

APPROACHING 50 YEARS: TITLE IX'S “COMPETITIVE SKILL” EXCEPTION TO THE PROHIBITION ON SINGLE-SEX SPORTS

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INTRODUCTION

“Physical differences between men and women...are enduring.”² Because of the tendency for males to have an advantage over females in sports due to those differences, most school sports teams comprised of post-pubescent athletes are separated by sex in order to maximize the number of opportunities available for females as well as males.³ Indeed, while Title IX of the Education Amendments of 1972 generally prohibits separating school sports teams on the basis of sex, it expressly permits teams to be sex-segregated where the sport is a “contact” sport or “where selection for...teams is based upon competitive skill.”⁴ It is therefore apparent that contact sports teams like football are permitted to remain sex-segregated due to concerns centered on

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² *United States v. Virginia*, 518 U.S. 515, 533 (1996).

³ See generally Doriane Lambelet Coleman, et al., *Re-affirming the Value of the Sports Exception to Title IX’s General Non-discrimination Rule*, 27 *Duke J. Gender L. & Pol’y* 69, 82 (2020).

⁴ 34 C.F.R. § 106.41(b). It should be noted that Title IX’s implementing regulations originally were enacted by the Department of Health, Education, and Welfare (HEW) at 45 C.F.R. § 86.41, but after Congress divided HEW into the Department of Education and Department of Health and Human Services in 1979, “the Department of Education then reissued the Title IX regulation without change in 1980, and its Office for Civil Rights now has primary responsibility for enforcing Title IX.” Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 *U. Mich. J. L. Reform* 151, 155 n.17 (2001).

physical safety, and non-contact teams may be segregated due to concerns that males would dominate the competition and take every available roster spot if allowed to compete against females.

But even with these general principles in mind, it is not clear precisely what the language of the “competitive skill” exception means, or how broadly that exception to Title IX’s general prohibition on sex-segregated sports applies. The recent experiences of four high school boys in Wisconsin, South Dakota, and Minnesota illustrate the need for a careful examination of the purpose and meaning of the competitive skill exception for non-contact sports and highlight the dangers of limiting athletic opportunities for students based on stereotypes and outdated assumptions about athletic preferences that may occur in the absence of a fully considered understanding of the exception’s meaning.

For example, in 2016, Kaiden Johnson was a student at Superior High School in Superior, Wisconsin.⁵ Due to his love for dance, Kaiden tried out for, and made, his school’s competitive dance team.⁶ Because of Superior’s remote location in Wisconsin at the western tip of Lake Superior, its school teams primarily competed against schools across the border in Minnesota.⁷ This situation was convenient and unremarkable until a fateful day that winter when Kaiden and his Superior teammates arrived at a dance competition in Duluth, Minnesota.⁸ After changing into their uniforms and preparing for competition, Kaiden and his team were informed that dance is a girls-only activity in Minnesota.⁹ As a result, Kaiden was forced to sit on the sidelines and watch his teammates perform without him.¹⁰

In response to a series of legal challenges against Minnesota’s girls-only dance rule stemming from Kaiden’s relegation to spectator, the United States Court of Appeals for the Eighth

⁵ Kaiden Johnson—Teen Dancer Kicked Out of Competition for Being a Boy, Pacific Legal Foundation (Oct. 10, 2017), <https://pacificlegal.org/kaiden-johnson-teen-dancer-kicked-out-of-competition-for-being-a-boy/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Circuit in 2019 preliminarily enjoined Minnesota's rule.¹¹ However, the court declined to address whether the rule was permissible under Title IX's competitive skill exception.¹² That is unfortunate, as the Eighth Circuit had the opportunity to be the first appellate court to substantially interpret this important exception and provide much needed clarity on its meaning and application.

The aim of this Article is to take on that important task and attempt to determine the meaning of the competitive skill exception. A full understanding of the exception is necessary to determine whether all non-contact sports teams may be limited to a single sex under Title IX. If so, then Title IX's general prohibition against single-sex sports is effectively nullified by its exceptions, and future litigants lack an important avenue for statutory recourse for sex discrimination like Kaiden suffered. For context, Part II of this Article summarizes the history of litigation brought by boys in Wisconsin, South Dakota, and Minnesota to challenge rules limiting school dance teams to girls. Part III of this Article outlines Title IX and its exceptions. Part IV analyzes the competitive skill exception and offers an interpretation that best comports with logic, data, and the text of Title IX. Part V examines sports where physical differences may not be relevant to one's ability to compete and should therefore be offered on a co-ed basis. Part VI considers potential applications of the competitive skill exception to transgender athletes; and Part VII concludes.

I. DANCE LITIGATION HISTORY

A. Kaiden Johnson's OCR Complaint

After being denied the ability to perform with his teammates at dance competitions in Minnesota solely because he was a boy, Kaiden Johnson filed a formal complaint with the United States Department of Education's Office for Civil Rights (OCR).¹³ The

¹¹ D.M. by Bao Xiong. v. Minnesota State High School League, 917 F.3d 994, 998 (8th Cir. 2019).

¹² Id. at 1003.

¹³ Kaiden Johnson Complaint, Pacific Legal Foundation (Nov. 14, 2017), <https://pacificlegal.org/wp-content/uploads/pdf/k-j-v-minnesota-state-high-school-league/Complaint-Kaiden-Johnson.pdf>.

complaint, filed in November of 2017, asked OCR to investigate the Minnesota State High School League (MSHSL) for violations of Title IX and its implementing regulations that prohibit sex discrimination in school activities and athletics.¹⁴ Specifically, Kaiden's complaint alleged that Minnesota's girls-only dance rule did not satisfy either the competitive skill or contact sport exceptions to Title IX's general prohibition on single-sex high school sports or activities.¹⁵

OCR investigated Kaiden's complaint, and on May 10, 2018, ruled that Minnesota's girls-only dance rule did not violate Title IX or its implementing regulations.¹⁶ Rather than examining whether competitive dance team is a sport that falls under Title IX's competitive skill exception, though—indeed, OCR did not discuss the exception at all beyond acknowledging it exists—OCR determined that since girls are historically underrepresented in high school athletics,¹⁷ MSHSL may prohibit boys from trying out

¹⁴ See generally *id.*

¹⁵ *Id.* at 2 n.13. Discussion of Kaiden's additional claim that competitive dance team is an extracurricular activity rather than a sport is beyond the scope of this Article.

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Pacific Legal Foundation (May 10, 2018), <https://pacificlegal.org/wpcontent/uploads/2017/10/K.J.-v.-Minnesota-State-High-School-League-OCR-Complaint-Decision.pdf>.

