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COMPETING FOR THE STARTING LINE:

HOW OMBUDS PROGRAMS CAN HELP TRANSGENDER STUDENT-ATHLETES PARTICIPATE UNDER VARIOUS STATE POLICIES

Drew Fabricius[*]

I. INTRODUCTION

Ember played baseball when she was younger and, while she enjoyed the sport, severe bullying marred her experience.[1] This turned her off sports for a while, but in middle school she had a renewed interest in sports.[2] This time, she wanted to run track and play softball consistent with her gender identity.[3] Initially, her mother did not like the idea because she did not think it was possible in their state.[4] However, in eighth grade, Ember was thrilled to hear from her soon-to-be high school principal that Ohio permitted trans girls to play sports consistent with their gender identity.[5] After a year of hormone therapy, Ember submitted her doctor's note verifying her treatment as required by the state's policy and got approval to play softball.[6]

Ember enjoyed her sophomore season, as she was excited to return to sports, and made a great connection with her assistant coach.[7] Next season, Ember and her mother submitted a renewed letter confirming her treatment, looking forward to another great year.[8] However, instead of granting another approval, the state denied

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1. *See* Telephone Interview with Ember, an Ohio high school student-athlete, and her mother (July 28, 2022) (for the sake of privacy, this article will only use Ember's first name).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *See* Telephone Interview with Ember, an Ohio high school student-athlete, and her mother (July 28, 2022).

her application until they received further documentation from her doctor.[9] In accordance with the new policy, Ember also needed to submit proof "that she does not possess physical (bone structure, muscle mass, testosterone, hormonal, etc.) or physiological advantages over genetic females of the same age group."[10] Suddenly, Ember and her family were thrown into fear.[11] How could she show the state what they wanted? What more invasive tests might she have to undergo? Did she have time to meet these requirements before the season began two months later? The state blindsided Ember with updated and ambiguous requirements, leaving her suspended in a limbo of uncertainty.

Ember's experience will help illustrate broader questions this article explores. Namely, what is the value of these rules and procedures if they are neither respected nor exercised?[12] Additionally, are all student-athletes protected equally, even within their own state?[13] The absence of safeguards to implement a state's transgender student-athlete policies make these questions difficult to answer.

In federal courts, the current trend[14] features courts enforcing and expanding transgender rights and protections.[15] In spite of this judicial trajectory, the time-sensitive nature of sports seasons renders it impractical to resolve a student-athlete's right to compete in a court. It will be state high school athletic association policies, not the courts, that will continue to be the most relevant sources for determining eligibility to participate on a sports team that aligns with a student's gender identity.

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9. *Id*.

10. *Id.*; Doug Ute, *Ohio State Athletic Association Transgender Student Policy*, OHIO HIGH SCH. ATHLETIC ASS'N (2021-2022), https://ohsaaweb.blob.core.windows.net/files/Eligibility/OtherEligibiltyDocs/TransgenderPolicy.pdf (last visited Oct. 18, 2022).

11. *See* Telephone Interview with Ember, *supra* note 1.

12. This concern was inspired in large part by an anecdotal story this author was unfortunately unable to confirm. The story featured a transgender high school student competing at a local swim meet in Washington, whose policy deferred to the student's gender identity. Instead, local actors (either school officials and/or coaches) collectively agreed to a compromise: the student would compete with the girls but only as an exhibition swimmer. This meant she could not win her races nor could she use her time to qualify for the next level of competition. This anecdote displayed the importance of an institutional measure to educate and enforce the policy in place.

13. Natalie Prieb, *Missouri lawmaker goes viral for impassioned speech against transgender sports bill*, HILL (Apr. 20, 2022), https://thehill.com/news/3274466-missouri-lawmaker-goes-viral-for-impassioned-speech-against-transgender-sports-bill/ (in a challenge to a bill that would ban transgender girls from competing on girls' sports teams, Missouri Democratic Representative Ian Mackey, who is gay, went viral after he spoke on the House floor to a Republican colleague stating "I was afraid of people like you growing up . . . For 18 years, I walked around with nice people like you, who took me to ball games, who told me how smart I was and then went to the ballot to vote for crap like this. I couldn't wait to get out . . . I couldn't wait to move to a part of our state that would reject this stuff in a minute . . . Thank God I made it out, and I think every day [about] the kids that are still there that haven't made it out, who haven't escaped.").

14. *See infra* Section III.

15. *See e.g.,* Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 593–94 (4th Cir. 2020), as amended (Aug. 28, 2020) (discussed *infra* Section III.B); Parents for Priv. v. Barr, 949 F.3d 1210 (9th Cir.). (finding defendants failed to state a claim in their challenge of an Oregon high school policy that allowed transgender students to use restrooms, locker rooms, and showers consistent with their gender identity); Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (refusing to enjoin district bathroom policy that allowed transgender students to use restrooms, locker rooms, and showers consistent with their gender identity); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (granting injunction against school's unwritten policy that barred plaintiff from using the boys' bathroom after he started his female-to-male transition); Dodds v. U.S. Dep't of Educ., 845 F.3d 217 (6th Cir. 2016) (upholding an injunction against school district's policy of not permitting student, a transgender girl, to use girls' restroom).

State athletic association policies govern transgender student-athletes, and they range from inclusive policies which defer to athletes' gender identities[16] to obstructive policies which require medical procedures and documentation,[17] to prohibitive policies which ban participation different from an athlete's gender assigned at birth.[18] However, most states currently risk policies being misapplied or ignored at the local level because the burden to implement and enforce the policies falls largely on local administrators and students themselves.[19]

This article will argue that high school[20] transgender student-athletes' rights would be best served if states employed ombudspersons[21] to inform schools and students of, and subsequently enforce, state eligibility policies. By designating someone who will educate all parties, states can eliminate confusion and ignorance among students and school administrators. Most importantly, by requiring ombuds to be present for any and all meetings regarding transgender eligibility, ombuds will ensure protection of the rights and obligations for students and schools alike. Advocates on either side may be dissatisfied with this procedural compromise that does not deliver the substantive policy they seek. However, it is both a practical and beneficial supplement to most policies that will guard against potential abuse and serve to protect any future reforms.

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16. *E.g.,* 2010–2011 WASH. INTERSCHOLASTIC ATHLETIC ASS'N OFF. HANDBOOK 40-66 (2010), http://www.wiaa.com/ConDocs/Con358/Eligibility.pdf (last visited Oct. 20, 2022) (for a while, Washington's policy strongly mirrored the model policy from advocacy group LGBT Sports Foundation, as is common for most of the states with inclusive policies); *"All 50": The Transgender-Inclusive High School Sports and Activities Policy and Education Project: Proposed Model High School Policy,* LGBT SPORTS FOUNDATION (May 2, 2016), https://docs.wixstatic.com/ugd/2bc3fc_c8eeefb073a8421396f6520a4cca9f3b.pdf (deferring to a student's gender identity for eligibility determinations: it has since been amended and updated). *See infra* Section V.

17. *E.g.,* MO. STATE HIGH SCH. ACTIVITIES ASS'N, 2022-2023 OFFICIAL HANDBOOK 138 (94th ed. 2022), https://www.mshsaa.org/resources/pdf/Official%20Handbook.pdff (last visited Oct. 20, 2022) (requiring "one calendar year of documented medical/hormone treatment and/or suppression" before trans girls can compete on girls' sports teams).

18. TEX. EDUC. CODE ANN. § 33.0834 (2022). This Texas law uses only a student's gender listed on their birth certificate "at or near the time of the student's birth," *id. See 2021-2022 Constitution and Contest Rules*, UNIV. INTERSCHOLASTIC LEAGUE, § 360(h) (2021) [*hereinafter* Texas UIL C&CR]. Notably, this surpasses the previous state association policy allowing trans students to compete per their gender identity if they changed their birth certificate, *id. See also* IDAHO CODE ANN. §§ 33-6201–03 (requiring students whose gender is "disputed" to produce "a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex"); discussion *infra* Section III.C.

19. *See infra* Section V; *see also supra* notes 19–20 (the risk stems from the procedural capacity and freedom for local officials). *See also* Email Interview with Jason West, Communications Director, Mo. State High Sch. Activities Ass'n (September 8, 2021) (on file with author). It is difficult to more quantitatively assess the "risk" of such abuse because there is a dearth of data about trans student-athletes and the policies, *id*. Some states, like Missouri, collect data on the number of trans student-athletes admitted through the policy (six students from 2012-2021), *id.* However, this data does not include students that may have been interested but did not initiate the application process*, id*. *See also* Telephone Interview with Sam Brown, Eligibility Coordinator, Wash. Interscholastic Activities Ass'n (September 30, 2021). Furthermore, most of the inclusive-policy states decline to collect data out of privacy concerns, *id*. Brown elaborated the need better demographic data for both participants and their parents/guardians, *id.* Washington provided voluntary questionnaires over the last two years, but wants more data on what needs exist and how they can be supported, *id.*

20. This article is focused in scope on high school student-athletes and policies, although many of these policies affect and govern the eligibility of students in elementary or middle school.

21. *See infra* Section IV. Ombudspersons, providers of Alternative Dispute Resolution, are typically designated as "problem solvers" who provide counseling, advice, and mediation between an aggrieved party and the larger institution or organization that employs them, *id.*

Section II features a brief discussion of the health and medical information that will inform our subsequent discussion of cis and transgender student-athletes. Section III outlines the relevant federal law that stands today and suggests where states might expect federal law to trend in the near future. Section IV shifts to discuss the form and merits of Alternative Dispute Resolution ("ADR") and why it is appropriate to consider in the context of transgender student-athlete eligibility. Finally, Section V illustrates ADR as applied to drastically different state athletic association policies. Specifically, this section explains how ombuds programs are a solution to the de facto gaps in the current policies. It also reviews the benefits of using ADR to address and preempt transgender eligibility questions for students and schools to protect all parties.

II. A REVIEW OF RELEVANT VOCABULARY AND HEALTH BACKGROUND

Fourteen states and the District of Columbia incorporate trans-inclusive policies which rely on a student's gender identity.[22] Two states use a birth certificate rule to impose an ban on transgender student-athletes from competing consistent with their gender identity,[23] and eighteen states (and counting) have legislation that supersedes any athletic association policy and bans transgender student-athletes from participating consistent with their gender identity.[24] Eleven states first require a transgender girl to complete significant hormone therapy.[25] The remaining five states have no policy and leave the issue to local administrators.[26] While these policies affect both boys and girls, this article focuses on the effects on girls because these policies disproportionately burden girls.[27]

22. Chris Mosier, *K-12 Policies,* TRANSATHLETE.COM (Nov. 22, 2021), https://www.transathlete.com/k-12 (these states include California, Connecticut, Colorado, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington).

