girls] cannot break through no matter how hard they strive,” *McCormick*, 370 F.3d at 295—their training, striving, and competing without even a *hope* of recognition as a champion is a decidedly second-class “quality of competition.”

The Second Circuit has elaborated on this very point at some length: “The greater the potential victory, the greater the motivation to the athletes. . . . A primary purpose of competitive athletics is to strive to be the best.” *McCormick*, 370 F.3d at 294–95. In *McCormick*, the Second Circuit rejected as inconsistent with Title IX a scheduling policy that had the effect of foreclosing girls from achieving state-level championships and recognition, observing that this:

“places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling. Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX’s mandate of equal opportunity for both sexes.”

Id. at 295.

As the court declaimed elsewhere, “[w]e are unpersuaded by the School Districts’ attempt to downplay the significance of the opportunity that they are denying their female athletes but affording their male athletes—*the chance to be State champions.*” *McCormick*, 370 F.3d at 279 (emphasis added). Instead, the court found that denying the high school girls “treatment equal to boys *in a matter so fundamental to the experience of sports* denies equality of athletic opportunity to the female students.” *Id.* (emphasis added).

The harms ripple outward far beyond the girls on the track. The little sister on the sidelines sees that those born female—like her—can’t win, don’t win, are not recognized as champions. Athletics is not a direction in which she can hope to strive,

achieve, and win recognition. That “collateral damage” is antithetical to the goals and spirit of Title IX.

Closely related to an equal opportunity for victory—or an equal ability to legitimately *aspire* to victory—is the equal opportunity for “publicity” required by 34 C.F.R. §106.41(c)(10). In part, this provision speaks to equal investments by athletic programs in publicity for girls’ or women’s athletics. But in track events, the starting place for public recognition is the finish line of the race; those who win are the ones who are photographed, written up in the local newspaper, praised in school assemblies and publications . . . and recognized in long-lived public records.

As a result of the CIAC Policy, girls are denied equal treatment in publicity. For example, Plaintiff Alanna Smith lost out on the recognition as a precocious star that would have come had she been awarded the statewide silver medal in the women’s outdoor 200-meter race that she legitimately earned in her freshman year. V.C. ¶ 98. Likewise, instead of recording Plaintiff Chelsea Mitchell’s earned first place performance in the 55 meter race at the 2019 State Open Championship, the CIAC written records give that honor to male runner Terry Miller, and announce Chelsea’s accomplishment as a third-place finish (without mentioning that the gold and silver were taken by males). Chelsea was likewise deprived of public recognition as “State Open Champion” and “All State Athlete,” which her training and performance on the track had legitimately earned. V.C. ¶¶ 90-94; Mitchell Decl. ¶ 26, 29. The fastest boy in the boys’ category, of course, was recognized as the

champion in that division, while male athlete Terry Miller was named “All-Courant girls indoor track and field athlete of the year.” (V.C. ¶ 97.)

Likewise, when male competitors seized the top two slots in the qualifying heat for the state final for the indoor 55 meter event in 2019 (by insurmountable margins), Plaintiff Selina Soule was not just denied the opportunity to participate in the finals, she was also denied the public recognition that surrounds being one of those elite finalists, and was excluded from posted lists of the finalists. V.C. ¶¶ 90-91. No footnote explains that she was indeed one of the seven fastest girls in the state. Here as in every disadvantage reviewed above, “[m]ale athletes do not suffer from any comparable disadvantage.” *McCormick*, 370 F.3d at 294. Under the CIAC Policy, female athletes simply do not receive equal opportunities for publicity.

Unequal opportunities for publicity, in turn, lead to unequal opportunities for recruiting and scholarships. Not surprisingly, the Policy Interpretation identifies equality in access to scholarships as one aspect of compliance with Title IX. 44 Fed. Reg. at 71,415. The Second Circuit has rightly observed that if girls are excluded from championship competitions, this is likely to reduce their visibility to college coaches who “do their recruiting at the high level club tournaments. . . .” *McCormick*, 370 F.3d at 282. That case concerned scheduling that prevented participation in post-season competitions, but the same is equally true when girls are excluded from championships and even participation in championship meets because males are filling the qualifying top slots in the “girls” competitions.

The simple truth is that because of the unalterable facts of human physiology, in track and field, as in many sports, the *only* way to provide “equal treatment” for girls, and competitive opportunities and experiences that are equal in “kind” and in “quality,” is the traditional way: competitions and records separated by sex. If males are permitted to compete in the girls’ categories, girls will become invisible in athletics. “The Godmother of Title IX” Dr. Sandler said as much near the beginning. *Supra* p. 8. HEW instructed schools on this point in early guidance, in its 1975 “Elimination of Sex Discrimination” memorandum, writing that programs above the elementary school level (i.e., once boys and girls are changed by puberty), should “determine the relative abilities of members of each sex for each . . . sport offered, in order to decide whether to have single sex teams or teams composed of both sexes . . . [A]n institution would not be effectively accommodating the interests and abilities of women if it abolished all of its women’s teams and opened up its men’s teams to women, but only a few women were able to qualify for the men’s team.” 40 Fed.Reg. 52656.⁵

HEW successor OCR made the same point in its binding 1979 Policy Interpretation, stating that schools “must” provide separate competitive opportunities where “[m]embers of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.” 44 Fed.Reg. at 71,418. In the case of track, of course, the relevant “skill” is

⁵ Available at <http://cdn.loc.gov/service/ll/fedreg/fr040/fr040218/fr040218.pdf> (last visited Feb. 10, 2020).

speed, and when the competition is mixed, comparably talented and trained female athletes cannot compete successfully.

Numerous courts have agreed. The Sixth Circuit offered frankly: “It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement.” *Cape v. Tenn. Secondary Sch. Athletic Ass’n.*, 563 F.2d 793, 795 (6th Cir. 1977), *abrogated on other grounds*, as recog’d by *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 190 F.3d 705 (6th Cir. 1999). The Ninth Circuit, ruling against a boy’s challenge to a high school policy excluding males from participating on the girls’ volleyball team, affirmed that the exclusion of boys was necessary to secure equal opportunity and treatment for female athletes. *Clark v. Ariz. Interscholastic Ass’n.*, 695 F.2d 1126 (9th Cir. 1982). It found it a “physiological fact” to reveal that “males would have an undue advantage competing against women,” and that the record evidence in that case was clear that “due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions” on the women’s team. *Id.* at 1131. The result would be that “athletic opportunities for women would be diminished.” *Id.*; *see also Williams*, 998 F.2d at 178 (highlighting expert testimony that “if positions on the field hockey team were open to girls and boys, ‘eventually boys would dominate, eliminating the opportunities of females.’”).

This is exactly, and predictably, what is happening now in Connecticut to these Plaintiffs, and to many girls.

2. The CIAC Policy does not effectively accommodate the athletic abilities of girls.

The “effective accommodation” standard of the Regulation articulates different tests than the “equal treatment” standard, but in this context it is simply another window into the same basic unfairness, flowing from the same unalterable physiological differences between the sexes, and the Defendants’ refusal to recognize and accommodate those differences.

Speaking to the “effective accommodation” requirement, the Policy Interpretation elaborates that schools must provide “equal opportunity in . . . *levels of competition,*” and competitive opportunities “which *equally reflect [girls]’ abilities.*” 44 Fed. Reg. at 71,417–418 (emphasis added).

Courts interpret this to require that “the *quality of competition* provided to male and female athletes equally reflects their abilities,” *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir.1993) (emphasis added), and the OCR has agreed that this is a component of “effective accommodation.” *See* 1996 Clarification (“OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.”).

To evaluate whether the competitive opportunities offered are equivalent, the Policy Interpretation offers a two-part test. This test is directed principally at issues of scheduling, but the *goal* it highlights is that men and women athletes enjoy “equivalently advanced competitive opportunities.” 44 Fed.Reg at 71,418. In

evaluating “effective accommodation,” “[a]thletic opportunities’ means real opportunities, not illusory ones.” *Williams*, 998 F.2d at 175.

Finally, lest we mistake the various means of measurement for the goal itself the Policy Interpretation reminds us that the “overall” question of compliance with the “effective accommodation” requirement will be based on a determination of “whether the policies . . . are discriminatory in . . . effect,” or whether there are “disparities” in the program with respect to benefits, treatment, or opportunities that deny equal opportunity. 44 Fed. Reg at 71,417-418.

Again, the CIAC Policy fails under every one of these tests. On its face, the Policy makes no attempt whatsoever to “accommodate” the distinctive abilities of female athletes. In practice, given that boys have consistent and large physiological advantages in athletic performance, the competitive reality that the Policy presents to girls when competent males run in the girls’ division is “Sorry, you lose.” When girls face insurmountable competition from males, then they do *not* enjoy “equal opportunity in levels of competition,” nor equal “quality of competition.” Their opportunity to win—or in many cases even to participate in championship-level competition—is rendered “illusory.” Boys, of course, face no such impossible odds when they step to the starting line.

And empirically, as detailed in the Complaint, because the Policy does not accommodate the athletic abilities of girls, girls are not only being denied “equal quality of competition,” they are being displaced from large numbers of competitive opportunities and competitive victories. V.C. ¶¶ 77-99; Mitchell Decl. ¶¶ 11-37. The

Policy is decidedly “discriminatory in effect.” Again, in the case of track and field, at least, where speed is everything, the *only* mechanism that can “effectively accommodate” the athletic abilities of girls is separate, sex-specific recognition of victories, records, and qualification for advancement to elite competition. As HEW specified 45 years ago, “If by opening a team to both sexes . . . an educational institution does not effectively accommodate the abilities of members of both sexes, . . . separate teams in that sport will be required. . . .” 1975 Elimination of Sex Discrimination Memorandum, *supra* n. 1, 40 Fed. Reg. at 52,656. Speaking in the context of athletic scholarships, HEW elaborated that “effective accommodation” requires: “criteria which do not inherently disadvantage members of either sex” *Id.* “For example, when ‘ability’ is used as a basis for scholarship award and the range of ability . . . differs widely between the sexes, separate norms must be developed for each sex.” *Id.* 52656–57. In track events, victory, advancement, post-season opportunities, and recognition all depend entirely on athletic “ability.” For all the same reasons, “effective accommodation” of the different capabilities of the sexes requires that sex-separated competition.

II. The Court should grant a preliminary injunction prohibiting males from competing in girls’ interscholastic track and field competitions in Connecticut.

A. Legal standard for preliminary injunctive relief

To obtain a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the balance of hardships tips in his favor; and (4) an injunction is in the public interest.

Am. Civil Liberties Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015); *Cohen.*, 991F.2d at 902) (applying same standard in Title IX context).

The facts and law reviewed above establish a strong likelihood of success on the merits. The other factors also weigh in favor of granting preliminary injunctive relief.

1. Likelihood of irreparable harm

“A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Singas Famous Pizza Brands Corp. v. New York Advertising LLC*, 468 Fed. Appx. 43 (2d Cir. 2012). It hardly needs elaboration to say that lost chances to run in State finals and other elite meets (V.C. ¶¶ 104-05); lost chances to win new levels of recognition for one’s high school (V.C. ¶ 94); lost recognition as a remarkable freshman state-wide silver-medalist (*supra* p. 20); lost gold medals and recognition as a State Open Champion and All State Athlete (*supra* p. 20)—these are indeed irreplaceable, and cannot be “made right” by a later monetary award or adjustment to records. These are once-in-a-lifetime experiences, and lifetime memories. Further, the experience in recent seasons, in which males have again and again taken the top medals in almost every girls’ event in which they enter, leaves no room to doubt that similar harms to Plaintiff Alanna Smith—and to other girls in Connecticut—will be repeated in the Spring 2020 track season if no injunctive relief is granted.

The loss to these Plaintiffs of the experience of *fair* competition; being forced to labor under a “ceiling on ... achievement” and without that sense of *potential* for victory which the Second Circuit has described as central to athletics, *McCormick*,

370 F.3d at 295—these are less tangible, but no less grave and irreparable. And flowing from this insurmountable unfairness, Plaintiffs suffer emotional distress, anxiety, and even depression and nausea on an ongoing basis, race after race. Cmpl. ¶ 113; Mitchell Decl. ¶ 46-47.

This factor thus weighs strongly in favor of injunctive relief. *See Barrett v. West Chester Univ.*, 2003 WL 22803477, No. Civ. A. 03–CV–4978, at *14 (E.D. Pa. 2003) (issuing a preliminary injunction reinstating a sports team, finding irreparable harm in “the fact that Plaintiffs have a finite period of time in which to compete. . . . Several of the players are in their final year of school and would be denied their last opportunity to compete.”); *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578, 583 (W.D. Pa. 1993) (“The opportunity to compete in undergraduate interscholastic athletics vanishes quickly, but the benefits do not. We believe that the harm emanating from lost opportunities for the plaintiffs are likely to be irreparable.”); *Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1127 (M.D. Ala. 1997) (“The mere protractedness of [a] lawsuit should not vitiate the named plaintiff’s capacity to vindicate the broad remedial purpose of Title IX.”).

2. Balance of hardships

The “balance of hardships” tips decidedly in Plaintiffs’ favor. When males take first place in 13 out of 14 CIAC state-level events across both “boys” and “girls” categories in events in which males were permitted to compete in girls’ events; when males are awarded 51 opportunities to participate in state-level competition in those events, while girls are awarded only 31, V.C. ¶ 101; when girls must step to the starting line in the “girls’ race” knowing that it is almost certain that a male

will win, V.C.¶¶ 84, 108-113—the harm to girls is dramatic, and stabs at the heart of all that Title IX was crafted to achieve. If Title IX is important, then the very type of hardship that these Plaintiffs are suffering must be rated as severe.

Meanwhile, the requested injunction will restore what has been the status quo within Connecticut athletics since Title IX was enacted and until 2017—providing separate competition categories in track and field based on sex because of the physiological differences and abilities between the sexes—and will ensure fair and equal competitive opportunities and experiences for female athletes while this case is litigated. There will be no financial cost to Defendants from complying with the requested preliminary injunction, and Defendants have no cognizable state interest in maintaining the discriminatory treatment of female athletes at issue in this case.

3. The public interest

Finally, if Title IX is in the public interest, then the requested injunction is in the public interest. Courts have recognized that just as “[t]he Government does not have an interest in the enforcement of an unconstitutional law,” *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (internal citations omitted), so also “the overriding public interest [lies] in the firm enforcement of Title IX.” *Cohen.*, 991 F.2d at 906.

No doubt, it will be urged that there is a public interest in accommodating male athletes who claim a transgender identity. But that goal grants no license to nullify or ignore the requirements of Title IX by according a lower priority to its statutory goal of ensuring fair and equal opportunities to females.

“Title IX requires that schools provide equal athletic opportunity to boys and girls. To base our measurement of the significance of a denial of opportunity on the lesser value that may be placed on the success of girls in athletic competition would be contrary to the mandate of the statute.”

McCormick, 370 F.3d at 296.

In the same way, even if some would assign a “lesser value” to equal opportunities for girls than they do to the participation choices of male students who assert a transgender identity, that preference “must not play a role in our assessment of the significance of the denial of opportunity to the female athletes in this case.” *Id.*

Finally, because it attempts to substitute a purely subjective and self-declared state of mind for the objective reality of the biological sexes which is the concern of Title IX and the express basis for sex-separation of athletic competitions, the CIAC Policy is also incoherent. Advocates assert that “gender” is a “spectrum;” a Tumblr blog currently lists 112 different genders that users may claim. TUMBLR, GENDERFLUID SUPPORT, <https://genderfluidsupport.tumblr.com/gender> (last visited Feb. 10, 2020). It is not possible to map this subjective concept to the two biological sexes which are not only the concern, but the essential backbone of Title IX, both in logic and in enforcement. There can be no public interest in reducing Title IX to incoherence and thus negating its very purpose.

CONCLUSION

For the reasons set forth above and in the accompanying Declarations and Verified Complaint, Plaintiffs respectfully request that the Court enter a preliminary injunction in the form submitted herewith.

Respectfully submitted this 12th day of February, 2020.

By: s/ Howard M. Wood III

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**Motions to Appear Pro Hac Vice pending*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Motion for Preliminary Injunction, which was electronically filed in this case on February 12, 2020, will be served on all Defendants by service of process with the Verified Complaint and its accompanying documents.

/s/ Howard M. Wood III

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants.

Case No. 3:20-cv-00201-RNC

Dated: February 12, 2020

DECLARATION OF PROFESSOR GREGORY BROWN

I, Gregory A. Brown, declare as follows:

1. I serve as Professor of Exercise Science in the Department of Kinesiology and Sport Sciences at the University of Nebraska Kearney.
2. In the attached Expert Declaration which I executed on January 7, 2020, I provide certain information and certain expert opinions based on my

expertise and professional familiarity with exercise physiology and my review of the currently available science.

3. The statements made in my Expert Declaration do represent my expert opinion, and I believe all facts asserted therein to be true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Signed: *Greg A. Brown*

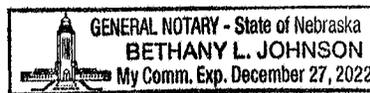
Dr. Gregory A. Brown

Date: Feb. 10, 2020

Signed and affirmed before me on the 10th day of February, 2020 by Gregory A. Brown, who proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Bethany L. Johnson
(Signature)

Bethany L. Johnson
(Printed Name)



My commission expires: Dec 27, 2022

EXPERT DECLARATION OF GREGORY A. BROWN, Ph.D.

I, Dr. Gregory A. Brown, declare as follows:

Qualifications

1. I serve as Professor of Exercise Science in the Department of Kinesiology and Sport Sciences at the University of Nebraska Kearney. I have served as a tenured (and nontenured) professor at universities for over a decade.
2. I teach classes in Exercise Physiology.
3. In August 2002, I received a Doctor of Philosophy degree from Iowa State University, where I majored in Health and Human Performance, with an emphasis in the Biological Bases of Physical Activity. In May 1999, I received a Master of Science degree from Iowa State University, where I majored in Exercise and Sport Science, with an emphasis in Exercise Physiology.
4. I have received many awards over the years, including the Mortar Board Faculty Excellence Honors Award, College of Education Outstanding Scholarship / Research Award, and the College of Education Award for Faculty Mentoring of Undergraduate Student Research.
5. I have authored more than 40 refereed publications and more than 50 refereed presentations in the field of Exercise Science. I have authored chapters for multiple books in the field of Exercise Science. And I have served as a peer reviewer for over 25 professional journals, including The American Journal of Physiology, the International Journal of Exercise Science, and The Journal of Applied Physiology.
6. My areas of research have included the endocrine response to testosterone prohormone supplements in men and women, the effects of testosterone prohormone supplements on health and the adaptations to strength training in men, the effects of energy drinks on the physiological response to exercise, and assessment of various athletic training modes in males and females. Articles that I have published that are closely related to topics that I discuss in this declaration, and to articles by other researchers that I cite and discuss in this declaration, include:
 - a. Studies of the effect of ingestion of a testosterone precursor on circulating testosterone levels in young men. Douglas S.

King, Rick L. Sharp, Matthew D. Vukovich, Gregory A. Brown, et al., *Effect of Oral Androstenedione on Serum Testosterone and Adaptations to Resistance Training in Young Men: A Randomized Controlled Trial*, JAMA 281: 2020-2028 (1999); G. A. Brown, M. A. Vukovich, et al., *Effects of Anabolic Precursors on Serum Testosterone Concentrations and Adaptations to Resistance Training in Young Men*, INT J SPORT NUTR EXERC METAB 10: 340-359 (2000).

- b. A study of the effect of ingestion of that same testosterone precursor on circulating testosterone levels in young women. G. A. Brown, J. C. Dewey, et al., *Changes in Serum Testosterone and Estradiol Concentrations Following Acute Androstenedione Ingestion in Young Women*, HORM METAB RES 36: 62-66 (2004.)
- c. A study finding (among other things) that body height, body mass, vertical jump height, maximal oxygen consumption, and leg press maximal strength were higher in a group of physically active men than comparably active women, while the women had higher percent body fat. G. A. Brown, Michael W. Ray, et al., *Oxygen Consumption, Heart Rate, and Blood Lactate Responses to an Acute Bout of Plyometric Depth Jumps in College-Aged Men And Women*, J. STRENGTH COND RES 24: 2475-2482 (2010).
- d. A study finding (among other things) that height, body mass, and maximal oxygen consumption were higher in a group of male NCAA Division 2 distance runners, while women NCAA Division 2 distance runners had higher percent body fat. Furthermore, these male athletes had a faster mean competitive running speed (~3.44 min/km) than women (~3.88 min/km), even though the men ran 10 km while the women ran 6 km. Katherine Semin, Alvah C. Stahlnecker, Kate A. Heelan, G. A. Brown, et al, *Discrepancy Between Training, Competition and Laboratory Measures of Maximum Heart Rate in NCAA Division 2 Distance Runners*, JOURNAL OF SPORTS SCIENCE AND MEDICINE 7: 455-460 (2008).

7. I attach a copy of my current Professional Vita, which lists my education, appointments, publications, research, and other professional experience.

8. I have been asked to offer my opinions about whether males have inherent advantages in athletic performance over females, and if so the scale and physiological basis of those advantages, to the extent currently understood by science. I have also been asked to offer my opinion as to whether the sex-based performance advantage enjoyed by males is eliminated if feminizing hormones are administered to male athletes who identify as transgender.

9. The opinions in this declaration are my own, and do not necessarily reflect the opinions of my employer, the University of Nebraska.

10. I have not been compensated for my time spent in preparing this declaration.

Overview

11. Based on my professional familiarity with exercise physiology and my review of the currently available science, including that contained in the sources I cite in this declaration, it is my professional opinion that:

a. At the level of elite competition, men, or adolescent boys, have an advantage over women, or adolescent girls, in almost all athletic contests;

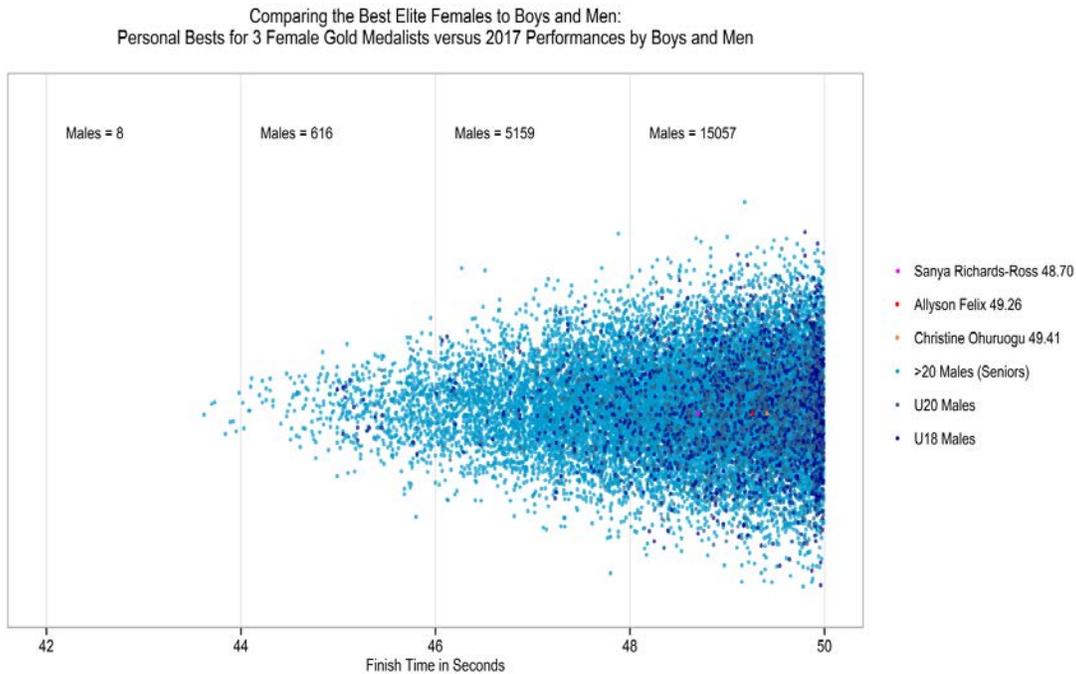
b. Biological male physiology is the basis for the performance advantage that men, or adolescent boys, have over women, or adolescent girls, in almost all athletic contests; and

c. Administration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty, and administration of testosterone to women or adolescent girls, after female puberty, does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.