¹⁷ "Historically underrepresented" means that the number of girls participating in high school athletics in Minnesota was consistently substantially disproportionate, in the negative, to the number of girls enrolled in Minnesota high schools. Stated differently, if girls made up 50% of the number of students enrolled in school, but only 45% of athletes, then girls would be underrepresented by 5%. OCR viewed the issue through this lens due to a 1979 Policy Interpretation of Title IX issued by OCR under the then-Department of Health, Education, and Welfare. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, *et seq.* (Dec. 11, 1979) available at [https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html#:~:text=No%20person%20in%20the%20United,activity%20receiving%20Federal%20financial%20assistance](https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html#:~:text=No%20person%20in%20the%20United,activity%20receiving%20Federal%20financial%20assistance.). Among other things, the 1979 Policy Interpretation established a three-part test for determining whether intercollegiate athletic programs comply with Title IX by "effectively accommodating the interests and abilities of male and female athletes." *Id.* While satisfying any one of the prongs is sufficient to show compliance, prong one asks whether the program can show "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." *Id.* While further discussion of the 1979 Policy Interpretation goes beyond the scope of this Article, in recent years the Policy has come to be applied at the high school level despite the Policy's express textual application to intercollegiate athletics only, and a growing number of schools appear to have resorted to proportionality as their primary means of complying with Title IX. See Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High

for dance team.¹⁸ However, as discussed below, OCR's analysis improperly skipped the crucial step of first determining whether the sport is permissibly single-sex in the first instance.

B. Freddie Linden's South Dakota Case

By the time Freddie Linden completed the eighth grade, he was practicing dance approximately 14 hours a week and was even an assistant dance teacher at a private studio.¹⁹ Due to his extensive experience and success, Freddie sought to try out for his school's competitive dance team his freshman year of high school, but he was informed that only girls are permitted to join the team.²⁰ As a result, he was forced to sit the year out, but the following Spring he filed suit in federal district court in South Dakota.²¹ Because Kaiden's Title IX OCR complaint was still pending when Freddie initiated his case, Freddie's complaint contained a single legal claim: the rule limiting school dance teams to girls violated the Equal Protection Clause of the Fourteenth Amendment.²²

Shortly after Freddie filed his complaint in federal court, the defendant South Dakota High School Activities Association voted to temporarily suspend the rule prohibiting boys from participating on dance teams for the upcoming 2018-19 school year.²³ In line with the Association's rulemaking process, it also directed its Dance Advisory Committee "to study the issue during the intervening year and recommend language specific to the issue" in order to consider permanently modifying the Association's rules to allow for male participation on dance teams.²⁴ Upon consideration, the Dance Advisory Committee

School Athletics, U.S. Dep't of Education (June 19, 2007). In Kaiden's case then, OCR effectively applied the proportionality prong of the three-part test as an effective quota to uphold the girls-only dance rule.

¹⁸ Pacific Legal Foundation, *supra* note 16, at 8.

¹⁹ Complaint for Declaratory and Injunctive Relief, *F.L. v. South Dakota High School Activities Ass'n*, No. 18-4038-KES at *3, ¶ 13 (D. S.D. April 12, 2018).

²⁰ *Id.*, at *6 ¶ 23.

²¹ See generally *supra* note 19.

²² Complaint at *6, ¶¶ 29-38.

²³ Press Release, South Dakota High School Activities Association Board of Directors (May 8, 2018), <http://www.sdhsaa.com/Portals/0/PDFs/BoardofDirectors/2017-18/MayPressRelease-Spec.pdf>.

²⁴ *Id.*

agreed that “there is not a real advantage to male participation in [d]ance,” but left open the possibility of revisiting the situation to create a separate male division or designated co-ed division in the unlikely event that the sport came to be “male dominated” in future years.²⁵ In the following months, the Association voted to permanently change its rules to allow for male participation on dance teams at South Dakota schools.²⁶ As a result, Freddie and the Association stipulated to dismiss the case.²⁷

C. Dmitri Moua’s and Zachary Greenwald’s Minnesota Case

Following the unsuccessful resolution of Kaiden Johnson’s OCR complaint against the Minnesota State High School League, two other boys who were denied the opportunity to try out for their Minnesota high schools’ competitive dance teams decided to pursue the matter in federal court.²⁸

Dmitri Moua is the son of first-generation Hmong immigrants.²⁹ Dmitri enjoys dance, and due to his positive experiences, he sought to try out for his high school’s competitive dance team.³⁰ But after inquiring about trying out for the team, Dmitri was informed that MSHSL’s rules prohibited boys from joining the team.³¹ Likewise, Zachary Greenwald was given the same disappointing news after seeking to try out for his school’s competitive dance team to put his years of dance experience to work.³²

Due to being unable to try out for their schools’ competitive dance teams, Dmitri and Zach filed suit in federal court in St.

²⁵ South Dakota High School Activities Association Competitive/Sideline Cheer and Competitive Dance Advisory Committee, Meeting Minutes 4 (Oct. 24, 2018).

²⁶ Stipulation of Dismissal and Second Joint Status Report, *F.L. v. South Dakota High School Activities Ass’n*, No. 18-4038-KES (D. S.D. June 19, 2019).

²⁷ *Id.*

²⁸ Kaiden did not pursue the matter further, because while his OCR complaint was pending, his school stopped participating in the Minnesota State High School League and instead joined a Wisconsin league, thus relieving Kaiden of Minnesota’s discriminatory rule.

²⁹ Complaint for Declaratory and Injunctive Relief, *D.M. by Bao Xiong v. Minnesota State High School League*, No. 18-02140 at *1, ¶ 1 (D. Minn. July 25, 2018).

³⁰ *Id.* at ¶ 26.

³¹ *Id.*

³² *Id.* at ¶ 31.

Paul, Minnesota.³³ Their complaint and preliminary injunction motion sought a declaration that the rule violated Title IX's competitive skill exception, as well as the Fourteenth Amendment's Equal Protection Clause.³⁴ However, their preliminary injunction motion was denied by the district court shortly thereafter.³⁵

According to the district court, Dmitri and Zach were unlikely to succeed on the merits of their equal protection claim.³⁶ Echoing OCR's tacit use of the 1979 Policy Interpretation in rejecting Kaiden's earlier complaint,³⁷ MSHSL claimed that limiting competitive dance to girls "further[s] the important governmental objective of remedying the past and present effects of gender underrepresentation in interscholastic athletics in Minnesota."³⁸ The court endorsed remedying past discrimination as an important governmental interest.³⁹ And even though Dmitri and Zach, as discussed below, introduced evidence to show that girls are no longer underrepresented in high school athletics in Minnesota, the court disagreed that the evidence was sufficient to show "that the gap has closed or is imminently likely to close."⁴⁰ The court further stated that "the governmental objective is to give girls more chances to participate, because their 'opportunities have previously been limited,'" and "[p]reviously' in this context could mean last year or five, ten, or twenty years ago."⁴¹ As a result, the court concluded that "[o]pening up a girls-only team to boys will not increase girls' participation, and thus it will not further the objective of increasing girls' athletic opportunities."⁴²

³³ See generally *id.*

³⁴ *Id.* at 8-13; Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, D.M. by Bao Xiong v. Minnesota State High School League, No. 18-02140 (D. Minn. July 26, 2018).