23. *Compare* Mosier, *supra* note 21, *with Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (last visited Sept. 30, 2022), https://www.lgbtmap.org/equality-maps/sports_participation_bans (the two states using the birth certificate are Georgia and New Mexico).

24. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (last visited Sept. 30, 2022), https://www.lgbtmap.org/equality-maps/sports_participation_bans (these states include Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia). As the Movement Advancement Project map and notes explain, several of these state laws face challenges in courts, and may not be in effect, *id*. This article reflects a snapshot of a highly volatile policy landscape consisting of overlapping political discourse, medical guidance, state association policies, and state legislation, *id.*

25. *Compare* Mosier, *supra* note 21, *with Bans on Transgender Youth Participation in Sports*, *supra* note 23 (those eleven states are Delaware, Illinois, Maine, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Virginia, Wisconsin, and Wyoming). As the Movement Advancement Project map and notes explain, several of these state laws face challenges in courts, and may not be in effect, *Bans on Transgender Youth Participation in Sports, supra* note 24. This article reflects a snapshot of a highly volatile policy landscape consisting of overlapping political discourse, medical guidance, state association policies, and state legislation, *id.*

26. *Compare* Mosier, *supra* note 21, *with Bans on Transgender Youth Participation in Sports*, *supra* note 23 (those five states are Alaska, Hawaii, Kansas, Michigan, and Pennsylvania).

27. Hecox v. Little, 479 F. Supp. 3d 930, 965–66 (D. Idaho 2020) (internal citations and footnotes omitted) (as one court explained, discussing the proposed law in Idaho, "As a cisgender girl who plays on the Boise High soccer team and who will run track on the girls' team in the spring, Jane is subject to worse and differential treatment than are similarly situated male students who play for boy's teams in Idaho. Jane has suffered an injury because she is subject to disparate rules for participation on girls' teams, while boys can play on boys' teams without such rules. That Jane has not had her sex challenged

Before evaluating these policies for legality, effectiveness, and inclusiveness, we will first examine the medical context that some transgender children must navigate as a requirement to play sports. By demanding medical procedures for eligibility, states and schools erect a barrier to participation. Model policies articulate a standard based on gender *identity*, but some state and school policies impose additional standards based instead on medical procedures, which are not necessarily relevant to someone's gender identity.[28] In this way, discriminatory policies and standards force students to consider medical treatments and procedures that are at best incongruous with standard medical consensus.[29] At worst, these policies scorn the medical community's guidance. Restrictive state policies therefore may compel transgender student-athletes to sacrifice their health in pursuit of a chance to be eligible to participate in competition consistent with their gender identity.

A. Vocabulary and Biology

This article uses the term "trans" and "transgender"[30] to inclusively to describe people whose gender identity is different from their sex assigned at birth. "Gender expression," on the other hand, refers to how someone expresses their gender in public, which can include "haircut, clothing, voice and body characteristics, and behavior."[31] Similarly, but separately, "gender presentation" is how the world sees and understands a person's gender.[32] Finally, the broad term to which many state laws and policies refer, "gender identity," is a "personal sense of what our own gender is."[33] The term "transgender" will only be used as an adjective and never as a noun.[34] Transgender persons may prefer to identify as transsexual, as reflected in some sources, "although others consider the term to be outdated."[35] The most respectful practice is to "ask for, and use, the term that a person prefers."[36]

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does not change the fact that she is subject to different, and less favorable, rules for participation on girls' teams that similarly situated boys are not. In addition to being subject to disparate treatment on the basis of her sex, Jane reasonably fears that her sex will be disputed and that she will suffer the further injury of having to undergo the sex verification process. . . [h]er general fear of being subjected to the dispute is credible because the Act currently provides that essentially anyone can challenge another female athlete's sex and protects any challenger from adverse action regardless of whether the dispute is brought in good faith or simply to bully or harass. Although, as Defendants note, the State Board of Education may promulgate regulations that narrow the Act's dispute process, Jane risks being subject to the currently unlimited process as soon as she tries out for Boise High's soccer team on or around August 17, 2020.").

28. *See infra* text accompanying notes 28–29.

29. *See infra* Section II.B (explaining the variety of health considerations for trans student athletes, which do not comport well with some one-size-fits-all policy that requires students to make certain medical decisions).

30. *Understanding Gender Identities*, TREVOR PROJECT (Aug. 23, 2021), https://www.thetrevorproject.org/trvr_support_center/trans-gender-identity (an additional comment on transgender identity: if a person decides their current gender or sex is not "right," and they want to make their gender identity fit with their ideal gender expression and presentation, that experience is called "transitioning;" this can be social (telling other people about their preferred pronouns), legal (changing their name, officially), or medical (with hormones or surgery); none of these are a prerequisite "to be 'officially' transgender, or to have [one's] gender identity be valid.").

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Understanding Gender Identities*, TREVOR PROJECT (Aug. 23, 2021), https://www.thetrevorproject.org/trvr_support_center/trans-gender-identity/.

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The Diagnostic and Statistical Manual of Mental Disorders (DSM-V) defines "Gender Dysphoria"[37] for adolescents as "[a] marked incongruence between one's experienced/expressed gender and assigned gender."[38] The most restrictive state policies often limit student-athletes to their gender assigned at birth, according to their birth certificate.[39] Other policies identify vague physiological standards for transgender student-athletes.[40] "However, these strict references to 'sex' are limited to one's 'anatomy, biology, and physiology,' and are based upon tangible structures of the body, particularly 'genitalia, chromosomal structure, and internal sexual organs.'"[41] "Gender," on the other hand, "refers to an individual's self-image, how others perceive the individual, and the underlying stereotypes surrounding sex."[42] As in colloquial conversation, courts frequently misuse these terms as synonymous,[43] but they are not. This conflation of gender with "genitalia and reproductive capacity" leads to an unwarranted and "[inaccurate assumption] that sex and gender fit together; that gender follows from sex."[44] Inversely, academics, medical professionals, and advocates recognize that gender is more relevant than anatomy or biology.[45]

Nevertheless, many state policies focus only on sex and birth certificates.[46] These state policies put the cart before the horse, and proceed to put blinders on their horse, too.[47] While some state policies require hormone treatment or surgery,[48] these requisites are not always financially feasible[49] or biologically healthy for high school student-athletes.

37. *See* Amets Suess Schwend, *Trans Health Care from a Depathologization and Human Rights Perspective*, 41 PUB. HEALTH REV. 1, 8 (2020) (while many advocates welcome the adoption of "gender dysphoria" over the previous term "gender identity disorder," there are still calls for trans depathologization, namely, "the removal of the diagnostic classification of transexuality as a mental disorder," and "changes in the health care and legal context.").

38. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §302.85 (5th ed. 2013).

39. *See, e.g., Subchapter J Section 360*, TEX. UNIV. INTERSCHOLASTIC. LEAGUE, https://www.uiltexas.org/policy/constitution/general/nondiscrimination (last visited Oct. 25, 2022) (stating "[g]ender shall be determined based on a student's birth certificate.").

40. *See, e.g.*, *IHSAA Gender Policy*, IND. HIGH SCH. ATHLETIC ASS'N, INC., https://myihsaa-prod-ams.azurewebsites.net/api/resource-library/categories/07d0f399-73b3-421c-a407-08d5e7b1cb1f/documents/94d527da-68e3-4f23-734b-08d7b55fcb06/file (Mar. 31, 2021). *See also infra* Section V.

41. Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 600 (1998).

42. *Id.* at 600–01; *see* Kerrie J. Kauer & Vikki Krane, *"Scary Dykes" and "Feminine Queens": Stereotypes and Female Collegiate Athletes*, WOMEN SPORT & PHYSICAL ACTIVITY J. 42, 42–55 (2006), for a discussion of harmful gender stereotypes in athletics.

43. Barnes, *supra* note 40, at 601 (citing Leslie Pearlman*, Transsexualism as Metaphor: The Collision of Sex and Gender,* 43 BUFF. L. REV. 835, 839 (1995)).

44. Barnes, *supra* note 40, at 601.

45. *See* Barnes, *supra* note 40, at 601.

46. *See, e.g.*, *Subchapter J Section 360, supra* note 38.

47. If this metaphor is perplexing, perhaps that matches the equally confusing ambition of many states to create a policy for high school children (as young as thirteen) which is stricter and more invasive than the International Olympic Committee's policy for transgender athletes vying for medals in the most competitive, global forum in sports.

48. *See* Mosier, *supra* note 21 (Kentucky and Louisiana previously required surgery); *Bans on Transgender Youth Participation in Sports*, *supra* note 23 (state legislative bans recently superseded these policies).

49. *See* CTR. AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE 7 (2015), https://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf (for example, there is usually not healthcare coverage for "transition-related care" such as "hormone replacement therapy, mental health services, and reconstructive surgeries even when the same services are covered for non-

B. Hormone Therapy and Surgical Standards of Care According to the World Professional Association for Transgender Health[50]

Hormone therapy and transgender health require complex and individualized considerations, and do not sit safely under a "one-size-fits all" rule.[51] The World Professional Association for Transgender Health ("WPATH") notes that "[h]ormone therapy must be individualized based on a patient's goals, the risk/benefit ratio of medications, the presence of other medical conditions, and consideration of social and economic issues."[52]

There are two forms of hormone therapy. The first form is hormone suppression, which is fully reversible.[53] Here, patients "use gonadotropin releasing hormone[54] analogues to suppress estrogen or testosterone production and consequently delay the physical changes of puberty."[55] In the second form of therapy, patients use hormones that induce changes to develop masculine or feminine features. The changes from this second form of treatment are only partially reversible, and "may need reconstructive surgery to reverse the effect."[56]

Given the gravity of the effects of hormone treatment on developing adolescents, WPATH identifies four pre-requisites to hormone therapy for this patient population:

1. The adolescent has demonstrated a long-lasting and intense pattern of gender nonconformity or gender dysphoria (whether suppressed or expressed);
2. Gender dysphoria emerged or worsened with the onset of puberty;
3. Any co-existing psychological, medical, or social problems that could interfere with treatment (e.g., that may compromise treatment adherence) have been addressed, such that the adolescent's situation and functioning are stable enough to start treatment;
4. The adolescent has given informed consent and, particularly when the adolescent has not reached the age of medical consent, the parents or other caretakers or guardians have consented to the treatment and are involved in supporting the adolescent throughout the treatment process.[57]

Unfortunately, transgender teens experience some of the highest rates of mental health concerns,[58] and participation in athletics is a powerful way to support and

transgender people;" furthermore, "few states explicitly prohibit gender identity based discrimination in health insurance . . . [and] few states have issued guidance explicitly prohibiting discrimination against transgender people and requiring insurance companies to remove anti-transgender exclusions from their plans.").

