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Proponents of the Charlotte type discrimination ordinance say it has been enacted in 200 cities nationwide. Their leader, Rep. Chris Sgro, says it is 100 cities. Whether it is 100 or 200 means that about 10,000 other cities and towns nationwide do not have a similar ordinance. How many NCAA events, members or fans are located in these 10,000 other cities and towns?

FACT #2: North Carolina has been joined by 24 other states in challenging President Obama’s bizarre interpretation of the word “sex” in Title IX (education funding) relating to “discrimination.” The first was *North Carolina Governor McCrory and Secretary Perry v. U.S. Department of Justice*. Twenty-three other states have joined the battle. In addition, *G.G. v. Gloucester County School Board* of Virginia is on appeal in the US Supreme Court, and deals with the same issue. The U.S. Supreme Court decided 5-3 NOT to allow the President’s interpretation to go into effect pending final decision. Since the NCAA would no doubt like to solidify its “commitment to fairness and inclusion” by avoiding these 25 states, here is a complete list:

- | | |
|----------------|------------------------------|
| Alabama | North Dakota |
| Arizona | Ohio |
| Arkansas | Oklahoma |
| Georgia | South Carolina |
| Kansas | South Dakota |
| Kentucky | Texas |
| Louisiana | Tennessee |
| Maine | Wisconsin |
| Michigan | West Virginia |
| Mississippi | Wyoming |
| Montana | Utah |
| Nebraska | Virginia – Gloucester County |
| North Carolina | |

FACT #3: LGBT persons have the same rights in North Carolina that the rest of us do. Let me explain in detail:

What is discrimination? American citizens who are North Carolina residents have a full panoply of rights that come from the United States Constitution, United States Statutes, the North Carolina State Constitution (particularly Article I of the Declaration of Rights), state statutes and local ordinances. These rights are available in full to *almost* everyone.

Article I Section I of the North Carolina Constitution provides as follows:

The equality and rights of persons.

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

There are exceptions. Aliens do not have the right to vote, whether here legally or illegally. Children do not have the right to enter into most contracts nor the right to vote nor the right to buy alcohol. Those who by mental disease are not able to conduct their own affairs may be declared incompetent by a Court. Their rights are protected and enhanced by the appointment of a Guardian. Convicted criminals lose some of their rights. Even convicted criminals have the right in most circumstances to not undress or use the bathroom in the presence of a person of the opposite sex.¹

Each of us has the same rights when facing the same circumstances. For historical reasons the exercise of these rights has been protected by additional constitutional or statutory provisions.

Article I Section 19 of the North Carolina Constitution provides:

Law of the land; equal protection of the laws

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The 14th Amendment (Section 1) to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In contrast, what the NCAA asks for is extra special rights based on the undefinable “sexual orientation” or “gender identity.”

¹ The North Carolina Department of Public Safety, Adult Correction and Juvenile Justice stated in a memo to Rep. Stam on May 10, 2016, that, “Convicted criminals and inmates do have privacy rights when it comes to their using the restroom or changing clothes and they have the right to not be observed by members of the opposite sex while using the restroom or changing clothes. The specific policy language is included in the Prison Rape Elimination Act (PREA), with which the Division of Adult Correction...Community Corrections and Juvenile Justice... abides.”

FACT #4: The NCAA and its member institutions are NOT in compliance with the civil rights provision of Title IX as defined by President Obama. If the association tried to get into compliance it would destroy half (women's athletics) of its reason to exist.² This requires some explanation:

On May 13, 2016, the United States Departments of Justice and Education issued a joint letter explaining a school's obligation under Title IX regarding transgender students.³ It came with an implicit threat of denial of Title IX funding. Almost all, if not all, NCAA member institutions receive Title IX funding.

The Problem

The letter claimed to rely on Title IX of the Education Amendments of 1972. The letter stated that:

“[g]ender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth... Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex... Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.” (emphasis added)

Title IX requires that, “[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.”⁴ Title IX requires that schools treat females and males equally with respect to participation, opportunities, athletics scholarships and treatment of male and female teams.⁵ Title IX athletic regulations were extensively debated by Congress and became law in June of 1975, giving high schools and colleges three years and elementary schools one year to comply.⁶

The Departments of Justice and Education's Solution for Athletes

According to the Department of Justice (DOJ) and the Department of Education (DOE), the solution is simple:

“Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.”⁷ However, a school may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others' discomfort with transgender students”⁸

² On June 2, 2016, NBA Commissioner Adam Silver said it was not the changing room provision that was the issue but rather the failure to protect LGBT rights. But that makes little sense, as we will see.

³ Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (Referred to as *The Letter*).

⁴ Title IX of the Education Amendments, 20 U.S.C. Â§1681 (1972).

⁵ Id.

⁶ Pub. L. 93-380, H.R. 69, Elementary and Secondary Education Amendments, introduced Jan. 3, 1973, passed Aug. 21, 1974. “[D]irected Secretary to prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.” See [The Library of Congress](http://thomas.loc.gov/cgi-bin/bdquery/z?d093:HR00069) at <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:HR00069>.

⁷ 34 C.F.R. § 106.41(b). “Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.”

⁸ See *The Letter*.

One of the purposes of Title IX was to create the same opportunity and equality of treatment for male and female student-athletes.⁹ The regulation requires that any member of the "underrepresented sex" (the sex that has the fewest opportunities) must have an opportunity to play on the team of the overrepresented sex if that player is not provided with a team of the player's own sex.¹⁰ Since males have more opportunities than females, a male playing on a female's team would take away a participation opportunity for an underrepresented sex (female). Thus, in the interest of the "class" (all females), males are not allowed to take spots on a female's team even though the reverse is permitted. Males have no right to try out for a female's team *if* there are more males playing sports at that particular school than females.

There is little research on the impact of students' participation based on age-appropriateness, and, as the letter notes, the policies needed at the collegiate level may not be the same at the high school or even middle school level of competition.¹¹ "[P]olicies that may be appropriate at the college level may 'be unfair and too complicated for [the high school] level of competition.'"¹²

States and school districts have previously used discretion to enact their own policies concerning transgender students on school teams. Some have allowed transgender students to play on teams consistent with their gender identity regardless of their sex assigned at birth. Others evaluate the student's eligibility for gender-specific school activities by considering their school records, medical history or the student's gender-specific advantage of their participation. The North Carolina High School Athletic Association, for example, adopted a rule that, "A Student's gender is denoted by what is listed on the birth certificate."¹³ In North Carolina, and in most states, the birth certificate can be changed under medical certification.¹⁴

The NCAA and Title IX

In April 2010, the National Collegiate Athletic Association¹⁵ Executive Committee adopted policies to include transgender student-athletes. The NCAA Office of Inclusion "encourages thoughtful development of policies and practices that provide fair participation opportunities for all student-athletes, including transgender individuals."¹⁶ The two bylaws affected were 1) **mixed team status** and 2) the **use of banned substances**.¹⁷ So long as the student is receiving hormone therapy, transgender students are permitted to participate in sex-segregated sports consistent with their gender identity.

There are problems with these bylaws:

- The "mixed team status" rules violate President Obama's new civil rights "law."
- Students may be forced by NCAA schools to show their medical records for proof of hormone therapy. This violates President Obama's new interpretation of civil rights under Title IX.

⁹ Available at <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#benefit>.

¹⁰ Department of Education's "Three-Part Test," Policy Interpretation by Office of Civil Rights, 1979. Available at <http://www.womenssportsfoundation.org/home/athletes/for-athletes/know-your-rights/athlete-resources/mythbusting-what-every-female-athlete-should-know>.

¹¹ See *The Letter. On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), [https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B\(2\).pdf](https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf). See NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes 2*, 30-31 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹² See *The Letter*, footnote 18.

¹³ NCHSSA, Attachment # 9, Birth Certificate & Gender, adopted April 28, 2014. Available at <http://www.nchsaa.org/file/1610>.

¹⁴ N.C. Gen. Stat. § 130A-118(b)(4): Amendment of Birth and Death Certificates.

¹⁵ NCAA, which oversees competitive sports at over 1,000 colleges & universities.

¹⁶ Inclusion of Transgender Student-Athletes- Bylaws, page 7 (August 2011)

https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁷ *Id.* at 12.