³⁵ D.M. by Bao Xiong v. Minnesota State High School League, 335 F.Supp.3d 1136 (D. Minn. 2018).

³⁶ *Id.* at 1139.

³⁷ Pacific Legal Foundation, *supra* note 16.

³⁸ *Id.*

³⁹ *Id.* (citing Minn. Stat. § 121A.04, subd. 3(a)).

⁴⁰ D.M. by Bao Xiong v. Minnesota State High School League, 335 F.Supp.3d 1136, 1139 (D. Minn. 2018).

⁴¹ *Id.*

⁴² *Id.*

Regarding Dmitri's and Zach's Title IX claim, the district court held that they were also unlikely to succeed on that claim.⁴³ The court recognized Title IX's "general rule" that sex discrimination in high school athletics is prohibited,⁴⁴ but noted the exception allowing "separate teams for members of each sex where selection for such teams is based upon competitive skill."⁴⁵ In applying the competitive skill exception, the court simply concluded that "dance team participants are chosen based on athletic ability," and therefore held the exception was satisfied.⁴⁶ In essence, then, the district court—the first court to discuss the competitive skill exception at any length (at least as far as I can determine)—interpreted the competitive skill exception to be synonymous with athletic ability.

On appeal to the Eighth Circuit, the appellate court reversed the lower court and directed that a preliminary injunction be entered enjoining Minnesota's girls only dance rule.⁴⁷ However, the court limited its analysis and holding to Dmitri's and Zach's equal protection claim, thus declining to address their Title IX claim.⁴⁸

In analyzing the boys' equal protection claim, the court began by noting the evidence submitted in the lower court regarding high school enrollment and athletic participation figures in Minnesota, for the years 2013-17, broken down by sex.⁴⁹ That data showed that for the 2013-14 school year, girls were underrepresented in high school athletics, in comparison to their enrollment numbers, by 1.9%.⁵⁰ For the school years 2014-15 and 2015-16, girls were underrepresented by 1.1%, but by the 2016-17

⁴³ Id. at 1140.

⁴⁴ Id. at 1139 (citing 34 C.F.R. § 106.41(a)).

⁴⁵ Id. at 1139-40 (citing 34 C.F.R. § 106.41(b)).

⁴⁶ Id. at 1140. The court based its conclusion on a letter submitted by the Minnesota Association of Dance Teams stating that "[d]ance coaches set their selection criteria for tryouts based upon the level of their program and the objective factors are primarily related to athletic ability." See Declaration of Erich K. Martens in support of Defendants' Memorandum of Law Opposing Plaintiffs' Motion for Preliminary Injunction, Exhibit D, D.M. by Bao Xiong v. Minnesota State High School League, No. 18-02140 Dck. 26-4 (D. Minn. Aug. 28, 2018).

⁴⁷ D.M. by Bao Xiong v. Minnesota State High School League, 917 F.3d 994, 998 (8th Cir. 2019).

⁴⁸ Id. at 1003.

⁴⁹ Id. at 1001.

⁵⁰ Id.

school year boys were underrepresented by 0.3%.⁵¹ The trend continued through the 2017-18 school year, where boys were underrepresented by 0.35%.⁵²

Based on the data showing that girls were no longer underrepresented in Minnesota high school athletics, the Eighth Circuit concluded that MSHSL failed to establish “that the underlying problem it initially sought to remedy by creating all girl teams—the overall underrepresentation of girls in high school athletics—continues to exist, at least in Minnesota.”⁵³ As a result, unless MSHSL could articulate an “exceedingly persuasive” justification for girls-only dance, it would not be permitted to exclude boys from participating.⁵⁴ It could not do so,⁵⁵ therefore the court held that the boys were likely to succeed on their claim that the girls-only dance rule was unconstitutional.⁵⁶

II. TITLE IX AND ITS SPORTS EXCEPTIONS

Due to evidence of discrimination against females in education and education programs,⁵⁷ Congress enacted Title IX of the Education Amendments of 1972 to prohibit discrimination on the basis of sex in any education program or activity that receives federal financial assistance.⁵⁸ The effects of Title IX on high school

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1002.

⁵⁴ *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728-30 (1982)).

⁵⁵ D.M. by Bao Xiong, 917 F.3d at 1002-03.

⁵⁶ *Id.* at 1003. Following the Eighth Circuit’s remand of the case to the district court for entry of a preliminary injunction, MSHSL and the boys agreed to dismiss the case. Order of Dismissal, D.M. by Bao Xiong v. Minnesota State High School League, No. 18-02140 Dck. 53 (D. Minn. May 3, 2019). As a result of their agreement, MSHSL committed to change its rules to allow for boys to participate on competitive dance teams in Minnesota. Stipulation and Order for Dismissal with Prejudice, D.M. by Bao Xiong v. Minnesota State High School League, No. 18-02140 Dck. 51 (D. Minn. April 25, 2019).

⁵⁷ Elaine Chamberlain, et al., *Athletics and Title IX of the 1972 Education Amendments*, 19 *Geo. J. Gender & L.* 231, 233 (2018).

⁵⁸ 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

athletics were felt immediately.⁵⁹ Whereas 1 in 27 high school girls participated in sports in 1972, by 1978 the rate had shot to 1 in 4, and over the same span the number of boys maintained a steady rate of 1 in 2.⁶⁰ In total, nearly 300,000 girls competed in high school athletics at the time of Title IX's enactment—compared to over 3.6 million boys—but by 2011 over 3 million girls were participating—in comparison to almost 4.5 million boys.⁶¹ Likewise, at the collegiate level female participation in athletics increased six-fold over Title IX's first 40 years.⁶² It is evident, then, that Title IX has been successful in significantly addressing sex discrimination against females in school athletics by increasing opportunities for them to participate.

But how has Title IX accomplished this? While Title IX's general prohibition on sex discrimination does not expressly mention athletics, Title IX's implementing regulations require that “[n]o person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”⁶³ Therefore, under Title IX the general rule is that opportunities to participate

⁵⁹ While I primarily discuss the competitive skill exception in the context of high school sports, there is nothing inherent in my analysis to distinguish high school from college sports.

⁶⁰ Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 *Del. L. Rev.* 83, 84 (2013).

⁶¹ *Id.* at 83. Interestingly, based on high school enrollment figures for 2011, the proportion has held quite steady for boys (52.5%), while the proportion of girls continued to climb to nearly 2 in 5 participating in high school athletics. See Table 2: Single Grade of Enrollment and High School Graduation Status for People 3 Years Old and Over, by Sex, Age (Single Years for 3 to 24 Years), Race, and Hispanic Origin: October 2011, All Races, United States Census Bureau, available at <https://www.census.gov/data/tables/2011/demo/school-enrollment/p20-571.html>. In any event, while consideration of athletic participation rates relative to school enrollment rates, compared between the sexes, is relevant information for measuring gains and identifying opportunities, it is not meant to be an end in itself. See 20 U.S.C. § 1681(b) (“Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community...”).

