

AN EXAMINATION OF POLICIES REGULATING THE PARTICIPATION OF TRANSGENDER LEARNERS IN SOUTH AFRICAN HIGH SCHOOL SPORTS

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SUMMARY

South African high schools typically adopt a sex-segregated approach to sports teams and, therefore, have “boys” sports teams and “girls” sports teams. This approach is complicated by the increasing number of high school learners who identify openly as transgender. Transgender learners experience the sports policies that South African high schools choose to adopt as falling into one of three broad categories. These categories are: the restrictive approach, the partially inclusive approach and the fully inclusive approach. These approaches vary in terms of what steps they require trans learners to take in order to participate in sports teams that are consistent with their gender identity. School policies must be consistent with the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) in order to be legally compliant. It is argued that the restrictive approach is inconsistent with PEPUDA, and, therefore, unlawful, as no legitimate purpose underlies it. As legitimate reasons exist for the implementation of partially and fully inclusive policies, it is argued that they are lawful. As both such policies are lawful, policymakers will have a choice regarding which set of policies to adopt. When making this choice, a school must consider which values it seeks to promote. On the one hand, there is the imperative to acknowledge the well-being and dignity of trans learners while, on the other hand, there are legitimate concerns about the fairness of competition. As dignity is both a right that is granted to everyone by the Constitution, and one of its founding values, it is argued that fully inclusive policies should be favoured as they result in the validation of trans learners’ dignity. Furthermore, it is argued that high school sports should serve broader educational goals, such as teaching high school learners that their trans peers deserve the chance to live their truth in full.

1 INTRODUCTION

High schools around the world typically adopt a sex-segregated approach to sports teams and, therefore, have “boys” sports teams and “girls” sports teams.¹ South African high schools are no different in this regard. In terms of

¹ Lenzi “The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies” 2018 67(3) *American University Law Review* 841.

this approach, inclusion in the “boys” sports teams is the exclusive preserve of those whose birth certificates designate them as male, and inclusion in the “girls” sports teams is the exclusive preserve of those whose birth certificates read “female”. This approach has been complicated by the increasing number of high school learners who identify openly as transgender (“trans”).²

In the absence of a centralised authority on all aspects of school sport, young people who do not identify as either male or female experience the sports policies that South African high schools choose to adopt as falling into one of three broad categories. These categories, as formulated by Lenzi,³ are the restrictive approach, the partially inclusive approach and the fully inclusive approach.

In terms of the restrictive approach, trans learners are prohibited, without exception, from participating in teams that do not correspond with their sex as classified in the population registry.⁴ Conversely, the fully inclusive policy, is the converse of the restrictive approach, and, therefore, allows trans learners to participate, without exception, in teams that are congruous with their gender identity. Lastly, the partially inclusive policy requires trans girls to undergo specific medical procedures in order to participate in girls’ teams.⁵ However, this policy does not require trans boys to undergo any interventions of this nature.

School policies must be consistent with the Promotion of Equality and Prevention of Unfair Discrimination Act⁶ (PEPUDA) in order to be legally compliant. Although the Act does not expressly prohibit discrimination on the ground of gender identity, its respective non-discrimination provisions are broad enough that they can be interpreted to contain such prohibitions. In this paper, it is argued that the restrictive approach is inconsistent with PEPUDA, and therefore unlawful, as no legitimate purpose exists that could justify discriminating between cisgender and transgender learners on the basis of gender identity. As legitimate reasons exist for the implementation of partially and fully inclusive policies, it is argued that they are lawful. The author’s arguments are shaped by the lens of the research question: are South African high school sports policies that regulate the participation of transgender learners in accordance with their gender identity compliant with South Africa’s equality laws?

As both partially and fully inclusive policies are lawful, policymakers have a choice regarding which policy to adopt. When making this choice, a school must consider which values it seeks to promote. On the one hand, there is the imperative to acknowledge the well-being and dignity of trans learners, while on the other hand, there are legitimate concerns about the prevention of injury and fairness of competition. As dignity is both a right that is granted to everyone in the Constitution, and one of the founding values of the Constitution, it is argued that fully inclusive policies should be favoured as

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ 4 of 2000.

they result in the validation of trans learners' dignity. Furthermore, high school sports should serve broader educational goals, which should include teaching high school learners that their trans peers deserve the chance to live their truth in full, including participating in sports teams that are congruent with their gender identity.