12. In short summary, men, and adolescent boys, perform better in almost all sports than women, and adolescent girls, because of their inherent physiological advantages that develop during male puberty. In general, men, and adolescent boys, can run faster, output more physical power, jump higher, and exercise greater physical endurance than women, and adolescent girls.

13. Indeed, while after the onset of puberty males are on average taller and heavier than females, a male performance advantage over females has been measured in weightlifting competitions even between males and females matched for body mass.

14. These performance advantages are also very substantial, such that large numbers of men and even adolescent boys are able to outperform the very top-performing women. To illustrate, Doriane Coleman, Jeff Wald, Wickliffe Shreve, and Richard Clark created the figure below (last accessed on Monday, December 23, 2019 at <https://bit.ly/35yOyS4>), which shows that the *lifetime best performances* of three female Olympic champions in the 400m event—including Team USA’s Sanya Richards-Ross and Allyson Felix—would not match the performances of literally thousands of boys and men, *just in 2017 alone*, including many who would not be considered top tier male performers:



15. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which “compares the number of boys—males under the age of 18—whose results in each event in 2017 would rank them above the single very best elite [adult] woman that year:”

Event	Best Women’s Result	Best Boys’ Result	# of Boys Outperforming
100 Meters	10.71	10.15	124 ⁺
200 Meters	21.77	20.51	182
400 Meters	49.46	45.38	285
800 Meters	1:55.16*	1:46.3	201+
1500 Meters	3:56.14	3:37.43	101+
3000 Meters	8:23.14	7:38.90	30
5000 Meters	14:18.37	12:55.58	15
High Jump	2.06 meters	2.25 meters	28
Pole Vault	4.91 meters	5.31 meters	10
Long Jump	7.13 meters	7.88 meters	74
Triple Jump	14.96 meters	17.30 meters	47

16. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which compares the number of men—males over 18—whose results in each event in 2017 would have ranked them above the very best elite woman that year.

Event	Best Women’s Result	Best Men’s Result	# of Men Outperforming
100 Meters	10.71	9.69	2,474
200 Meters	21.77	19.77	2,920
400 Meters	49.46	43.62	4,341
800 Meters	1:55.16*	1:43.10	3,992+
1500 Meters	3:56.14	3:28.80	3,216+
3000 Meters	8:23.14	7:28.73	1307+
5000 Meters	14:18.37	12:55.23	1,243
High Jump	2.06 meters	2.40 meters	777
Pole Vault	4.91 meters	6.00 meters	684
Long Jump	7.13 meters	8.65 meters	1,652
Triple Jump	14.96 meters	18.11 meters	969

17. These advantages result, in large part, from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty. Higher testosterone levels cause men, and adolescent boys, to develop more muscle mass, greater muscle strength, less body fat, higher bone mineral density, greater bone

strength, higher hemoglobin concentrations, larger hearts and larger coronary blood vessels, and larger overall statures than women, and adolescent girls. In addition, maximal oxygen consumption (VO₂max), which correlates to ~30-40% of success in endurance sports, is higher in both elite and average men and boys than in comparable women and girls when measured in regards to absolute volume of oxygen consumed and when measured relative to body mass. Testosterone is also associated with increased aggressiveness, which may offers competitive advantages for men over women.

18. Although androgen deprivation may modestly decrease some physiological advantages that men and adolescent boys have over women and adolescent girls, it cannot fully eliminate those physiological advantages once an individual has passed through male puberty. For example, androgen deprivation does not reduce bone size, does not alter bone structure, and does not decrease lung volume or heart size. Nor does androgen deprivation in adult men completely reverse the increased muscle mass acquired during male puberty.

19. In this declaration, I present, in the headings marked with Roman numerals, certain of my opinions about sex-based differences in human physiology and the impact of those differences on the athletic performance of men and women. For each of these opinions, I then provide a brief overview, and a non-exhaustive summary of studies published in science journals or other respected sources that support and provide in part the basis of my opinion, also quoting relevant findings of each article.

20. In particular, I cite nine articles published in scientific journals. I provide capsule summaries of those nine articles below.

a. The first resource I cite is David J. Handelsman, Angelica L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018). This article correlates data about performance differences between males and females with data from over 15 liquid chromatography-mass spectrometry studies of circulating testosterone in adults, as a function of age. The authors conclude, among other things, that “[f]rom male puberty onward, the sex difference in athletic performance emerges as circulating concentrations rise as the testes produce 30 times more testosterone than before puberty, resulting in men having 15- to 20-fold greater circulating testosterone than children or women at any age.” (804)

b. The second resource I cite is Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010). This

article analyzes results from 82 athletic events since the beginning of the modern Olympic era, and concludes in part that while a wide sex-based performance gap existed before 1983, due to a likely combination of physiological and non-physiological reasons, the sex-based performance gap stabilized in 1983, at a mean difference of $10.0\% \pm 2.94$ between men and women for all events. (214)

c. The third resource I cite is Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013). This article analyzes results from a study of the relationship between performance and age in races of several lengths, and reports in part that “[i]n all races [studied], women were significantly slower than men.” (7)

d. The fourth resource I cite is Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013). This article analyzes results from various triathlon events over the course of about 15 years, and reports in part a sex-based performance gap between the sexes of no less than 10% in every component event, with this sex-based performance gap increasing with age.

e. The fifth resource I cite is Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex, and Sport Discipline*, 10:6 PLOS ONE 1 (2015). This article analyzes the 100 all-time best Norwegian male and female track and field results (in persons aged 11 to 18) from the 60m and 800m races, and the long jump and high jump events. The results show that sex-specific differences that arise during puberty significantly affect event results, with males regularly outperforming females after age 12.

f. The sixth resource I cite is David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017). This article analyzes results from a secondary quantitative analysis of four published sources that report performance measures in swimming meets, track and field events, and hand-grip strength. The results show in part that the onset and tempo of sex-based performance divergence were very similar for all performance measures, and that this divergence closely paralleled the rise of circulating testosterone in adolescent boys.

g. The seventh resource I cite is Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 ASIAN J. OF ANDROLOGY 653 (2011). This article highlights specific

research that indicates pubertal testosterone increases result in significant physiological advantages for men and adolescent boys, compared to women and girls, after the onset of male puberty.

h. The eighth resource I cite is Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 J. MED ETHICS 395 (2019). This article confirms from available science that higher testosterone levels provide an all-purpose benefit in sport, and that the current International Olympic Guidelines rule requiring males who identify as transgender to keep testosterone levels under 10 nmol/L for 1 year does not eliminate (or even come close to eliminating) the performance advantage of their male physiology.

i. The ninth resource I cite is Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004). This article analyzes results from a study that compared pretreatment physiological measurements in 17 female-to-male transsexuals with the measurements after one year of cross-sexual treatment in 19 male-to-female transsexuals undergoing sex reassignment therapy. The results in part confirmed that androgen deprivation in male-to-female transsexuals increases the overlap in muscle mass with women but does not reverse certain effects of androgenization that had occurred during male puberty.

21. I explain my opinions and the results of these studies in more detail below.

Opinions

I. Biological men, or adolescent boys, have an advantage over women, or adolescent girls, in almost all athletic contests.

22. As one team of researchers has recently written, “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger, muscles and bones as well as a higher circulating hemoglobin level.” David J. Handelsman, Angelic L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018).

23. In fact, biological men, and adolescent boys, substantially outperform comparably aged women, and adolescent girls, in competitions involving running

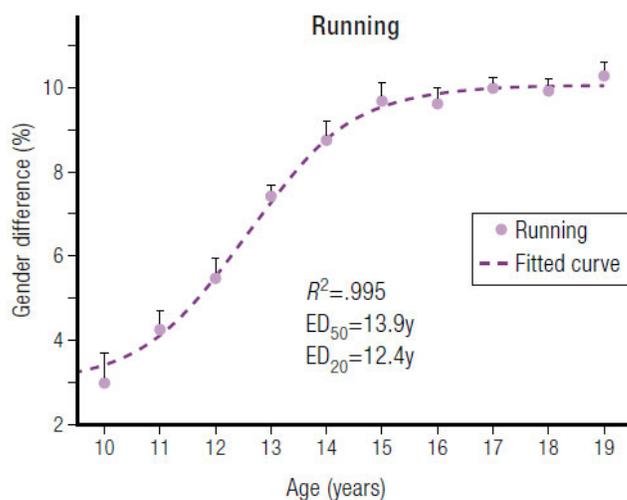
speed, swimming speed, cycling speed, jumping height, jumping distance, and strength (to name a few, but not all, of the performance differences). These performance advantages for men, and adolescent boys, are inherent to the biological differences between the sexes and are not due to social or cultural factors, as evidenced by minimal to no change in the percentage differences between males and females in world class and record setting performances in the past 40 years.

24. I highlight below key findings about male performance advantages from seven studies or datasets.

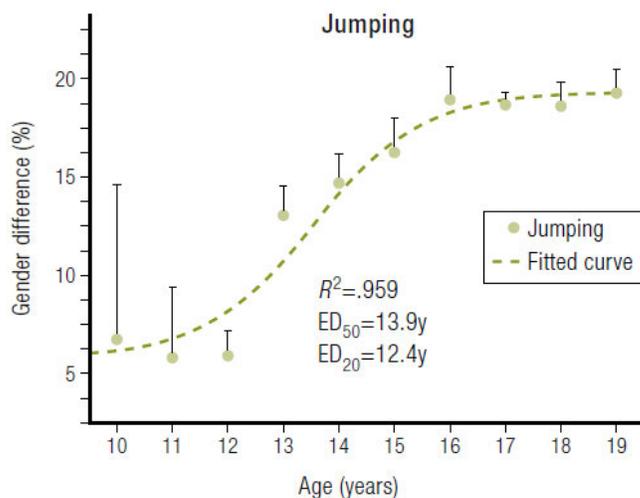
**A. David J. Handelsman, Angelica L. Hirschberg, et al.,
Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance, 39:5 ENDOCRINE REVIEWS 803 (2018):**

25. The Handelsman et al. (2018) authors demonstrate a consistent pattern of divergence of athletic performance, in favor of males, across the years of puberty and strongly correlating to increasing testosterone levels in adolescent males. The pattern is observed in events exercising a variety of muscle systems. In sum, the Handelsman et al. (2018) authors report: “Corresponding to the endogenous circulating testosterone increasing in males after puberty to 15 to 20 nmol/L (sharply diverging from the circulating levels that remain <2 nmol/L in females), male athletic performances go from being equal on average to those of age-matched females to 10% to 20% better in running and swimming events, and 20% better in jumping events.” (812)

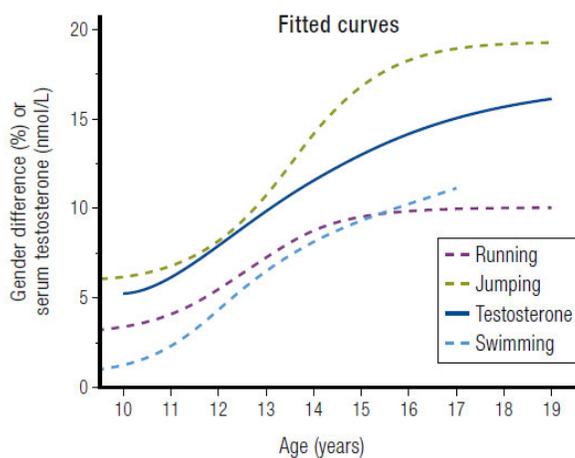
26. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) in running events, including 50m to 2 miles.” (813)



27. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) ... in jumping events, including high jump, pole vault, triple jump, long jump, and standing jump.” (813)



28. Taken from Handelsman’s Figure 1, the chart below indicates “a fitted sigmoidal curve plot of sex differences in performance (in percentage) according to age (in years) in running, jumping, and swimming events, as well as the rising serum testosterone concentrations from a large dataset of serum testosterone of males. Note that in the same dataset, female serum testosterone concentrations did not change over those ages, remaining the same as in prepubertal boys and girls. Data are shown as mean and SEM of the pooled sex differences by age.” (813)



29. These authors also note the significance, for athletic competition, of the subjective nature of “gender identity” in current understanding: “Prompted by biological, personal, and societal factors, volitional expression of gender can take on virtually any form limited only by the imagination, with some individuals asserting they have not just a single natal gender but two genders, none, a distinct third gender, or gender that varies (fluidly) from time to time....” For this reason, the authors conclude: “[I]f gender identity were the basis for eligibility for female sports, an athlete could conceivably be eligible to compete at the same Olympics in both female and male events. These features render the unassailable personal assertion of gender identity incapable of forming a fair, consistent sex classification in elite sports.” (804)

B. Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap has not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010):

30. The Thibault et al. authors note that there was a large but narrowing sex-based performance gap between men’s and women’s Olympic athletic performances before 1983, which could hypothetically be attributed to a combination of social, political, or other non-physiological reasons, in addition to physiological reasons. However, “the gender gap in Olympic sport performance has been stable since 1983” (219) “at a mean difference of $10.0\% \pm 2.94$ between men and women for all [Olympic] events.” (222)

31. Since then, even when performances improve, the “progressions are proportional for each gender.” (219-20)

32. The results of this study “suggest that women’s performances at the high level will never match those of men” (219) and that “women will not run, jump, swim or ride as fast as men.” (222) The authors conclude that this gap, now stable for 30+ years, is likely attributable to physiology, and thus that “[s]ex is a major factor influencing best performances and world records.” (222)

33. Breaking these performance advantages out by event, the authors report the following sex-based performance gaps in Olympic sport competitions since 1983:

a. “The gender gap ranges from 5.5% (800-m freestyle, swimming) to 36.8% (weightlifting).” (222)

b. Olympic world records in running events indicate that men perform “10.7% (± 1.85)” better than women since gender gap stabilization. (217)

c. Olympic world records in jumping events indicate that men perform “17.5% (\pm 1.11)” better than women since gender gap stabilization. (217)

d. Olympic world records in swimming events indicate that men perform “8.9 % (\pm 1.54)” better than women since gender gap stabilization. (218)

e. Olympic world records in cycling sprint events indicate that men perform “6.95% (\pm 0.16)” better than women since gender gap stabilization. (219)

f. Olympic world records in weightlifting events indicate that men perform “36.8% (\pm 6.2)” better than women since gender gap stabilization. Note that the Olympics first introduced women’s weightlifting events in 1998, and “no breakpoint date has been detected yet.” (219)

34. “The top ten performers’ analysis reveals a similar gender gap trend with a stabilization in 1982 at 11.7%” when averaged across all events. (222)

C. Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013):

35. A comparison of performances in races of a variety of distances showed that “[i]n all races, women were significantly slower than men. The estimated sex differences ... were increasing” as race distances increased from 8km.¹

D. Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013):

36. Based on data from a variety of elite triathlon and ultra-triathlon events spanning 22 years, the Lepers et al. authors reported that “elite males appear to run approximately 10–12 % faster than elite females across all endurance running race distances up to marathon, with the sex difference narrowing as the race distance increases. However, at distances greater than 100 km, such as the 161-km ultramarathon, the difference seems even larger, with females 20–30 % slower than males.” (853)

¹ Throughout this Declaration, in the interest of readability I have omitted internal citations from my quotations from the articles I cite. The sources cited by these authors may of course be found by reference to those articles.

37. Lepers and Knechtle Table 1 below shows the “[m]ean sex differences in time performance for swimming, cycling, running and total time at different national and international triathlons.” (854)

Event	Sex difference in time performance (%)			
	Swim	Cycle	Run	Total
Short distance (1.5–40–10 km): [30, 79]				
Zurich (Switzerland) from 2000 to 2010				
Top five elite overall	15.2	13.4	17.1	14.8
Top five AG, from 18 to 54 years	18.5	15.5	18.5	17.1
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	13.3	10.7	7.5	12.0
Half Ironman (1.9–90–21 km): [31, 79]				
Rapperswil (Switzerland) from 2007 to 2010				
Top five elite overall	14.1	12.3	12.5	12.6
Top five AG, from 18 to 54 years	22.3	16.4	19.2	17.6
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	12.4	11.2	14.5	12.6
Off-road triathlon (1.5–30–10 km): [9]				
World championship (Maui, USA) from 2007 to 2009				
Top ten elite overall	12.4	19.6	18.4	18.2
Ironman (3.8–180–42 km): [2, 32, 34]				
World championship (Kona, Hawaii, USA) from 1988 to 2007				
Top ten elite overall	9.8	12.7	13.3	12.6
Top ten AG, from 18 to 64 years	12.1	15.4	18.2	15.8
Zurich (Switzerland) from 1995 to 2010				
Top ten elite overall	14.0	13.2	18.2	14.9

38. “[F]or ultratriathlons, it has been shown that with increasing length of the event, the best females became relatively slower compared with the best males. Indeed, if the world’s best performances are considered, males were 19 % faster than the females in both Double and Triple Ironman distance, and 30 % faster in the Deca-Ironman distance.” (854)

39. “The average sex difference in swimming performance during triathlon for race distances between 1.5 and 3.8 km ranged between approximately 10 and 15 % for elite triathletes.” (854)

40. Lepers and Knechtle Table 2 below shows the “[m]ean percentage differences in times for swimming, cycling, running and total event between the top ten females and males ... in 2012 at four international triathlons:” (855)

Event	Sex difference in performance in top ten athletes in 2012 (mean \pm SD)			
	Swim	Cycle	Run	Total
Hawaii Ironman Triathlon (3.8–180–42 km)	14.1 \pm 7.9	13.1 \pm 2.3	7.3 \pm 2.9	11.3 \pm 0.5
Olympics Triathlon (1.5–40–10 km) with drafting	11.8 \pm 2.0	11.3 \pm 0.6	14.7 \pm 0.8	14.1 \pm 7.9
Hy-Vee Triathlon (1.5–40–10 km) without drafting	8.6 \pm 4.8	10.2 \pm 3.5	8.6 \pm 4.4	9.3 \pm 0.5
World Championship Off-Road Triathlon (1.5–30–10 km)	15.2 \pm 15.5	22.6 \pm 4.4	15.1 \pm 6.7	17.3 \pm 2.9

41. “[T]he sex difference in performance between the best male and female ultraswimmers is more generally close to 11–12 %, which corresponds to values observed for swimming in triathlon.” (855)

42. “Sex differences in triathlon cycling vary from 12 to 16% according to the level of expertise of participating triathletes for road-based triathlons.” (855)

43. “In track cycling, where females are generally weaker than males in terms of power/weight ratios, the performance gap between males and females appears to be constant (<11 %) and independent of the race distance from 200 to 1,000 m.” (855)

44. “In ultra-cycling events, such as the ‘Race Across America,’ sex difference in performance was around 15 % among top competitors. Greater muscle mass and aerobic capacity in males, even expressed relative to the lean body mass, may represent an advantage during long-distance cycling, especially on a relatively flat course such as Ironman cycling, where cycling approximates to a non-weight-bearing sport. Indeed, it has been shown that absolute power output (which is greater for males than for females) is associated with successful cycling endurance performance because the primary force inhibiting forward motion on a flat course is air resistance.” (855-56)

45. “Interestingly, for elite triathletes, the sex difference in mountain bike cycling during off-road triathlon (<20 %) is greater than cycling sex differences in conventional road-based events. Mountain biking differs in many ways from road cycling. Factors other than aerobic power and capacity, such as off-road cycling economy, anaerobic power and capacity, and technical ability might influence off-road cycling performance. Bouts of high-intensity exercise frequently encountered

during the mountain biking leg of off-road triathlon (lasting <1 h 30 min for elite males and <2 h for elite females) can result from (1) having to overcome the constraints of gravity associated with steep climbs, (2) variable terrain necessitating wider tires and thus greater rolling resistance, and (3) isometric muscle contractions associated with the needs of more skilled bike-handling skills, not so often encountered in road cycling. However, in particular, lower power-to-weight ratios for female than for male triathletes inevitably leave them at a disadvantage during steep climbs.” (856)

46. “During the 1988–2007 period, the top ten elite males have run the Hawaii Ironman marathon on average 13.3 % faster than the top ten females.” (856)

E. Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex & Sport Discipline*, 10:6 PLOS ONE 1 (2015):

47. While both sexes increase performance across the teen years, the Tønnessen et al. authors found performance advantages for male athletes associated with the onset of puberty and becoming increasingly larger across the years of puberty, in a chronological progression that was closely similar across diverse track and field events.

48. “The current results indicate that the sex difference evolves from < 5% to 10–18% in all the analyzed disciplines from age 11 to 18 yr. The gap widens considerably during early adolescence before gradually stabilizing when approaching the age of 18. This evolution is practically identical for the running and jumping disciplines. The observed sex differences at the age of 18 are in line with previous studies of world-class athletes where a sex difference of 10–12% for running events and ~19% for jumping events has been reported.” (8)

49. “Male and female athletes perform almost equally in running and jumping events up to the age of 12. Beyond this age, males outperform females. Relative annual performance development in females gradually decreases throughout the analyzed age period. In males, annual relative performance development accelerates up to the age of 13 (for running events) or 14 (for jumping events) and then gradually declines when approaching 18 years of age. The relative improvement from age 11 to 18 was twice as high in jumping events compared to running events. For all of the analyzed disciplines, overall improvement rates were >50% higher for males than for females. The performance sex difference evolves from < 5% to 10-18% in all the analyzed disciplines from age 11 to 18 yr.” (1)

50. “Recent studies of world-class athletes indicate that the sex difference is 10–12% for running events and ~19% for jumping events.” (2)

51. Tønnessen and Svendsen’s Table 1 below shows the “[e]xpected progressions in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 4)

Table 1. Expected progressions in running and jumping performance for 11–18 yr old males and females.

Age (yr)	60 m		800 m		Long Jump		High Jump	
	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression m (%)	Girls Progression m (%)	Boys Progression m (%)	Girls Progression m (%)
11–12	-0.35 (4.1)	-0.35 (4.0)	-6.4 (4.4)	-7.3 (4.8)	+0.35 (7.4)	+0.36 (7.9)	+0.11 (7.4)	+0.10 (7.2)
12–13	-0.48 (5.8)	-0.25 (2.9)	-8.7 (6.2)	-5.5 (3.8)	+0.43 (8.6)	+0.30 (6.0)	+0.12 (7.9)	+0.09 (6.3)
13–14	-0.29 (3.7)	-0.16 (2.0)	-5.9 (4.5)	-3.6 (2.6)	+0.50 (9.0)	+0.21 (4.1)	+0.13 (8.1)	+0.06 (3.6)
14–15	-0.10 (1.3)	-0.02 (0.2)	-5.2 (4.1)	-2.2 (1.6)	+0.34 (5.6)	+0.13 (2.4)	+0.08 (4.3)	+0.04 (2.4)
15–16	-0.17 (2.3)	-0.08 (1.0)	-3.2 (2.7)	-1.6 (1.2)	+0.28 (4.4)	+0.10 (1.8)	+0.07 (3.6)	+0.03 (1.8)
16–17	-0.10 (1.4)	-0.07 (0.8)	-2.3 (1.9)	-1.5 (1.2)	+0.19 (2.9)	+0.06 (1.1)	+0.05 (2.5)	+0.01 (0.6)
17–18	-0.05 (0.7)	-0.02 (0.2)	-1.5 (1.4)	-0.6 (0.4)	+0.17 (2.5)	+0.02 (0.4)	+0.04 (1.9)	+0.01 (0.5)

Data are mean (standard deviation) for top 100 Norwegian male and female performers in each discipline.