⁶² Chamberlain, et al., *supra* n.57 at 232.

⁶³ 34 C.F.R. § 106.41(a).

and compete in school athletics cannot be denied to someone on the basis of their sex, and teams must be open to everyone.⁶⁴

Nevertheless, due to concerns for maintaining fair competition, an important exception to the general prohibition on single-sex athletics exists “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁶⁵ For the purposes of this Article, as well as generally, it is best to conceptualize the exception as two separate sports exceptions: one for contact sports, and the other for non-contact sports where team selection is determined by “competitive skill.” This necessarily means that non-contact sports where team selection is not based on competitive skill must be open to members of both sexes.

The regulations helpfully clarify that contact sports “include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”⁶⁶ By implication then, the contact sports exception appears to function primarily as a protective measure for females due to the general size and strength advantages possessed by post-pubescent males.⁶⁷ Indeed, it seems obvious to state that it is dangerous to allow most high school boys and girls to participate in co-ed boxing, for example. Nonetheless, it is true that some girls choose to participate in contact sports.⁶⁸ And while Title IX does not require schools to permit girls to try out for contact sports teams,⁶⁹ some states do so require,⁷⁰ and some courts have held

⁶⁴ This is not to say that 34 C.F.R. § 106.41(a) is solely responsible for the increase in athletic opportunities for females. Of course, Title IX and its implementing regulations include additional provisions related to program funding, facilities, scholarships, etc., discussion of which is beyond the scope of this Article.

⁶⁵ 34 C.F.R. § 106.41(b).

⁶⁶ 34 C.F.R. § 106.41(b); see also *Williams v. School Dist. of Bethlehem, PA.*, 998 F.2d 168, 172-73 (3rd Cir. 1993).

⁶⁷ See *Coleman*, supra note 3, at 82.

⁶⁸ See e.g., Kelsey McKinney, *More High School Girls Are Playing Tackle Football Than Ever*, Deadspin (Sept. 6, 2019) available at <https://deadspin.com/more-high-school-girls-are-playing-tackle-football-than-1837378141>.

⁶⁹ 34 C.F.R. § 106.41(b) (“where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered *unless the sport involved is a contact sport*”) (emphasis added); *Lantz v. Ambach*, 620 F.Supp. 663, 665 (S.D. N.Y. 1985).

⁷⁰ See e.g., Minn. Stat. § 121A.04, subd. 3(d) (“If two teams are provided in the same sport, one of these teams may be restricted to members of a sex whose overall

that categorically prohibiting girls from trying out for contact sports teams violates the 14th Amendment's Equal Protection Clause.⁷¹ As a result, after nearly 50 years of Title IX, contact sports generally remain sex-segregated, but there are instances where females are members of teams that are predominately male.

Unfortunately, understanding Title IX's competitive skill exception is not as straightforward. This is largely due to the fact that Title IX and its implementing regulations fail to define "competitive skill," and as far as I can determine no court or commentator has yet to offer a substantive or definitive interpretation as to the meaning of the "competitive skill" component of the exception.⁷² However, there are at least two plausible readings of the exception:⁷³ (1) it applies where teams have competitive try outs that result in some participants making the team over others; or (2) where teams have limited roster spots,⁷⁴ *and* due to inherent physiological differences members of one sex are at risk of losing participation opportunities to members of the other sex if they are required to compete against each other for those spots. Under either reading, only teams in non-contact sports that limit their rosters are subject to the exception. In any event, and as I demonstrate below, the better of the two readings is the second.

athletic opportunities have previously been limited, and members of either sex *shall be permitted to try out* for the other team.") (emphasis added).

⁷¹ See, e.g., *Lantz*, supra note 69, at 666 (so holding, and collecting cases).

⁷² See Diane Heckman, Title IX Marks Its 35th Anniversary by Opening the Doors to Single-Sex Public Elementary and Secondary Schools, 237 Ed. Law Rep. 1, 13 (2008); but see *Hoover v. Meiklejohn*, 430 F.Supp. 164, 170 (D. Colo. 1977) (noting that the Colorado High School Activities Association defines "competitive skills" to mean "skill[s] presently possessed by athletes as a class composed of male athletes, as compared to the class of female athletes.").

⁷³ But see D.M. by Bao Xiong, supra note 35, at 1140 (interpreting "competitive skill" as synonymous with athletic ability).

⁷⁴ "Limited roster spots" means that not everyone with an interest in joining the team may do so. In contrast, a team may separate its players among units for varsity, junior varsity, practice squad, etc., based on ability, but all who wish to participate are permitted to join in some capacity as a player.

III. THE MEANING OF “COMPETITIVE SKILL”

“The legislative history on the application of Title IX to athletic programs is scanty.”⁷⁵ The same is true with regard to Title IX’s competitive skill exception within its implementing regulations.⁷⁶ However, important clues can be gleaned from first examining Title IX’s contact sports exception. As noted above, Title IX’s implementing regulations clarify that contact sports “include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”⁷⁷ Thus, concerns centered on preventing serious injury to females are at the core of keeping males and females separated in contact sports. Further, the concern that boys would displace girls if there were co-ed basketball teams, for instance, is also implicated by the contact sports exception. In other words, if a school had only one basketball team, due to the generally greater size, strength, speed, and athleticism of males compared to females, it is unlikely that many, if any, girls would make the team.⁷⁸ As a result, meaningful opportunities for girls in contact sports are created and preserved by maintaining separate teams for boys and girls.⁷⁹

The concern over female displacement is also at the core of the competitive skill exception. While safety concerns may not be implicated in non-contact sports (or at least not as much), physical characteristics—and the general physical advantages enjoyed by male athletes—remain highly relevant.⁸⁰ Consider running and swimming, for example. Physical characteristics such as speed and strength—and size to a lesser extent—are directly related to one’s ability to seriously compete against other competitors in

⁷⁵ *Yellow Springs Exempted Village Sch. Dist. Bd. of Ed. v. Ohio High School Athletic Ass’n*, 647 F.2d 651, 660 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part). For a brief discussion of the limited legislative history, see *id.* at 660-61. See also Judith Lee Oliphant, *Title IX’s Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?* 64 *Ky. L. J.* 432, 450-53 (1975).

⁷⁶ Oliphant, *supra* note 75, at 458; *Equity in Athletics, Inc. v. Dep’t of Education*, 504 F.Supp.2d 88, 95-96 (W.D. Va. 2007).

⁷⁷ 34 C.F.R. § 106.41(b); see also *Williams v. School Dist. of Bethlehem, PA.*, 998 F.2d 168, 172-73 (3rd Cir. 1993).

⁷⁸ Coleman, et al., *supra* note 3, at 82.

⁷⁹ *Id.* at 81, 91.

