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On the Basis of Sex? Transfemales in Sport

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ABSTRACT

Ciccolella ME, Van Ness JM. On the Basis of Sex? Transfemales in Sport. **JEPonline** 2023;26(2):50-55. Title VII and Title IX use identical language that prohibits discrimination “on the basis of sex” in employment and school sports, respectively. Yet neither law defines sex, which is an essential term in these laws. Therefore, it remains with the courts and policy makers to define sex. Sex discrimination against transgenders in employment and sports are two contexts where disparate definitions of sex exist. Incongruent positions about the identification of the sex of an individual have resulted. Law and science share a commitment to defining terms applicable to an issue prior to analysis or conclusion of that issue. Defining terms is a prerequisite to the analysis that follows. This paper examines from both a legal and scientific perspective the definitions of sex. It concludes that the failure to agree on a common definition of sex will continue to produce incongruent analyses of discriminatory practices “on the basis of sex”, especially with regard to the issue of whether transfemales can participate in cisgender female sports.

Key Words: Cisgender, Definition of Sex, Policy Makers, Sex Discrimination, Transfemales

INTRODUCTION

Discrimination “on the basis of sex” is explicitly prohibited in the statutory language of our laws. Yet, the statutes fail to define the term. Title IX and Title VII, for example, prohibit sex discrimination in federally funded school sports and employment, respectively. These two major federal laws have been applied to lawsuits challenging the participation of transfemales in different sports and employment each using a different basis for the identification of sex.

The problem is twofold. First, there is the legal failure to agree on a definition of sex. Second, there is a failure to distinguish the context of employment versus sports. If there were a commonly understood and accepted definition of sex, then analysis of varying contexts like employment versus participation in different sports might not be incongruent. A commonly accepted definition of an essential term is foundational to context, even when the contexts vary.

Despite common statutory language acknowledging that sex is a protected characteristic, there is no commonly accepted legal definition of sex. In caselaw, sex and gender are often used interchangeably, and sex identification has been disparately based on both birth certificates and current school records. These incongruencies beg resolution by the courts.

Context is also critical to consider. Employment cases typically offer a sex neutral context, meaning that jobs are not typically sex segregated by necessity. Title VII deals with such issues. Alternatively, Title IX is rooted in commitments to provide equity for males and females in sex segregated sports. This context makes all the difference when examining biologically based sex-linked differences that impact performance.

It is for these reasons that we offer this article, which is a follow up to prior articles on the issue of transgenders and sports. Scientific research and law both define their relevant terms. Context is integral to a review of any issue. In this article, we will address the meaning of sex as it is applicable to transfemales in sports.

THE LAW OF SEX

The Definition of Sex

Title VII and Title IX use identical language prohibiting discrimination in employment and school sports “on the basis of sex”. Neither law defines sex, so it has been left to the courts and policy to provide an applicable understanding of the term (10,11). Two recent cases illustrate disparity in the definition of sex and its applicable context, Bostock (3) and Soule (9).

In Bostock, a 2020 Title VII case, the United States Supreme Court examined employment discrimination against transgenders (3). Title VII’s statutory language explicitly prohibits “discrimination on the basis of sex”. The Bostock Court began with a definition of “sex”, a term that the parties disputed. The Court defined the ordinary meaning of “sex” as it was understood in 1964 when the statute was passed quoting several standardized dictionaries. Opposition to that commonsense approach suggested “a broader scope, capturing more than anatomy and reaching at least some norms concerning *gender* identity…” (Ibid,

emphasis added). The Bostock Court determined that “sex” referred “only to biological distinctions between male and female”. Gender identity was not included in this distinction.

After defining sex, the Bostock Court (3) reasoned that the unfair employments actions in question would not have occurred but for the biological sex of the transgender employee. The court then held that transgender employees were protected under Title VII against employment sex discrimination using a biological definition of sex (Ibid) Definition, analysis, and conclusion were inextricably linked.

On December 16, 2022, Soule (9) affirmed dismissal of a case alleging that a Connecticut based transgender participation policy in high school sports violated Title IX. The dismissal of the case was based on a lack of standing because the Plaintiffs, cisgender females, were members of a track team but had graduated. For this reason, they lost their right to sue based on the allegations in their complaint. Nonetheless, the Soule court addressed the issues of a Connecticut based policy that allows students to “compete on gender specific athletic teams consistent with their *gender* identity if that is different from the gender listed on their official birth certificates (9; p. 3, emphasis added).” The applicable policy allows transgender participation based on “gender identification of that student in current school records and daily life activities…” and states that the school district’s determination that expression of gender identity is “bona fide and not for the purpose of gaining an unfair advantage in competitive athletics” (9, p. 7).