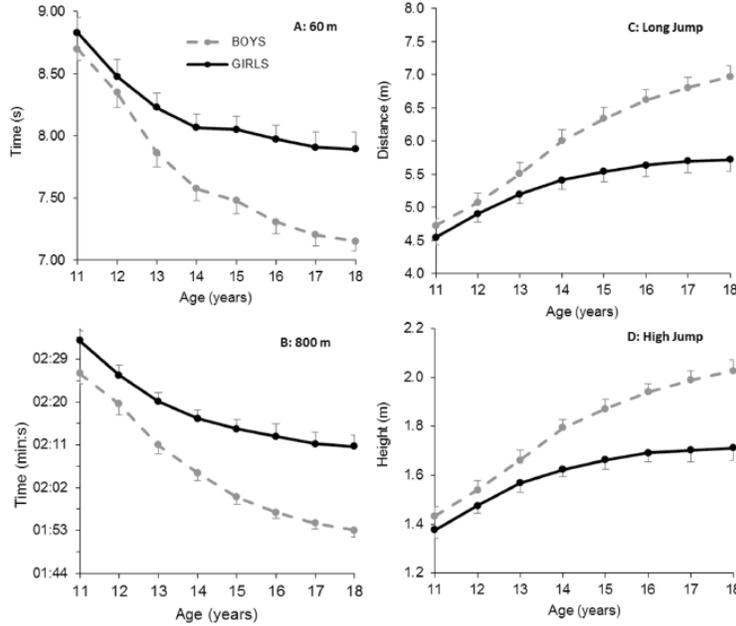
52. Tønnessen and Svendsen’s Table 2 below shows the “[s]ex ratio in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 6)

Table 2. Sex ratio in running and jumping performance for 11–18 yr old males and females.

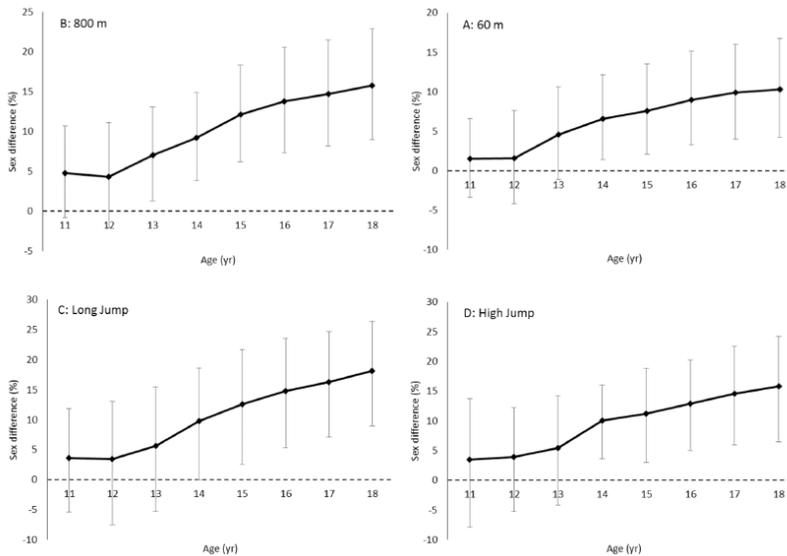
	60 m	800 m	Long Jump	High Jump
11	0.99	0.95	0.96	0.97
12	0.98	0.96	0.97	0.96
13	0.96	0.93	0.94	0.95
14	0.94	0.92	0.90	0.90
15	0.93	0.89	0.87	0.89
16	0.92	0.88	0.85	0.87
17	0.91	0.87	0.84	0.85
18	0.91	0.86	0.82	0.84

Data are calculated from mean results of top 100 Norwegian male and female performers in each discipline.

53. Tønnessen and Svendsen’s Figure 1 below shows “[p]erformance development from age 11 to 18 in running and jumping disciplines. Data are mean \pm [standard deviation] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in each discipline:” (4)



54. Tønnessen and Svendsen’s Figure 3 below shows the “[s]ex difference for performance in running and jumping disciplines from age 11 to 18. Data are mean and 95% [confidence intervals] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in each discipline:” (6)



55. As for the 60m race, the tables and charts above illustrate:

a. “[B]oys improve 0.3–0.5 [seconds] over 60 m sprint each year up to the age of 14 [years] (very large to nearly perfect annual effect), 0.1–0.2 [seconds] annually from 14 to 17 [years] (moderate to large annual effect), and 0.05 [seconds] from age 17 to 18 [years] (moderate effect). Relative annual improvement peaks between 12 and 13 [years] (5.8%; nearly perfect effect), and then gradually declines to 0.7% between age 17 and 18 [years] (moderate effect).” (3)

b. “On average, boys improve their 60 m performance by 18% from age 11 to 18 [years]. Girls improve 0.35 [seconds] over 60 m from age 11 to 12 [years] (4%; very large effect). Then, absolute and relative annual improvement gradually slows and almost plateaus between age 14 and 15 (0.02 s; 0.2%; trivial effect). From age 15 to 17, annual improvement increases somewhat to 0.07–0.08 [seconds] (~1%; moderate effect) before plateauing again between age 17 and 18 (0.02 s; 0.2%; trivial effect). In total, girls improve their 60-m performance by 11% from age 11 to 18 [years].... [T]he sex difference for 60 m sprint evolves from 1.5% at age 11 to 10.3% at the age of 18.... [T]he sex ratio for 60 m running performance develops from 0.99 at age 11 to 0.91 at age 18.” (4-5)

56. As for the 800m race, the tables and charts above illustrate:

a. “[B]oys improve 6–9 [seconds] over 800 m each year up to age 14 [years] (very large to nearly perfect annual effect). Relative annual improvement peaks between age 12 and 13 (6.2%; nearly perfect effect), then gradually decreases to 1.5 [seconds] between age 17 and 18 (1.4%; moderate effect).” (5)

b. “On average, boys enhance their 800-m performance by 23% from age 11 to 18. For girls, both absolute and relative annual performance development gradually decreases across the analysed age stages. The improvement is slightly above 7 [seconds] between age 11 and 12 [years] (4.8%; very large effect), decreasing to only 0.6 [seconds] from age 17 to 18 (0.4%; small effect).... [G]irls enhance their 800-m performance by 15% from age 11 to 18. The 800 m performance sex difference evolves from 4.8% at the age of 11 to 15.7% at the age of 18.... [T]he sex ratio for 800 m running performance develops from 0.95 at age 11 to 0.86 at age 18.” (5)

57. As for the long jump, the tables and charts above illustrate:

a. “[A]nnual long jump improvement among boys gradually increases from 35 cm between age 11 and 12 [years] (7.4%; very large effect) to 50 cm between age 13 and 14 (9%; very large effect). Both absolute and relative annual development then gradually falls to 17 cm between age 17 and 18 (2.5%; moderate effect).” (5)

b. “[B]oys, on average, improve their long jump performance by 48% from age 11 to 18 yr. For girls, both absolute and relative annual performance enhancement gradually falls from age 11 to 12 [years] (36 cm; 7.9%; very large effect) until nearly plateauing between 17 and 18 [years] (2 cm; 0.4%; trivial effect). Overall, girls typically improve their long jump performance by 26% throughout the analysed age stages. The sex difference in long jump evolves from 3.6% at the age of 11 to 18% at the age of 18.... [T]he sex ratio for long jump performance develops from 0.96 at age 11 to 0.82 at age 18.” (5)

58. As for the high jump, the tables and charts above illustrate:

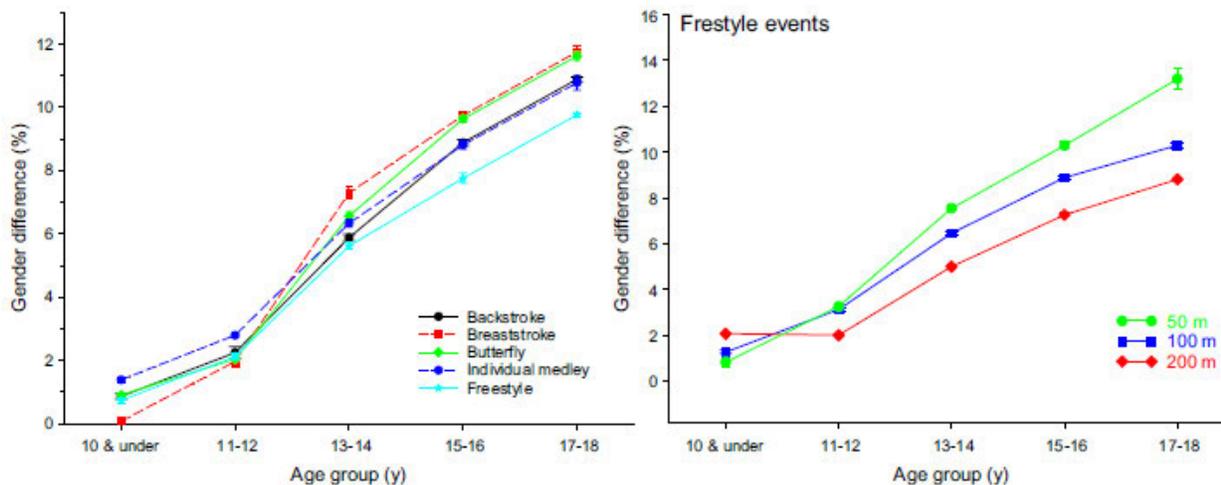
a. “[B]oys improve their high jump performance by 11–13 cm each year up to the age of 14 (7–8%; very large annual effects). Both absolute and relative annual improvement peaks between age 13 and 14 (13 cm; 8.1%; very large effect), then gradually decreases to 4 cm from age 17 to 18 (1.9%; moderate annual effect).” (6)

b. “Overall, boys improve their high jump performance by, on average, 41% from age 11 to 18. For girls, both absolute and relative annual improvement decreases from 10 cm from age 11 to 12 [years] (7.2%; very large effect) until it plateaus from age 16 (1 cm; ~0.5%; small annual effects). Overall, girls typically improve their high jump performance by 24% from age 11 to 18. The sex difference in high jump performance evolves from 3.5% at the age of 11 to 16% at the age of 18.... [T]he sex ratio for high jump performance develops from 0.97 at age 11 to 0.84 at age 18.” (6-7)

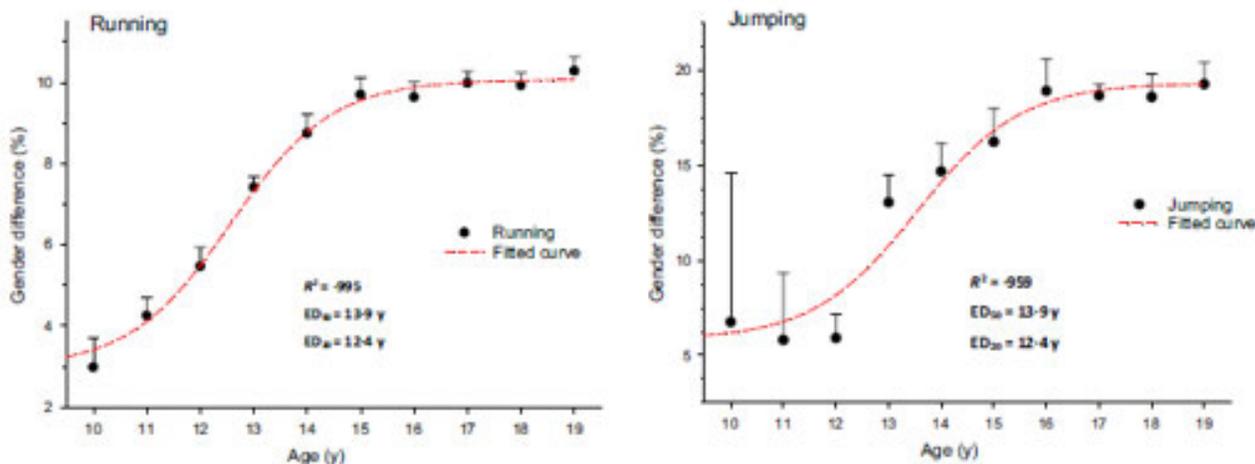
F. David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017):

59. Analyzing four separate studies, Handelsman (2017) found very closely similar trajectories of divergence of athletic performance between the sexes across the adolescent years, in all measured events.

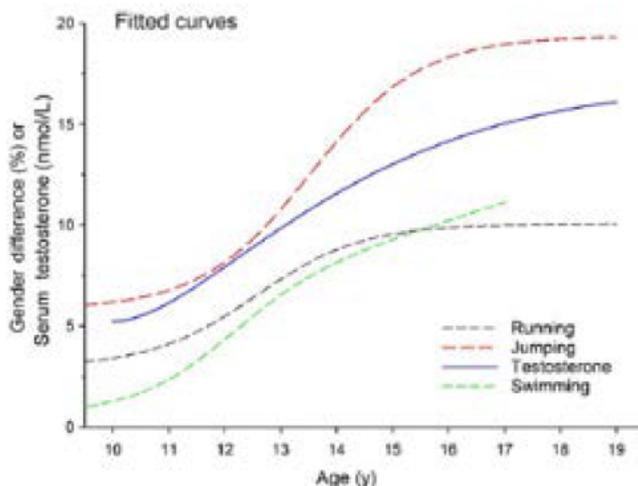
60. As illustrated by Figure 1 of Handelsman (2017) below, study results showed that “[i]n swimming performance, the overall gender differences were highly significant” (69)



61. As illustrated by Figure 2 of Handelsman (2017) below, “[i]n track and field athletics, the effects of age on running performance showed that the prepubertal differences of 3.0% increased to a plateau of 10.1% with an onset (ED₂₀) at 12.4 years and reaching midway (ED₅₀) at 13.9 years. For jumping, the prepubertal difference of 5.8% increased to 19.4% starting at 12.4 years and reaching midway at 13.9 years.” (70)



62. As also illustrated in Figure 2 of Handelsman (2017), the author found a strong correlation between the increasing male performance advantage and blood serum testosterone levels, and reported: “The timing of the male advantage in running, jumping and swimming was similar [across events] and corresponded to the increases in serum testosterone in males.” (70)



G. International Weightlifting Federation “World Records”:

63. I accessed weightlifting records as posted by the International Weightlifting Federation at <https://www.iwf.net/results/world-records/>. The records collected below are as of November 1, 2019.

64. As the chart below illustrates, junior men’s and women’s world records (age 15-20) for clean and jerk lifts indicate that boys or men perform better than girls or women even when they are matched for body mass. Similar sex differences can be found for the snatch event on the International Weightlifting Federation website.

Junior Men’s and Women’s World Records (ages 15-20) for Clean and Jerk			
Men’s weight (kg)	Record (kg)	Women’s weight (kg)	Record (kg)
56	171	58	142
62	183	63	147
69	198	69	157
77	214	75	164
85	220	90	160
94	233	+90	193

II. Biological male physiology is the basis for the performance advantage that men, or adolescent boys, have over women, or adolescent girls, in almost all athletic contests.

65. Common observation and knowledge tell us that, across the years of puberty, boys experience distinctive physical developments that largely explain the performance advantages I have detailed above. These well-known physical developments have now also been the subject of scientific measurement and study.

66. At the onset of male puberty the testes begin to secrete greatly increased amounts of testosterone. Testosterone is the primary “androgenic” hormone. It causes the physical traits associated with males such as facial and body hair growth, deepening of the voice, enlargement of the genitalia, increased bone mineral density, increased bone length in the long bones, and enhanced muscle growth (to name just a few of testosterone’s effects). The enhanced muscle growth caused by testosterone is the “anabolic” effect often discussed when testosterone is called an anabolic steroid.

67. Women lack testes and instead have ovaries, so they do not experience similar increases in testosterone secretion. Instead, puberty in women is associated with the onset of menstruation and increased secretion of “estrogens.” Estrogens, most notably estradiol, cause the feminizing effects associated with puberty in women which include increased fat tissue growth in the hips, thighs, and buttocks, development of the mammary glands, and closure of the growth plates in long bones. The smaller amount of muscle growth typically seen in women during puberty explains in part the athletic performance gap between men, and boys after the onset of puberty, and women and girls.

A. Handelsman, Hirschberg, et al. (2018)

68. In addition to documenting objective performance advantages enjoyed by males as I have reviewed above, Handelsman and his co-authors also detail physiological differences caused by male puberty—and by developments during puberty under the influence of male levels of testosterone in particular—that account for those advantages. These authors state: “The striking male postpubertal increase in circulating testosterone provides a major, ongoing, cumulative, and durable physical advantage in sporting contests by creating larger and stronger bones, greater muscle mass and strength, and higher circulating hemoglobin as well as possible psychological (behavioral) differences. In concert, these render women, on average, unable to compete effectively against men in power-based or endurance-based sports.” (805)

69. First, Handelsman et al. explain that all of these physiological differences appear to be driven by male levels of circulating testosterone. “The available, albeit incomplete, evidence makes it highly likely that the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance. This is based on the dose-response effects of circulating testosterone to increase muscle mass and strength, bone size and strength (density), and circulating hemoglobin, each of which alone increases athletic capacity, as well as other possible sex dichotomous, androgen-sensitive contributors such as mental effects (mood, motivation, aggression) and muscle myoglobin content. These facts explain the clear sex difference in athletic performance in most sports, on which basis it is commonly accepted that competition has to be divided into male and female categories.” (823)

70. “Prior to puberty, levels of circulating testosterone as determined by LC-MS are the same in boys and girls They remain lower than 2 nmol/L in women of all ages. However, from the onset of male puberty the testes secrete 20 times more testosterone resulting in circulating testosterone levels that are 15 times greater in healthy young men than in age-similar women.” (806) “[T]he circulating testosterone of most women never reaches consistently >5 nmol/L, a level that boys must sustain for some time to exhibit the masculinizing effects of male puberty.” (808)

71. “The characteristic clinical features of masculinization (e.g., muscle growth, increased height, increased hemoglobin, body hair distribution, voice change) appear only if and when circulating testosterone concentrations rise into the range of males at mid-puberty, which are higher than in women at any age even after the rise in circulating testosterone in female puberty.” (810)

72. “[The] order-of-magnitude difference in circulating testosterone concentrations is the key factor in the sex difference in athletic performance due to androgen effects principally on muscle, bone, and hemoglobin.” (811)

73. “Modern knowledge of the molecular and cellular basis for androgen effects on skeletal muscle involves effects due to androgen (testosterone, DHT) binding to the AR that then releases chaperone proteins, dimerizes, and translocates into the nucleus to bind to androgen response elements in the promoter DNA of androgen-sensitive genes. This leads to increases in (1) muscle fiber numbers and size, (2) muscle satellite cell numbers, (3) numbers of myonuclei, and (4) size of motor neurons. Additionally, there is experimental evidence that testosterone increases skeletal muscle myostatin expression, mitochondrial biogenesis, myoglobin expression, and IGF-1 content, which may augment energetic and power generation of skeletal muscular activity.” (811)

74. **Muscle mass** is perhaps the most obvious driver of male athletic advantage. “On average, women have 50% to 60% of men’s upper arm muscle cross-sectional area and 65% to 70% of men’s thigh muscle cross-sectional area, and women have 50% to 60% of men’s upper limb strength and 60% to 80% of men’s leg strength. Young men have on average a skeletal muscle mass of >12 kg greater than age-matched women at any given body weight. Whereas numerous genes and environmental factors (including genetics, physical activity, and diet) may contribute to muscle mass, the major cause of the sex difference in muscle mass and strength is the sex difference in circulating testosterone.” (812)

75. “Dose-response studies show that in men whose endogenous testosterone is fully suppressed, add-back administration of increasing doses of testosterone that produce graded increases in circulating testosterone causes a dose-dependent (whether expressed according to testosterone dose or circulating levels) increase in muscle mass (measured as lean body mass) and strength. Taken together, these studies prove that testosterone doses leading to circulating concentrations from well below to well above the normal male range have unequivocal dose-dependent effects on muscle mass and strength. These data strongly and consistently suggest that the sex difference in lean body mass (muscle) is largely, if not exclusively, due to the differences in circulating testosterone between men and women. These findings have strong implications for power dependent sport performance and largely explain the potent efficacy of androgen doping in sports.” (813)

76. “Muscle growth, as well as the increase in strength and power it brings, has an obvious performance enhancing effect, in particular in sports that depend on strength and (explosive) power, such as track and field events. There is convincing evidence that the sex differences in muscle mass and strength are sufficient to account for the increased strength and aerobic performance of men compared with women and is in keeping with the differences in world records between the sexes.” (816)

77. Men and adolescent boys also have distinct athletic advantages in **bone size, strength, and configuration.**

78. “Sex differences in height have been the most thoroughly investigated measure of bone size, as adult height is a stable, easily quantified measure in large population samples. Extensive twin studies show that adult height is highly heritable with predominantly additive genetic effects that diverge in a sex-specific manner from the age of puberty onwards, the effects of which are likely to be due to sex differences in adult circulating testosterone concentrations.” “Men have distinctively greater bone size, strength, and density than do women of the same age. As with muscle, sex differences in bone are absent prior to puberty but then

accrue progressively from the onset of male puberty due to the sex difference in exposure to adult male circulating testosterone concentrations.” (818)

79. “The earlier onset of puberty and the related growth spurt in girls as well as earlier estrogen-dependent epiphyseal fusion explains shorter stature of girls than boys. As a result, on average men are 7% to 8% taller with longer, denser, and stronger bones, whereas women have shorter humerus and femur cross-sectional areas being 65% to 75% and 85%, respectively, those of men. These changes create an advantage of greater bone strength and stronger fulcrum power from longer bones. (818)

80. **Male bone geometry** also provides mechanical advantages. “The major effects of men’s larger and stronger bones would be manifest via their taller stature as well as the larger fulcrum with greater leverage for muscular limb power exerted in jumping, throwing, or other explosive power activities.” (818) Further, “the widening of the female pelvis during puberty, balancing the evolutionary demands of obstetrics and locomotion, retards the improvement in female physical performance, possibly driven by ovarian hormones rather than the absence of testosterone.” (818)

81. Beyond simple performance, the greater density and strength of male bones provides higher protection against stresses associated with extreme physical effort: “[S]tress fractures in athletes, mostly involving the legs, are more frequent in females with the male protection attributable to their larger and thicker bones.” (818)

82. In addition to advantages in muscle mass and strength, and bone size and strength, men and adolescent boys have **greater hemoglobin levels** in their blood as compared to women and girls, and thus a greater capability to transport oxygen within the blood, which then provides bioenergetic benefits. “It is well known that levels of circulating hemoglobin are androgen-dependent and consequently higher in men than in women by 12% on average.... Increasing the amount of hemoglobin in the blood has the biological effect of increasing oxygen transport from lungs to tissues, where the increased availability of oxygen enhances aerobic energy expenditure.” (816) “It may be estimated that as a result the average maximal oxygen transfer will be ~10% greater in men than in women, which has a direct impact on their respective athletic capacities.” (816)

B. Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 *Asian J. of Andrology* 653 (2011)

83. Gooren et al. like Handelsman et al., link male advantages in height, bone size, muscle mass, strength, and oxygen carrying capacity to exposure to male testosterone levels: “Before puberty, boys and girls hardly differ in height, muscle and bone mass. Pubertal testosterone exposure leads to an ultimate average greater height in men of 12–15 centimeters, larger bones, greater muscle mass, increased strength and higher hemoglobin levels.” (653)