50. *See infra* Section V. Although some of the language in this section is highly technical, these details can be helpful in understanding the implications of policies that require gender-affirming care as a requisite to competition, *id*. This section also illuminates the concern that some policies might be creating ambiguous, moving targets with their "physiological" standards, *id.*

51. WORLD PRO. ASS'N TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 5 (7th ed. 2012), https://www.wpath.org/publications/soc.

52. *Id.* at 33.

53. *Id.* at 18–20.

54. Also known as "GnRH," this is a hormone that helps the body release other hormones that develop male and female reproductive health during puberty.

55. WORLD PROF. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 18.

56. WORLD PROF. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 18.

57. WORLD PROF. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 19.

58. *See* Jonathon W. Wanta et al., *Mental Health Diagnoses Among Transgender Patients in the Clinical Setting: An All-Payer Electronic Health Record Study*, 4.1 TRANSGENDER HEALTH 313, 314 (2019)

nurture adolescent mental health.[59] However, the ability to participate is currently under siege for many transgender student-athletes. The teenage and pubescent years are especially crucial because, as WPATH notes, hormone therapy is not appropriate before a patient begins puberty.[60] As patients begin taking advantage of feminizing or masculinizing hormones, there are risks associated with the treatment, as outlined in the table below.

Table 1: Risks associated with hormone therapy.[61]

Risk Level	Feminizing hormones	Masculinizing hormones
Likely increased risk	Venous thromboembolic disease (blood clots) Gallstones Elevated liver enzymes Weight gain Elevated triglycerides in blood	Polycythemia (excess red blood cells) Weight gain Acne Androgenic alopecia (balding) Sleep apnea
Likely increased risk with presence of additional risk factors	Cardiovascular disease	
Possible increased risk	Hypertension Hyperprolactinemia or prolactinoma (excess hormone, prolactin, in blood)	Elevated liver enzymes Hyperlipidemia (cholesterol)
Possible increased risk with presence of additional risk factors	Type 2 diabetes	Destabilization of certain psychiatric disorders Cardiovascular disease Hypertension Type 2 diabetes

(finding that 13% of the general population has at least one mental health diagnosis compared to 58% of transgender patients).

59. Jean-Philippe Chaput et al., *2020 WHO Guidelines on Physical Activity and Sedentary Behaviour for Children and Adolescents Aged 5–17 Years: Summary of the Evidence*, 17 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 141, 141 (2020) (discussing the mental and physical health benefits of physical activity for children and adolescents).

60. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 18–20.

61. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 40.

While some states require surgery as a participation prerequisite for transgender students, WPATH only describes this treatment option as often the last step in the treatment process for gender dysphoria.[62] Furthermore, WPATH offers the reminder that "many transsexual, transgender, and gender nonconforming individuals find comfort with their gender identity, role, and expression without surgery."[63] Therefore, if a state allows transgender student-athletes to participate consistent with their gender identity only *after* surgery, that state is categorically barring participation for many transgender student-athletes. Specifically, such policies may exclude transgender competitors that are still in the early stages of transitioning, students that might be several years into hormone therapy, and those who "find comfort with their gender identity without surgery."[64]

The purpose of the above medical discussion is not to question WPATH's robust and firm endorsement of transgender healthcare measures.[65] Rather, this section shows the inherent complexity and individualized nature that characterizes transgender healthcare. Accordingly, it is inconsistent with the medical community's professional healthcare standards for state policies to demand that adolescents are prepared to begin and possibly complete serious, sometimes permanent treatment options, particularly considering the time sensitive nature of sports seasons.

III. FEDERAL LAW

This section reviews recent federal cases that address protections for transgender students under Title IX[66] and the Equal Protection Clause of the Fourteenth Amendment.[67] The current trend in federal court is prohibiting discrimination against persons with transgender status. The issue that remains is what, if any, state interests allow such discrimination against transgender students.

A. Bostock and the But-For Causation Test for Sex-Based Discrimination

In *Bostock v. Clayton Cty., Georgia*,[68] the Supreme Court determined that Title VII[69] protects transgender employees from discrimination in the workplace[70] by defining such discrimination as discrimination "based on sex."[71] *Bostock* decided

62. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 54.
63. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 54.
64. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 54.
65. *See* WORLD PRO. ASS'N TRANSGENDER HEALTH, *supra* note 50, at 107 ("Follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function.").
66. *See* 20 U.S.C. § 1681 (2002).
67. U.S. CONST. amend. XIV, § 1, cl. 4.
68. 140 S. Ct. 1731 (2020).
69. *See* 42 U.S.C. § 2000e–2.
70. *See* Pamela Prescott, *"Entitled": Why Victims of Sex Discrimination Should Be Entitled to Seek Relief Under Title VII and Title IX*, 54 CAL. W. L. REV. 267, 275–76 (2018) (". . . Title VII has been used as a framework for analysis in sex discrimination cases arising from education . . . fields."); *see also* J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass "Gender"?*, 51 J. MARSHALL L. REV. 225, 248 (2018) ("[W]e turn to Title VII to analyze gender discrimination as potential Title IX sex discrimination.") (discussion of transgender protection under Title VII is helpful because Title VII workplace analysis is often instructive for Title IX education analysis).
71. *Bostock*, 140 S. Ct. at 1741.

three similar cases that involved employees whose employers fired them after learning of the employees' LGBTQ+ status.[72] The transgender plaintiff was Aimee Stephens, who worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan.[73] After presenting as male for six years, she disclosed to her employer that "she planned to 'live and work full-time as a woman' after she returned from an upcoming vacation."[74] The funeral home terminated Ms. Stephens before she left for vacation.[75]

Justice Gorsuch, writing for the majority, identified that the task for the Court was to "determine the ordinary public meaning of Title VII's command that it is 'unlawful . . . for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .'"[76] The Court adopted a textualist approach and embraced the defendant-employer's suggestion that "sex" in the statute referred "only to biological distinctions between male and female."[77] Using this understanding of the statute, the Court applied a but-for causation test, and explained that a "defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law."[78]

Incorporating the but-for test, the Court reasoned that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex" because "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[79] *Bostock* and Title VII therefore protect "otherwise identical" persons subject to intentional penalties for traits or actions by cisgender individuals, because an individual's sex at birth "plays an unmistakable and impermissible role in the discriminatory action."[80] However, Title VII only serves to curtail workplace discrimination.[81] This begs the question: how does the *Bostock* ruling operate in the context of education claims based not on Title VII, but on Title IX[82] and the Equal Protection Clause?

72. *Id.* at 1737.
73. *Id.* at 1738.
74. *Id.*
75. *Id.*
76. *Id.* at 1738 (citing 42 U.S.C. § 2000e).
77. *Bostock*, 140 S. Ct. at 1739.
78. *Id.*
79. *Id.* at 1741–42 (Justice Gorsuch offered an illustration of this "simple but momentous" message) ("[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.").
80. *Id.*
81. *See* 42 U.S.C. § 2000e–2(a)(1).
82. *See, e.g.*, *Grimm,* 972 F.3d 586 at 616 ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX."); Emeldi v. Univ. of Or., 698 F.3d 715, 724 (9th Cir. 2012) (interpreting Title IX provisions in accordance with Title VII); *see also* Prescott, *supra* note 69 (". . . Title VII has been used as a framework for analysis in sex discrimination cases arising from education . . . fields.").

B. Bostock and Bathrooms: Transgender Protections in Education

Professor Jeremiah A. Ho[83] is not satisfied with the protection that *Bostock* affords to transgender persons, lamenting that "*Bostock*'s textualism leaves heteronormative gender stereotypes intact."[84] Professor Ho argues that instead, "future pro-LGBTQ decisions must revive and develop anti-stereotyping rationales that appropriately and honestly regard the experiences of queer minorities."[85] Ho highlights the Eleventh Circuit's analytical merger of the *Bostock* but-for causation test with anti-stereotyping analysis in transgender discrimination cases. [86]

Likewise, the Fourth Circuit applied this very same "merged" reasoning in a post-*Bostock* case to protect a transgender plaintiff's bathroom access. In *Grimm v. Gloucester Cty. Sch. Bd.*,[87] Gavin Grimm (assigned female at birth) entered his sophomore year living fully as a boy.[88] The defendant school board required students to use only restrooms matching their "biological gender,"[89] and provided single stall bathrooms for students with "'gender identity issues.'"[90] In *Grimm*, the Fourth Circuit "join[ed] a growing consensus of courts" and held that the Equal Protection Clause of the Fourteenth Amendment and Title IX "can protect transgender students from school bathroom policies that prohibit them from affirming their gender."[91] The court applied the *Bostock* but-for test and determined that the school board violated Title IX.[92] The *Grimm* court noted that even if the Board was primarily motivated to exclude Grimm because of his transgender status, "his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys [sic] restrooms 'on the basis of sex.'"[93] Going beyond *Bostock*, the court also found that Grimm suffered significant physical and psychological harm from the policy.[94]

Furthermore, independent of *Bostock* analysis, the court found the bathroom policy was a violation of the Equal Protection Clause.[95] The court determined the

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83. *Faculty, Biography of Jeremiah Ho*, UNIV. MASS. L., https://www.umassd.edu/directory/jho/ (last visited Oct. 9, 2022) (Professor Ho teaches at University of Massachusetts School of Law and writes frequently about inequity in law as it pertains to sexuality, race, and culture).