⁸⁰ *Id.* at 88-99.

head-to-head competition in those sports even if no physical contact occurs.⁸¹ Therefore, Title IX also permits the creation of single-sex teams in non-contact sports to ensure that females maintain meaningful opportunities to compete in those sports.⁸²

But for two key reasons explored further below, not all non-contact sports implicate the safety or displacement concerns that justify limiting them to a single sex.⁸³ First, some sports do not pit individual competitors against each other in head-to-head competition. For example, in competitive dance and cheer, teammates perform choreography together as a team, and their score is based on how well the team performs together as a whole, which is then ranked in comparison to competing teams.⁸⁴ Second, physical differences do not provide one sex with an advantage in every sport. In synchronized swimming, for example, there can be team performances similar to dance and cheer, but there are also duet performances where males and females perform together to combine their unique, complementary traits into a single performance.⁸⁵ More directly, in sports like bowling⁸⁶ and darts,⁸⁷ males and females regularly compete against each other because no sex possesses a relevant physical advantage over the other in either sport.

Fundamentally, were the competitive skill exception not limited in its applicability to certain sports, Title IX's implementing regulations would contradict the statute. As a reminder, Title IX generally prohibits single-sex athletics.⁸⁸ Thus, it simply cannot be the case that on one hand single-sex sports are prohibited, but on the other hand single-sex sports are allowed

⁸¹ *Id.*

⁸² *Id.* at 81, 98-99; see also *Petrie v. Illinois High School Ass'n*, 394 N.E.2d 855, 859 (Ill. App. Ct. 1979).

⁸³ Cf. *Mercer v. Duke Univ.*, 190 F.3d 643, 646 (4th Cir. 1999) ("By its terms, [§ 106.41(b)] permits covered institutions to operate separate teams for men and women *in many sports*, including contact sports such as football, rather than integrating those teams.") (emphasis added).

⁸⁴ See discussion *infra* at Section V, Part A.

⁸⁵ See discussion *infra* at Section V, Part B.

⁸⁶ Professional Women's Bowling Association, Wikipedia (last visited Feb. 9, 2021), https://en.wikipedia.org/wiki/Professional_Women%27s_Bowling_Association.

⁸⁷ Courtney Connley, 25-year-old Fallon Sherrock becomes first woman to win World Darts Championship match, CNBC (Dec. 18, 2019), https://www.cnbc.com/2019/12/18/fallon_sherrock-is-first-woman-to-win-world-darts-championship-match.html.

⁸⁸ 34 C.F.R. § 106.41(a).

because all sports are either contact based or based on competitive skill.⁸⁹

In fact, the competitive skill exception is already limited by the regulation's subsequent qualification that "where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport."⁹⁰ Hence, if a high school sponsors a single volleyball team (a non-contact sport because it is not a sport where "the purpose or major activity of which involves bodily contact,"⁹¹ and where physical characteristics like size, strength, speed, and jumping ability generally provide males with an advantage over females)⁹² and limits the roster to girls only, Title IX does not require that the school allow boys to try out unless "athletic opportunities for [boys] have previously been limited."⁹³ In contrast, if the school's volleyball team is established only for boys, girls must still be allowed to try out so long as athletic opportunities for girls were previously limited. Therefore, by seeking to maximize participation opportunities by inherently recognizing that females may be able to compete with males in certain non-contact sports, the regulation's own limitations on the competitive skill exception caution against watering down through interpretation the general rule favoring co-ed sports. Further, even if it turns out that individual females cannot fairly compete

⁸⁹ See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180-82 (2012) (discussing the Harmonious-Reading Canon of statutory construction and that "provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

⁹⁰ 34 C.F.R. § 106.41(b).

⁹¹ *Id.*

⁹² *Petrie*, 394 N.E.2d at 861.

⁹³ 34 C.F.R. § 106.41(b). The purpose of the clause: "athletic opportunities have previously been limited," then, is to provide a compensatory mechanism of addressing historic discrimination against members of a particular sex by giving them the choice to try out for a team that Title IX's competitive skill exception might otherwise permit them to be excluded from. While Title IX was originally intended as a means of remedying discrimination against females, see Chamberlain, *supra* n.57 at 233, the statute and regulations are written neutrally so as to apply to sex discrimination against females or males and to avoid facial unconstitutionality under the Equal Protection Clause.

with males in a particular non-contact sport, as a means of compensating for past discrimination they still must be permitted to try if they so choose.

But what about the “where selection for such teams...” language?⁹⁴ Perhaps the most natural reading of the competitive skill exception is simply to distinguish sports with open rosters—i.e., those teams where anyone with an interest may join the team—from those with competitive tryouts and strict roster limits.⁹⁵ It certainly seems like it would be unfair to limit a baseball team to only boys if any boy who came out for the team was given a spot of some kind. Surely an argument could be made that if any boy could join the team regardless of his ability to play baseball, then a girl should be allowed to join the team as well. However, if the competitive skill exception is limited to such an interpretation, schools and state athletic associations could manipulate their rules to effectively negate Title IX’s general rule of co-ed sports by implementing roster caps and making selection for every non-contact team based on competitive tryouts. The roster caps and competitive tryouts would thus trigger the exception regardless of whether the sexes could fairly compete against each other in a particular sport.⁹⁶

Indeed, just because team selection may be based on competitive tryouts, that does not address whether a particular sport is one where physical difference between males and females are relevant or provide one sex with an advantage over the other.

⁹⁴ See 34 C.F.R. § 106.41(b) (“...a recipient may operate or sponsor separate teams for members of each sex *where selection for such teams* is based upon competitive skill or the activity involved is a contact sport.”) (emphasis added).

⁹⁵ See e.g., *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 816 F.Supp.2d 869, 928 n.47 (E.D. Cal. 2011). HEW itself appears to have interpreted the language in this manner, as gleaned from a 1975 “Memorandum to Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents.” See *Mularadelis v. Haldane Central Sch. Bd.*, 427 N.Y.S.2d 458, 463 (N.Y. App. Div. 1980) (“Where a team in a non-contact sport, the membership of which is based on skill...”); see also *Yellow Springs*, 647 F.2d at 655 (“The regulation additionally permits separate teams in sports which require competitive selection...”); see also *Oliphant*, supra note 75, at 459.

⁹⁶ *Oliphant*, supra note 75, at 459. Such a result would be particularly harmful for students interested in participating in sports that members of his or her sex don’t traditionally or commonly participate in. As a result, stereotypes about athletic preferences of males and females would persist and opportunities for individual fulfillment and participation would be limited.

Further, the very constitutional basis for allowing differential treatment on the basis of sex (so long as the proper scrutiny is applied and satisfied) hinges on there being physical differences between the sexes.⁹⁷ Therefore, the key to determining whether the competitive skill exception applies to a particular sport or team requires determining whether physical differences between males and females are relevant in that sport such that one sex has an inherent advantage over the other.⁹⁸

An added benefit to an interpretation holding that non-contact sports can only be single-sex if physical differences so warrant in that particular sport, is that such an interpretation provides breathing room for things to change. In other words, and as discussed further below, just because members of one sex may have an inherent advantage in a sport today, that does not automatically mean the advantage is based on inherent physical differences rather than advanced training or experience such that improvements in those areas by the currently disadvantaged sex could not level the playing field in the future.⁹⁹ In fact, South Dakota even recognized the potential for this benefit to also

⁹⁷ U.S. v. Virginia, 518 U.S. 515, 533 (1996); Coleman, et al., supra note 3, at 87, 108.