This article begins by providing a brief history of sex-segregated sport in South Africa and an explanation of trans identity. There follows a discussion of the legal framework in which the author assesses the lawfulness of the three different policy approaches in relation to the Constitution,⁷ PEPUDA, and domestic and foreign jurisprudence. This assessment involves an appraisal of, not only the legal justifications for sex-segregated sports, but also those of a social nature.

2 EXPLANATION OF TERMS

In this article, the author adopts the following definitions of the terms "sex", "intersex", "gender", "cisgender" and "transgender":

"Sex" refers to a category that is assigned at birth on the basis of anatomical and biological features.⁸ In addition to external genitalia, these biological features include the composition of hormones and chromosomal DNA.⁹

An "intersex" individual is a person who exhibits both male and female sex characteristics and, therefore, is not considered to be male nor female.¹⁰

Unlike sex, "gender" is not assigned. Rather, it is a category of identity that is claimed by the individual and is independent of the individual's sex.¹¹ It follows that gender is a cultural and social construct, with the content of the notions of "male" and "female" being attributed within a heteronormative context.¹² Gender, when understood progressively, is inseparable from a sense of self-identification and interiority.¹³ Accordingly, gender is more concerned with cultural meanings attached to gender roles and the psychology of individuals than it is with their biology. "Gender identity", in turn, is the personal sense of one's own gender.¹⁴

A "cisgender" individual wholly identifies with the sex that was attributed to that person at birth. The term "transgender", on the other hand, refers to an

⁷ Constitution of the Republic of South Africa, 1996 (the Constitution).

⁸ Newcombe "Blurred Lines: Intersexuality and the Law" 2017 109(2) *Law Library Journal* 227.

⁹ Visser and Picarra "Victor, Victoria or V? A Constitutional Perspective on Transsexuality and Trans-Genderism" 2012 28(3) *South African Journal on Human Rights* 508.

¹⁰ Newcombe 2017 *Law Library Journal* 227.

¹¹ *Ibid.*

¹² Klein "Who Decides Whose Gender? Medico-Legal Classifications of Sex and Gender and Their Impact on Transgendered South Africans' Family Rights" 2014 14(2) *Ethnoscripts* 13.

¹³ *Ibid.*

¹⁴ Wilson, Marais, De Villiers, Addinall and Campbell "Transgender Issues in South Africa, With Particular Reference to the Groote Schuur Hospital Transgender Unit" 2014 104(6) *South African Medical Journal* 449.

individual whose gender identity does not correspond with the sex assigned to that individual at birth.¹⁵

3 SETTING THE SCENE

There is little-to-no literature to be found on the specific topic to be engaged with in this article. Although much has been written about transgender individuals in South Africa, the issue of the legal compliance of high school sports policies in regulating the participation of transgender learner athletes has not been canvassed. Given this gap, the author has chosen to review literature that deals with congruent issues. The author has also taken a thematic approach to the literature review, in which the history of sex-segregated sport, transgender identity, the dilemma of trans athletes, the potential benefits of sports participation for transgender learners, and current models for incorporating transgender athletes into sex-segregated sports are considered.

A review of South African literature illustrates that trans individuals, both inside and outside educational institutions, encounter societal prejudice and barriers to exercising their rights on a daily basis. Sanger's¹⁶ work, in conjunction with Moloji's,¹⁷ is used to determine the position of transgender individuals in South African society and assists in placing their lived experiences at the centre of this article. American studies analyse arguments that arise in the context of devising trans-inclusive policies¹⁸ but there is little-to-no South African case law on discrimination in sports. The American articles are thus particularly useful in learning how courts approach the issue of discrimination in sport, as issues of discrimination in high school sports have come before American courts in the past.

Most literature that pertains to queer issues is written from a Western perspective in terms of which the concerns, views and challenges of White, cisgendered, masculinist and middle-class queers are considered to be the default.¹⁹ This article forms part of a small, but growing, group of writers in the global South attempting to place gender-diverse, feminist and queers of colour at the centre of their work.²⁰ This article considers, for the first time, the legal compliance of the three main categories of transgender high school sports policies in their application to South Africa learners.

¹⁵ Luvuno, Ncama and Mchunu "Transgender Population's Experiences With Regard to Accessing Reproductive Health Care in Kwazulu-Natal, South Africa: A Qualitative Study" 2019 11(1) *African Journal of Primary Health Care & Family Medicine* 1.