84. Jeremiah A. Ho, *Queering Bostock*, 29 AM. U.J. GENDER SOC. POL'Y & L. 283, 364 (2021).

85. *Id.* at 364–65. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 228 (1989) (largely the source of the "anti-stereotyping rationale" for which Ho calls; Ho discusses the anti-stereotyping rationale's subsequent lack of momentum in discrimination claims but argues that post-*Bostock* employment cases should feature "both textualism and gender stereotyping theories . . . side-by-side.").

86. Ho, *supra* note 83 at 366–67 (specifically, the analysis in *Kasper v. Sch. Bd. St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) considers the plaintiff's harm, distress, anxiety, and psychological and dignitary harm resulting from the stigma of the discriminatory policies).

87. *Grimm,* 972 F.3d at 612.

88. *Id*. at 593–94.

89. *Id.* (using the term "biological gender" to refer to a student's gender assigned at birth).

90. *Id.* (using the term "gender identity issues" to refer to transgender students).

91. *Id.*

92. *Id.* at 616–17.

93. *Grimm*, 972 F.3d 586 at 616–17.

94. *Id.* at 617–18. The court had "no difficulty holding that *Grimm* was harmed," citing the stigma of a "walk of shame" to a bathroom in such a remote area that he was often late to class, *id.* The burden drove *Grimm* to avoid using the restroom so much that he developed painful urinary tract infections, *id.* The stress culminated into suicidal thoughts that led to his hospitalization at Virginia Commonwealth University Medical Center Critical Care Hospital, *id.*

95. *Id*. at 615.

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Board must discriminate by sex in order to discriminate on transgender status.[96] The Board argued that the policy was not an Equal Protection violation because Grimm should be compared with "biological" girls under the policy, but the court rejected this defense.[97] The court also held that transgender students qualify for heightened scrutiny as a quasi-suspect class, and ultimately concluded that the policy was "not substantially related to [the Board's] important interest in protecting students' privacy."[98]

Grimm is an example of a Circuit Court using the *Bostock* but-for test to find that a bathroom policy targeting transgender students violates Title IX by discriminating on the basis of sex.[99] Likewise, the Fourth Circuit was only the third Court of Appeals to consider whether to apply heightened scrutiny during Equal Protection analysis of laws that facially discriminate against transgender students.[100] In *Grimm*, the Fourth Circuit joined the Seventh[101] and Eleventh[102] Circuits in applying heightened scrutiny to these facially discriminatory policies.[103] This is the landscape for post-*Bostock* bathroom bills, but the next question extends past bathrooms and onto sports fields: "do these attempts to ban trans kids from sports teams have any better justification under heightened scrutiny than laws banning trans kids from using the restrooms?"[104]

C. *The Uncharted Waters of Bostock and Sports*

Of the sparse cases to hear these "better justifications,"[105] *Hecox v. Little*[106] offers an illustration of how courts might address the above question under *Bostock*. On March 30, 2020, Idaho passed the "Fairness in Women's Sports Act."[107] Two transgender athletes[108] brought Title IX and Equal Protection challenges against two of the act's functions.[109] First, this act categorically barred transgender girls and

96. *Id.* at 609 (interestingly, without explicitly referencing *Bostock*, this Equal Protection analysis continues to borrow from *Bostock*'s but-for sex-based discrimination logic).

97. *Id.* at 609–10. The court here criticized the Board's bias for believing that gender identity is a choice, *id.* "[The Board] privileges sex-assigned-at-birth over Grimm's medically confirmed, persistent and consistent gender identity . . . Adopting the Board's framing of Grimm's equal protection claim here would only vindicate the Board's own misconceptions, which themselves reflect 'stereotypic notions'.", *id.* Such analysis aligns with the but-for and anti-stereotyping merger outlined by Professor Ho, *id.*

98. *Id.* at 613 (The court reviewed the details of the bathroom reality under the policy, finding that "[t]he Board does not present any evidence that a transgender student . . . [and] that bodily privacy of cisgender boys using the boys restrooms did not increase when Grimm was banned from those restrooms.") (the court actually suggested privacy increased when Grimm was permitted to use the boys bathroom, because the Board installed extra privacy screens between the urinals.).

99. *Grimm*, 972 F.3d 586 at 616–17.

100. *Id.* at 608.

101. *Whitaker*, 858 F.3d at 1050.

102. Adams v. Sch. Bd. of St. Johns Cnty., Fla., 3 F.4th 1299, 1307 (11th Cir.), reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021).

103. *Grimm*, 972 F.3d at 610.

104. Bianca Quilantan, *'This isn't the Olympics': GOP transgender laws head to court*, POLITICO (Jul. 3, 2021, 7:01 AM) https://www.politico.com/news/2021/07/03/transgender-laws-court-sports-restrictions-gop-497892 (quoting Josh Block, senior staff attorney with the American Civil Liberties Union LGBTQ & HIV Project).

105. *Id.*

106. 479 F. Supp. 3d 930 (D. Idaho 2020).

107. WEST'S IDAHO CODE ANN. §§ 33-6201–6206 (West 2022).

108. *Hecox*, 479 F.Supp.3d 930, 946 (D. Idaho 2020).

109. *Id.* at 944–45.

women from participating in girls' and women's sports.[110] Second, the act allowed schools to dispute a student-athlete's sex, forcing that student to submit to an examination of their "reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels."[111]

The district court issued a preliminary injunction for the plaintiffs, enjoining the state's policy, after finding a likelihood of success on the merits for the plaintiffs' Equal Protection claim.[112] The *Hecox* court explained that the policy discriminated against the plaintiffs because it "exclude[ed] transgender women and girls from women's sports entirely, regardless of their physiological characteristics," and that the state failed to "[offer] evidence that the Act is substantially related to its purported goals of promoting sex equality."[113]

Hecox is not a perfect example of how federal courts will address transgender sports bans. It does not yet offer decision on the merits,[114] and the Ninth Circuit has yet to decide on the issues.[115] Likewise, it features a law that stands on the far end[116] of the exclusive side of the inclusion-exclusion spectrum of relevant state polices and legislation.[117] However, two components of the court's analysis are relevant for considering the future of transgender sports legislation.

First, the court applied the *Bostock* but-for causation test to find that Idaho's law discriminates on the basis of sex.[118] Second, the court did not accept the state's arguments or evidence that the policy served the government interest in supporting sex equality.[119] Therefore, we have one answer to our question "do these attempts to ban trans kids from sports teams have any better justification under heightened scrutiny than laws banning trans kids from using the restrooms?":[120] as far as the federal district court of Idaho is concerned, the answer is no.[121]

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110. §§ 33-6201–6203.

111. § 33-6203(3).

112. *See Hecox* 479 F. Supp. 3d 930 at 984–85, 987.

113. *Id*. (suggesting the law and its purported goals of sex equality failed to reckon with either medical evidence or athletic opportunities and scholarships for girls and women).

114. *Id*. at 985, 988.

115. Re: Hecox v. Little, Nos. 20-35813, 20-35815, 2021 U.S. App. WL 2189094 (9th Cir. May 20, 2021) (the latest update from the Ninth Circuit was a remand to the District Court to determine if the plaintiff's claim is moot).

116. *See infra* Section V (this may be on the extreme end of the spectrum, but it is growing in popularity in conservative states).

117. IDAHO CODE § 33-6203 (policy based itself solely on "biological sex," determined by an athlete's sex at birth, without any consideration for hormone therapy).

118. *Hecox*, 479 F. Supp. 3d at 970 (citing *Bostock*, 140 S. Ct. at 1741) ("[A]lthough in the context of Title VII, the Supreme Court has, as mentioned, recently stated, 'it is impossible to discriminate against a person for being… transgender without discriminating against that individual based on sex'.").

119. *Hecox*, 479 F. Supp. 3d at 983 (the court found the ban was not justifiable discrimination because the state failed to demonstrate that the policy would support sex equality, stating "Based on the dearth of evidence in the record to show excluding transgender women from women's sports supports sex equality, provides opportunities for women, or increases access to college scholarships . . . [Plaintiff's likelihood for success] is further enhanced by [the state's] implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider's verification stating that a transgender woman athlete is female.").

120. Quilantin, *supra* note 103 (quoting Josh Block, senior staff attorney with the American Civil Liberties Union LGBTQ & HIV Project).

121. *See also* Soule v. Conn. Ass'n of Schs., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *6 (D. Conn. Apr. 25, 2021) (the issue of whether a school policy which allows trans student athletes to participate in high school athletics violates title IX is moot); 2011 Conn. Pub. Acts No. 11-55 (Connecticut legislation extending protections from discrimination to include gender identity or expression, including in public school activities).

This brief discussion of federal law offers insight into the budding trend of transgender athlete state legislation and litigation, which suggests that Idaho-like plans stand on shaky ground.[122] Regardless of how some state legislatures may feel, transgender athletes are not going away. Notwithstanding constitutional requirements, the medical community also supports sports participation that aligns with gender identity.[123] For these reasons, states should adopt proactive policies to protect the rights and obligations of the state, the schools, and the students. No matter the policy a state adopts, an ombuds program will help them implement and optimize their plan in an effective manner.

IV. ALTERNATIVE DISPUTE RESOLUTION

This section explains the methods and benefits of ADR, and how they are relevant to transgender student-athlete eligibility. ADR will allow states and schools to efficiently educate parties and implement their policies at the local level. States can also preempt and resolve the contentions that schools and students encounter from questions or concerns regarding this issue. Notably, where all parties are keen to carefully guard their interests, ADR will help protect rights and obligations by way of an ombuds program.

A. Alternative Dispute Resolution: The Process and the Benefits

ADR is a broad label given to numerous options for parties to resolve disputes outside of a public trial.[124] Some of the advantages and incentives of ADR include privacy, voluntariness/consent, expediency, flexibility, efficiency, increased control by the parties, cooperative and expansive outcomes, maintenance of relationships, and specialized knowledge held by the third party facilitating the ADR process.[125] At the same time, ADR is not a one-size-fits-all solution. Specifically, and relevant to the issue at hand, ADR may not be appropriate where: one party wishes to have a public jury trial to air a grievance;[126] a dispute turns on substantive legal issues rather than factual issues;[127] a power imbalance exists;[128] or a party wishes to establish a judicial precedent that will have a binding effect on non-parties.[129]

One distinction among approaches is the distributive versus integrative spectrum. A distributive ADR process can be more adversarial because it addresses problems as "zero sum," with a fixed number of resources over which parties haggle

122. *See Legislative Tracker: Anti-Transgender Legislation,* FREEDOM FOR ALL AMS., https://freedomforallamericans.org/legislative-tracker/student-athletics/ (last visited Nov. 26, 2021) (legislation enacted by Arizona, Illinois, New Hampshire, Oklahoma, Pennsylvania, South Carolina, and Wisconsin).