C. Thibault, Guillaume, et al. (2010)

84. In addition to the testosterone-linked advantages examined by Handelsman et al. (2018), Thibault et al. note sex-linked differences in body fat as impacting athletic performance: “Sex has been identified as a major determinant of athletic performance through the impact of height, weight, body fat, muscle mass, aerobic capacity or anaerobic threshold as a result of genetic and hormonal differences (Cureton et al., 1986; Maldonado-Martin et al., 2004; Perez-Gomez et al., 2008; Sparling and Cureton, 1983).” (214)

D. Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 *J. MED ETHICS* 395 (2019):

85. Knox et al. analyze specific testosterone-linked physiological differences between men and women that provide advantages in athletic capability, and conclude that “[E]lite male athletes have a performance advantage over their female counterparts due to physiological differences.” (395) “Combining all of this information, testosterone has profound effects on key physiological parameters that underlie athletic performance in men. There is substantial evidence regarding the effects on muscle gain, bone strength, and the cardiovascular and respiratory system, all of which drive enhanced strength, speed and recovery. Together the scientific data point to testosterone providing an all-purpose benefit across a range of body systems that contribute to athletic performance for almost all sports.” (397-98)

86. “It is well recognised that testosterone contributes to physiological factors including body composition, skeletal structure, and the cardiovascular and respiratory systems across the life span, with significant influence during the pubertal period. These physiological factors underpin strength, speed and recovery with all three elements required to be competitive in almost all sports. An exception is equestrian, and for this reason, elite equestrian competition is not gender-

segregated. As testosterone underpins strength, speed and recovery, it follows that testosterone benefits athletic performance.” (397)

87. “High testosterone levels and prior male physiology provide an all-purpose benefit, and a substantial advantage. As the IAAF says, “To the best of our knowledge, there is no other genetic or biological trait encountered in female athletics that confers such a huge performance advantage.” (399)

88. These authors, like others, describe sex-linked advantages relating to **bone size and muscle mass**. “Testosterone also has a strong influence on bone structure and strength. From puberty onwards, men have, on average, 10% more bone providing more surface area. The larger surface area of bone accommodates more skeletal muscle so, for example, men have broader shoulders allowing more muscle to build. This translates into 44% less upper body strength for women, providing men an advantage for sports like boxing, weightlifting and skiing. In similar fashion, muscle mass differences lead to decreased trunk and lower body strength by 64% and 72%, respectively in women. These differences in body strength can have a significant impact on athletic performance, and largely underwrite the significant differences in world record times and distances set by men and women.” (397)

89. Knox et al. also identify the relatively higher percentage of **body fat** in women as both inherently sex-linked, and a disadvantage with respect to athletic performance. “Oestrogens also affect body composition by influencing fat deposition. Women, on average, have higher percentage body fat, and this holds true even for highly trained healthy athletes (men 5%–10%, women 8%–15%). Fat is needed in women for normal reproduction and fertility, but it is not performance enhancing. This means men with higher muscle mass and less body fat will normally be stronger kilogram for kilogram than women.” (397)

90. Knox et al. detail the relative performance disadvantage arising from the oestrogen-linked **female pelvis shape**: “[T]he major female hormones, oestrogens, can have effects that disadvantage female athletic performance. For example, women have a wider pelvis changing the hip structure significantly between the sexes. Pelvis shape is established during puberty and is driven by oestrogen. The different angles resulting from the female pelvis leads to decreased joint rotation and muscle recruitment ultimately making them slower.” (397)

91. “In short, higher testosterone levels lead to larger and stronger bones as well as more muscle mass providing a body composition-related performance advantage for men for almost all sports. In contrast, higher oestrogen levels lead to changes in skeletal structure and more fat mass that can disadvantage female athletes, in sports in which speed, strength and recovery are important.” (397)

92. Knox et al. break out multiple sex-linked contributions to a male advantage in **oxygen intake and delivery**, and thus to energy delivery to muscles. “Testosterone also influences the cardiovascular and respiratory systems such that men have a more efficient system for delivering oxygen to active skeletal muscle. Three key components required for oxygen delivery include lungs, heart and blood haemoglobin levels. Inherent sex differences in the lung are apparent from early in life and throughout the life span with lung capacity larger in men because of a lower diaphragm placement due to Y-chromosome genetic determinants. The greater lung volume is complemented by testosterone-driven **enhanced alveolar multiplication rate** during the early years of life.” (397)

93. “Oxygen exchange takes place between the air we breathe and the bloodstream at the alveoli, so more alveoli allows more oxygen to pass into the bloodstream. Therefore, the greater lung capacity allows more air to be inhaled with each breath. This is coupled with an improved uptake system allowing men to absorb more oxygen. Once in the blood, oxygen is carried by haemoglobin. Haemoglobin concentrations are directly modulated by testosterone so men have higher levels and can carry more oxygen than women. Oxygenated blood is pumped to the active skeletal muscle by the heart. The left ventricle chamber of the heart is the reservoir from which blood is pumped to the body. The larger the left ventricle, the more blood it can hold, and therefore, the more blood can be pumped to the body with each heartbeat, a physiological parameter called ‘stroke volume’. The female heart size is, on average, 85% that of a male resulting in the stroke volume of women being around 33% less. Putting all of this together, men have a much more efficient cardiovascular and respiratory system, with testosterone being a major driver of enhanced aerobic capacity.” (397)

E. Lepers, Knechtle, et al. (2013)

94. Lepers et al. point to some of these same physiological differences as explaining the large performance advantage they found for men in triathlon performance. “Current explanations for sex differences in [maximal oxygen uptake] among elite athletes, when expressed relative to body mass, provide two major findings. First, elite females have more (<13 vs. <5 %) body fat than males. Indeed, much of the difference in [maximal oxygen uptake] between males and females disappears when it is expressed relative to lean body mass. Second, the hemoglobin concentration of elite athletes is 5–10 % lower in females than in males.” (853)

95. “Males possess on average 7–9 % less percent body fat than females, which is likely an advantage for males. Therefore, it appears that sex differences in percentage body fat, oxygen-carrying capacity and muscle mass may be major factors for sex differences in overall triathlon performance. Menstrual cycle, and

possibly pregnancy, may also impact training and racing in female athletes, factors that do not affect males.” (853)

F. Tønnessen, Svendsen, et al. (2015)

96. Tønnessen et al. likewise point to some of the same puberty and testosterone-triggered physiological differences discussed above to explain the increasing performance advantage of boys across the adolescent years, noting that “[T]here appears to be a strong mechanistic connection between the observed sex-specific performance developments and hormone-dependent changes in body composition during puberty.” (7) “Beyond [age 12], males outperform females because maturation results in a shift in body composition. Our results are in line with previous investigations exploring physical capacities such as [maximal oxygen uptake] and isometric strength in non-competitive or non-specialized adolescents.” (7)

97. “[S]ex differences in physical capacities (assessed as [maximal oxygen uptake] or isometric strength in the majority of cases) are negligible prior to the onset of puberty. During the adolescent growth spurt, however, marked sex differences develop. This can primarily be explained by hormone dependent changes in body composition and increased red blood cell mass in boys.” (2)

98. “Sexual dimorphism during puberty is highly relevant for understanding sex-specific performance developments in sports. The initiation of the growth spurt in well-nourished girls occurs at about 9–10 yrs of age. Age at peak height velocity (PHV) and peak weight velocity (PWV) in girls is 11–12 and 12–13 yrs, respectively, with an average 7–9 cm and 6–9 kg annual increase. The growth spurt and PHV in girls occurs approximately 2 years earlier than for boys. However, the magnitude of the growth spurt is typically greater in boys, as they on average gain 8–10 cm and 9–10 kg annually at PHV and PWV, respectively. Girls experience an escalation in fat mass compared to boys. Fat free mass (FFM) (also termed lean muscle mass) is nearly identical in males and females up to the age of 12–13 yrs. FFM plateaus in females at 15–16 years of age, but continues increasing in males up to the age of 19–20 yrs. On average, boys and girls increase their FFM by 7.2 and 3.5 kg/year⁻¹, respectively, during the interval near peak height velocity. Corresponding estimates for changes in absolute fat mass are 0.7 and 1.4 kg/year⁻¹, while estimates for relative fatness are -0.5% and +0.9%/year⁻¹ in boys and girls, respectively.” (2)

99. “During puberty, boys begin to produce higher levels of circulating testosterone. This affects the production of muscle fibers through direct stimulation of protein synthesis. Higher testosterone levels result in more muscle mass, which in turn facilitates greater power production and more advantageous ground reaction

forces during running and jumping. Adolescent weight gain in boys is principally due to increased height (skeletal tissue) and muscle mass, while fat mass remains relatively stable. In contrast, during puberty girls begin to produce higher levels of circulating estrogen and other female sex hormones. Compared to their male counterparts, they experience a less pronounced growth spurt and a smaller increase in muscle mass, but a continuous increase in fat mass, thereby lowering the critical ratio between muscular power and total body mass.” (7)

100. “The relatively greater progress in jumping exercises can also be explained by growth and increased body height during puberty. The increase in body height means that the center of gravity will be higher, providing better mechanical conditions for performance in jumping events.” (8)

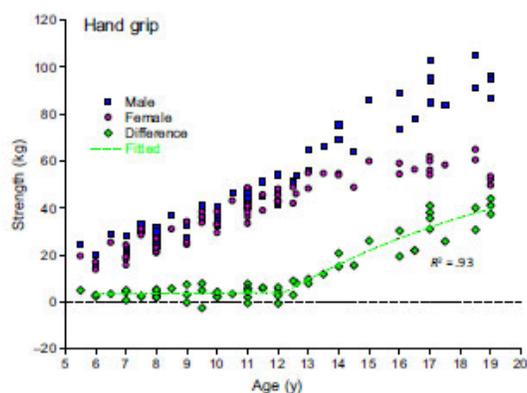
G. Louis J. G. Gooren & Mathijs C. M. Bunck, *Tanssexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004):

101. In their study of performance of transsexual athletes, Louis et al. note that “[b]efore puberty, boys and girls do not differ in height, muscle and bone mass. Recent information shows convincingly that actual levels of circulating testosterone determine largely muscle mass and strength.” (425) “Testosterone exposure during puberty leads ultimately to an average greater height in men of 12–15 cm, larger bones and muscle mass, and greater strength.” (425)

H. Handelsman (2017)

102. Handelsman (2017) notes the existence of a “stable and robust” performance gap between males and females, with no narrowing “over more than three decades” (71), observing that “[i]t is well known that men’s athletic performance exceeds that of women especially in power sports because of men’s greater strength, speed and endurance. This biological physical advantage of mature males forms the basis for gender segregation in many competitive sports to allow females a realistic chance of winning events. This physical advantage in performance arises during early adolescence when male puberty commences after which men acquire larger muscle mass and greater strength, larger and stronger bones, higher circulating haemoglobin as well as mental and/or psychological differences. After completion of male puberty, circulating testosterone levels in men are consistently 10-15 times higher than in children or women at any age.” (68)

103. To illustrate, Figure 3 of Handelsman (2017) below indicates, “the age trends in hand-grip strength showed a difference in hand-grip strength commencing from the age of 12.8 years onwards (Figure 3). Prior to the age of 13 years, boys had a marginally significant greater grip strength than girls ($n=45$, $t=2.0$, $P=.026$), but after the age of 13 years, there was a strong significant relationship between age and difference in grip strength ($n=18$, $r=.89$, $P<.001$.” (70)



104. Handelsman (2017) in particular focuses on the correlation between the development of this performance gap and the progress of male adolescence and circulating testosterone levels in boys. “The strength of the present study is that it includes a wide range of swimming as well as track and field running and jumping events as well as strength for nonathletes for males and females across the ages spanning the onset of male puberty. The similar timing of the gender divergence in each of these settings to that of the rise in circulating testosterone to adult male levels strongly suggests that they all reflect the increase in muscular size and strength although the impact of other androgen-dependent effects on bone, haemoglobin and psychology may also contribute.” (71-72)

105. “In this study, the timing and tempo of male puberty effects on running and jumping performance were virtually identical and very similar to those in swimming events. Furthermore, these coincided with the timing of the rise in circulating testosterone due to male puberty. In addition to the strikingly similar timing and tempo, the magnitude of the effects on performance by the end of this study was 10.0% for running and 19.3% for jumping, both consistent with the gender differences in performance of adult athletes previously reported to be 10%-12% for running and 19% for jumping.” (71)

106. “In the swimming events, despite the continued progressive improvements in individual male and female event records, the stability of the gender difference over 35 years shown in this study suggests that the gender differences in performance are stable and robust.” (71)

107. “The similar time course of the rise in circulating testosterone with that of the gender divergences in swimming and track and field sports is strongly suggestive that these effects arise from the increase in circulating testosterone from the start of male puberty.” (71) “It is concluded that the gender divergence in athletic performance begins at the age of 12-13 years and reaches adult plateau in the late teenage years. Although the magnitude of the divergence varies between athletic skills, the timing and tempo are closely parallel with each other and with the rise in circulating testosterone in boys during puberty to reach adult male levels.” (72)

108. Handelsman (2017) notes several specific physiological effects of male levels of circulating testosterone that are relevant to athletic performance:

a. “Adult male circulating testosterone also has marked effects on bone development leading to longer, stronger and denser bone than in age-matched females.” (71)

b. “A further biological advantage of adult male circulating testosterone concentrations is the increased circulating haemoglobin. Men have ~10 g/L greater haemoglobin than women with the gender differences also evident from the age of 13-14 years.” (71)

109. Handelsman (2017) also observes that “exposure to adult male testosterone concentrations is likely to produce some mental or psychological effects. However, the precise nature of these remains controversial and it is not clear whether, or to what extent, this contributes to the superior elite sporting performance of men in power sports compared with the predominant effects on muscle mass and function.” (71)

I. Centers for Disease Control & Prevention, “National Health Statistics Reports Number 122,” CDC (2018):

110. To obtain data on height, weight, and body mass differences between men and women, I accessed the “National Health Statistics Reports Number 122” published by the Centers for Disease Control & Prevention, at <https://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf>, which is based on data through 2016.

111. The average height for a U.S. adult man is 5 feet 9 inches and for a U.S. adult woman the average height is 5 feet 4 inches. (3)

112. The average weight for a U.S. adult man is 197.8 lbs. and for a U.S. adult woman the average weight is 170.5 lbs. (6)

113. The average body mass index for a U.S. adult man is 29.1, and the average body mass index for a U.S. adult woman is 29.6. (3)

III. Administration of cross-sex hormones to men, or adolescent boys, after male puberty does not eliminate their performance advantage over women, or adolescent girls, in almost all athletic contests.

114. So far as I am aware, secondary school leagues do not have rules requiring testosterone suppression as a condition of males qualifying to compete in girls' athletic events based on a claim of a female gender identity. At the collegiate level, the "NCAA Policy on Transgender Student-Athlete Participation" requires only that such males be on unspecified and unquantified "testosterone suppression treatment" for "one calendar year" prior to competing in women's events. The International Olympic Committee requires that males be on testosterone suppression treatment that successfully reduces testosterone to less than 10 nmol/L in order to compete in women's events.

115. In fact, the effects of hormone administration of testosterone suppression on elite athletes remains largely unquantified from a scientific perspective due to the lack of research in this population.

116. That said, it is obvious that some effects of male puberty that confer advantages for athletic performance—in particular bone size and configuration—cannot be reversed once they have occurred.

117. In addition, some studies have now determined that other physiological advantages conferred by male puberty are also not fully reversed by later hormonal treatments associated with gender transition. Specifically, studies have shown that the effects of puberty in males including increased muscle mass, increased bone mineral density, increased lung size, and increased heart size, are not completely reversed by suppressing testosterone secretion and administering estrogen during gender transition procedures in males.

118. For example, suppressing testosterone secretion and administering estrogen in post pubescent males does not shrink body height to that of a comparably aged female, nor does it reduce lung size or heart size. Indeed, while testosterone suppression and estrogen administration reduce the size and density of skeletal muscles, the muscles remain larger than would be expected in a typical female even when matched for body height or mass. A general tenet of exercise science is that larger muscles are stronger muscles due to larger muscles containing more contractile proteins. Thus, while gender transition procedures will impair a male's athletic potential it is still highly unlikely to be reduced to that of a

comparably aged and trained female. I review below relevant findings from several studies.

A. Handelsman, Hirschberg, et al. (2018)

119. Handelsman et al. (2018) note that in “transgender individuals, the developmental effects of adult male circulating testosterone concentrations will have established the sex difference in muscle, hemoglobin, and bone, some of which is fixed and irreversible (bone size) and some of which is maintained by the male circulating testosterone concentrations (muscle, hemoglobin).” (824)

120. “[D]evelopmental bone effects of androgens are likely to be irreversible.” (818)

121. With respect to muscle mass and strength, Handelsman et al. (2018) observe that suppression of testosterone in males to levels currently accepted for transsexual qualification to compete in women’s events will still leave those males with a large strength advantage. “Based on the established dose-response relationships, suppression of circulating testosterone to <10 nmol/L would not eliminate all ergogenic benefits of testosterone for athletes competing in female events. For example, according to the Huang *et al.* study, reducing circulating testosterone to a mean of 7.3 nmol/L would still deliver a 4.4% increase in muscle size and a 12% to 26% increase in muscle strength compared with circulating testosterone at the normal female mean value of 0.9 nmol/L. Similarly, according to the Karunasena *et al.* study, reducing circulating testosterone concentration to 7 nmol/L would still deliver 7.8% more circulating hemoglobin than the normal female mean value. Hence, the magnitude of the athletic performance advantage in DSD athletes, which depends on the magnitude of elevated circulating testosterone concentrations, is considerably greater than the 5% to 9% difference observed in reducing levels to <10 nmol/L.” (821)

B. Gooren (2011)

122. In addition to noting that the length and diameter of bones is unchanged by post-pubertal suppression of androgens (including testosterone) (653), Gooren found that “[i]n spite of muscle surface area reduction induced by androgen deprivation, after 1 year the mean muscle surface area in male-to- female transsexuals remained significantly greater than in untreated female-to-male transsexuals.” (653) “Untreated female-to-male transsexuals” refers to biological females, who will have hormonal levels ordinarily associated with women.

123. As I have explained above, greater muscle surface area translates into greater strength assuming comparable levels of fitness.

C. Knox, Anderson, et al. (2019)

124. In their recent article, Knox et al. reviewed the physiological effects of reducing circulating testosterone levels below 10nmol/L, the level current accepted by the International Olympic Committee (IOC) (2015) guidelines as adequate to permit males to enter as women in Olympic competition.

125. Knox et al. note the unarguable fact that 10nmol/L is a far higher level of circulating testosterone than occurs in women, including elite women athletes. “Transwomen [meet IOC guidelines] to compete with testosterone levels just under 10 nmol/L. This is more than five times the upper testosterone level (1.7 nmol/L) of healthy, premenopausal elite cis-women athletes. Given that testosterone (as well as other elements stemming from Y-chromosome-dependent male physiology) provides an all-purpose benefit in sport, suggests that transwomen have a performance advantage.” (398)

126. As to **bone strength**, Knox et al. report that a “recent meta-analysis shows that hormone therapy provided to transwomen over 2 years maintains bone density so bone strength is unlikely to fall to levels of cis-women, especially in an elite athlete competing and training at high intensity. Increased bone strength also translates into protection against trauma, helping with recovery and prevention of injury.” (398)

127. Based on a review of multiple studies, Knox et al. report that, in addition to bone size, configuration, and strength, “hormone therapy will not alter ... **lung volume or heart size** of the transwoman athlete, especially if [that athlete] transitions postpuberty, so natural advantages including joint articulation, stroke volume and maximal oxygen uptake will be maintained.” (398)

128. With respect to **muscle mass and strength**, Knox et al. found that “healthy young men did not lose significant muscle mass (or power) when their circulating testosterone levels were reduced to 8.8 nmol/L (lower than the IOC guideline of 10 nmol/L) for 20 weeks. Moreover, retention of muscle mass could be compensated for by training or other ergogenic methods. In addition, the phenomenon of muscle memory means muscle mass and strength can be rebuilt with previous strength exercise making it easier to regain muscle mass later in life even after long intervening periods of inactivity and mass loss.” (398)

129. Indeed, Knox et al. observe that oestradiol—routinely administered as part of hormone therapy for transwomen—is actually known to *increase* muscle mass, potentially providing an *additional* advantage for these athletes over women. “While testosterone is the well-recognised stimulator of muscle mass gain, administration of oestradiol has also been shown to activate muscle gain via

oestrogen receptor- β activation. The combination of oestradiol therapy and a baseline testosterone of 10 nmol/L arguably provides transwomen athletes with an added advantage of increased muscle mass, and therefore power.” (398)

130. Summing up these facts, Knox et al. observe: “A transwoman athlete with testosterone levels under 10 nmol/L for 1 year will retain at least some of the physiological parameters that underpin athletic performance. This, coupled with the fact that [under IOC rules] transwomen athletes are allowed to compete with more than five times the testosterone level of a cis-woman, suggests transwomen have a performance advantage.” (398) Indeed, considering the magnitude of the advantages involved, Knox et al. conclude that the physiological advantages resulting from male puberty that are not negated by post-pubertal hormonal therapy “provide a strong argument that transwomen have an intolerable advantage over cis-women.” (399)

D. Gooren & Bunk (2004)

131. Measuring the concrete significance of the fact that bone size and configuration cannot be changed after puberty, Gooren and Bunk reported that “[Male-to-female transsexuals] were on average 10.7 cm taller (95% CI 5.4–16.0 cm) than [female-to-male transsexuals] (7).” (427)

132. With respect to muscle mass, Gooren and Bunk reported what other authors have since described in more detail: “After 1 year of androgen deprivation, mean muscle area in [male-to-female transsexuals] had decreased significantly but remained significantly greater than in [female-to-male transsexuals] before testosterone treatment.” (427) To be clear, female-to-male transsexuals “before testosterone treatment” are biological females with natural female hormone levels.

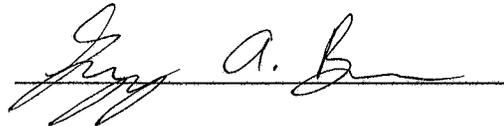
133. “The conclusion is that androgen deprivation in [male-to-female transsexuals] increases the overlap in muscle mass with women but does not reverse it, statistically.” (425)

E. Likely effects of proposed more stringent testosterone suppression requirements.

134. There have been reports that the IOC plans to reduce the acceptable level of circulating testosterone in males seeking to compete in women’s events to 5 nmol/L. However, more recent reports indicate that this proposal has been put on hold due to objections that this lower level would still not eliminate the physiological advantage of such males over women. See “*IOC delays new transgender guidelines after scientists fail to agree*,” THE GUARDIAN, Sept. 24, 2019.

135. I am not aware of studies measuring the impact on athletic performance of reducing circulating testosterone in males to 5 nmol/L. However, in light of the facts reviewed above concerning physiological characteristics that are irreversible after male puberty, it is clearly correct that a reduction of the IOC requirement to this level would not eliminate the physiological advantage of males over women. Further, given that the *mean* female concentration of circulating testosterone is 0.9 nmol/L (Handelsman et al. (2018) (821)), with the *high* end of the normal female range being about 1.7 nmol/L (Knox et al. (2019) (398)), a level of 5 nmol/L of circulating testosterone remains between *300% and 500% higher* than normal female levels. Given the findings of Huang et al. and Karunasena et al. reported in Handelsman et al. (2018) (821) and quoted above concerning the effects of suppressing circulating testosterone in adult males to 7.3 and 7 nmol/L respectively (just 46% and 40% respectively above the IOC's proposed 5 nmol/L level), it is reasonable to expect that males in whom testosterone is suppressed to 5 nmol/L will also continue to enjoy physiological advantages even in somewhat malleable parameters including muscle size, muscle strength, and circulating hemoglobin, as compared to females.