Relying on Bostock, Soule curiously stated that Title VII decisions illuminate Title IX interpretations of discrimination (Id. at p. 25). Unfortunately, the illumination ignored completely Bostock’s biological definition of sex. The conflation of sex and gender was seemingly unnoticed and not addressed. Soule did not dispute that transfemales were protected under Title IX against sports participation discrimination. Because Plaintiffs were found to lack standing to sue, transfemales were not prohibited from competing on cisgender female sports.

Context

Employment law rarely (if ever) defines sex segregated opportunities. Bostock, a Title VII case, was especially clear this point stating that “An individual’s…transgender status is not relevant to employment decisions (3).” It is reasonable to assert that unlike the workplace, one may be able to gain an unfair advantage in sports.

Title IX provides for sex segregated teams and thereby implicitly recognizes the unfair advantage in sports if biology were ignored. The purpose of Title IX is the provision of equitable opportunities to play for *both* sexes (4). Unlike employment, an individual’s transgender status is relevant to sports participation on the basis of both biology and context.

Soule acknowledged the issue of unfair advantage by citing a policy that argued gender identity is “bona fide and not for the purpose of gaining an unfair advantage in competitive athletics” (9, p. 7). The policy’s basis for such a claim was not challenged presumably because the Plaintiffs had no standing to dispute the statement.

Comparisons of policy/rules between human racing and horse racing illustrates this point. In an open race like the Kentucky Derby, the rules allow both sexes to compete against one

another, but fillies and mares carry 3 to 5 pounds less weight. Since 1897, 40 fillies have run in the Kentucky Derby. The winners have included 135 stallions, 9 geldings, and 3 fillies (1). On the basis of sex, the relevance of biology seems abundantly clear. Stallions and geldings have an overwhelming advantage when racing against a filly even when she carries less weight in the contest. The rules for a filly's race differ in that no stallions or geldings can run. Males, castrated or not, are held to have an unfair advantage. On the basis of sex, they are prohibited from these races (6).

Unlike policies for humans, horses do not have the apparent ability to self-identify as male or female. Biology is the sole basis for who enters a race. Kentucky Derby statistics alone give a basis to conclude that stallions and geldings have an unfair biological advantage when competing against mares and fillies (5). The science of sex must be considered as we struggle with the issue of transgender participation in human sports.

THE SCIENCE OF SEX

Sex determination is made at birth with 99.95% accuracy (8). It is recorded on the birth certificate, and is nearly always consistent with phenotype. Sexual dimorphism produces physiological differences that necessitate separation of male and female sports competition. This division allows for fair and equitable competition and participation.

Sexual exclusivity preserves the integrity of competition the same way that drug testing preserves equitable competition. If usage of anabolic, androgenic steroid provides a potential unfair advantage, why wouldn't the level of testosterone, or the presence of testes in female sports be legislated? Females produce 5 to 7% of the testosterone that males do, and is one of many reasons that body shape, form, and capability in some sports necessitate that fair competition be sex-specific.

The courts and policy makers are seemingly swayed by an understanding that transfemales have no unfair advantage when competing against biological females in sports programs. Strength advantages are argued to be eliminated by reducing testosterone production to levels of cisgender females. This can be accomplished surgically and/or using hormones. Further assumptions that "all male-bodied people" are taller and stronger are not accurate, given the natural variations that exist in "physical size and ability" between biological sexes (7). This, in addition to arguments especially sensitive to the plight of those with gender dysphoria, have led to policies allowing transfemales places on cisgender female teams and podiums. The problem with these arguments is the failure to define terms.

CONCLUSION

Our laws determine how we will treat one another. Fairness depends upon a commitment to a nondiscriminatory application of facts and circumstance. Defining our terms and understanding context are basic considerations whether we are writing law, making a cogent argument, or doing research. Sex is a biological construct distinguished from gender, a more fluid sociologically based construct. The terms must be defined and should not be conflated. The context of sports and employment beg an appropriate application that flows from commonly understood definitions.

There is no mystery to our historical understanding of sex-linked physical differences in sports. For example, in the 1970s, Renee Richards, a transfemale achieved international prominence in her 40s on the women's tennis circuit. Dr. Richards went through both surgical and hormonal sexual reassignment prior to competing against biological females. In her 80s, Renee acknowledged the overwhelming physical advantage she had by being a biological male stating, "I know if I'd had surgery at the age of 22, and then at 24 went on the tour, no genetic woman in the world would have been able to come close to me" (2).

The continued physical advantage of the transfemale in women's sports should not continue. It is not merely a matter of who stands on the podium. More importantly, it is a matter of who gets to play at all. Team rosters are limited and when biological males get a spot, then one less female gets her chance. The genesis of Title IX was to remedy the lack opportunity for females. If current legal and policy sentiment prevail with regard to the invitation of transfemales to play on girls' teams, then cisgender females will continue to be displaced. If self-identification is the basis for sex, then increasing numbers of cisgender females will be displaced.

As the blurring of the distinction of the sexes continues in the context of sports, the two will become one and he will be the one. It is simply a matter of biology.

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