123. *See supra* Section II.

124. JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 1.1 (Thomson West 4th ed. 2016).

125. *Id*. at 4 (this list is far from exhaustive).

126. *Id*. at 5–6 (other examples where ADR may not be optimal include where: one party is a stakeholder financially benefitting from a delay; linkage exists; there are credibility questions; there are multiple parties; an adversary is unreasonable; and when extensive discovery is necessary).

127. *Id.*

128. *Id.*

129. *Id.* (other examples where ADR may not be optimal include where: one party is a stakeholder financially benefitting from a delay; linkage exists; there are credibility questions; there are multiple parties; an adversary is unreasonable; and when extensive discovery is necessary).

and divide.[130] Conversely, an integrative approach seeks to "expand the pie" of available resources.[131] While not always feasible, this approach allows parties to accommodate each other's interests as they include more creative solutions for a "win-win" result.[132] Additionally, parties can understand ADR through the lens of "the basis on which decisions are made,"[133] namely relationship-based, power-based, rights-based, or interest-based. Although the benefits of ADR are often found in these more diverse and flexible approaches, the parties in dispute may not agree on which basis is most appropriate.

Relationship-based approaches can focus on narratives, and can be seen in restorative justice[134] efforts.[135] A power-based option is the most competitive and is characterized as the process in which the more powerful party wins the dispute.[136] With a similarly narrow scope, the rights-based or entitlement-based option focuses most on rights and entitlements.[137] This most closely mirrors traditional courtroom adjudication but can still be present in mediation and arbitration.[138] Finally, interest-based approaches adopt the integrative process to prioritize accommodating parties' interest in a "value creating" process through which both parties win.[139] Importantly, as compared to a rights-based approach, the interest-based perspective allows for the assumption that the parties' interests may not necessarily come at the expense of one another.

B. Ombuds[140] and ADR

One form of ADR is ombuds programs. Ombudspersons are typically designated as "problem solvers" who provide counseling, advice, and mediation for an aggrieved party and the larger institution or organization that employs them.[141] They can serve as a neutral liaison or contact between the individual and the institution, where they supplement and support an existing procedure.[142]

Ombuds programs may have a variety of missions and methods. They can prioritize protecting human rights, or instead focus on ensuring fair administrative

130. Catherine Morris, *Definitions in the Field of Conflict Transformation*, PEACEMAKERS TR., https://www.peacemakers.ca/publications/ADRdefinitions.html (last visited Nov. 26, 2021).
131. *Id.*
132. *Id.*
133. *Id.*
134. GRENIG, *supra* note 123, at § 2:39 (restorative justice allows victims and community members to help collectively determine the resolution and aftermath after a crime, with a particular focus on the needs of the victim, rather than retributive punishment for the offender).
135. Morris, *supra* note 129 (because dispute resolution has the potential for contention and ill feelings between the parties, a relationship-based approach can be helpful for parties that frequently interact with one another, and will continue to do so in the future . . . [f]or example, a supplier and a vendor may be in dispute over a recent delivery, but the longevity of their relationship can be prioritized over a purely adversarial and distributive competition over their dispute).
136. Morris, *supra* note 129.
137. Morris, *supra* note 129.
138. Morris, *supra* note 129.
139. Morris, *supra* note 129.
140. Morris, *supra* note 129 ("The term 'ombudsman' is Swedish in origin and means 'representative.' The Swedish term is said to be etymologically gender inclusive, but in the English language, the term is often modified as 'ombudsperson' or 'ombuds' office.") (this article uses "ombuds" and "ombudsperson" interchangeably).
141. GRENIG, *supra* note 123, at § 2.28.
142. GRENIG, *supra* note 123, at §15.1.

proceedings.[143] Likewise, some may use mediation, while others rely more on investigation and recommendation to either an executive or governing body.[144] Regardless, the necessary requisites for any office are threefold: "impartiality, the power to investigate and the power to recommend changes."

Some strengths of an ombuds program include: a neutral, objective evaluation in disputes; protected privacy and confidentiality; and reduced litigation and legal fees.[145] Particularly relevant to gender identity eligibility policies, ombuds offices can provide information that might not otherwise be available to district and state athletic association offices.[146] Furthermore, ombuds programs offer a means by which institutions can identify and correct weak procedural and compliance measures.[147]

Critics of an ombuds office frequently describe it as costly and ineffective because its investigation and input are not binding.[148] Likewise, in order for the office to help resolve disputes, parties must be fully informed of the office's role and benefits, take the ombuds seriously, and be assured of the ombuds's neutrality.[149] Most significantly, "[i]n circumstances where unfairness appears to have occurred, gathering information and not taking action to correct the problem would render the [ombudsperson] ineffective and the [ombudsperson] may be regarded as a protector of the status quo."[150]

It may be a steep hill to propose a flexible ADR approach to transgender eligibility, because ADR is in many ways the antithesis of one getting to "have their day in court." The stakes are high for all parties, and they deserve a process that preserves the rights and obligations of everyone at the table. As one author identified this tension:

For many clients, the idea of settling a matter in which they believe they are indisputably right is so vexing that they would prefer the cost, delay, and intrusiveness of litigation rather than feel that they have acquiesced. Adjudicative forms of ADR might be appropriate in such cases, unless the client believes that public vindication is needed, but settlement-oriented forms of ADR may be inappropriate.[151]

Athletes, advocates, and stakeholders from all perspectives generally hold strong convictions regarding transgender student-athlete eligibility. Such strongly held, rights-based interests might suggest that parties would prefer to deal with the drawbacks of litigation, "rather than feel that they have acquiesced."[152] However,

143. Morris, *supra* note 129.
144. Morris, *supra* note 129.
145. GRENIG, *supra* note 123, at §15.3.
146. GRENIG, *supra* note 123, at §15.3 (as discussed *infra* note 241, state athletic associations face a challenge in crafting and evaluating policy because transgender identity statistics are often only collected on a voluntary basis).
147. GRENIG, *supra* note 123, at §15.3.
148. GRENIG, *supra* note 123, at §15.3.
149. GRENIG, *supra* note 123, at §15.3.
150. GRENIG, *supra* note 123, at §15.3.
151. David A. Hoffman, *Alternatives to Litigation*, *in* MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL ch. 10 sec. 4.2 (Mass. Continuing L. Educ. eds., 5th ed. 2021).
152. *Id.*

the time-sensitive nature of sports often diminishes the value of litigation as a means of addressing eligibility conflicts.[153]

Another concern for high schools and student-athletes is confidentiality. Students may not want to advertise their transgender status to their peers or community, and schools may wish to limit their involvement in any dispute deemed controversial.[154] ADR policies allow "administrators and student-athletes [to] resolve their conflicts privately, away from direct public scrutiny."[155]

The flexibility of an ADR forum likely provide more benefit to pending student-athletes than their potential administrative opponent. A state athletic association or school district will have more resources to fight in court and less incentive to reach a timely resolution for a single athlete. Furthermore, the expense and hassle of a lawsuit represents a more imposing obstacle for individual students seeking a resolution before their season commences.

On the other hand, any student-athlete seeking to change an administrative policy may be less satisfied with an ADR forum. These principles and processes offer efficient, individualized dispute resolution, but are ill-suited to induce sweeping policy changes.[156] This drawback cannot be disregarded. Lawsuits stemming from transgender eligibility policies evidence this where claims for relief exceed the scope of an as-applied challenge by the individual plaintiff athlete and present the court with facial challenges to the policy as a whole.[157]

Some may question the appropriateness of an ombudsperson and ADR in such a sensitive, values-based issue. Advocates protesting trans-inclusive policies are concerned that such measures threaten equality and opportunity for women in sports.[158] On the other hand, advocates for trans athletes want trans students to be able to enjoy sports like their cisgender peers: competing consistent with their gender identity.[159] As parties on both sides of this issue cite federal civil rights protections, one might be cautious to resolve these rights-based claims in a forum that is most known for its integrative, interests-based approach.

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153. *Soule*, 2021 WL 1617206, at *6 (for example, cisgender plaintiff's enjoinment action against the Connecticut Interscholastic Athletic Association's gender-identity affirming policy was found to be moot).

154. Dominic D. Saturday et. al., *Get Off the Courts: Using ADR Principles to Resolve High School Sport Disputes*, 28 MARQ. SPORTS L. REV. 359, 369 (2018).

155. *Id.*

156. Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1415–16 (2019). (As one observer noted ". . . even if dispute resolution sought to increase access to justice by creating new venues for disputes to be addressed and for those on the margins to raise disputes and air their grievances, critics argued that it did so in a way that promoted an ideology of social harmony and avoided questions of right. Resolving a series of individual disputes through private means would not create legal or social change, even if such means would permit individual disputes to be resolved more efficiently. This was a part of the more generalized concern that ADR dissolved big questions of public values into small matters of private interest, so context dependent that shared features were obscured.") (internal citations omitted).

157. *E.g.*, *Soule*, 2021 WL 1617206, at *6 (finding moot a request for an injunction enjoining enforcement of the CIAC policy that permitted transgender student-athletes to compete consistent with their gender identity); *Hecox*, 479 F. Supp. 3d, at 988 (issuing an injunction against Idaho law that effectively barred transgender girls from competing in girls' sports after finding the law to be likely unconstitutional).

158. Telephone Interview with Christina Holcomb, Counsel, Alliance Defending Freedom (Oct. 14, 2021).

159. *See* Quilantan, *supra* note 103.

However, other values and rights-based issues Disability rights is one arena where governmental agencies use ADR processes.[160] ADR options exist across a wide variety of circumstances, including labor disputes, Americans with Disabilities Act ("ADA") disputes, Equal Employment Opportunity Commission ("EEOC") claims, and conflicts arising under the Individuals with Disabilities in Education Act ("IDEA").[161] Some also suggest ADR in the field of international human rights, specifically as a tool for better human rights protections within the Association of Southeast Asian Nations ("ASEAN").[162] Where South East Asian countries may be "reluctant to cede their sovereignty to external intervention," ADR can serve as a flexible, unintrusive bridge to support human rights enforcement until there is more enthusiastic buy-in from member states for a judicial court for human rights.[163] These examples show that the ADR benefits of speed and flexibility maintain its relevance and helpfulness even in sensitive, rights and values-based issues.