By:



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Academic Preparation

Doctor of Philosophy, Iowa State University. August 2002 -- Major in Health and Human Performance, Emphasis in the Biological Bases of Physical Activity, dissertation title: “Androgenic supplementation in men: Effects of age, herbal extracts, and mode of delivery.”

Master of Science, Iowa State University, May 1999 -- Major in Exercise and Sport Science, Emphasis in Exercise Physiology, thesis title: “Oral anabolic-androgenic supplements during resistance training: Effects on glucose tolerance, insulin action, and blood lipids.”

Bachelor of Science, Utah State University, June 1997 -- Major in Physical Education, Emphasis in Pre-physical Therapy.

Awards

College of Education Outstanding Faculty Teaching Award. University of Nebraska at Kearney 2019

Mortar Board Faculty Excellence Honors. Xi Phi Chapter, University of Nebraska at Kearney, Honored in 2006, 2007, 2008, 2012, 2013, 2015, and 2019

Profiled in New Frontiers, the University of Nebraska Kearney annual publication highlighting excellence in research, scholarship, and creative activity. 2009, 2017

College of Education Outstanding Scholarship / Research Award. University of Nebraska at Kearney 2009, 2014

College of Education Award for Faculty Mentoring of Undergraduate Student Research University of Nebraska at Kearney, 2007, 2010, & 2013

“Pink Tie” award from the Susan G. Komen Nebraska Affiliate, for outstanding service to the Central Nebraska Race for the Cure, 2013

Star Reviewer for the American Physiological Society and Advances in Physiology Education. 2010.

Fellow of the American College of Sports Medicine. Awarded April 23, 2008

UNK Senior Appreciation Program honoree, the University of Nebraska at Kearney

Iowa State University Research Excellence Award, Iowa State University, 2002

The Zaffarano Prize for Graduate Student Research, Iowa State University, 2002

Helen Hilton Lebaron Excellence in Research Award, Dept. of Health and Human Performance, Iowa State University, 2002

Best Paper Award, 2nd Annual Education Research Exchange. Iowa State University Education Research Exchange, 2001

Helen Hilton Lebaron Excellence in Research Award, Dept. of Health and Human Performance, Iowa State University, 2000

Professional Experience

Professor: University of Nebraska Kearney, Dept. of Kinesiology and Sport Sciences (2012-)

Associate Professor: University of Nebraska Kearney, HPERLS Dept. (2007-2012)

Assistant Professor: University of Nebraska Kearney, HPERLS Dept. (2004- 2007) Full Graduate Faculty status awarded on hire, 2004

Assistant Professor: Georgia Southern University, Jiann-Ping Hsu School of Public Health. (2002-2004) Full Graduate Faculty status awarded Nov. 26, 2002

Laboratory Director: Human Performance Laboratory, Georgia Southern University, Jiann-Ping Hsu School of Public Health. (2002-2004)

Research Assistant: Exercise Biochemistry and Physiology Laboratory, Iowa State University, Department of Health and Human Performance. (1997-2002)

Graduate Teaching Assistant: Iowa State University, Department of Health and Human Performance. (1997-2002)

Temporary Instructor: Iowa State University, Department of Health and Human Performance. (1999-2002)

Temporary Adjunct Faculty: Des Moines Area Community College. (2000)

Undergraduate Teaching Intern: Department of Biology, Utah State University. (1995-1996)

Refereed Publications

1. Schneider KM and Brown GA (as Faculty Mentor). What's at Stake: Is it a Vampire or a Virus? International Journal of Undergraduate Research and Creative Activities. 11, Article 4. 2019.
2. Christner C and Brown GA (as Faculty Mentor). Explaining the Vampire Legend through Disease. UNK Undergraduate Research Journal. 23(1), 2019. *this is an on campus publication
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42. Brown GA, & MacKenzie D. Resistance Exercise Does Not Change The Hormonal Response To Sublingual Androstenediol. *Eur J Appl Physiol*. 97:404-412, 2006
43. Brown GA, Vukovich MD, and King DS. Urinary excretion of steroid metabolites following chronic androstenedione ingestion. *J. Clin. Endocrinol. Metab*. 12:6235 – 6338, 2004

44. Brown GA, Dewey JC, Brunkhorst J, Vukovich MD, & King DS. Changes in serum testosterone and estradiol concentrations following acute androstenedione ingestion in young women. *Horm Metab Res.* 1:62-66, 2004
45. Kohut ML, Thompson JR, Campbell J, Brown GA, Vukovich MD, Jackson DA, & King DS. Ingestion of a Dietary Supplement Containing Dehydroepiandrosterone (DHEA) and Androstenedione Has Minimal Effect on Immune Function in Middle-Aged Men. *J Am Coll Nutr.* 22: 363-71, 2003
46. Brown GA, Martini ER, Roberts BS, Vukovich MD, & King DS. Acute hormonal responses to sublingual androstenediol intake in young men. *J Appl Physiol.* 92: 142-146, 2002.
47. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke WL, Jackson DA, & King DS. Effects of androstenedione-herbal supplements on serum sex hormone concentrations in 30-59 year old men. *Int J Vitam Nutr Res.* 71: 293-301, 2001
48. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke WL, Jackson DA, & King DS. Endocrine and lipid responses to chronic androstenediol-herbal supplementation in 30 to 58 year old men. *J Am Coll Nutr.* 20: 520-528, 2001.
49. Brown GA, Vukovich MD, Martini ER, Kohut ML, Franke ML, Jackson DA, & King DS. Endocrine response to chronic androstenedione intake in 30-56 year old men. *J Clin Endocrinol Metab.* 85: 4074-4080, 2000.
50. Brown GA, Vukovich MD, Reifenrath TA, Uhl NL, Parsons KA, Sharp RL, & King DS. Effects of anabolic precursors on serum testosterone concentrations and adaptations to resistance training in young men. *Int J Sport Nutr Exerc Metab.* 10: 342-362, 2000.
51. Brown GA, Vukovich MD, Sharp RL, Reifenrath TA, Parsons KA, & King DS. Effect of oral DHEA on serum testosterone and adaptations to resistance training in young men. *J Appl Physiol.* 87: 2274-2283, 1999.
52. King DS, Sharp RL, Vukovich MD, Brown GA, Reifenrath TA, Uhl NL, & Parsons KA. Effect of oral androstenedione on serum testosterone and adaptations to resistance training in young men: a randomized controlled trial. *JAMA.* 281: 2020-2028, 1999.

Refereed Presentations

1. Brown GA, Jackson B, Szekeley B, Schramm T, Shaw BS, Shaw I. A Pre-Workout Supplement Does Not Improve 400 M Sprint Running or Bicycle Wingate Test Performance in Recreationally Trained Individuals. *Med Sci Sport Exerc.* 50(5), 2932. 65th Annual Meeting of the American College of Sports Medicine. Minneapolis, MN. June 2018.
2. Paulsen SM, Brown GA. Neither Coffee Nor A Stimulant Containing “Pre-workout” Drink Alter Cardiovascular Drift During Walking In Young Men. *Med Sci Sport Exerc.* 50(5), 2409. 65th Annual Meeting of the American College of Sports Medicine. Minneapolis, MN. June 2018.
3. Adkins M, Bice M, Bickford N, Brown GA. Farm to Fresh! A Multidisciplinary Approach to Teaching Health and Physical Activity. 2018 spring SHAPE America central district conference. Sioux Falls, SD. January 2018.

4. Shaw I, Kinsey JE, Richards R, Shaw BS, and Brown GA. Effect Of Resistance Training During Nebulization In Adults With Cystic Fibrosis. *International Journal of Arts & Sciences' (IJAS)*. International Conference for Physical, Life and Health Sciences which will be held at FHWien University of Applied Sciences of WKW, at Währinger Gürtel 97, Vienna, Austria, from 25-29 June 2017.
5. Bongers M, Abbey BM, Heelan K, Steele JE, Brown GA. Nutrition Education Improves Nutrition Knowledge, Not Dietary Habits In Female Collegiate Distance Runners. *Med Sci Sport Exerc.* 49(5), 389. 64th Annual Meeting of the American College of Sports Medicine. Denver, CO. May 2017.
6. Brown GA, Steele JE, Shaw I, Shaw BS. Using Elisa to Enhance the Biochemistry Laboratory Experience for Exercise Science Students. *Med Sci Sport Exerc.* 49(5), 1108. 64th Annual Meeting of the American College of Sports Medicine. Denver, CO. May 2017.
7. Brown GA, Shaw BS, and Shaw I. Effects of a 6 Week Conditioning Program on Jumping, Sprinting, and Agility Performance In Youth. *Med Sci Sport Exerc.* 48(5), 3730. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
8. Shaw I, Shaw BS, Boshoff VE, Coetzee S, and Brown GA. Kinanthropometric Responses To Callisthenic Strength Training In Children. *Med Sci Sport Exerc.* 48(5), 3221. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
9. Shaw BS, Shaw I, Gouveia M, McIntyre S, and Brown GA. Kinanthropometric Responses To Moderate-intensity Resistance Training In Postmenopausal Women. *Med Sci Sport Exerc.* 48(5), 2127. 63rd Annual Meeting of the American College of Sports Medicine. Boston, MA. June 2016.
10. Bice MR, Cary JD, Brown GA, Adkins M, and Ball JW. The use of mobile applications to enhance introductory anatomy & physiology student performance on topic specific in-class tests. National Association for Kinesiology in Higher Education National Conference. January 8, 2016.
11. Shaw I, Shaw BS, Lawrence KE, Brown GA, and Shariat A. Concurrent Resistance and Aerobic Exercise Training Improves Hemodynamics in Normotensive Overweight and Obese Individuals. *Med Sci Sport Exerc.* 47(5), 559. 62nd Annual Meeting of the American College of Sports Medicine. San Diego, CA. May 2015.
12. Shaw BS, Shaw I, McCrorie C, Turner S., Schnetler A, and Brown GA. Concurrent Resistance and Aerobic Training in the Prevention of Overweight and Obesity in Young Adults. *Med Sci Sport Exerc.* 47(5), 223. 62nd Annual Meeting of the American College of Sports Medicine. San Diego, CA. May 2015.
13. Schneekloth B, Shaw I, Shaw BS, and Brown GA. Physical Activity Levels Using Kinect™ Zumba Fitness versus Zumba Fitness with a Human Instructor. *Med Sci Sport Exerc.* 46(5), 326. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL. June 2014.
14. Shaw I, Lawrence KE, Shaw BS, and Brown GA. Callisthenic Exercise-related Changes in Body Composition in Overweight and Obese Adults. *Med Sci Sport Exerc.* 46(5), 394. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.

15. Shaw BS, Shaw I, Fourie M, Gildenhuis M, and Brown GA. Variances In The Body Composition Of Elderly Woman Following Progressive Mat Pilates. *Med Sci Sport Exerc.* 46(5), 558. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.
16. Brown GA, Shaw I, Shaw BS, and Bice M. Online Quizzes Enhance Introductory Anatomy & Physiology Performance on Subsequent Tests, But Not Examinations. *Med Sci Sport Exerc.* 46(5), 1655. 61st Annual Meeting of the American College of Sports Medicine. Orlando, FL June 2014.
17. Kahle, A. and Brown, G.A. Electromyography in the Gastrocnemius and Tibialis Anterior, and Oxygen Consumption, Ventilation, and Heart Rate During Minimalist versus Traditionally Shod Running. 27th National Conference on Undergraduate Research (NCUR). La Crosse, Wisconsin USA. April 11-13, 2013
18. Shaw, I., Shaw, B.S., and Brown, G.A. Resistive Breathing Effects on Pulmonary Function, Aerobic Capacity and Medication Usage in Adult Asthmatics *Med Sci Sports Exerc* 45 (5). S1602 2013. 60th Annual Meeting of the American College of Sports Medicine, Indianapolis, IN USA, May 26-30 3013
19. Shaw, B.S. Gildenhuis, G.A., Fourie, M. Shaw I, and Brown, G.A. Function Changes In The Aged Following Pilates Exercise Training. *Med Sci Sports Exerc* 45 (5). S1566 60th Annual Meeting of the American College of Sports Medicine, Indianapolis, IN USA, May 26-30 2013
20. Brown, G.A., Abbey, B.M., Ray, M.W., Shaw B.S., & Shaw, I. Changes in Plasma Free Testosterone and Cortisol Concentrations During Plyometric Depth Jumps. *Med Sci Sports Exerc* 44 (5). S598, 2012. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
21. Shaw, I., Fourie, M., Gildenhuis, G.M., Shaw B.S., & Brown, G.A. Group Pilates Program and Muscular Strength and Endurance Among Elderly Woman. *Med Sci Sports Exerc* 44 (5). S1426. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
22. Shaw B.S., Shaw, I., & Brown, G.A. Concurrent Inspiratory-Expiratory and Aerobic Training Effects On Respiratory Muscle Strength In Asthmatics. *Med Sci Sports Exerc* 44 (5). S2163. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
23. Scheer, K., Siebrandt, S., Brown, G.A, Shaw B.S., & Shaw, I. Heart Rate, Oxygen Consumption, and Ventilation due to Different Physically Active Video Game Systems. *Med Sci Sports Exerc* 44 (5). S1763. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
24. Jarvi M.B., Shaw B.S., Shaw, I., & Brown, G.A. (2012) Paintball Is A Blast, But Is It Exercise? Heart Rate and Accelerometry In Boys Playing Paintball. *Med Sci Sports Exerc* 44 (5). S3503. 59th Annual Meeting of the American College of Sports Medicine. May 29 - June 2, 2012; San Francisco, California
25. Shaw, I., Shaw, B.S., and Brown G.A. Effort-dependent Pulmonary Variable Improvements Following A Novel Breathing Retraining Technique In Asthmatics. *Med Sci Sports Exerc*

- 43 (5). S617, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
26. Brown G.A. Shaw, B.S., and Shaw, I. Exercise and a Low Carbohydrate Diet Reduce Body Fat but Not PYY and Leptin Concentrations. *Med Sci Sports Exerc* 43 (5). S4627, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
27. Shaw, B.S., Shaw, I, and Brown G.A. Pulmonary Function Changes In Response To Combined Aerobic And Resistance Training In Sedentary Male Smokers. *Med Sci Sports Exerc* 43 (5). S492, 2011. 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
28. Heiserman, K., Brown G.A., Shaw, I., and Shaw, B.S. Seated Weighted Abdominal Exercise Activates the Hip Flexors, But Not Abdominals, More Than Unweighted Crunches. *A Med Sci Sports Exerc* 43 (5). S277, 2011 58th Annual Meeting of the American College of Sports Medicine. May 31-June 4, 2011 Denver, Colorado
29. Brown, G.A., Nienhueser, J., Shaw, I., and Shaw, B.S. Energy Drinks Alter Metabolism at Rest but not During Submaximal Exercise in College Age Males. *Med Sci Sports Exerc.* 42 (5): S1930. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD
30. Shaw, I, Shaw, B.S., and Brown G.A. Abdominal and Chest Wall Compliance in Asthmatics: Effects of Different Training Modes. *Med Sci Sports Exerc.* 42 (5): S1588. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
31. Shaw, B.S., Shaw, I, and Brown G.A. Exercise Effects on Lipoprotein Lipids in the Prevention of Cardiovascular Disease in Sedentary Males Smokers. *Med Sci Sports Exerc.* 42 (5): S1586. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
32. Brown, G.A. Collaborative Research at a Primarily Undergraduate University. *Med Sci Sports Exerc.* 42 (5): S424. 57th Annual Meeting American College of Sports Medicine, June 1-5, 2010. Baltimore, MD.
33. Nienhueser, J., Brown, G.A., Effects of Energy Drinks on Resting and Submaximal Metabolism in College Age Males. NCUR 24 (24th National Conference on Undergraduate Research). Missoula, MT. April 15-17, 2010
34. Brown, G.A., N. Dickmeyer, A. Glidden, C. Smith, M. Beckman, B. Malicky, B.S. Shaw and I. Shaw. Relationship of Regional Adipose Tissue Distribution to Fasting Plasma PYY Concentrations in College Aged Females. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S1333
35. Shaw, B.S., I. Shaw, and G.A. Brown. Contrasting Effects Of Exercise On Total And Intra-abdominal Visceral Fat. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S1718
36. Shaw, I., B.S. Shaw, and G.A. Brown. Role of Endurance and Inspiratory Resistive Diaphragmatic Breathing Training In Improving Asthmatic Symptomology. 56th Annual

- Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S2713
37. McWha, J., S. Horst, G.A. Brown, B.S. Shaw, and I. Shaw. Energy Cost of Physically Active Video Gaming Against a Human or Computer Opponent. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S3069
 38. Horst, S., J. McWha, G.A. Brown, B.S. Shaw, and I. Shaw. Salivary Cortisol and Blood Lactate Responses to Physically Active Video Gaming in Young Adults. 56th Annual Meeting American College of Sports Medicine, May 27-30, 2009. Seattle, WA. *Med Sci Sports Exerc.* 41 (5): S3070
 39. Glidden A., M. Beckman, B. Malciky, C. Smith, and G.A. Brown. Peptide YY Levels in Young Women: Correlations with Dietary Macronutrient Intake and Blood Glucose Levels. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. *Med Sci Sports Exerc.* 40 (5): S741
 40. Smith C., Glidden A. M. Beckman, B. Malciky, and G.A. Brown. Peptide YY Levels in Young Women: Correlations with Aerobic Fitness & Resting Metabolic Rate. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. *Med Sci Sports Exerc.* 40 (5): S742
 41. Brown, G.A. M. Holoubeck, B. Nylander, N. Watanabe, P. Janulewicz, M. Costello, K.A. Heelan, and B. Abbey. Energy Costs of Physically Active Video Gaming in Children: Wii Boxing, Wii tennis, and Dance Dance Revolution. 55th Annual Meeting American College of Sports Medicine, May 28-31, 2008. Indianapolis, IN. *Med Sci Sports Exerc.* 40 (5): S2243
 42. McFarland, S.P. and G.A. Brown. One Session of Brisk Walking Does Not Alter Blood Glucose Homeostasis In Overweight Young Men. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. *Med Sci Sports Exerc* 38: S205, 2006
 43. Stahlnecker IV, A.C. and G.A. Brown Acute Effects of a Weight Loss Supplement on Resting Metabolic Rate and Anaerobic Exercise Performance. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. *Med Sci Sports Exerc* 38: S403, 2006
 44. Brown, G.A. and A. Swendener. Effects of Exercise and a Low Carbohydrate Diet on Serum PYY Concentrations 53rd annual meeting of the American College of Sports Medicine, Denver, CO.. *Med Sci Sports Exerc* 38: s461, 2006
 45. Swendener, A.M. and G.A. Brown. Effects of Exercise Combined with a Low Carbohydrate Diet on Health. 53rd annual meeting of the American College of Sports Medicine, Denver, CO. *Med Sci Sports Exerc* 38: s460, 2006
 46. Swendener, A.M. and G.A. Brown. Effects Of Exercise Combined With A Low Carbohydrate Diet On Health. *NCUR®* 20, 2006
 47. Stahlnecker IV, A.C. and G.A. Brown. Acute Effects Of A Weight Loss Supplement On Resting Metabolic Rate And Anaerobic Exercise. *NCUR®* 20, 2006

48. Eck, L. M. and G.A. Brown. Preliminary Analysis of Physical Fitness Levels in Kinesiology Students. Southern Regional Undergraduate Honors Conference. March 31, 2005.
49. Brown, G.A., J.N. Drouin, and D. MacKenzie. Resistance Exercise Does Not Change The Hormonal Response To Sublingual Androstenediol. 52nd Annual Meeting of the American College of Sports Medicine, June 1-4, 2005, Nashville, TN. Med Sci Sports Exerc 37(5): S40, 2005
50. Brown, G.A., M.P Rebok, M.L. Scott, M.K. Colaluca, and J Harris III. Economy of Jogging Stroller Use During Running. 51st Annual Meeting of the American College of Sports Medicine, June 2-5, 2004, Indianapolis, IN. Med Sci Sports Exerc 36(5): S1714, 2004
51. M.P. Rebok, M.L. Scott, J. Harris III, M.K. Colaluca, and G.A. Brown. Economy of Jogging Stroller use During Running. Georgia Southern University Legislative Wild Game Supper, 2004.
52. M.P. Rebok, M.L. Scott, J. Harris III, M.K. Colaluca, and G.A. Brown. Energy cost of jogging stroller use during running. Annual Meeting of the Southeastern Chapter of the American College of Sports Medicine, 2004.
53. Brown, G.A., Effect of 8 weeks androstenedione supplementation and weight training on glucose tolerance and isokinetic strength. Annual Meeting of the Southeastern Chapter of the American College of Sports Medicine, 2004.
54. Brown, G.A., Vukovich, M.D., Kohut, M.L., Franke, W.D., Jackson, D.A., King, D.S., and Bowers, L.D. Urinary excretion of steroid metabolites following chronic androstenedione ingestion. 50th Annual Meeting of the American College of Sports Medicine, May 27-31 2003, San Francisco, CA. Med Sci Sports Exerc 35(5): S1835
55. Brown, G.A., E.R. Martini, B.S. Roberts, M.D. Vukovich, and D.S. King. Effects of Sublingual androstenediol-cyclodextrin on serum sex hormones in young men. 48th Annual Meeting American College of Sports Medicine, May 30 – June 2, 2001. Baltimore, MD. Med Sci Sports Exerc. 33(5): S1650
56. Kohut, M.L., J.R. Thompson, J. Campbell, G.A. Brown, and D.S. King. Ingestion of a dietary supplement containing androstenedione and dehydroepiandrosterone (DHEA) has a minimal effect on immune response. International Society of Exercise and Immunology, 3rd Annual Convention May 29-30, 2001. Baltimore, MD. Med. Sci. Sports Exerc. 33(5): SISE112
57. Brown, G.A., E.R. Martini, B.S. Roberts, and D.S. King. Effects of Sublingual androstenediol-cyclodextrin on serum sex hormones in young men. Iowa State University Educational Research Exchange, March 24, 2001. Ames, IA.
58. Martini, E.R., G.A. Brown, M.D. Vukovich, M.L. Kohut, W.D. Franke, D.A. Jackson, and D.S. King. Effects of androstenedione-herbal supplementation on serum sex hormone concentrations in 30-59 year old men. Iowa State University Educational Research Exchange, March 24, 2001. Ames, IA.

59. King, D.S., G.A. Brown, M.D. Vukovich, M.L. Kohut, W.D. Franke, and D.A. Jackson. Effects of Chronic Oral Androstenedione Intake in 30-58 year Old Men. 11th International Conference on the Biochemistry of Exercise. June 4-7, 2000. Little Rock, Arkansas
60. Brown, G.A., M.L. Kohut, W.D. Franke, D. Jackson, M.D. Vukovich, and D.S. King. Serum Hormonal and Lipid Responses to Androgenic supplementation in 30 –59 year old men. 47TH Annual Meeting American College of Sports Medicine, May 31-June 3, 2000. Indianapolis, IN. Med Sci Sports Exerc. 32(5): S486
61. Brown, G.A., T.A. Reifernath, N.L. Uhl, R.L. Sharp, and D.S. King. Oral anabolic-androgenic supplements during resistance training: Effects on glucose tolerance, insulin action, and blood lipids. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1293
62. Reifernath, T.A., R.L. Sharp, G.A. Brown, N.L. Uhl, and D.S. King. Oral anabolic-androgenic supplements during resistance training: Effects on body composition and muscle strength. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1292
63. King, D.S., R.L. Sharp, G.A. Brown, T.A. Reifernath, and N.L. Uhl. Oral anabolic-androgenic supplements during resistance training: Effects on serum testosterone and estrogen concentrations. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1291
64. Parsons, K.A., R.L. Sharp, G.A. Brown, T.A. Reifernath, N.L. Uhl, and D.S. King. Acute effects of oral anabolic-androgenic supplements on blood androgen and estrogen levels in man. 1999 Annual Meeting American College of Sports Medicine, Seattle, WA. Med Sci Sports Exerc. 31(5): S1290

Book Chapters

Brown, G.A. Chapters on Androstenedione and DHEA. In: Nutritional Supplements in Sport, Exercise and Health an A-Z Guide. edited by Linda M. Castell, Samantha J. Stear, Louise M. Burke. Routledge 2015.