⁹⁸ See Att’y General v. Massachusetts Interscholastic Athletic Ass’n, Inc., 393 N.E.2d 284, 294-95 (Mass. 1979) (“But even if the claimed fear of inundation because of male advantages in many sports were more solidly based in fact, it would not justify the categorical exclusion of males from any sport, or divisions or “events” of a sport, in which, overall, they enjoy no or only a slight advantage over females.”); *Petrie*, 394 N.E.2d at 861, 863; Aaron J. Hershtal, Does Title IX Work After School? California Applies the Three Part Test to Municipal Sports, 12 *Cardozo J. L. & Gender* 653, 682 (2006) (“in sports where male physical advantages are moot...the argument [that single-sex sports are appropriate to avoid displacing females] fails.”).

⁹⁹ While not required by Title IX, other creative alternatives to single-sex sports also exist that recognize and account for relevant physical differences. By using rules modifications in some sports, males and females can fairly compete against one another and better maximize participation opportunities at certain levels of competition. For example, golf has a handicap system in place for scoring, USGA, Rules of Handicapping FAQs: World Handicapping System (WHS) Background and Overview, <https://www.usga.org/content/usga/home-page/handicapping/world-handicap-system/world-handicap-system-usga-golf-faqs/faqs---what-is-the-world-handicap-system-all-about-.html>, and each hole of a golf course has multiple tee boxes to swing from, see Bill Pennington, Swallow Your Ego and Play the Right Tees, *New York Times* (May 3, 2009), available at <https://www.nytimes.com/2009/05/04/sports/golf/04pennington.html>. Combined, these measures allow people of different abilities, ages, and strengths to fairly compete against each other regardless of sex.

operate in the reverse.¹⁰⁰ In sum, just because someone may have an inherent physical advantage in a sport if it is co-ed today, that does not mean members of the currently disadvantaged sex (or creative rules modifications) cannot neutralize that advantage in the future and put an end to unfair competition. Therefore, by using current science and data to determine which sports males or females have an advantage in over the other, and only limiting participation on those sports' teams to a single sex, Title IX's general rule of co-ed sports can be more fully honored while simultaneously maximizing opportunities for members of both sexes to fairly compete in those sports.

The question that remains then, is which sports are neither contact sports, nor sports where physical differences between males and females are relevant or provide one sex with an advantage over the other. Unfortunately, most courts and commentators that have had occasion to consider Title IX's application to non-contact sports seem to have assumed without meaningful consideration that all non-contact sports fall under the competitive skill exception.¹⁰¹ Admittedly, few currently sanctioned sports at the high school level likely fail to fall within either exception.¹⁰² However, as illustrated in Kaiden's, Freddie's, Dmitri's, and Zach's fight over competitive dance, determining the scope of the competitive skill exception for non-contact sports is vitally important.

¹⁰⁰ Supra note 25.

¹⁰¹ See e.g., *Mercer v. Duke Univ.*, 190 F.3d 643, 647 (4th Cir. 1999); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 *Yale L. J.* 1254, 1258 n.34 (1979); P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 *Marq. Sports L. J.* 149, 157 (1990); Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 *Nev. L. J.* 486, 513 (2013); Walter T. Champion, Jr., *Contact v. Non-contact Sports*, *Fundamentals of Sports Law* § 13:3 (2019); Heckman, supra note 72, at 13.

¹⁰² Many thanks to law student and Pacific Legal Foundation law clerk Natalie K. Fulton for assisting me in surveying the various high school athletic and activities association websites to compile a list of sanctioned single-sex non-contact sports at the high school level.

IV. NON-CONTACT SPORTS WHERE COMPETITORS OF ONE SEX
POTENTIALLY LACK INHERENT PHYSICAL ADVANTAGES OVER
THE OTHER

A. Competitive Dance

Competitive dance is a team sport where a group of teammates perform choreographed dance routines together in competition against other teams for the highest team score.¹⁰³ In a typical competition, the various teams will perform different routines in multiple categories such as hip hop, jazz, kick, and pom.¹⁰⁴ Performances are judged on a variety of factors, with the predominant factor being technique.¹⁰⁵

While there is obviously an athletic component to dance, competitions do not pit individual dancers against other dancers in a contest of speed or strength like they do in running or swimming, for example.¹⁰⁶ As a result, the characteristics that tend to give males an advantage over females in athletic competition—speed and strength—are not relevant in any meaningful way in competitive dance.¹⁰⁷ Further, because of the team choreography nature of competitive dance, individual dance team members do not compete against other individual dancers, but perform in conjunction with their teammates with the hope of besting the opposing teams' performances. Thus, even if an individual dance team maintains competitive tryouts, competitive dance should not be considered a sport in which “selection for such teams is based upon competitive skill” such that teams can be limited to one sex, typically girls. That is because one dancer's selection to the team over another does not necessarily mean they are a better dancer, rather than simply a better fit with the team due to any number of factors.

In contrast, consider baseball. Baseball is also a team sport, but one in which each individual competitor goes head-to-head

¹⁰³ South Dakota High School Activities Ass'n, *Competitive Dance Handbook* 5-7, available at <https://www.sdhsaa.com/Portals/0/PDFs/Handbook/Athletics/23-CompetitiveDance.pdf>.

¹⁰⁴ *Id.* at 7.

¹⁰⁵ South Dakota Dance Rubric, available at <https://www.sdhsaa.com/Portals/0/PDFs/Officials/Cheer Dance/DanceRubric.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ Meeting Minutes 4, *supra* note 25.

In the Minnesota litigation, the Minnesota State High School League provided no contrary interpretation of the competitive skill exception to that offered above, nor did MSHSL provide any evidence—or hint that such evidence exists—that allowing boys to participate in dance would give boys a competitive advantage over girls.¹¹⁰ Nevertheless, the district court in that case overlooked this lack of evidence, and despite never actually holding that selection to dance teams is based on competitive skill, the court interpreted the competitive skill exception by focusing on the competitive nature of dance competitions and that “dance team participants are chosen based on athletic ability.”¹¹¹ As noted above, though, there are at least two problems with that interpretation of the competitive skill exception.

First, that dance teams are judged in competitions based on their competitive performance does not speak to whether selection to the teams was based on competitive skill rather than the dancers’ ability to perform routines and contribute to the team. As it turned out, under either of the possible readings of the meaning of the competitive skill exception noted above (competitive tryouts and limited rosters), dance team was not subject to it. Not only was there no evidence that boys possess an inherent advantage over girls in dance competition, but under the rules for dance team in Minnesota, teams had no roster limits.¹¹² Thus, any interested dancer who tried out for the dance team had the opportunity to make the team.