Finally, there is a practical and logistical question of whether ADR is appropriate for the structure and reality of high schools. At least some observers anticipate a possibility that athletics and education become so "intertwin[ed]" that students may successfully defend their property interests in sports participation.[164] As of now, eligibility is not a constitutionally protected right.[165] In *Get Off the Courts: Using ADR Principles to Resolve High School Sport Disputes* Saturday et. al.[166] argue that if courts begin to recognize a right to participate, students can then assert a Fourteenth Amendment due process claim regarding athletic eligibility, leading to a surge in lawsuits.[167] The authors envision a solution that features ADR to avoid lawsuits and offer the "quickest, cheapest, and fairest way possible" to resolve high school sports disputes.[168] The authors highlight how ADR in high school sports disputes could enable "tailor-made solutions for the specific dispute at hand. . .[and facilitate] the exchange of new information; help student-athletes and administrators understand each other's views; support emotional expression; stimulate creative options; and design win-win settlements."[169] Additionally, they note that schools can benefit from ADR approaches because "administrators are in a much

160. Phyllis E. Bernard, *The Administrative Law Judge As A Bridge Between Law and Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 26–27 (2003).

161. *Id.*

162. Mariam Sarwar, *Human Rights the "Asean Way": Exploring the Possibilities for A Regional Adr and Adjudicative Body in Southeast Asia*, 52 LOY. L.A. L. REV. 27 (2018) (member nations of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Myanmar, Lao PDR, Malaysia, Philippines, Singapore, Thailand, Vietnam)

163. *Id.* at 61–62.

164. Saturday, *supra* note 153, at 363–64.

165. Dominic D. Saturday et. al., *Get Off the Courts: Using Adr Principles to Resolve High School Sport Disputes*, 28 MARQ. SPORTS L. REV. 359, 361 (2018) (citing Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 114 Cal. Rptr. 2d 798, 807 (Cal. Ct. App. 2001); Jordan *ex rel*. Edwards v. O'Fallon High Sch. Dist. No. 203 Bd. of Educ., 706 N.E.2d 137, 141 (Ill. App. Ct. 1999)).

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167. Saturday, *supra* note 164, at 363.

168. Saturday, *supra* note 164, at 364.

169. Saturday, *supra* note 164, at 364.

better position to adopt utilitarian philosophies on punishment, rather than doling out traditional (retributive) athletic disqualifications."[170]

It remains to be seen whether the mere opportunity to "adopt utilitarian philosophies on punishment"[171] is a sufficient incentive for administrators to relinquish their authoritarian control over students and invite them to the table to help determine an appropriate punishment. Indeed, the threat of lawsuits may prove to be a more powerful motivator. More significantly, administrators will turn to ADR if they are required to do so by their own athletic association constitution or bylaws.[172]

Ultimately, the authors in *Get Off the Courts* conclude that mediation can benefit schools and students alike by offering efficient, flexible, and fair means to creatively resolve their disputes.[173] However, as discussed above, flexibility is not always consistent with solutions based in rights from laws such as Title IX and the Equal Protection Clause. Instead of mediation for transgender student-athlete eligibility, all states stand to benefit from a different form of ADR that can protects the parties' rights and obligations under the current policies: an ombuds program. Ombudspersons can offer a means to ensure enforcement of more inclusive policies if and when they are adopted.

V. How High School Policies Will Benefit from an Ombuds Program

This section reviews the current landscape of high school policies governing transgender student-athletes. Unlike common healthcare[174] or athletic standards and norms, there is incredible disparity and lack of uniformity across the nation in gender identity policies for high school athletes. This section begins by reviewing the most inclusive policies, then examines the more exclusive and discriminatory policies. Key differences exist for issues of eligibility for each approach, and this section will discuss if and how an ombuds program would support the policies and interests of all parties by ensuring awareness and enforcement of the policy.

A. Deference to Gender Identity: The Model Policy and Inclusive States

In the absence of uniform policies, and in the presence of discriminatory policies, LGBT Sports Foundation[175] created a "Proposed Model High School Policy"

170. Saturday, *supra* note 164, at 366.
171. Saturday, *supra* note 164, at 366.
172. Saturday, *supra* note 164, at 371–72.
173. Saturday, *supra* note 164, at 376 (the authors argued, "Mediation fosters a collaborative environment where administrators and student-athletes can creatively resolve their disputes. ADR mechanisms foster a quicker, cleaner and cheaper option than fighting a lawsuit in court. The ADR process is private and operates under principles of procedural justice to maximize the perceptions of fairness by all parties. It keeps controversies away from public scrutiny, and it prevents parties from hardening their positions. But most importantly, ADR could help school districts avoid dangerous lawsuits by forming a much-needed layer of due process for student-athletes).
174. *See* World Pro. Ass'n, *supra* note 50, at 18–20.
175. *"All 50", supra* note 15 (the LGBT Sports Foundation works with athletes, coaches, and administrators to address racism, sexism, and social injustice: they collaborated with a network of thirty like-minded organizations and used a Nike grant to create their model policy).

("the Model Policy") in 2016.[176] The Model Policy is based on the "single principle" that "[t]ransgender high school [student] athletes will compete in the gender in which they identify and have a positive sport experience."[177] This is generally consistent with medical advice that transgender athletes compete in sports consistent with their gender identity.[178]

The Model Policy begins with an affirmation of that principle, then provides a timeline for how all parties should proceed when a transgender student participates in athletics and activities consistent with their gender identity.[179] A student's gender identity under the Model Policy is independent from the "the gender listed on a student's records" and does not require "prior medical or mental health care."[180] A student or their parents must inform the school, who then informs the state athletic association, "that the student desires to participate in activities in a manner consistent with his/her gender identity."[181] This notice would only be required where a student's gender identity differs from their school records, but not where their identity is already consistent with school records.[182]

The Model Policy describes a "determination proceeding" if a member institution files a timely petition to challenge a student's participation consistent with their gender identity, or if a student wishes to preemptively confirm their eligibility.[183] The determination proceeding begins with the "Gender Identity Eligibility Committee," composed of experts in health and stakeholders in sports.[184] The committee is charged with holding a hearing as quickly as possible, and at least five business days before the contest in question.[185] At the hearing, the committee will review items including transcripts, registration information, documentation of the student's "consistent gender identification," such as "affirmed written statements from student and/or parent/guardian and/or health care provider."[186] The focus of the hearing's inquiry is whether "the student's gender identity is sincere" and "not

176. *"All 50", supra* note 15.
177. *"All 50", supra* note 15.
178. *See* WORLD PRO. ASS'N, *supra* note 52, at 16; *see also* Johanna Olson-Kennedy et al., *Health Considerations for Gender Non-Conforming Children and Transgender Adolescents*, U.C. S.F. TRANSGENDER CARE & TREATMENT GUIDELINES (June 17, 2016), https://transcare.ucsf.edu/guidelines/youth; *see also Health Considerations for Gender Non-Conforming Children and Transgender Adolescents*, UCSF TRANSGENDER CARE & TREATMENT GUIDELINES (June 17, 2016), https://transcare.ucsf.edu/guidelines/youth.
179. *"All 50", supra* note 15.
180. *"All 50", supra* note 15.
181. *"All 50", supra* note 15.
182. *"All 50", supra* note 15. This distinction stands in contrast to states that rely on the sex listed on birth certificates, or even the sex assigned at birth if a birth certificate has been updated, *id. See e.g.* TEX. EDUC. CODE ANN. § 33.0834 (2022).
183. *"All 50", supra* note 15.
184. *"All 50", supra* note 15 (specifically, "The Gender Identity Eligibility Committee will be comprised of a minimum of three of the following persons one of whom must be from the physician or mental health profession category: i. Physician with experience working with youth whose gender identity different than the sex they were assigned at birth, and familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care and other standard-setting documents. ii. Licensed mental health provider with experience working with youth whose gender identity different than the sex they were assigned at birth, and familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care and other standard-setting documents. iii. School administrator from a non-appealing school. iv. [State athletic association] staff member. v. A gender-affirming advocate familiar with issues affecting youth whose gender identity different than the sex they were assigned at birth.").
185. *"All 50", supra* note 15.
186. *"All 50", supra* note 15.

motivated by an improper purpose."[187] If the committee makes a finding a sincerity, the student is deemed eligible.[188] Finally, the Model Policy allows either the student or the petitioning member institution to appeal an adverse outcome.[189] The appellant must file a notice of appeal to the Executive Director (the highest-ranking state athletic association employee), who will convene a hearing to review the decision.

Thirteen states have policies similar to or nearly identical to the Model Policy.[190] The distinguishing features of these policies that separate it from the less inclusive states are: (1) using a student's gender identity as the basis for eligibility; (2) omitting any medical treatment or document threshold; and (3) forming a neutral, informed committee of experts whose sole purpose is to review gender identity eligibility questions. Policies with this structure place a de facto presumption in favor of any student seeking a determination of eligibility in an activity with a gender different than what their school records reflect.