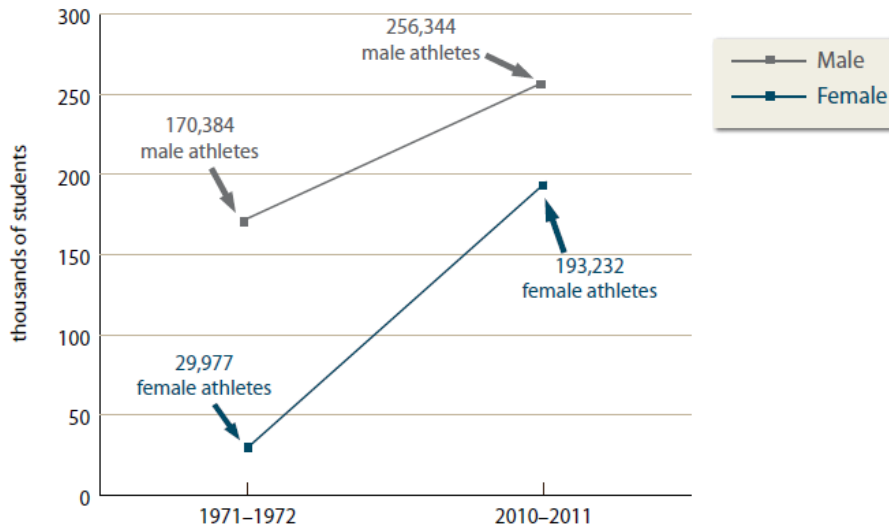
NCAA “MIXED TEAM STATUS” POLICIES

1. A trans male (Female to Male) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men’s team, but is no longer eligible to compete on a women’s team without changing that team status to a mixed team.¹⁸

2. A trans female (Male to Female) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.¹⁹

If either of the above occurred, colleges and universities would see a decrease in the number of women’s collegiate sports teams. Once a team is changed to “mixed-team status,” that team is no longer able to compete against females nor is that team classified as a female team.²⁰ As of 2011, the number of female athletes was still far behind the number of male athletes (see chart below).²¹ The NCAA reported that the gap seems to be narrowing from its 2014-15 data with the average NCAA institution having approximately 437 student-athletes, 247 males and 190 females.²² However, if the Departments of Justice and Education prevails on their purely subjective gender identity policy, there WILL be a decrease in the number of women’s collegiate teams since they will become “mixed teams” under NCAA rules.

Male and Female Participation in College Sports, 1972–2011



SOURCE: NCAA Sports Sponsorship and Participation Report, 1971-72–2010-11.

¹⁸ Inclusion of Transgender Student-Athletes- Bylaws, page 13 (August 2011)
https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁹ Id. at 13.

²⁰ “A mixed team is a varsity intercollegiate sports team on which at least one individual of each gender competes. A mixed team shall be counted as one team. A mixed team shall count toward the minimum sponsorship percentage for men’s championships...Once a team is classified as a mixed team, it retains that status through the remainder of the academic year without exception.”

<http://www.smith.edu/admission/studygroup/docs/NCAA-Policy-on-Transgender-Student.pdf>.

²¹ NCAA Sports Sponsorship and Participation Report, 1971-72 – 2010-11.

²² Student-Athlete participation, 1981-82-2014-15; NCAA Sports Sponsorship and Participation Rates Report, available at <http://www.ncaa.org/sites/default/files/Participation%20Rates%20Final.pdf>.

In order to comply with Title IX funding, women and men must be provided *equitable* opportunities to participate in sports.²³ There is no requirement to offer identical sports but rather an equal opportunity to play.²⁴ **If more teams transition to mixed teams, female athletes will suffer.** Mixed teams are permitted to play all-male teams and compete in the men's championships, but mixed teams are NOT permitted to play against all female teams nor are they permitted to participate in the women's NCAA Championship.²⁵ If there is a team of 30 females and 1 male, the team must compete in the men's championship. Female teams will ultimately suffer from a lower level of competition.²⁶ Some talented female athletes will be less likely to join athletic teams since they will only be playing other mixed teams or all male teams.

Institutions must also demonstrate a history and continuing practice of program expansion for the underrepresented sex.²⁷ However, where more female teams transition to mixed teams, this will no longer be expanding opportunities for the underrepresented sex: female. Eventually, no schools will be in compliance with the rules required under President Obama's new law on Title IX.

USE OF BANNED SUBSTANCES

The NCAA's bylaws states that,

“Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.