Second, the lower court’s holding that dancers are chosen “based on athletic ability” drastically expands the competitive skill exception. Under the district court’s interpretation, all sports would qualify, and the exception would contradict and swallow the general rule against single-sex sports.¹¹³ Again, it cannot be true that on one hand single-sex sports are banned by Title IX’s general rule, but through expansive interpretation of Title IX’s

¹¹⁰ South Dakota also acknowledged that boys do not have an inherent advantage. *Supra* note 25.

¹¹¹ *D.M. & Z.G. v. Minnesota State High School League*, 335 F.Supp.3d 1136, 1140 (D. Minn. 2018).

¹¹² Minnesota State High School League Official Handbook, Bylaw 502.00 (2020-2021), available at https://www.mshsl.org/sites/default/files/2020-07/handbook_2020-21_500bylaws_web.pdf.

¹¹³ *Supra* Section IV.

exceptions single-sex sports are allowed because all sports are either contact-based or based on “athletic ability.” Furthermore, there would be no need for the separate contact sport exception if “competitive skill” were interpreted synonymously with “athletic ability,” because it is implausible that selection to any contact sport team is not based on the participant’s athletic ability.¹¹⁴

With all that in mind, the meaning of the competitive skill exception is revealed by applying it in the competitive dance context. In sports where physical differences between the sexes cause one sex to enjoy a competitive advantage over the other, separate teams are permissible. Thus, female dance teams can exclude boys if it can be shown that boys would have a distinct competitive advantage over girls—a showing that no party has made to date in litigation.

To be clear, I do not mean to suggest that there is a head-to-head competition requirement in order for the competitive skill exception to apply to a given sport. Rather, size, speed, and strength are simply characteristics that are relevant to whether one sex may have a competitive advantage over the other, and those factors do not come into play in competitive dance the same way they do in other sports such as volleyball. Volleyball players do not individually go head-to-head with the opposing team’s players. Instead, the team performs together to defeat the other team. But due to physical characteristics like size, strength, and jumping ability having significant relevance to one’s ability to play volleyball, team volleyball is typically sex segregated. Appreciating the differences between the competitive aspect of dance versus volleyball is therefore also critical to an accurate application of the competitive skill exception that respects the only legal justification for single-sex sports in the first instance: meaningful physical differences.

B. Other sports

Based on a review of sanctioned high school sports in the United States, there are likely few sports currently designated for

¹¹⁴ See *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (it is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.”).

girls, other than competitive dance, that when analyzed under the above framework may be vulnerable to a legal challenge from an interested male student.¹¹⁵ In any event, competitive cheerleading, synchronized swimming, and possibly skiing and gymnastics are potential avenues for male participation at this time.

Competitive cheerleading is similar to competitive dance.¹¹⁶ As competitive dance is distinguishable from sideline dance and spirit teams whose main goal is to support other sports teams, so is competitive cheerleading distinguishable from sideline cheer. Competitive cheer teams compete against other teams by performing routines that consist of stunts, jumps, and tumbling, and are set to music.¹¹⁷ Competitive cheer is a female-dominated sport, with some 97% of participants being female.¹¹⁸ Nevertheless, a significant number of males also participate throughout the country despite a number of states limiting the sport to girls-only at the high school level.¹¹⁹ Because of the traditional and enduring involvement of males in competitive cheerleading,¹²⁰ rather than evidence-based concerns of safety or

¹¹⁵ The situation is framed in this manner in order to reflect the reality that in most states it is likely the case that girls can show a history of underrepresentation in athletics so as to trigger 34 C.F.R. § 106.41(b)'s requirement that they be permitted to try out for any non-contact all-boys team. However, as seen in the Minnesota dance litigation, underrepresentation has started to move in the other direction, with boys now being the underrepresented sex in Minnesota high school athletics. If that trend were to continue to a significant degree, boys would be permitted to try out for non-contact all-girls teams. As a result, future litigation seeking to expand participation opportunities is most likely to come from male students, and this possibility highlights the need to cabin Title IX's competitive skill exception to permit co-ed participation only when there are no relevant inherent physical advantages enjoyed by a particular sex in a particular sport.

¹¹⁶ There is an ongoing debate as to whether competitive cheerleading is a "sport" for Title IX purposes. See e.g., Lee Green, *Impact of Competitive Cheer Laws, Regulations on Title IX Compliance*, National Federation of State High School Associations (April 16, 2019), available at <https://www.nfhs.org/articles/impact-of-competitive-cheer-laws-regulations-on-title-ix-compliance/>. However, that debate is beyond the scope of this Article, and without taking a position in that debate I assume for the purposes of this Article that competitive cheerleading is a sport.

¹¹⁷ *What is Competitive Cheerleading?*, <https://www.louisvillewarriors.com/Default.aspx?tabid=1166384>.

¹¹⁸ Green, *supra* note 116.

¹¹⁹ *Id.*

¹²⁰ See e.g., Katie O'Malley, *14 hours training a week, 38,000 spectators, homophobic slurs: What it's really like to be a male cheerleader*, *Independent* (Feb. 3,

displacement it is likely a result of more recent stereotyping and assumptions about athletic preferences that explains some states' exclusion of males at the high school level. In any event, due to the similarities to competitive dance, competitive cheerleading is likely the sport most ripe for challenge from an interested male who has been excluded from participating solely due to his sex.

Synchronized swimming is another interesting potential avenue. Synchronized swimming is a demanding sport. "Performers need to hold their breath for long periods while carrying out a dizzying array of kicks and turns upside-down in the water."¹²¹ While it is a team sport, competitors can also perform solos or duets "in which the competitors typically swim next to each other, creating a series of perfectly mirrored figures."¹²²

Synchronized swimming was traditionally mixed sex, but in 1941 when the Amateur Athletic Union adopted it as an official sport in the United States, it was divided by sex, eventually becoming predominantly female worldwide.¹²³ Even still, men and boys have continued to participate through the years, allowing teams to create more varied and unique performances than if the competitors were all female.¹²⁴ Similar to competitive dance, "[m]en's choreography is different from women's. It's a completely different style. In a mixed duet the man should personify strength, power. The woman, on the contrary, beauty and grace."¹²⁵ While their choreography may be different, male performers do not believe they possess any inherent advantage over women in the water, because "[a]lthough men are stronger, they are less flexible so it is harder to get the necessary extension in the legs. Buoyancy is also an issue."¹²⁶ Thus, "[i]n mixed duets, physical differences between men and women do not help any one team over

2019), <https://www.independent.co.uk/life-style/super-bowl-2019-male-cheerleader-atlanta-los-angeles-rams-new-england-patriots-nfl-a8758721.html>.