Before exploring the role of an ombuds program, it is important to note a recent progression in the field of these inclusive policies as advocates and athletic associations continue to review and assess existing policies and procedures. Washington state is eliminating the appeals process in order to further confirm that gender identity dictates eligibility, and there is nothing for another school or student to challenge.[191] Instead, students are deemed eligible per their gender identity, leaving nothing for opponents to challenge or appeal.[192] Separately, a school district superintendent (or their designee), "having reasonable cause to believe that a student is ineligible to participate in or continue in an interschool activity under the Rules and Regulations of the WIAA, shall provide the student with notice of his/her ineligibility."[193] If the student is declared ineligible on the basis of gender identity, only then does the policy provide for an appeals process for the student, which is heard by the Eligibility Committee similar to the committee described by the Model Policy.[194] The new proposal also requires that, if a student is deemed ineligible on the basis of gender identity, "the WIAA office will assign a facilitator who will assist the school and student in preparation and completion of the paperwork associated with the eligibility appeal process."[195]

The effect of this progression from the Model Policy is to codify the presumption of eligibility for transgender student-athletes. The former process effectively gave schools a right to challenge a student-athlete's gender identity and required the student to defend their identity in the appeals process. The new process strips schools of their ability to make such a challenge.[196] Instead, any question over a student's gender identity is incorporated into the process of any other eligibility inquiry, which starts with a superintendent's finding of "reasonable cause" that a student is ineligible.[197] Therefore, the shift is twofold: 1) schools cannot bring a

187. *"All 50", supra* note 15.
188. *"All 50", supra* note 15.
189. *"All 50", supra* note 15.
190. Email Interview with Jason West, *supra* note 18.
191. *ML/HS Amendment #3*, WASH. INTERSCHOLASTIC ATHLETIC ASS'N (Jan. 26,2021), https://wiaa.com/blog.aspx?BID=70&ID=1390&Mon=1&Yr=2021.
192. *Id.*
193. *Id.*
194. *Id*; *"All 50", supra* note 15.
195. *ML/HS Amendment #3, supra* note 190.
196. *Id.*
197. *Id.*

challenge because the inquiry now rests with superintendents, and 2) the rules impose a standard of proof (reasonable cause) which was not previously required to challenge a student's gender identity. This policy, which affords greater protection to transgender students, has not yet been adopted outside of the state of Washington.[198]

Yet, an ombudsperson may supplement this process with proactivity and perspective. Parties' rights and obligations are only as strong as the enforcement thereof. Even the most inclusive policies do not provide for express information and education of the policies and opportunities available to the parties.[199] First, without a proactive method to inform students of their options, the burden is on them to educate themselves on how to initiate and defend their participation in a sport consistent with their gender identity. Moreover, the same problem applies to schools and districts, who risk misapplying the policy. These risks can be preempted and mitigated by an ombudsperson who can speak to schools and students and provide information, resources, and broad policy guidelines to facilitate awareness and compliance.

For example, this author spoke with a school official[200] who worked in a state with a more inclusive policy. This official has years of experience and a demonstrable commitment to serving their students and their school, and they have worked with trans student-athletes at their school.[201] Still, they expressed confusion over their state's policies and procedures pertaining to trans student-athletes and even expressed an erroneous understanding of the policy.[202]

Specifically, this official was unaware that appeals would go to the state's Eligibility Committee.[203] This official was not sure which entity was responsible for facilitating a student's eligibility decision (school or district).[204] This official was unsure what body had jurisdiction over eligibility in regard to rosters (the state athletic association or the local school district).[205] Most notably, this official believed that a student needed to supply sufficient documentation to update the school's records on their gender despite the state policy making no such requirement.[206]

This is not to suggest any malice or negligence by similarly situated states or officials. Instead, these gaps in knowledge show the need for scaffolding and the benefit an ombudsperson could provide for students and schools by providing robust education on the policies and procedures. The ombudsperson would also serve as the accessible expert for parties' prospective questions and concerns.

Additionally, beyond preemptive education, an ombudsperson could help serve as a qualified and experienced facilitator and as a mediator should any conflict

198. *Id.* (however, the updated policy without an option for appeal is being considered by at least one state with a progressive policy akin to the Model Policy, according to one such state employee who wished to remain anonymous).

199. *See* Phone interview with Sam Brown, *supra* note 18 (nonetheless, some states separately promote education and awareness, as exemplified by Washington's training of coaches and administrators on how to best support trans student-athletes).

200. Phone Interview with anonymous individual (Oct. 10, 2021) (this individual spoke on the condition of anonymity).

201. *Id.*

202. *Id.*

203. *Id.* (this official had not heard of such a committee).

204. *Id.*

205. *Id.*

206. Phone Interview with anonymous individual (Oct. 10, 2021).

arise.[207] Instead of waiting for a facilitator in the event of an appeal, an ombudsperson who oversees the process from the outset could help prevent any mistakes or misapplications of the state's policy. Because the burden is on each party to educate themselves on the policy, the burden of compliance at the initial stage of an eligibility request will usually fall on the student submitting the request. For example, if an official like the one discussed above should tell a student they must first obtain medical documentation before they can obtain eligibility with a team different than the gender on their school records, a student may very well comply. One can imagine that rather than challenge the school or hire an attorney, a student would have to then appease the school and go through a potentially arduous and time-consuming process to provide the requested documents. If this untimely delay costs the student a chance to compete in their sport, they will have suffered because the school made an error and the student was neither educated about the process nor comfortable making a challenge.

Instead, there should be few, if any, burdens on students to enforce compliance. In the above scenario, an ombudsperson would not wait until any of the parties file a kind of appeal. Instead, they would be involved as soon as the student notifies their school of their interest to participate on a team with a gender different from the school's records. That way, the ombudsperson would be aware of the student's circumstances and goals and could prevent any procedural errors, while answering questions and dispelling confusion. If the school attempted to request documentation or materials from the student that the policy does not require, the ombudsperson would serve as a backdrop to enforce the state athletic association's policy and protect the rights and obligations of all parties. This would be most effective if the ombudsperson provided consistent education to all students and schools and became involved as soon as any student wished to participate in a sport consistent with a gender identity not assigned at birth.

B. Surgery, Hormones, and Other Obstacles: Restrictive States

While many states defer to a student's gender identity for eligibility purposes, other states require that certain medical and/or documentary criteria be met before a student can participate consistent with their gender identity. Where the Model Policy calls for transgender high school student-athletes to "compete in the gender in which they identify and have a positive sport experience,"[208] these more restrictive policies usually purport to "insure competitive fairness, equity and physical safety of all interscholastic sports and student-athletes."[209] Using Missouri as an example, we shall see that this approach presents two problems: 1) it is not always consistent with medical guidance, and 2) many policies are devoid of any significant means of protection for students' entitlements under the policy.

The Missouri policy on transgender participation first requires students to submit an application and all necessary documentation to their school administration.[210] Next, "[t]he Executive Director shall issue an opinion on the school's request

207. Interview with Mark Drymalski, Physician, Sch. Med. Ombudsperson & Assistant Prof. Physical Med. & Rehab., Univ. Mo. Health Care (Mar. 3, 2022) (explaining the variety of roles an ombudsperson serves for different parties in different contexts).

208. *"All 50", supra* note 15.

209. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16.

210. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16.

regarding participation under this policy after receiving all documentation required."[211] A student may appeal the Executive Director's opinion through the regular eligibility appeals process.[212] Missouri's policy allows trans boys to apply to play on any team they wish if they are not undergoing hormone therapy,[213] while trans girls must be taking hormones[214] to be able to apply to compete on a girls' team.[215]

It is important to note here that the Executive Director "shall" issue an opinion upon a school's request.[216] However, transgender students must start the application with their school before competing consistent with their gender identity.[217] Yet, the language of this policy fails to clarify whether or not schools are required to submit students' requests to the Executive Director.[218] In other words, this policy on its face does not prevent a school from receiving an application from a student, but instead arbitrarily refusing to submit a request to the Executive Director.[219] Furthermore, students may appeal an Executive Director's decision, but the policy provides no recourse[220] for dealing with an obstructive school administration that gives them nothing to appeal.[221]

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211. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16.

212. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16 (unlike the progressive policies, Missouri has no version of a specialized Gender Identity Eligibility Committee).

213. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16.

214. Email Interview with Jason West, *supra* note 18 (when asked about the standards or threshold for hormone therapy, MHSAA stated that "Treatments vary and we talk to medical professionals until we understand the specific treatment and are persuaded it has met the objective.").

215. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16, at 138 (establishing policy requirements) ("**No Medical/Hormone Treatment:** Any transgender student-athlete who is not taking medical/hormone treatment related to gender transition may commence and continue interscholastic participation in sex-separated sports in accordance with his or her assigned birth gender. A trans male (female to male) student-athlete who is not taking medical/hormone treatment related to gender transition may participate in co-ed sports and may apply to participate in boys sports. Once the student participates in a boys' sport, he shall participate consistently with that gender for the remainder of his interscholastic eligibility. A trans female (male to female) student-athlete who is not taking medical/hormone treatments related to gender transition may not compete on a girls' team, but may participate in co-ed and boys sports . . . **Receiving Medical/Hormone Treatment:** A trans male (female to male) student-athlete who has commenced medical/hormone treatment with prescribed drugs for diagnosed gender dysphoria and/or transsexualism, may compete on a boys' team, but is no longer eligible to compete on a girls' team without changing that team status to a co-ed team. A trans female (male to female) student-athlete being treated with hormone suppression medication for diagnosed gender dysphoria and/or transsexualism may continue to compete on a boys' team but may not compete on a girls' team, without changing it to a co-ed team, until one calendar year of documented medical/hormone treatment and/or suppression is completed. To maintain eligibility, a trans female student shall thereafter provide continuing medical documentation that the appropriate hormone levels are being maintained.").

216. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16, at 138.

217. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16, at 138.

218. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16, at 138.

219. *See,* e.g., Mo. State High Sch. Activities Ass'n, *supra* note 16, at 138.

220. Email Interview with Jason West, *supra* note 18 (responding to a question about the possibility of an obstructive school refusing to submit an application to the Executive Director of the Missouri State High School Activities Association) ("No, we are not aware of any such instances. Typically, our member school contacts us to discuss any concerns they have regarding any policy or bylaw, and we would work through their concerns.").

221. *See* Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO L. REV. 57, 60–61 (2007) (citing Groten v. California, 251 F.3d 844 (9th Cir. 2001) (holding that qualified immunity did not protect government officials engaged in ministerial acts who intentionally obstructed plaintiff's efforts to apply for specific licenses). Another interesting note regards the nature of school officials' duties under this policy, *id.* If policy ultimately requires them

Therefore, policies like that in Missouri stand to gain the same benefit from an ombuds program as policies of states like Washington. In Missouri, an ombudsperson could be responsible for providing proactive education to students and faculty about the gender identity policy. They could guarantee students and faculty know the standards and have easy access to the required forms. During the process, they would be a resource for schools and student-athletes for any questions about the required hormone therapy and/or documentation. Students would have an immediate point of contact if a school deviated from the policy, and schools would be under less pressure to police and enforce the policy's hormone requirements because the ombudsperson would be the initial point of contact in reviewing the soundness of the documentation before it is submitted to the school.