- **A trans male (FTM) student-athlete who is not taking testosterone** related to gender transition may participate on a **men's or women's team.***
- **A trans female (MTF) transgender student-athlete who is not taking hormone treatments** related to gender transition **may not compete on a women's team.**”²⁸*

The provisions in these bylaws are in direct conflict with President Obama's new law on Title IX.

In 2010, a female identifying as a male was allowed to play on a women's collegiate NCAA basketball team because the individual had not undergone hormone treatments.²⁹ If this player had undergone hormone treatment or the transgender athlete was a biological male identifying as a woman who wanted to play on the women's team, the player could not have participated.

A transgender student-athlete in track and field won many honors and a national championship in women's hammer throw but identified as a male.³⁰ The athlete was allowed to continue competing in the women's category because the athlete had not undergone reassignment surgery or hormonal treatment which is consistent with NCAA regulations. If this athlete *had* undergone hormonal treatment, the student would have had to compete in the men's division according to NCAA policies.

²³ 34 CFR 106.41 – Athletics.

²⁴Id. See also <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#how>

²⁵ *Supra*, NCAA Inclusion of Transgender Student-Athletes, 12. see also <http://www.smith.edu/admission/studygroup/docs/NCAA-Policy-on-Transgender-Student.pdf>.

²⁶ 34 CFR 106.41(c)(1) – Athletics. “In determining whether equal opportunities are available, the Director will consider [several] factors...(1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]”

²⁷ Id.

²⁸ *Supra*, NCAA Inclusion of Transgender Student-Athletes, 13.

²⁹ http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html?_r=1

³⁰<http://www.usatoday.com/story/sports/college/2015/08/03/ncaa-transgender-athlete-guidelines-keelin-godsey-caitlyn-jenner/31055873/>.

The NCAA provides additional considerations for the student-athlete when transitioning to the other sex. The student must submit a letter of request to participate on a sports team to the director and include with that letter a note from the student's physician documenting the transition status and identifying the hormonal treatment and documenting of the student's testosterone levels if relevant.³¹ This NCAA requirement is in direct conflict with President Obama's new law on Title IX.

The Effect on Women and Title IX Funding

According to the Department of Justice "there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity."³² The Department of Justice's interpretation of Title IX concludes that these athletes should have been able to participate on *either* team that their self-determined gender aligned with, regardless whether they had taken hormones or sex reassignment surgery. No medical diagnosis or treatment should be required since "requiring students to produce such identification documents in order to treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an education program or activity."³³

According to the DOJ's analysis of Title IX, the NCAA WILL BE IN VIOLATION OF TITLE IX and its member schools may lose federal funding if they do not amend their policies concerning athletes and sex-reassignment surgery and hormone treatments. BUT THEN, what would be the effect on competition? A male could self-identity as a female and demand a position on the team. Will women put up with having an anatomically correct male in their shower rooms and in their hotel rooms on travel days? Some may; most will not. None should be asked to do so.

The Unfortunate Reality

If the letter of advice from the Department of Justice and Department of Education is converted into a law by the Federal Courts then the days are numbered for collegiate, high school and professional women's sports. Title IX was conceived as a boon to women in sports but will now be used as a weapon against them.

FACT #5: The NCAA also claimed to have made its decision because "North Carolina law provides legal protections for government officials to refuse services to the LGBT community" – a vague reference to [SB 2/S.L. 2015-75](#). **In the litigation over that law not a single LGBT person has cited one instance of being denied service.** In fact, the law provides how marriage services are provided to everyone legally entitled to marry. The NCAA has no reference to any other concern or issue on that point.

FACT #6: The NCAA cites as a reason for its decision that 5 states (and some cities) prohibit travel to North Carolina. **That would be a reason to sanction those states and cities.** To sanction North Carolina for that reason gives power to the "heckler's veto."

CONCLUSION

If the NCAA wants to solidify its commitment to "fairness and inclusion" and restrict its activities to states that meet its litmus test for an "inclusive atmosphere," it should expand its deliberations to include the 24 states suing the Obama Administration and the overlapping 28 states with policies similar to North Carolina's, while also turning the spotlight on its own policies regarding women in athletics. Soon it will no longer be the National Collegiate Athletic Association.

³¹ *Supra*, NCAA Inclusion of Transgender Student-Athletes, 14.

³² See *The Letter*, page 2.

³³ *Id.*