¹²¹ William Kremer, *Why Can't Men Be Olympic Synchronised Swimmers?*, BBC Magazine (July 21, 2015), available at <https://www.bbc.com/news/magazine-33566335>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *id.*; see also Brendan Parker, *16-Year-old Yukon Boy Breaking Barriers in Synchronized Swimming*, Global News (Mar. 23, 2018), available at <https://globalnews.ca/news/4103095/yukon-boy-synchronized-swimming/>.

¹²⁵ Kremer, *supra* note 121.

¹²⁶ *Id.*

another.”¹²⁷ Regardless of the apparent lack of one sex having an advantage over the other, so long as states like Minnesota prohibit boys from participating in synchronized swimming,¹²⁸ we lack the data to make a definitive determination. And in the meantime, the exclusion of boys only furthers “the stigma of boys doing what is perceived to be a girls’ activity.”¹²⁹ In that regard, single-sex synchronized swimming is also quite similar to competitive dance and is potentially vulnerable to a legal challenge.

Another intriguing example is that of downhill skiing. One recent article examined the possibility of men and women competing against each other in Olympic skiing.¹³⁰ The International Ski Federation prohibits mixed-gender ski competitions, but gold-medal Olympian Lindsey Vonn has requested to compete against men on multiple occasions.¹³¹ Upon analyzing the results of four Olympic alpine events going back to 1948, the article determined that men are consistently faster than women in only one of those events.¹³² However, the differences in courses run by men and women in the same events makes it difficult to definitively know whether women are truly competitive with men in those events.¹³³ Regardless, skiing highlights the notion that what may be an unequal competition today is not necessarily always going to be the case.

There are likely other minor examples (bowling, archery, and rifle shooting) that warrant further consideration, but this Article is not intended to provide an exhaustive analysis of all sports. Nevertheless, while it appears to be the case that a solid majority of sanctioned school sports are ones in which inherent physical differences provide males with a competitive advantage over females, at least as of this writing, the examples discussed and noted here provide an important clarification that the same is not

¹²⁷ *Id.*

¹²⁸ See Girls Synchronized Swimming Rules, Policies, and Bylaws, Minnesota State High School League, https://www.mshsl.org/sites/default/files/2020-08/sysm_20202021_rulesandpolicies.pdf.

¹²⁹ Kremer, *supra* note 121.

¹³⁰ Ella Koeze, What If Men and Women Skied Against Each Other in The Olympics?, *FiveThirtyEight* (Feb. 14, 2018), available at <https://fivethirtyeight.com/features/what-if-men-and-women-skied-against-each-other-in-the-olympics/>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

true of all sports, and that things could change in the future. Ensuring that school athletic directors, administrators, and state athletic associations recognize those facts, and make their eligibility rules and roster decisions in line with data analyzing and applying those facts, is thus necessary to fulfill Title IX's promise of maximizing opportunities for all student athletes.

V. APPLICATION TO TRANSGENDER ATHLETES

There is a growing debate over what to do when transgender girls and women seek to compete in girls' and women's sports after having completed puberty as a biological male.¹³⁴ Unfortunately, allowing post-pubescent trans girls and women to compete against biological females runs the risk of placing biological females at a disadvantage when a trans athlete retains the physical characteristics of a biological male, primarily testosterone.¹³⁵ On the other hand, strict rules dictating participation based on an athlete's sex at birth, for example, runs the risk of unfairly excluding individuals when a more tailored approach could protect competition and participation for all. Without wading into the highly contentious political and cultural debate surrounding the issue, we can apply the lessons learned above in determining the meaning of Title IX's competitive skill exception for a workable solution that looks to science and data as its guide to ensuring that meaningful athletic opportunities are available for athletes regardless of sex or gender.

As discussed above, in sports where competitors do not compete head-to-head such that physical differences do not provide one sex with an advantage over the other, and in sports where physical differences are not relevant to one's ability to compete, there is no valid reason to separate athletes on the basis of sex at all. In line with that understanding, sex-distinctions applicable to transgender athletes should only be permitted in sports when a trans girl or woman maintains a relevant physical advantage due to being a biological male that also provides a competitive advantage in their particular sport.

¹³⁴ See e.g., Case page for *Soule v. Connecticut Association of Schools, Alliance Defending Freedom*, <https://www.adflegal.org/case/soule-v-connecticut-association-schools>.

¹³⁵ Coleman, *supra* note 3, at 97-99.

But as previously noted, the majority of sports are likely ones in which biological males possess inherent physical advantages over biological females. Rather than imposing restrictive outright bans on trans athletes in those sports,¹³⁶ where possible, athletics organizations should instead develop science-based eligibility standards to account for whatever relevant and meaningful physical differences apply in a certain sport. For example, under guidelines issued by the International Olympic Committee in 2015, “athletes who transition from male to female can compete in the women’s category without requiring surgery to remove their testes provided their total testosterone level in serum is kept below 10 nanomoles per litre for at least 12 months.”¹³⁷ Such measures mostly account for retained physical advantages while allowing for transitioning competitors to neutralize their advantage and fairly compete in women’s sports.¹³⁸ As a result, through inclusively inspired and data-guided measures like the IOC’s, Title IX’s promise of maximizing athletic opportunities for all athletes can be respected.

CONCLUSION

As we near the fiftieth anniversary of the enactment of Title IX, much has changed. In Minnesota, for example, boys and girls are now essentially on equal footing when it comes to the availability of opportunities to participate in high school athletics. But much work also remains to be done. Unfortunately, many policymakers and those in charge of overseeing athletics programs that must comply with Title IX seem to have forgotten about Title IX’s general prohibition on single-sex sports. Whether it’s due to unfortunate stereotypes or the misguided belief that Title IX demands numerical parity for high school athletics, boys routinely find their sports being eliminated or their hopes of participating in

¹³⁶ See, e.g., Protection of Women and Girls in Sports Act of 2020, S.4649, 116th Cong. (2020).

¹³⁷ Sean Ingle, *IOC Delays New Transgender Guidelines After Scientists Fail to Agree*, *The Guardian* (Sep. 24, 2019), available at <https://www.theguardian.com/sport/2019/sep/24/ioc-delays-new-transgender-guidelines-2020-olympics>.

¹³⁸ Whether the IOC’s 2015 guidelines are the best approach is beyond the scope of this Article. The guidelines are simply mentioned as an example of an alternative that is preferable to more-restrictive eligibility rules.

a non-traditional sport dashed. Likewise, questions of how to fairly make room for transgender athletes will only grow more prevalent in the future. However, it is my hope that through understanding and properly applying Title IX's "competitive skill" exception, opportunities for all athletes can be maximized by using science and data as our guide. In sum, in non-contact sports where teams do not have roster limits, Title IX requires that team to be co-ed; and for those non-contact sports teams that do limit their rosters, unless it can be determined that biological males hold some inherent physical advantage such that biological females would be at risk for their safety, or would not fairly be able to compete for positions on teams should that particular sport be co-ed, then Title IX also requires that sport to be co-ed.