Brown, G.A. Evaluating a Nutritional Supplement with SOAP Notes to Develop Critical Thinking Skills. In: Teaching Critical Thinking and Clinical Reasoning in the Health Sciences, edited by Facione NC and Facione PA. Millbrae, CA: California Academic Press 2008

Non Refereed Publications

Brown, G.A. and King, D.S. Sport Dietary Supplement Update on DHEA supplementation. Human Kinetics Publishers, Inc. October, 2000.

Brown, G.A. Getting in Shape for Paintball in the Winter. Paintball Sports International, January, 1999

Invited Presentations

Brown G.A. Collaborative experiences with researchers in South Africa. Africa Summit 2019 (March 28, 2019). Presented by the University of Nebraska and the University of Nebraska Medical Center.

Peer Reviewer for the Following Journals

Advances in Physiology Education. <http://www.the-aps.org/publications/advan/>

African Journal For Physical, Health Education, Recreation and Dance (AJPHERD). ISSN: 1117-4315 http://www.ajol.info/journal_index.php?jid=153

Anatomical Sciences Education. <http://www.asejournal.com>

Asian Journal of Sports Medicine. <http://asjasm.tums.ac.ir/index.php/asjasm>

CardioVascular Journal of Africa. <http://www.cvjsa.co.za/>

Complementary Therapies in Medicine. <http://ees.elsevier.com/ctim/>

European Journal of Sport Science. <http://www.tandf.co.uk/journals/titles/17461391.asp>

Games for Health Journal. <http://www.liebertpub.com/overview/games-for-health-journal/588/>

Global Journal of Health and Physical Education Pedagogy. <http://js.sagamorepub.com/gjhpep>

Interactive Learning Environments. <https://www.tandfonline.com/toc/nile20/current>

International Journal of Exercise Science. <http://digitalcommons.wku.edu/ijes/>

Journal of Sports Sciences. <http://www.tandf.co.uk/journals/titles/02640414.html>

Journal of Strength and Conditioning Research. <http://journals.lww.com/nsca-jscr/pages/default.aspx>

Lung. <http://www.springer.com/medicine/internal/journal/408>

Pediatrics. <http://pediatrics.aappublications.org/>

Scandinavian Journal of Medicine and Science in Sports.
<http://www.blackwellpublishing.com/journal.asp?ref=0905-7188>

South African Journal of Diabetes and Vascular Disease <http://www.diabetesjournal.co.za/>

The American Journal of Physiology - Endocrinology and Metabolism.
<http://ajpendo.physiology.org/>

The American Journal of Physiology - Heart and Circulatory Physiology.
<http://ajpheart.physiology.org/>

The American Journal of Physiology - Regulatory, Integrative and Comparative Physiology.
<http://ajpregu.physiology.org/>

The International Journal of Sport Nutrition & Exercise Metabolism.
<http://www.humankinetics.com/IJSNEM/journalAbout.cfm>

The Journal of Sports Science and Medicine (JSSM) <http://www.jssm.org/>

The International Journal of Nutrition and Metabolism www.academicjournals.org/IJNAM

The Open Sports Sciences Journal. <http://benthamscience.com/open/tossj/index.htm>

The Journal of Applied Physiology. <http://jap.physiology.org/>

African Health Sciences. <http://www.ajol.info/index.php/ahs>

Menopause. <http://journals.lww.com/menopausejournal/pages/default.aspx>

Membership in Professional Organizations

American College of Sports Medicine

American Physiological Society

National Strength and Conditioning Association

Graduate Student Advisement/Mentoring

Kourtney Woracek. MAEd Thesis Committee. in progress

Marissa Bongers. MAEd Thesis Committee Director. Dietary Habits and Nutrition Knowledge in Female Collegiate Distance Runners. Degree Awarded Spring 2016.

Justin Thiel. MAEd Advisor. Degree Awarded Spring 2016.

Mitchell Sasek. MAEd Advisor. Degree Awarded Summer 2015

Chad Keller. MAEd Advisor. Degree Awarded Summer 2014

Faron Klingehoffer. MAEd Advisor. Degree Awarded Summer 2014

Joe Scharfenkamp. MAEd Internship Advisor. Degree Awarded Summer 2014

Andrew Hudson. MAEd Thesis Committee. Thesis Title. valuation of Weight Loss in Parents Participating in a Pediatric Obesity Treatment Intervention Degree Awarded Fall 2012

Megan Adkins. Doctoral Dissertation Committee. An Examination of Changes in Sedentary Time with the Integration of Technology for Children Participating in a Morning Fitness Program. Degree Awarded Summer 2011

Christopher Campbell. MAEd Advisor. Degree Awarded Spring 2011

Logan Brodine. MAEd Advisor. Degree Awarded Spring 2010

Megan Costello. MAEd Thesis Committee. Changes in the Prevalence of at risk of overweight or overweight in children. Degree Awarded Spring 2009

Pamela Janulewicz, MAEd Thesis Committee. Effects of Exercise Balls as Chair Replacements in a Fourth Grade Classroom. Degree Awarded Spring 2008

Melissa Shelden. MAEd Advisor.

Michael Bell. MAEd Advisor.

Karen DeDonder. MAEd Thesis Committee. Confidence Levels of Certified Athletic Trainers Regarding Female Athlete Triad Syndrome. Degree Awarded Spring 2008

Benjamin Nylander. MAEd Comprehensive Project Director. Degree Awarded Summer 2007

Eme Ferro. MAEd advisor. Degree Awarded Summer 2007

Julie McAlpin. MAEd Thesis Committee. Children Escorted to School; effect on Parental Physical Activity Degree awarded fall 2006

Michael Ray. MAEd Comprehensive Project Director. Degree Awarded Summer 2006

Seth McFarland. MAEd Thesis Committee Director. The Effects of Exercise Duration on Glucose Tolerance and Insulin Sensitivity in Mildly Overweight Men. Degree Awarded Summer 2005

Drew McKenzie. MS Academic Advisor. Degree Awarded Spring 2005

Matthew Luckie. MS Academic Advisor. Degree Awarded Spring 2005

Todd Lane. MS Academic Advisor

Leilani Lowery. MS Internship committee, Degree Awarded Spring 2003

Johnna Ware. MS Internship committee, Degree Awarded Spring 2003

David Bass. MS Internship committee, Degree Awarded Spring 2003

Crystal Smith. MS Internship committee, Degree Awarded Summer 2003

Undergraduate Student Research Mentoring

Cassidy Johnson. Project to be determined. Undergraduate Research Fellowship (Fall 2019 -)

Taylor Wilson. A comparison of High Intensity Interval Exercise on a bicycle ergometer to a treadmill on Resting Metabolic Rate the next day. Undergraduate Research Fellowship (Fall 2018 -)

Dakota Waddell. The effect of yoga versus mindful meditation on stress in physically active and non-physically active female college-aged students Undergraduate Research Fellowship (Fall 2018 -)

Dakota Waddell. A case study of the effects of the *osteostromg* program on bone mineral density and lean body mass in a paraplegic male. Undergraduate Research Fellowship (Fall 2017 – Spring 2018)

Andrew Fields. The effects of retraining running cadence on oxygen consumption in experienced runners. Undergraduate Research Fellowship. (Fall 2017 – Spring 2019)

Logan Engel. The effects of Tart Cherry Juice on Delayed Onset Muscle Soreness following Eccentric Exercise. Undergraduate Research Fellowship. Fall 2017 -

Stephanie Paulsen. Comparing the effects of coffee to a pre-workout drink on cardiovascular drift. Summer Student Research Program. University of Nebraska Kearney. Summer 2017.

Stephanie Paulsen. Comparing the effects of coffee to a pre-workout drink on resting and exercise metabolic rate. Undergraduate Research Fellowship. Spring 2017 - .

Rachael Ernest. Comparing the effects of coffee to a pre-workout drink on resting and exercise metabolic rate. Undergraduate Research Fellowship. Fall 2016 - Spring 2017.

Aleesha Olena. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2016 - Spring 2017.

Marco Escalera. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2015 - Spring 2017.

Trevor Schramm. Effects of “pre-workout” drinks on 400 m sprint performance and salivary cortisol concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Spring 2016.

Taylor Turek. Evaluating the role of body composition on abdominal muscle definition. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2015 - Spring 2016.

Brian Szekely. Effects of “pre-workout” drinks on Wingate test performance and blood lactate concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2014 - Spring 2016.

Brianna Jackson. Effects of “pre-workout” drinks on 400 m sprint performance and salivary cortisol concentrations. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2014 – Fall 2015.

Ashley Pearson. Changes in resting metabolic rate over a semester in undergraduate students. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2015.

Tricia Young. Changes in resting metabolic rate over a semester in undergraduate students. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2014.

Gavin Schneider. Effects of “pre-workout” drinks on resistance training performance. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2013 - Spring 2014.

Bridgette Schneekloth. Physical Activity while engaging in a Zumba dance class or Microsoft Kinect Zumba. Summer Student Research Program. University of Nebraska Kearney. Summer 2013.

Bridgette Schneekloth. Physical Activity while engaging in Microsoft Kinect Track & Field running vs. free running on an indoor track. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2012 - Spring 2014.

Adam Kahle. Evaluating changes in running mechanics with “barefoot” footwear. Summer Student Research Program. University of Nebraska Kearney. Summer 2012

Michelle Jarvi. Quantifying paintball as a form of physical activity in Boys. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2011 - Spring 2012.

Benjamin Lentz, Krista Scheer, & Sarah Siebrandt. Wii, Kinect, and Move for Physical Activity: Analysis of Energy Expenditure, Heart Rate, and Ventilation. Undergraduate Research Fellowship. University of Nebraska Kearney. Fall 2010 - Spring 2012.

Katlyn Heiserman. Comparison of EMG activity in the rectus abdominis and rectus femoris during supine un-weighted abdominal crunch exercise and a seated abdominal crunch exercise weight machine. Summer Student Research Program. University of Nebraska Kearney. Summer 2010

Janae Nienhueser. Effects of Energy drink on resting and submaximal exercise metabolism in college age men. Summer Student Research Program. University of Nebraska Kearney. Summer 2009

Jessica McWha. Metabolic changes while playing active video gaming against a human and computer opponent. Summer Student Research Program and Undergraduate Research Fellowship. University of Nebraska Kearney. Summer 2008 – Spring 2009

Sarah Horst. Changes in blood lactate and salivary cortisol concentrations while “exergaming” against a human or computer opponent. Summer Student Research Program. University of Nebraska Kearney. Summer 2008

Craig Carstensen. Differences in the Physiological Response to Treadmill versus Freely Paced Walking. Summer Student Research Program. University of Nebraska Kearney. Summer 2006

Alvah Stahlnecker. Acute effects of a weight loss supplement on resting metabolic rate and anaerobic exercise performance. Summer Student Research Program. University of Nebraska Kearney. Summer 2005

Allison Swendener. Effects of exercise combined with a low carbohydrate diet on health. Summer Student Research Program. University of Nebraska Kearney. Summer 2005

Kamilah Whipple. A measurement of the physical activity and fitness of undergraduate Georgia Southern University students. Ronald E. McNair Post-Baccalaureate Achievement Program. Georgia Southern University. Summer 2004.

Lindsey Eck. Preliminary Analysis of Physical Fitness Levels in Kinesiology Students. Independent undergraduate research project. Georgia Southern University. Summer 2004.

Description of Graduate Courses Taught

PE 870: Advanced Exercise Physiology Course presumes a student has had a basic course in exercise physiology. The content of cardiorespiratory fitness, body composition, muscular strength/flexibility, body fluids and metabolism is presented beyond the introductory level. (University of Nebraska at Kearney)

PE 866P: Nutrition for Health and Sport. (Dual listed/taught with PE 469) Metabolism and metabolic regulation, the influence of dietary practices on health and human performance, and mechanisms and consequences of weight loss and gain.. (University of Nebraska Kearney)

PE 861P: Physiology of Exercise. (Dual listed/taught with PE 461) Physiological processes of body as pertain to physical activity. How trained and untrained individuals differ, and importance of training. (University of Nebraska at Kearney)

TE 800: Education Research. This introductory web-based course in educational research focuses on evaluating and interpreting educational research and applying its findings to educational practice. (University of Nebraska at Kearney)

KINS 7230: Exercise Physiology. Focuses on the study of the effects of exercise on the physiological functions of the human organism with emphasis on theoretical orientations. (Georgia Southern University)

KINS 7231: Laboratory Techniques in Exercise Physiology. Acquaints the student with the use of typical laboratory equipment used in exercise physiology. (Georgia Southern University)

KINS 7238: Human Performance and Nutrition. Examines the interaction between nutrition and physical activity, including exercise and athletic performance. (Georgia Southern University)

KINS 7431: Applied Sport Physiology. Focuses on the study of exercise physiology principles applied to developing training and conditioning programs for enhancing health related fitness and performance (Georgia Southern University)

KINS 7899: Directed Independent Study. Provides the student with an opportunity to investigate an area of interest under the direction of faculty mentor (Georgia Southern University)

EXSP 551: Advanced Exercise Physiology 2. Analysis of factors affecting work capacity and performance. Human energy metabolism concepts and measurement. (Iowa State University)

Description of Undergraduate Courses Taught

PE 498: Special Topics. (University of Nebraska at Kearney)

PE 475: Research Methods in Exercise Science. This course is designed to introduce advanced undergraduate students to the processes of research in the field of Exercise Science including the processes of finding, reading and understanding Exercise Science research; data collection; data analysis; and data interpretation. (University of Nebraska at Kearney)

PE 469: Sports Nutrition. Metabolism and metabolic regulation, the influence of dietary practices on human performance. (University of Nebraska at Kearney)

PE 461: Physiology of Exercise. Physiological processes of body as pertain to physical activity. How trained and untrained individuals differ, and importance of training. (University of Nebraska at Kearney)

PE 388: General Studies Capstone - The Living Dead in Fact & Fiction. The Living Dead, such as Zombies and Vampires, are pervasive in fictional literature, television, and movies. During this course, novels, television episodes, and movies will be used to identify disease symptoms displayed by the living dead, and these symptoms will then be evaluated regarding what type of medical condition might cause the symptoms.

PE 310: Introduction to Exercise Physiology. Provides a foundation of scientific basis for understanding the body's anatomical structures and physiologic responses to acute exercise, as well as its adaptations to chronic exercise. (University of Nebraska at Kearney)

PE 107. This course is designed to introduce students to the field of Exercise Science as an area of academic study and as a professional career. Students majoring in Exercise Science should take this course in their first year. (University of Nebraska at Kearney)

KINS 4231: Fitness Evaluation and Exercise Prescription. Provides the student with an in-depth study of fitness appraisal and exercise prescription and the development, interpretation, implementation and management of fitness programs (with laboratory). (Georgia Southern University)

KINS 3133: Physiological Aspects of Exercise. Provides an in-depth perspective of physiological and biochemical responses of the human body when subjected to exercise (with laboratory). (Georgia Southern University)

GSU 1210: University Orientation 1. Designed to help first year students understand the purpose of a college education, learn about college requirements, explore values and interests, learn to make decisions and realistic choices, explore career objectives and programs of study, and establish supportive relationships with faculty and staff. Required of all new students during their first semester. (Georgia Southern University)

EX SP 462: Medical Aspect of Exercise. The role of exercise in preventive medicine. Impact of exercise on various diseases, and the effect of various medical conditions on the ability to participate in vigorous exercise and competitive sports. Principles of exercise testing and prescription for individuals with these conditions. Environmental and nutritional aspects of exercise. (Iowa State University)

EX SP 458: Principles of Exercise Testing and Prescription. Physiological principles of physical fitness; design and administration of fitness programs; testing, evaluation, and prescription; cardiac risk factor modification. (Iowa State University)

EX SP 455 (Renumbered as EX SP 358 for Fall 2001). Physiology of Exercise. Physiological basis of human performance; effects of physical activity on body functions (with laboratory). (Iowa State University)

EX SP 355: Biomechanics (Laboratory). Mechanical basis of human performance; application of mechanical principles to exercise, sport and other physical activities. (Iowa State University)

EX SP 258: Physical Fitness and Conditioning. Development of personal fitness using a variety of conditioning and exercise techniques such as aerobics, weight training, and aquatic fitness. Introduction to acute and chronic responses to exercise, and the role of exercise in health promotion and weight management. (Iowa State University)

EX SP 236: Fundamentals of Archery, Badminton, Bowling (Archery Segment). (Iowa State University)

EX SP 119: Archery 1. (Iowa State University)

EX SP 220: Physical Fitness and Conditioning. Development of personal fitness using a variety of conditioning and exercise techniques such as aerobics, weight training, and aquatic fitness. Introduction to acute and chronic responses to exercise, and the role of exercise in health promotion and weight management. (Des Moines Area Community College)

PE 157: Introduction to Athletic training. Introduction to methods of prevention and immediate care of athletic injuries. Basic information concerning health supervision of athletes, and some basic wrapping and strapping techniques for common injuries. (Des Moines Area Community College)

PE 144: Introduction to Physical Education. History and development of physical education as an academic discipline. Principles and current practices of teaching physical education. (Des Moines Area Community College)

PHYSL 130: Human Physiology. Principles of the regulation and maintenance of human physiology. (Utah State University; Volunteer Undergraduate TA)

PHYSL 103 Human Anatomy. Introduction to the structure and location of bones, muscles, and organs in the human body. (Utah State University; Volunteer Undergraduate TA)

Service

Service to the Profession

Associate Editor, Asian Journal of Sports Medicine (2019-).

Director, North American Chapter, International Physical Activity Projects (IPAP) (2009-)

Fellow, American College of Sports Medicine (2008-)

National Research Foundation (South Africa) peer evaluator for grant applicants

National Research Foundation (South Africa) evaluator of applications for funding in Thuthuka Programme

External Evaluator for Master's Theses and Doctoral Dissertations, University of Johannesburg, Johannesburg South Africa.

Grant proposal reviewer for NASPE/ING Run for Something Better School Awards Program.

Session Chair. Special Event. Undergraduate Research Experiences in Exercise Science. ACSM Annual Meeting, 2010

Session Chair. 2nd Annual Education Research Exchange. Iowa State University Education Research Exchange, 2001

Current Service at the University of Nebraska at Kearney

University Wide

Faculty Senate Parliamentarian (April 2019 – April 2022)

Faculty Senate Oversight Committee Chair (April 2019 – April 2022)

Faculty Senate Executive Committee (April 2019 – April 2022)

Faculty Senate, At Large representative (Fall 2018-)

University Student Conduct Appeals Board (Fall 2019 - May 2020)

General Studies Council (fall 2013-)

University Safety Committee (Fall 2018 -)

University Student Travel Policy Committee (Fall 2019-)

University Retention Council (Fall 2019 -)

External Evaluator, Promotion Committee, Department of Social Work & Criminal Justice (Fall 2019-)

College of Education Dean Search Committee Member (Fall 2019 -)

College of Education

College of Education Promotion and Tenure Committee, Chair (Fall 2012 – present) Member (fall 2008 – spring 2012)

Department of Kinesiology and Sport Sciences

Kinesiology Lecturer Search Committee Member (Fall 2019 -)

Nebraska Kids Fitness and Nutrition Day, volunteer educator and student coordinator. (fall 2005-present)

Academic Advisor for Undergraduate exercise Science Students (Fall 2005 - present)

Previous Service at the University of Nebraska at Kearney

Recreation Faculty Search Committee Member (Spring 2019)

University Student Conduct Board (Fall 2016- May 2017, Fall 2018 – May 2019)

Faculty Senate Athletic Committee (Fall 2018-May 2019)

External Evaluator, Promotion & Tenure, Department of Social Work & Criminal Justice (Fall 2018)

External Evaluator, Faculty Annual Performance Reviews, Department of Social Work & Criminal Justice (Spring 2018)

University Graduate Council. (Fall 2014 – spring 2017)

University Graduate Council Standing Committee I: Policy & Planning Committee (fall 2014 – spring 2017)

Faculty Senate (April 2012- April 2016)

Faculty Senate Executive Council, (April 2014 – April 2016)

Faculty Senate representative to the Oversight Committee (September 2014 – April 2016)

Faculty Senate representative to the Grievance Committee (September 2014 – April 2016)

Faculty Senate representative to the Professional Conduct committee (September 2013 - April 2016)

Youth Agility Speed & Quickness program director (2011-2015)

Faculty Senate ad-hoc committee on best practices in peer evaluation (2013-2014)

Director of General Studies search committee, committee member (2013-2014)

Director of the Office of Sponsored Programs search committee member (2012-2013; 2013-2014)

College peer mentor for implementing Critical Thinking in the classroom (2013-2014)

Chair, Ad-hoc committee for the evaluation of a new Student Evaluation of Instruction survey (2012-2014 academic years)

Ad-hoc committee to enhance communication effectiveness within department faculty and staff (2013-2014)

Exercise Science faculty search (2012-2013)

Undergraduate Research and Creative Activity program review team (2011-2012)

Institutional Review Board for the protection of Human Research Subjects. (Service period 2006 - 2011)

Undergraduate Research Committee (Service fall 2008 – spring 2011)

University Graduate Council. (Service period 2006 - 2010)

Homecoming Hustle (HPERLS Fun Run) Race Director and Coordinator (Service period beginning Fall 2007 – fall 2009)

Ad-hoc Committee on Enhancing Enrollment and Course Offerings in PE 110 Dept. of HPERLS (Service period beginning fall 2006)

Graduate Council Standing Committee 1: Policy and Planning Committee. (Service period beginning fall 2006; Chair in 2007 – 2008 and 2009-2010)

General Studies Roundtable 2 (spring 2006-spring 2007)

Academic Affairs Committee on Teaching Continuity (Service period beginning fall 2006)

Health Science Program Assistant Director Search Committee, University of Nebraska at Kearney. (Service period summer 2006)

Graduate Program Chair, HPERLS Department, University of Nebraska at Kearney (Service period beginning summer 2006 - 2010)

Graduate Dean Search Committee. University of Nebraska at Kearney (Service period 2005 – 2006 academic year)

Assistant HPERLS Department Graduate Coordinator. (Service period 2005 – 2006 academic year)

University of Nebraska at Kearney Centennial Run committee. (Service period fall 2005)

Senior College of Central Nebraska, Fit after 50 course coordinator. (Service period 2005 – 2006 academic year)

Health Science Program Assistant Advisor Search Committee. (Service period summer 2005)

HPERLS Furniture Committee (Service period spring 2005)

Academic Advisor for Undergraduate exercise Science Students (Service period Beginning Fall 2005 academic year; ongoing)

Other Prior University Service

Institutional Review Board, Georgia Southern University (2003- 2004)

GSU Exercise Science undergraduate student advisor (2002 – 2004)

GSU Jiann-Ping Hsu School of Public Health extramural funding task force (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Curriculum Committee (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Assistant Graduate program director (2003-2004)

GSU Jiann-Ping Hsu School of Public Health Laboratory Director's Committee (2002-2004)

GSU Jiann-Ping Hsu School of Public Health Exercise Science Graduate program coordinator (2003-2004)

GSU Recreation and Athletic Center advisor to the personal training program (2003-2004)

Institutional Biosafety Committee, Georgia Southern University (2003-2004)

Kinesiology Cluster Area, Georgia Southern University, Jiann-Ping Hsu School of Public Health (2002-2004)

Biostatistics Faculty Search Committee. Georgia Southern University, Jiann-Ping Hsu School of Public Health (2002-2003, 2003-2004)

Computer Advisory Committee, Iowa State University, University-Wide, College of Education, and Dept. of Health and Human Performance (2000-2002)

Computer Fee Allocation Committee, Iowa State University (2000-2001)

Dept. of Health and Human Performance Graduate Student Association (Founding Officer and 1st President; 2001-2002)

Sport Management Faculty Search Committee, Iowa State University Dept. of Health and Human Performance (2001-2002)

Previous Community Involvement

Race Director, Central Nebraska Susan G. Komen Race for the Cure (2011, 2012, 2013 events)

Webelos Den Leader, Boy Scouts of America Pack 132, Kearney, NE. Chartered to the Church of Jesus Christ of Latter Day Saints

Scoutmaster, Boy Scouts of America Troop 132, Kearney, NE. Chartered to the Church of Jesus Christ of Latter Day Saints

Tiger Den Coach, Boy Scouts of America Pack 135, Kearney, NE. Chartered to Faith United Methodist Church.