Likewise, schools and students could both relinquish the burden of educating themselves on the policy and process. This is an even greater burden with more complex processes than those that simply defer to a student's gender identity. As discussed above, even policies of deference proved confusing enough for some employees to experience a hiccup in their own self-education.[222] The ombudsperson would be the state-provided expert available to preempt and clear up any confusion regarding the details of the policy. This would be valuable for states like Missouri that require months or more of hormone treatment and confirmation from physicians. This is especially true because Missouri has not provided or even suggested any treatment threshold for students, and instead only "talk to medical professionals until [the Missouri State High School Athletic Association understands] the specific treatment and [is] persuaded it has met the objective."[223] This policy would be best served with an ombudsperson who is an expert on the policy's options and obligations for all parties, and who can advise accordingly.

Returning to Ember's story, the Ohio softball player's narrowly successful reapplication offers several examples demonstrating the need for a designated ombudsperson. To begin, her family had the impression that Ember would never be able to participate, and a proactive, engaged, and sympathetic principal corrected their misunderstanding.[224] This begs the question of how many would-be athletes are never informed of the policy.

Moreover, Ember did not learn of the updated, more restrictive policy until she reapplied.[225] Thankfully, she applied a few months before the season, so she had time to react to the update.[226] But how could she be expected to timely comply with a new policy if no one told her until after she reapplied?

Further complicating the reapplication process, no one could explain the specific standard of "[not possessing] physical (bone structure, muscle mass, testosterone, hormonal, etc.) or physiological advantages over genetic females of the same age group."[227] Ember and her mom did not know, and even their doctor had no idea what OHSAA wanted or how they could get approval.[228] When Ember's

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to receive and submit a student's application, this role may only be ministerial, such that school officials who refuse to perform this duty would not be protected by qualified immunity, *id.*

222. See *supra* notes 213–18 and accompanying text.

223. Email Interview with Jason West, *supra* note 18.

224. Telephone Interview with Ember, *supra* note 1.

225. Telephone Interview with Ember, *supra* note 1.

226. Telephone Interview with Ember, *supra* note 1.

227. Telephone Interview with Ember, *supra* note 1; Ute, *supra* note 9 (perhaps the state's use of "etc." in their list best shows the lack of precision and clarity for their own standard).

228. Phone Interview with Ember, *supra* note 1.

mom asked OHSAA for clarification, or past examples of successful applications, OHSAA replied that they did not know.[229] Ember would be the first under the updated policy, and the OHSAA official suggested the doctor confirm Ember had typical "height and weight" compared to her peers.[230]

Additionally, Ember's mother expended significant time and energy communicating with the doctor, OHSAA, and researching questions throughout the process.[231] Afterwards, when a friend in a neighboring district ran into trouble with the same process and policy, Ember's mother stepped in to provide information and resources.[232] Drawing on her extensive experience, Ember's mother explained the increasingly arduous process, described the standards as she understood them, and provided contact information for the OHSAA official with whom the parent needed to connect.[233]

Finally, the parent in the neighboring district needed further help because their child's middle school was not communicating with them.[234] They inquired about their trans daughter playing sports, but their questions went unanswered.[235] Regardless of whether the school's unresponsiveness was due to animus, ignorance, or busyness, the child's parent did not know the next steps.[236] Beyond reaching out to the school, they were unaware of their options and resources, only remedied by assistance from Ember's mother.[237]

At each of these junctions, an ombudsperson provides the solution. Before any issues arise, they would be responsible for disseminating information and educating schools, students, and parents of the policy, so no parent would erroneously tell their child that it is impossible for them to participate. Likewise, the ombudsperson could distribute updates in the policies, so parties are not blindsided and scrambling with changes in requirements. This would be especially true if the ombudsperson was already connected with the state's trans athletes and could swiftly and easily offer timely updates. In these communications, the ombudsperson would also have the opportunity to explain and clarify the different standards and how athletes are able to satisfy them.

Notably, the ombudsperson would have a duty to provide information and resources so that schools and parents do not have to spend time educating themselves. For athletes with districts or parents without the time or means to do so, an ombudsperson may be the only way they can understand and initiate participation. Nowhere would this be truer than for families like the one Ember's mother assisted, where a school is not helpful. An ombudsperson could ensure a school fulfills their administrative obligations and provide options for families if they continue to experience resistance at the local level.

In an eye-opening move one state over, Indiana Governor Eric Holcomb recently vetoed[238] a state bill that would have banned transgender girls from playing

229. Phone Interview with Ember, *supra* note 1.
230. Phone Interview with Ember, *supra* note 1.
231. Phone Interview with Ember, *supra* note 1.
232. Phone Interview with Ember, *supra* note 1.
233. Phone Interview with Ember, *supra* note 1.
234. Phone Interview with Ember, *supra* note 1.
235. Phone Interview with Ember, *supra* note 1.
236. Phone Interview with Ember, *supra* note 1.
237. Phone Interview with Ember, *supra* note 1.
238. Letter from Eric J. Holcomb, Governor, Ind., to Todd Huston, Speaker, Ind. House of Representatives, (Mar. 21, 2022), https://www.in.gov/gov/files/Veto-HEA-1041.pdf.

girls sports.[239] Readers may find the striking nature of Governor Holcomb's decision not in the veto itself, but in his rationale that "*not a single case* of a male seeking to participate on a female team completed the process established by IHSAA's now decade-old policy."[240] Translation: the policy that purports to facilitate and regulate transgender student-athlete participation is "successfully" realizing its obvious and effective purpose to ban transgender student-athletes. The governor may have quipped this statistic to defend the current policy, but it instead underscores the need for an ombuds program to ensure there is actual enforcement of the current policy.[241] As it stands, the policy today offers little substantive protection on behalf of trans student-athletes.[242] Like many states, the Indiana legislature is adamantly pursuing a total ban,[243] and they plan to attempt to override the veto.[244]

In the states with complete bans on transgender student-athlete participation, an ombuds program would provide little benefit. Texas, for example, used to have a policy that determined student-athletes' gender exclusively from their birth certificates.[245] However, in 2022, Texas passed a law requiring the state high school athletic association (UIL) to update their policies to conform with the new standard, which further limits eligibility to only the "biological sex[246] . . . entered at or near the time of the student's birth."[247] This closed the already narrow and difficult window for transgender student-athletes to compete. Previously, a transgender student-athlete could have obtained an updated birth certificate and then competed consistent with their gender identity. Now, Texas will effectively only honor birth certificates issued before a student's transition. There would be no constructive role for an ombudsperson under this policy, at least in the realm of gender identity in sports.

Finally, one interesting development for readers to track could be the inconsistent overlap of laws and policies in states criminalizing gender-affirming care for patients in high school.[248] Some of these states still have gender identity eligibility

239. 2022 Ind. House Enrolled Act. No. 1041.

240. Letter from Eric J. Holcomb, *supra* note 236.

241. Indiana provides a great example for the practical value of an ombuds program to transgender student-athletes in states with discriminatory policies. It may be easier to lobby a non-governmental state athletic association to implement an ombuds program than to convince the Republican-supermajority in the Indiana legislature to expand access to transgender student-athletes.

242. Phone Interview with Sam Brown, *supra* note 18. Governor Holcomb's comments raise another important issue, which is data collection, *id.* Educators are in a difficult bind to both respect sensitive privacy wishes of minors with the need to make data-driven, informed decisions, *id.* There is a dearth of data about the number of transgender student-athletes, particularly those denied access or left on the sidelines, *id.* An ombudsperson could be trusted to anonymously collect data on the effectiveness of policies, *id.* Cases such as a state with zero transgender girls obtaining a waiver in a decade would be an obvious red flag that those entrusted with carrying out the policy may not understand or respect it, *id.*

243. Kristen Eschow, *Indiana Lawmakers May Override Veto of Transgender Athletes Bill*, FOX59 (Mar. 23, 2022, 7:28 PM), https://fox59.com/indianapolitics/indiana-lawmakers-may-override-veto-of-transgender-athletes-bill/ (statement of Ind. House Speaker Todd Huston (R)) ("This issue continues to be in the national spotlight and for good reason as women have worked hard for equal opportunities on the playing field – and that's exactly what they deserve.").

244. *Id.*

245. *See Subchapter J Section 360, supra* note 38.

246. See *supra* Section II for discussion of sex and vocabulary.

247. TEX. EDUC. CODE ANN. § 33.0834 (2022).

248. *Legislative Tracker, supra* note 121 (states with bills described as "anti-transgender medical care bans" are Alabama, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, North Carolina, Tennessee, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin).

policies that demand gender-affirming care as requisite for transgender student-athlete participation.[249] Must some students and their families choose between the dangers of running afoul of the state's criminal code on the or else be denied the opportunity to compete in athletics? Will a regional disparity in enforcement of these laws lead to a parallel disparity in opportunities for transgender student-athletes?[250] Perhaps state athletic associations will amend their polices to be congruent with these new laws but, if they do not, a conflicting overlap will emerge.

VI. CONCLUSION

As competitors like Ember well know, transgender student-athletes often face a messy landscape of confusing and conflicting rules that tell them how and when they can compete in the sports they love. This challenge to compete is made more difficult when schools do not communicate these requirements or when the school administrators do not know or refuse to respect the policies.

ADR in this context is a means to a more inclusive end, but ADR would not be the conclusion. Ultimately, the rights-based nature of the conflict will always leave advocates striving for a substantive reform of the policies that will reflect more inclusive values and a more informed medical foundation. An ombudsperson will not deliver this victory because such a reform only guarantees only procedural protections.

Nevertheless, an ombudsperson can provide value by filling a void of information and enforcement. Ombudspersons could support students, parents, and administrators by facilitating education about and implementation of the state policy. All parties face obstacles interpreting vague guidelines, changing and confusing medical standards, and unfamiliar procedural requirements. By inserting an ombudsperson into these procedures, all parties will be better informed and more accountable to whatever substantive policy governs eligibility.

249. *See supra* notes 21-24 & 246 and accompanying text (states with potential for conflict between their laws and their athletic association policies are Arizona, Iowa, Louisiana, Missouri, North Carolina, Oklahoma, Ohio, Utah, and Wisconsin).

250. *See* Prieb, *supra* note 12 (Missouri State Representative Mackey alluded to the differences in safety and culture for LGBTQ+ youth depending on where they live).