Personal Fitness Merit Badge Counselor. Boy Scouts of America, Overland Trails Council Covered wagon District.

Certifications

American College of Sports Medicine: ACSM Certified Exercise Physiologist (05/21/1998 - 12/31/2021)

USA Track and Field: Level One Coach

American Red Cross: Community First Aid and CPR

Funding

Research Funding

Brown GA, Bice MR, Abbey BM, Shaw I, Shaw BS. Effects of aerobic exercise, resistance exercise, and combined aerobic & resistance exercise on food choices and endocrine signals of satiety in middle aged adults. Submitted 6/26/2017 to National Institutes of Health [PA16-200] - Academic Research Enhancement Award (Parent R15) (Application #1R15DK117436-01). Total Amount Requested: \$367,708. (Resubmission of revised proposal; Pending Review.)

Brown GA, Bice MR, Abbey BM, Shaw I, Shaw BS. Effects of aerobic exercise, resistance exercise, and combined aerobic & resistance exercise on food choices and endocrine signals of satiety in middle aged adults. Submitted 6/26/2017 to National Institutes of Health [PA16-200] - Academic Research Enhancement Award (Parent R15) (Application #1R15DK117436-01). Total Amount Requested: \$351,708. Pending Review.

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. HEAT it up (Health, Exercise, Aquaponics, Technology) summer camps to grow future health professionals in Rural Nebraska. Submitted 5/25/2017 to National Institutes of Health [PAR17-183] - NICHD Research Education Programs (R25) (Application # 1R25 HD094673-01) Total Amount Requested: \$777,006. Pending Review.

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. Teaching Health, Exercise, Technology, & Aquaponics (THETA) Day Camps to Grow Future Health Professionals. University of Nebraska Rural Futures Institutes (RFI) \$20,000 – Funded (July 1, 2017 – June 30, 2019)

Brown GA, Bice MR, Adkins MM, Hollman A, Bickford S, Bickford N, Ranglack D. Teaching Health, Exercise, Technology, & Aquaponics (THETA) Day Camps to Grow Future Health Professionals. University of Nebraska Rural Futures Institutes (RFI) and McCook Economic Development Council \$11,400 – Funded (May 1, 2017 – August 30, 2017)

Brown GA, Abbey BM, Bice MR. “Is milk an effective rehydration beverage during repeated days of dehydrating exercise?” to the Dairy Research Institute® (DRI) \$125,560 – Not funded.

Brown GA & Steele J. “Biochemistry Laboratory Experiences for Exercise Science Students” to the Kelly Fund, University of Nebraska. \$23,947. Funded. August 2014- June 2016

Brown GA. “Horizon After School Quickness Program” to Blue Cross & Blue Shield of Nebraska for a Community Wellness grant. \$14,106. Not funded

Brown GA. “Effects of chocolate milk taken immediately post exercise on the adaptations to strength training in men” to the Dairy Research Institute® (DRI) \$123,192 – not funded.

Brown GA, Heelan KA, Bartee RT, & Maughan S. “Active Video Games as an Alternative to Traditional Group Exercise Classes” to the Robert Wood Johnson Health Games Research program. \$297,201 – not funded

Brown GA, Nylander B, Heelan KA. Energy Expenditure for Active Video Game Systems: Dance Dance Revolution and Nintendo Wii. University of Nebraska at Kearney Research Services Council. \$3,432. Funded

Brown G.A. Effects of green tea extract on fasting plasma insulin, glucose, leptin, and PYY concentrations in humans. University of Nebraska at Kearney Research Services Council. \$3,822. Funded

Brown G.A. Dose response relationship between resistance exercise and changes in the hormonal regulation of blood glucose homeostasis. American Diabetes Association Junior faculty Award. \$443,293. Not Funded.

Brown G.A, and K. Heelan. Health benefits of green tea extract in women. NIH NCCAM Exploratory/Developmental Grant for Clinical Studies (R21), PAR-03-153. \$485,163. Not Funded.

Brown, G.A. Changes In Biomarkers Of Satiety, Aerobic Fitness, And Body Composition While On A Low Fat Or Low Carbohydrate Diet. University of Nebraska at Kearney Research Services Council. \$3,750. Funded

Lynott, F., **Brown, G.A**, and K. Heelan. Health and Fitness of HPERLS Students. University of Nebraska at Kearney Research Services Council. \$4,000. Funded

Brown G.A, K. Heelan and D.S. King. Pharmacokinetics & Efficacy of Sublingual Androstenediol for Treating Andropause. NIH NCCAM Exploratory/Developmental Grant for Clinical Studies (R21), PAR-03-153. \$477,000. Not Funded.

Maughan S.L., D.P.Snider, and **G.A. Brown**, Physical Health and Social Factors Influencing Educational Success Among Hispanic Immigrant Children, University of Nebraska at Kearney Research Services Council. \$4,214.60. Funded

McFarland S.P. and **G.A. Brown**, Effects of Exercise Duration on Glucose Tolerance In Mildly Overweight Men, University of Nebraska at Kearney Research Services Council. \$750. Funded

Brown, G.A. Effects of Exercise Duration on Insulin Sensitivity In Mildly Overweight Men, University of Nebraska at Kearney Research Services Council. \$2,000. Funded

McFarland S.P. and **G.A. Brown**, Effects of Exercise Duration on Glucose Tolerance In Mildly Overweight Men, Gatorade Sports Sciences Institute. \$1,500. Not Funded

Brown, G.A. Effects of Exercise Duration on Glucose Tolerance and Insulin Sensitivity in Mildly Overweight Men. Life fitness Academy. \$5,000. not funded

Brown, G.A. American College of Sports Medicine Foundation Grant. Endocrinology of weight lifting & androgen supplementation, \$10,000. Not Funded.

Brown, G.A. and J.L. McMillan. Experimental and Applied Sciences. Effects of Green Tea Extract on Insulin Sensitivity and Adaptations to Exercise. \$71,075. Not Funded.

Brown, G.A. American College of Sports Medicine Foundation Grant. Endocrinology of weight training & androgen supplementation, \$10,000. Not Funded.

Brown, G.A. and J. Drouin. Georgia Southern University Faculty Research Grant. Effects of Resistance Training on the Hormonal response to Sublingual Androstenediol Intake. \$5,000. Funded

King D.S. and **G.A. Brown**. *World Anti Doping Agency*. Effects of Testosterone Precursors on the Muscular and Hormonal Response to Resistance Training in Men. \$464,634. Not Funded.

Brown, G.A. *American College of Sports Medicine* Foundation Grant. Effect of Raisin Ingestion on Substrate Use During Exercise. \$5,000. Not Funded.

King D.S. and **G.A. Brown**. *California Raisin Marketing Board*. The Glycemic Index Of Raisins Fed To Normal People And Non-Insulin Dependent Diabetics. \$110,869. Not Funded.

King D.S. and **G.A. Brown**. *California Raisin Marketing Board*. The Effects Of Raisin Ingestion On Substrate Utilization and Endurance Exercise Performance In Trained Cyclists. \$84,258. Not Funded.

Brown, G.A., E.R. Martini, and B.S. Roberts. Effect of Androstenediol on Serum Sex Hormone Concentrations. Iowa State University Professional Advancement Grant. Graduate Student Senate and Iowa State University Dept. of Health and Human Performance. \$700. Funded

Instructional Development Funding

Brown G.A. and K.A. Heelan. University of Nebraska at Kearney. Proposal for the purchase of upgraded resistance exercise equipment in the Human Performance Laboratory. \$21,100. Funded.

Brown G.A. and K.A. Heelan. University of Nebraska at Kearney. Proposal for the purchase of a new metabolic cart for the Human Performance Laboratory. \$24,560. Funded

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Instructional Development Grant. Proposal for purchase of heart rate monitors, manual sphygmomanometers, and automated sphygmomanometers. \$2,820. Funded.

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Innovative Teaching Strategies Retreat. Provides \$2,000 in instructional technology funds to the participant. Funded.

Brown, G.A. Georgia Southern University, Center for Excellence in Teaching Travel Grant. \$750. Funded.

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Molecular Devices SpectraMax 250 plate reader. \$17,000. Funded

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Lode Excalibur Sport Bicycle Ergometer and Physiodyne Max 2 Metabolic Cart. \$29,577. Funded

Brown, G.A. Georgia Southern University student technology fee proposal. Proposal for purchase of Packard Cobra 2 Automated Gamma Counter. \$14,000. Not funded

References

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In accordance with 39 CFR 601.105 notice of these changes is hereby published in the Federal Register as an amendment to that section and the text of the changes is filed with the Director, Office of the Federal Register, Office of the Federal Register, Subscribers to the basic Manual will receive these amendments from the Government Printing Office. (For other availability of the Postal Contracting Manual, see 39 CFR 601.104.)

Description of these amendments to the Postal Contracting Manual follows:

1. The following new, revised, or replacement forms for cleaning services contracts have been included in section 16 and shall be used immediately:

(a) Form 7331, May 1979, Solicitation, Offer, and Award—Cleaning Services.

(b) Form 7335, August 1979, Cleaning Service Requirements.

(c) Form 7356, May 1979, Representations and Certifications—Cleaning Services Contracts.

(d) Form 7360, May 1979, Biweekly Report of Contractor Performance—Cleaning Services Contracts.

(e) Form 7420, May 1979, General Provisions—Cleaning Services Contracts.

Note.—Previous editions of Form 7331 are obsolete and shall be destroyed.

2. Section 22, Part 7, has been revised to establish uniform policy for entering into and administering cleaning services contracts.

In consideration of the foregoing, 39 CFR 601 is amended by adding the following to §601.105:

§ 601.105 Amendments to the Postal Contracting Manual.

Transmittal letter	Dated	FEDERAL REGISTER publication
* * * * *	* * * * *	* * * * *
29	Sept. 28, 1979	44 FR

(5 U.S.C. 552(a), 39 U.S.C. 401, 404, 410, 411, 2008)

Note.—Incorporation by reference provisions approved by the Director of the Federal Register on December 3, 1971, and extended at 42 FR 29488, June 9, 1977, 43 FR 22717, May 26, 1978, and at 44 FR 31976, June 4, 1979 (corrected at 44 FR 32369, June 6, 1979).

Fred Eggleston,
Assistant General Counsel Legislative Division

[FR Doc. 79-37842 Filed 12-10-79; 8:45 am]
BILLING CODE 7710-12-M

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy Interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6671

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

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.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of (of HEW) shall prepare and publish * * * proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.¹

¹The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club
Footnotes continued on next page

Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- *Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:* Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

- *Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):* Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

- *Compliance in Meeting the Interests and Abilities of Male and Female Students:* Pursuant to the regulation, the governing principle in this area is that the athletic interests

and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or

- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for

women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department

Footnotes continued from last page
teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition.

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. *The Regulation*—Section 86.37(c) of the regulation provides:

[Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in * * * inter-collegiate athletics.²

2. *The Policy*—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require

spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. *Application of the Policy*—a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. *Definition*—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. *The Regulation*—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

- (1)³
- (2) Provision and maintenance of equipment and supplies;

³ 86.41(c) (1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy interpretation.

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.⁴

2. *The Policy*—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment"⁵ to Title IX, which instructed HEW to make "reasonable [regulatory] provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation,

⁴ See also § 86.41(a) and (b) of the regulation.

⁵ Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, (August 21, 1974) 88 Stat. 612.

² See also § 86.37(a) of the regulation.

nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. *Application of the Policy—General Athletic Program Components—*a. *Equipment and Supplies (§ 86.41(c)(2)).* Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies,

instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The quality of equipment and supplies;
- (2) The amount of equipment and supplies;
- (3) The suitability of equipment and supplies;
- (4) The maintenance and replacement of the equipment and supplies; and
- (5) The availability of equipment and supplies.

b. *Scheduling of Games and Practice Times (§ 86.41(c)(3)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The number of competitive events per sport;
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) The opportunities to engage in available pre-season and post-season competition.

c. *Travel and Per Diem Allowances (§ 86.41(c)(4)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Modes of transportation;
- (2) Housing furnished during travel;
- (3) Length of stay before and after competitive events;
- (4) Per diem allowances; and
- (5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).*

(1) *Coaching—*Compliance will be assessed by examining, among other factors:

- (a) Relative availability of full-time coaches;
- (b) Relative availability of part-time and assistant coaches; and
- (c) Relative availability of graduate assistants.

(2) *Academic tutoring—*Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (a) The availability of tutoring; and
- (b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)).*⁶ In

⁶The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51–86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E. Section 86.41(c)(6) of the regulation, however, authorizes the Department to

general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) *Assignment of Coaches—*

Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Training, experience, and other professional qualifications;
- (b) Professional standing.

(2) *Assignment of Tutors—*

Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

- (a) Tutor qualifications;
- (b) Training, experience, and other qualifications.

(3) *Compensation of Coaches—*

Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Rate of compensation (per sport, per season);
- (b) Duration of contracts;
- (c) Conditions relating to contract renewal;
- (d) Experience;
- (e) Nature of coaching duties performed;
- (f) Working conditions; and
- (g) Other terms and conditions of employment.

(4) *Compensation of Tutors—*

Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

- (a) Hourly rate of payment by nature of subjects tutored;
- (b) Pupil loads per tutoring season;
- (c) Tutor qualifications;
- (d) Experience;
- (e) Other terms and conditions of employment.

f. Provision of Locker Rooms, Practice and Competitive Facilities

(§ 86.41(c)(7)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Quality and availability of the facilities provided for practice and competitive events;

(2) Exclusivity of use of facilities provided for practice and competitive events;

(3) Availability of locker rooms;

(4) Quality of locker rooms;

(5) Maintenance of practice and competitive facilities; and

(6) Preparation of facilities for practice and competitive events.

g. Provision of Medical and Training Facilities and Services (§ 86.41(c)(8)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability of medical personnel and assistance;

(2) Health, accident and injury insurance coverage;

(3) Availability and quality of weight and training facilities;

(4) Availability and quality of conditioning facilities; and

(5) Availability and qualifications of athletic trainers.

h. Provision of Housing and Dining Facilities and Services (§ 86.41(c)(9)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Housing provided;

(2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. Publicity (§ 86.41(c)(10)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability and quality of sports information personnel;

(2) Access to other publicity resources for men's and women's programs; and

(3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. Application of the Policy—Other Factors (§ 86.41(c)). **a. Recruitment of Student Athletes.**⁷ The athletic

⁷Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of

recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;

(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and

(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance. The Department will base its compliance determination under § 86.41(c) of the regulation upon an examination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female

students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action * * *

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

athletes in the institution's program as a whole; or

c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at § 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available—

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy—Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy—Selection of Sports.

In the selection of sports, the regulation does not require institutions

to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. **Contact Sports**—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. **Non-Contact Sports**—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. **Application of the Policy—Levels of Competition.**

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(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 institution 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.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. **Overall Determination of Compliance.**

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights

Act of 1964.⁸ The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.⁹

According to the regulation, there are two ways in which enforcement is initiated:

• **Compliance Reviews**—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a))

• **Complaints**—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.

⁸ Those procedures may be found at 45 CFR 80.0-80.11 and 45 CFR Part 8.

⁹ *WEAL v. Harris*, Civil Action No. 74-1720 (D. D.C., December 29, 1977).

If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated: December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated: December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students).¹ Yet, only 30 percent of the intercollegiate athletes are women.²

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are

¹ *The Condition of Education 1979*, National Center for Education Statistics, p. 112.

² Figure obtained from Association for Intercollegiate Athletics for Women (AIAW) member survey, *AIAW Structure Implementation Survey Data Summary*, October 1978, p. 11.

providing twice the number of sports for men as they are for women.³

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.⁴ In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.⁵

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.⁶ During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.⁷ These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from \$1.2 to \$2.2 million between 1970-1977 alone.⁸

4. On most campuses, the primary problem confronting women athletes is

³ U.S. Commission on Civil Rights, *Comments to DHEW on proposed Policy Interpretation; Analysis of data supplied by the National Association of Directors of Collegiate Athletics*.

⁴ Figures obtained from National Federation of High School Associations (NFHS) data.

⁵ *Digest of Education Statistics 1977-78*, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are unavailable for the period from 1971 to 1977; consequently, these figures represent 50 percent of total enrollment for that period. This is the best comparison that could be made based on available data.

⁶ *Ibid.*, p. 112.

⁷ These figures, which are not precisely comparable to those cited at footnote 2, were obtained from *Sports and Recreational Programs of the Nation's Universities and Colleges*, NCAA Report No. 5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable data was not available from other associations.

⁸ Compiled from *NCAA Revenues and Expenses for Intercollegiate Athletic Programs, 1978*.

the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is \$39,000. Male athletes receive \$32,000 or 78 percent of this amount, and female athletes receive \$7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.⁹

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.¹⁰

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity."¹¹ However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and

⁹ Figures obtained from *AIAW Structure Implementation Survey Data Summary*, October, 1978, p. 11.

¹⁰ 121 Cong. REC. 29791-95 (1975) (remarks of Senator Williams); Comments by Senator Bayh, Hearings on S. 2106 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 94th Congress, 1st Session 48 (1975); "Survey of Women's Athletic Directors," AIAW Workshop (January 1978).

¹¹ See April 18, 1978, Opinion of General Counsel, Department of Health, Education, and Welfare, page 1.

groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July

1978, compliance deadline established in § 86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities

at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under § 86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially

measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentators indicated that the factors named in the proposed Policy Interpretation (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentators were concerned that the "scope of competition" factor that may currently be designated as "non-discriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No. 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentators stated that the comparability standard was fair and realistic. Some commentators were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to

participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentators indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentators.

(1) *Comment:* Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were

considered acceptable, non-discriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) *Comment:* Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) *Comment:* Many commentators were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) *Comment:* Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) *Comment:* Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to § 86.6(c) of the Title IX regulation, which reads in part:

"The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *"

Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has re-examined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve

collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) *Comment:* Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) *Comment:* Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: There are two problems with this approach to assessing equal

opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) *Comment:* Some commentors suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.

(9) *Comment:* A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intercollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;

(b) The Department would determine whether the plan satisfies the interests of the involved parties; and

(c) The Department would determine whether the institution is adhering to the plan.

These commenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an anti-discrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its responsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as

envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

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**UNITED STATES DISTRICT COURT
District of Connecticut**

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants.

Case No. 3:20-cv-00201-RNC

**DECLARATION OF
CHELSEA MITCHELL**

Dated: February 12, 2020

**DECLARATION OF CHELSEA MITCHELL IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

I, Chelsea Mitchell, declare as follows:

1. I am a seventeen-year-old senior at Canton High School in Canton, Connecticut.
2. I am an elite female athlete and compete in Connecticut Interscholastic Athletic Conference (CIAC) track and field events.
3. In the indoor track season, I compete in the 55m dash, the 300m, the long jump, and occasionally various relays.

4. In the outdoor track season, I compete in the 100m, 200m, long jump, triple jump, occasionally the 400m, and occasionally various relays.

5. During the school year, I usually train two hours per day, six days per week. In the summer, I still train one or two hours per day, three to four days per week.

6. From the Spring 2017 outdoor track season to present—six track seasons and counting—I have competed against biological males in my track and field athletic events due to the CIAC policy.

7. In total, I have lost four state championship titles, two All New England awards, medals, points, and publicity due to the CIAC policy that permits males to compete in girls' athletic events in Connecticut.

2016-2017 Freshman Year

8. I first competed against a male in girls' track and field as a fourteen-year-old freshman at the Spring 2017 outdoor CIAC State Open Championship.

9. On the way to this meet, I was instructed by my coach to respond “no comment” if asked about the issue of males competing in the female category.

10. In the 100m final at the 2017 outdoor State Open, I placed 7th overall. The top six receive a medal and qualify to advance to the New England Regional Championship: one of those top six spots was taken by a male:

Table 1: 2017 CIAC State Open Women's Outdoor Track 100m Results (June 5, 2017)¹

Place	Grade	Sex	Name	Time	High School
1*	12	F	Caroline O'Neil	12.14s	Daniel Hand
2*	12	F	Kathryn Kelly	12.36s	Lauralton Hall
3*	9	M	Andraya Yearwood	12.41s	Cromwell
4*	11	F	Tia Marie Brown	12.44s	Windsor
5*	12	F	Kiara Smith	12.59s	Jonathan Law
6*	11	F	Kate Hall	12.62s	Stonington
7	9	F	Chelsea Mitchell	12.69s	Canton
8	12	F	Tiandra Robinson	FS	Weaver

* Qualified for the New England Championship.

2017-2018 Sophomore Year

11. During my sophomore year, I learned that Andraya Yearwood's school was reclassified to the Class S division for indoor track events (the school remained a Class M for outdoor track events)—which was the same class as my school.

12. This news was frustrating for me, because I felt that an indoor Class S championship in sprints was now out of my reach as I would be racing against a male competitor.

13. At the February 10, 2018, indoor Class S Championship in the 300m, I was knocked out of advancing to the State Open by just one spot—a spot was taken by Andraya.

14. On April 27, 2018, at the first invitational race of the Spring 2018 outdoor season, I was seeded in the 100m in a lane between not just one, but two male athletes: Terry Miller and Andraya Yearwood.

¹ AthleticNet, <https://www.athletic.net/TrackAndField/meet/306453/results/f/1/100m>, last visited February 8, 2020.

15. I distinctly remember seeing Terry look over to Andraya and say: “You and me, one and two.” At fifteen years old, I felt extremely intimidated to run against bigger, faster, and stronger male competitors.

16. But Terry was right. I should have won that 100m race; but instead, Terry and Andraya took first and second place, while I placed third.

17. Similarly, at the Spring 2018 outdoor State Open Championship, Terry won the women’s 100m event by a wide margin, while Andraya finished second.

18. But for CIAC’s policy, I would have won second place statewide:

Table 2: 2018 CIAC State Open Championship Women’s Outdoor Track 100m Results (June 4, 2018)²

Place	Grade	Sex	Name	Time	High School
1*	10	M	Terry Miller	11.72s	Bulkeley
2*	10	M	Andraya Yearwood	12.29s	Cromwell
3*	11	F	Bridget Lalonde	12.36s	RHAM
4*	10	F	Chelsea Mitchell	12.39s	Canton
5*	11	F	Maya Mocarski	12.47s	Fairfield Ludlowe
6*	10	F	Selina Soule	12.67s	Glastonbury
7	12	F	Tia Marie Brown	12.71s	Windsor
8	11	F	Ayesha Nelson	12.80s	Hillhouse

* Qualified for the New England Championship.

19. Bridget Lalonde beat me by just three-hundredths of a second, but I was so relieved that she did. Emotionally, it was less of a loss to be denied runner-up status than to be denied a first place State Open Championship—a feat almost unheard of for a high school sophomore.

² AthleticNet,

<https://www.athletic.net/TrackAndField/meet/334210/results/f/1/100m>, last visited February 8, 2020.

20. At the 2018 outdoor New England Regional Championship, I placed seventh in the 100m. Only the top six medal and receive the All New England award—one of those top six spots was taken by Terry.

21. Had I earned the title of All New England, I would have made Canton High School history as the first Canton female athlete to win this prestigious award.

2018-2019 Junior Year

22. In the fall of my junior year, I learned that Terry Miller transferred to Bloomfield, another Class S school.

23. I was devastated, fearing that with two males competing in my division, my chances of ever winning a state championship in sprints were now over.

24. I trained harder than ever, spending countless hours to shave mere fractions of seconds off of my times. I never missed a practice, squeezed in extra workouts where I could, and saw my race times consistently drop.

25. But it was not enough. And my fears of losing championship after championship were realized in the Winter and Spring 2019 seasons.

26. At the February 7, 2019, indoor Class S State Championship, Terry finished first in the 55m. I placed second. But for the CIAC's policy, I would have been named the Class S State Champion in the 55m.

27. The February 16, 2019, indoor State Open Championship saw similar results and a similar impact. Terry and Andraya finished first and second

respectively in both the preliminary and final Women's 55m races, each time defeating the fastest girl by a wide margin. I placed third in the final.

28. But for CIAC's policy, I would have won the 2019 State Open Championship in the 55m dash:

Table 3: 2019 CIAC State Open Championship Women's Indoor Track 55m Preliminary Results (February 16, 2019)³

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	7.00s	Bloomfield
2*	11	M	Andraya Yearwood	7.07s	Cromwell
3*	12	F	Cori Richardson	7.24s	Windsor
4*	11	F	Chelsea Mitchell	7.27s	Canton
5*	12	F	Kate Shaffer	7.27s	Conard
6*	12	F	Ayesha Nelson	7.29s	Hillhouse
7*	12	F	Maya MocarSKI	7.34s	Fairfield Ludlowe
8	11	F	Selina Soule	7.37s	Glastonbury
9	10	F	Kisha Francois	7.41s	East Haven

* Qualified for the women's 55m final.

Table 4: 2019 CIAC State Open Championship Women's Indoor Track 55m Final Results (February 16, 2019)⁴

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	6.95s	Bloomfield
2*	11	M	Andraya Yearwood	7.01s	Cromwell
3*	11	F	Chelsea Mitchell	7.23s	Canton
4*	12	F	Kate Shaffer	7.24s	Conard
5*	12	F	Ayesha Nelson	7.26s	Hillhouse
6*	12	F	Maya MocarSKI	7.33s	Fairfield Ludlowe
7	12	F	Cori Richardson	7.39s	Windsor

* Qualified for the New England Championship.

³ AthleticNet, <https://www.athletic.net/TrackAndField/meet/352707/results/f/1/55m>, last visited February 8, 2020.

⁴ *Id.*

29. Instead, I was not named State Open Champion in the 55m, I received a bronze medal instead of a gold medal, and I did not make Canton High School history as the first ever Canton female athlete to be named a State Open Champion.

30. However, after the 55m race, I returned to the finals of the long jump, which had no males competing. While listening to them announce Terry as the winner and new meet record holder in the 55m, I won the long jump event to solidify my place in the Canton record books as the first Canton indoor track athlete—male or female—to be named a State Open Champion.

31. State Open Champions are recognized as All-State Athletes, an award listed on college applications, scholarship applications, and college recruiting profiles. State Open Champions are invited to the All-State Banquet, and get their name celebrated on a banner in their high school gym. I did not receive any of these awards for the 55m. But I was able to receive these awards for my long jump championship.

32. After the State Open Championship, I was repeatedly referred to in the press as the “third-place competitor, who is not transgender.” It felt like a gut punch. I was the fastest biological girl in the 55m race at the State Open Championship, but the press did not mention my name—I felt erased.

33. At the March 2, 2019, indoor New England Regional Championship, Terry took first and Andraya took second place in the 55m dash. I missed medaling and being named All New England Champion by just two spots—two spots that were taken by male competitors.

34. Following Terry Miller's sweep of the CIAC's Indoor Class S, State Open, and New England titles in the 55m dash and 300m, Terry was named "All-Courant girls indoor track and field athlete of the year" by the Hartford Courant newspaper. This felt like a slap in the face to female athletes.

35. In the Spring 2019 outdoor season, I competed against both Terry and Andraya in the Class S Championship. At this event, I ran the fastest biological female times in the 100m and 200m across all state class meets.

36. But because of the CIAC's policy, being the fastest biological girl just was not good enough to experience the thrill of victory. Instead, at the 2019 Class S Championship, Terry placed first in the 100m and 200m, while I placed second in both events. I won the long jump and received a state title. But because of the CIAC's policy, I took home only one state title instead of three.

37. The trend continued at the 2019 outdoor State Open Championship as Terry easily won the women's 200m race. But for CIAC's policy, Cori Richardson would have won the state championship, Alanna Smith would have finished runner-up, and Olivia D'Haiti would have advanced to the New England Championship:

Table 5: 2019 CIAC State Open Championship Women's Outdoor Track 200m Final Results (June 3, 2019)⁵

Place	Grade	Sex	Name	Time	High School
1*	11	M	Terry Miller	24.33s	Bloomfield
2*	12	F	Cori Richardson	24.75s	Windsor
3*	9	F	Alanna Smith	25.01s	Danbury
4*	11	F	Chelsea Mitchell	25.24s	Canton
5*	12	F	Nichele Smith	25.38s	East Hartford
6*	12	F	Bridget Lalonde	25.55s	RHAM
7	12	F	Olivia D'Haiti	25.63s	Kolbe-Cathedral

* Qualified for the New England Championship.

38. But I did receive one opportunity to compete on a more level playing field. At the Spring 2019 State Open Championship in the 100m, Terry, the top-seed in the race, false-started and was disqualified. This opened the door for me: I was able to relax, focus on my race, and win. I set a personal record of 11.67 seconds, made Canton High School history as the first sprinter to be a state open champion in any sprint event, medaled, received significant media publicity, and advanced to the New England Regional Championships.

39. I went on to win the New England Regional Championships in the 100m dash and was named All New-England. Here, too, I made Canton High School history as the first female to win a New England Championship.

40. Thereafter, I was awarded Track Athlete of the Year by the Connecticut High School Coaches Association, and the Hartford Courant named me 2019 All-Courant Girls Outdoor Track and Field Athlete of the Year and the Bo Kolinsky Female Athlete of the Year (across all sports).

⁵ AthleticNet, <https://www.athletic.net/TrackAndField/MeetResults.aspx?Meet=364088&show=all>, last visited February 8, 2020.

41. My new personal record, State Open Champion and All New-England awards put me in a much better recruiting position for college scholarships—all because a false start that prevented a male from competing against me in the women's division leveled the playing field.

2019-2020 Senior Year

42. I am now in my senior year of high school and competing in the final indoor track season of my high school athletic career. I am currently ranked second in the state in the women's 55m behind a biological male. The Connecticut State Championship for Class S will be held on February 14, 2020, the Connecticut State Open Championship will be held on February 22, 2020, and the New England Regionals Championship will be held on February 29, 2020.

43. I plan to compete in the 2020 Spring Outdoor Season. The official first practice date is March 21, 2020, and the first meet is April 4, 2020. Key end-of-season meets include the Connecticut State Open Championship and the New England Regional Championship.

44. These final two track seasons are my last opportunities to win championships, titles, set personal high school records, and win All New England awards.

45. These are opportunities that once lost, cannot be recovered. I will never be a high school athlete again.

46. It feels defeating to know that records at my high school, CIAC, AthleticNet, MySportsResults, CT.Milesplit.com, and others do not reflect the four

state titles and two All New England awards I should have earned. It is upsetting to know that the meet records of many great female athletes before me have also been wiped from the books.

47. Competing against males makes me feel anxious and stressed. And stress has a direct, negative impact on my athletic performance.

48. I try to stay positive, to take support from family and friends, but it is hard when I know that I must compete against those who have a biological advantage because they were born male.

49. I look forward to competing next year in college where I will be working towards a professional career in the sports industry.

Chelsea Mitchell

Chelsea Mitchell

Subscribed and sworn before me this 11 day of February, 2020.

Susan M Davies

Commissioner of Superior Court

Notary Public, my commission expires November 30, 2022



**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT**

SELINA SOULE, a minor, by Bianca Stanesco, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, by Cheryl Radachowsky, her mother

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE; BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION

Defendants.

No. 3:20-cv-00201 (RNC)

STATEMENT OF INTEREST

The United States files this Statement of Interest under 28 U.S.C. § 517, which authorizes the Department of Justice “to attend to the interests of the United States in a suit pending in a court of the United States.” *Id.* The United States enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and has a significant interest in the proper interpretation of Title IX. The United States also enforces several other federal anti-discrimination statutes that, like Title IX, prohibit sex discrimination, *e.g.* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and the United States has a significant interest in the proper interpretation of these laws. The United States also has a significant interest in ensuring that

federal funds are not used to discriminate on the basis of sex and other protected classes. *See* 20 U.S.C. § 1682.

INTRODUCTION

Title IX requires that “[n]o person in the United States shall, on the basis of sex, . . . be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a); *accord* 34 C.F.R. § 106.41(a). Title IX’s prohibition against sex discrimination extends to athletics operated or sponsored by recipients of federal money. 34 C.F.R. § 106.41. As a result, covered institutions must “provide equal athletic opportunity for members of both sexes.” *Id.* § 106.41(c).

The Connecticut Interscholastic Athletic Conference (CIAC), however, has adopted a policy that requires biological males to compete against biological females—despite the real physiological differences between the sexes—if the male is a transgender individual who publicly identifies with the female gender. CIAC claims that “federal law” requires this state of affairs. CIAC 2019-2020 Handbook (CIAC Handbook), at 55, http://www.casciac.org/pdfs/ciachandbook_1920.pdf; *see also* Defs.’ Initial Summ. Issues at 7, ECF No. 63. So do the proposed student-intervenors. *See* Mot. to Intervene at 11, ECF No. 36.

They are incorrect. Title IX and its implementing regulations prohibit discrimination solely “on the basis of sex,” not on the basis of transgender status, and therefore neither require nor authorize CIAC’s transgender policy. To the contrary, CIAC’s construction of Title IX as requiring the participation of students on athletic teams that reflect their gender identity would turn the statute on its head. One of Title IX’s core purposes is to ensure that women have an “equal athletic opportunity” to participate in school athletic programs. 34 C.F.R. § 106.41(c); *see also* *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (“Equal opportunity to

participate lies at the core of Title IX’s purpose.”). Schools realize that purpose primarily by establishing separate athletic teams for men and women and by ensuring that those teams are on equal footing. *See* 34 C.F.R. § 106.41(b)-(c). Because of the physiological differences between men and women, the existence of women’s sports teams permits women to participate more fully in athletics than they otherwise could.

Under CIAC’s interpretation of Title IX, however, schools may not account for the real physiological differences between men and women. Instead, schools must have certain biological males—namely, those who publicly identify as female—compete against biological females. In so doing, CIAC deprives those women of the single-sex athletic competitions that are one of the marquee accomplishments of Title IX. The United States therefore submits this Statement of Interest to aid the Court in the proper application of Title IX in this case.

TITLE IX DOES NOT MANDATE CIAC’S TRANSGENDER POLICY

Title IX does not require that recipients assign students to participate in sex-specific athletic teams that reflect their gender identity. CIAC’s policy and its briefing to this Court construing Title IX conflict with the statute’s text, history, purpose, and implementing regulations.

A. Text and History

1.a. Title IX prohibits “discrimination” in educational programs and activities “on the basis of sex.” 20 U.S.C. § 1681(a). Although Title IX includes statute-specific definitions of various terms, “sex” is not one of them. *See id.* § 1681(c) (defining “educational institution”); *id.* § 1687 (defining “program or activity” and “program”). Without such a definition, the term “sex” should “be interpreted as taking [its] ordinary, contemporary, common meaning.” *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted).

When Congress enacted Title IX in 1972, the “ordinary, contemporary, common meaning” of “sex” was biological sex. In that same year, 1972, the United States explained to the Supreme Court that “sex, like race and national origin, is a visible and immutable biological characteristic,” U.S. Br. at *15, *Frontiero v. Laird*, No. 71-1694, 1972 WL 137566 (U.S. Dec. 27, 1972), and the Court agreed that “sex” is “an immutable characteristic determined solely by the accident of birth,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Also during the time period surrounding Title IX’s enactment, dictionaries defined “sex” as referring to the physiological distinctions between males and females, and more particularly their reproductive functions. For example, *Webster’s Third* defined “sex” as “one of the two divisions of organic esp. human beings respectively designated male or female,” or “the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction.” *Webster’s New International Dictionary* 2081 (3d ed. 1968). Other contemporaneous dictionaries defined “sex” similarly. *See, e.g., American Heritage Dictionary of the English Language* 1187 (1st ed. 1969) (“1. a. The property or quality by which organisms are classified according to their reproductive functions. b. Either of two divisions, designated male and female, of this classification.”); *The American College Dictionary* 1109-10 (1970) (“1. The character of being either male or female . . . 2. The sum of the anatomical and physiological differences with reference to which the male and female are distinguished or the phenomena depending on these differences.”); *The Random House College Dictionary* 1206 (1973) (“1. either the male or female division of a species esp. as differentiated with reference to the reproductive functions. 2. The sum of the structural and functional differences by which male and females are distinguished.”).

Other provisions of Title IX employ “sex” as a binary term, and thus provide further confirmation that the prohibition on “sex” discrimination does not extend to discrimination on the basis of transgender status or gender identity. If the term “sex” in Title IX included “gender identity”—which, according to the American Psychiatric Association, may include “an individual’s identification as . . . some category *other than* male or female,” *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* 451 (2013) (emphasis added)—then multiple Title IX provisions would make little sense.

Title IX consistently uses “sex” as a binary concept capturing only two categories: male and female. For example, the statute creates an exception for “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*.” 20 U.S.C. § 1681(a)(8) (emphases added). Likewise, Title IX includes a transitional period for 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*,” provided certain criteria are met. *Id.* § 1681(a)(2) (emphases added). Moreover, Title IX expressly provides that nothing in the statute “shall be construed to prohibit any educational institution . . . from maintaining separate living facilities *for the different sexes*.” *Id.* § 1686 (emphasis added).¹ These provisions could not sensibly function if the term “sex” includes “gender identity,” which, unlike “sex,” may not be limited to two categories.

¹ See also 34 C.F.R. § 106.32(b) (A recipient “may provide separate housing on the basis of sex” provided the housing provided “to students of *one sex*, when compared to that provided to students of the *other sex*, shall be” proportionate and comparable. (emphasis added)); 34 C.F.R. § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of the *other sex*.” (emphasis added)).

b. Historical context further confirms that Congress used the word “sex” in its ordinary biological sense. “Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities, which was documented in hearings held in 1970 by the House Special Subcommittee on Education.” *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); *see also North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523 n.13 (1982). Against that backdrop, members of Congress voting on Title IX and any politically engaged citizen would have understood the law as directed at eliminating discrimination in education based on biological sex—*i.e.*, unequal treatment of men and women—consistent with the term’s ordinary meaning.

Congress’s actions in the 48 years following Title IX’s enactment confirm that “sex” in this statute does not encompass transgender status. In other statutory contexts, Congress has acted affirmatively to address gender-identity discrimination as a distinct category separate from sex discrimination. For example, when Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, Div. E., 123 Stat. 2190 (2009), Congress found that the “incidence of violence motivated by the actual or perceived race, color, religion, national origin, *gender, sexual orientation, gender identity*, or disability of the victim poses a serious national problem.” 34 U.S.C. § 30501(1) (emphasis added).

Congress accordingly used the Hate Crimes Prevention Act to amend or create several statutory provisions that prohibited or otherwise specifically addressed discrimination based on “gender identity,” in addition to discrimination based on “sex” or “gender.” *See* 18 U.S.C. § 249(a)(2)(A) & (c)(4) (prohibiting acts or attempts to cause bodily injury to any person “because of the actual or perceived religion, national origin, *gender, sexual orientation, gender identity*, or disability of any person,” and defining “gender identity” as “actual or perceived

gender-related characteristics” (emphasis added)); 34 U.S.C. § 30503(a)(1)(C) (regarding federal assistance to state, local, or tribal investigations of crimes “motivated by prejudice based on the actual or perceived race, color, religion, national origin, *gender, sexual orientation, gender identity*, or disability of the victim” (emphasis added)); *id.* § 30506(2) (construing violent acts motivated by actual or perceived race, color, religion, national origin, *gender, sexual orientation, gender identity*, or disability of a victim (emphasis added)); *id.* § 41305(b)(1) (regarding compiling statistics “about crimes that manifest evidence of prejudice based on race, *gender and gender identity*, religion, disability, *sexual orientation*, or ethnicity) (emphasis added)).

Similarly, in 2013, Congress amended the Violence Against Women Act to create a federal government enforcement action that protected the separate bases of sex and gender identity. *See* 34 U.S.C. § 12291(b)(13)(A) (2013), *as amended by* Pub. L. No. 113-4, § 3, 127 Stat. 56 (2013) (prohibiting discrimination in certain federally funded programs “on the basis of actual or perceived race, color, religion, national origin, *sex, gender identity* (as defined in [18 U.S.C. § 249(c)(4)]), *sexual orientation*, or disability” (emphases added)).

These post-Title IX enactments illustrate that Congress “kn[ows] how” to prohibit discrimination based on gender identity when it wishes to do so. *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 921 (2015). “If Congress had meant to prohibit . . . transgender discrimination” in Title IX, “surely the most straightforward way to do so would have been to say so—to add . . . ‘transgender status’ or ‘gender identity’ to the list of classifications protected under” Title IX. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring) (addressing Title VII). Congress did not do so when originally enacting Title IX or subsequently. Instead, Congress has failed to enact proposed bills to amend Title IX to add

protections for “gender identity.” *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

To be sure, “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Subjective expectations of Members of Congress as to which particular practices Title IX would prohibit therefore do not control. But the historical context makes clear that, in using the term “sex,” Congress was referring to discrimination based on biological sex—*i.e.*, unequal treatment of men and women—consistent with the term’s ordinary meaning. Conversely, the United States knows of no evidence showing that when Congress employed the term “sex” in Title IX it did so to reach anything about transgender status, and CIAC has identified none.

2. In addition, Title IX prohibits only “*discrimination*” “on the basis of sex,” 20 U.S.C. § 1681(a) (emphasis added), and requiring all students to participate on the athletic team associated with their biological sex cannot be described as sex “discrimination.” The “normal definition of discrimination, is differential treatment” or, more specifically, “less favorable treatment.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citation and internal quotation marks omitted) (construing “discrimination” in Title IX). Thus, for a prohibition on *discrimination* because of sex, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed.” *Oncale*, 523 U.S. at 80 (citation omitted) (addressing Title VII). Requiring students to participate on the athletic team associated with their biological sex accounts for the real physiological differences between the sexes in a manner that burdens each sex equally, which is the main reason why Defendants may continue to maintain single-sex teams. *See infra* Part B.

The situation is no different for transgender students specifically: biological males with a female gender identity are exposed to the same conditions as similarly situated biological females with a male gender identity.

Indeed, because such a policy would facially turn solely on biological differences rather than on gender identity, the policy would not even consider, much less discriminate on the basis of, transgender status. School officials would not even have to “know an individual’s transgender status in order to enforce the policy—knowledge of characteristics unrelated to gender preference is both necessary and sufficient.” *Doe 2 v. Shanahan*, 917 F.3d 694, 733 (D.C. Cir. 2019) (Williams, J., concurring in result) (addressing military policy requiring all “service members [to] serve ‘in their biological sex’”); *cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003) (noting that if an employer “were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent’s disability”).

If the law were otherwise, countless sex-specific policies would be per se unlawful. A policy mandating that male students not frequent the women’s bathrooms or locker rooms, for example, would be susceptible to challenge. And so would a policy setting different physical-fitness standards for male and female athletic events. Indeed, many of Title IX’s implementing regulations—which permit sex-specific athletic teams, bathrooms, locker rooms, or shower facilities—would be in jeopardy if CIAC’s view of sex discrimination were to carry the day. *See* 34 C.F.R. § 106.33 (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”); *id.* § 106.41(b) (permitting “separate teams for members of each sex”); *see also infra* Part B.

Nothing in Title IX or Supreme Court precedent requires such radical upheaval. To the contrary, the Supreme Court has recognized that sex-based classifications sometimes are permissible because certain “differences between men and women” are “enduring.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). That holds true in the area of physical-fitness standards, as “[m]en and women simply are not physiologically the same for the purposes of physical fitness programs.” *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (finding FBI did not violate Title VII when using different physical fitness standards for special agent candidates based on sex); *see also Virginia*, 518 U.S. at 550 n.19 (admitting women to a previously all-male military academy “would undoubtedly require” that institution “to adjust aspects of the physical training programs”).

B. Purpose and Regulations

Far from being required by Title IX, CIAC’s transgender policy is in tension with “the core of Title IX’s purpose”—namely, ensuring that women have an “[e]qual opportunity to participate” in educational programs and activities at covered institutions. *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993); *accord McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286-95 (2d Cir. 2004). Notably, Congress reaffirmed that Title IX’s core purpose was to provide women equal opportunities—and particularly athletic opportunities—with the Civil Rights Restoration Act of 1987, which superseded a Supreme Court decision that limited the scope of Title IX. As the Second Circuit observed, “[t]he congressional debate leading to the passage of [the Civil Rights Restoration Act] demonstrates concern by members of Congress about ensuring equal opportunities for female athletes.” *McCormick*, 370 F.3d at 287-88; *see also Cohen*, 991 F.2d at 894 (“Although the Restoration Act does not specifically

mention sports, the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes.”).

Title IX’s athletic regulations further the statute’s purpose by expressly contemplating the existence of single-sex teams. As Title IX’s sponsor promised, the statute and its implementing regulations would “permit differential treatment by sex . . . in sport facilities,” 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh), and would not mandate, for instance, the “desegregation of football fields,” 117 Cong. Rec. 30407 (1971) (statement of Sen. Bayh); *see North Haven Bd. of Ed.*, 456 U.S. at 526-27 (“Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”). Accordingly, those regulations provide that a recipient of federal funds does not violate Title IX when it “operate[s] or sponsor[s] separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(b). And the regulations expressly require “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics [to] provide equal opportunity for members of both sexes.” *Id.* § 106.41(c).

CIAC nevertheless has decided to force biological girls to compete against biological boys who publicly identify with the female gender and want to compete on sex-specific athletic teams. Specifically, CIAC’s policy determines eligibility for sex-specific sports teams according to a student’s gender identification “in current school records and daily life activities in the school and community,” and does not require students to attempt to undergo any physiological changes to reflect their gender identity. CIAC Handbook at 55. Accordingly, CIAC’s transgender athletic policy is in tension with the core purpose of Title IX and its implementing regulations.

The policy also illustrates why this Court should not read Title IX to compel schools to require students to participate on sex-specific teams solely on the basis of their gender identity. Even if the term “sex” is somehow ambiguous, if “only one of the permissible meanings” of an allegedly ambiguous term “produces a substantive effect that is compatible with the rest of the law,” this Court should adopt it because the Judiciary “cannot interpret federal statutes to negate their own stated purposes.” *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (citations omitted). Reading Title IX to compel schools to require biological males to compete against biological females in athletic competitions is precisely the type of interpretation that this Court should reject on this ground.

CONCLUSION

For the foregoing reasons, this Court should reject the assertion that Title IX requires CIAC’s transgender policy.

Respectfully submitted,

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DATED: March 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to all counsel of record.

s/ Matthew J. Donnelly
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