¹⁶ Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* (Gender DynamiX Research Report) 2014.

¹⁷ Moloji *KwaZulu-Natal Transgender and Gender Non-Conforming Needs Assessment Report: 2012* (2013).

¹⁸ Lenzi 2018 *American University Law Review* 841.

¹⁹ Coates "Collateral Damage: Warfare, Death, and Queer Theory in the Global South" 2019 25(1) *GLQ: A Journal of Lesbian and Gay Studies* 132.

²⁰ *Ibid.*

3 1 History of sex-segregated sport

Sports were traditionally exclusively the purview of men and boys.²¹ The key objective of the promotion of team sports by educational and religious institutions in the nineteenth century was to engender in the male participants “masculine qualities such as physicality, aggression and dominance”.²² The few sporting opportunities offered by these institutions to females largely focused on socialising and fitness as opposed to competition.²³ Furthermore, these opportunities tended to have different rules grounded in stereotypical conceptions of male physical superiority.

The history of sex-segregated sport in South Africa can be traced to British colonialism.²⁴ The gender binary was a key component of the Judeo-Christian ideology that British colonialists imposed on indigenous peoples. These colonialists excluded women from participation in sports and used sports as a material and ideological cornerstone for the perpetuation of male superiority (socially, physically and economically) over women.²⁵

Owing to the historical constraints faced by women in sports, their participation in “male-type” sports, such as rugby, is far less acceptable than their participation in “female-type” sports, such as netball. In comparison to racial segregation, this approach of separating male and female athletes on the basis of birth went largely unchallenged, both in South Africa and globally, until the early 2000s when it was contested by an increasing number of individuals who identify openly as trans.²⁶ There is evidence of women who participated in all-male teams prior to the 1960s, but it was only at the end of the 1960s that South African women challenged the gendered nature of sports and formed their own teams and sporting associations.²⁷

3 2 Understanding transgender identity

Traditional notions of gender and sex have been challenged by a more liberal discourse. The first major departure offered by the liberal perspective is that gender and sex are not definite concepts. The second departure is that gender and sex are not binary.²⁸

The values at the heart of the traditional conception of gender and sex are certainty and stability, which encourages the use of distinct discursive

²¹ Buzuvis “Transgender Student-Athletes and Sex-Segregated Sports: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics” 2011 21(2) *Seton Hall Journal of Sports & Entertainment Law* 24.

²² *Ibid.*

²³ *Ibid.*

²⁴ Pelak “Women and Gender in South Africa Soccer: A Brief History” in Alegi and Bolsmann (eds) *South Africa and the Global Game: Football, Apartheid and Beyond* (2013) 112.

²⁵ *Ibid.*

²⁶ Lenzi 2018 *American University Law Review* 844.

²⁷ *Ibid.*

²⁸ Van Schalkwyk “Rejecting the Theoretical Basis of the Alteration Act: Analysis of Sex and Gender Binaries Through the Optic of the First Case of National Coalition and Comparative Foreign Jurisprudence” 2018 55 *Responsa Meridiana* 34.

binaries and classifications;²⁹ whereas, the value at the heart of the progressive perspective, which extends the discursive boundaries of “gender” and “sex”, is individual freedom. This understanding is congruent with modern medical, psychological and scientific views,³⁰ and it is therefore submitted that the traditional conception of gender and sex is anachronistic.

Trans predispositions are deeply ingrained and have presented in two-year-old children.³¹ Some trans individuals who want their bodies to better display their gender identity opt to undergo gender-reassignment surgery and/or hormonal therapy. Other individuals, for a number of reasons, continue their lives as a gender that differs from their birth sex.³²

The process of transitioning largely depends on the physical development and age of an individual. The World Professional Association for Transgender Health (WPATH) has established different medical protocols for transitioning sportspersons, with age being a key factor. WPATH recommends that young children seeking to transition should not undergo medical intervention and, in that case, the transition should rather be exclusively social.³³ Upon impending puberty, doctors may prescribe hormone blockers to defer its commencement. It is recommended that postpubescent young adults undergo cross-gender hormone treatments and/or chest reconstruction surgery.³⁴

For purposes of this article, it is important to note that gender reassignment surgery for patients under the age of 18 is strongly discouraged by WPATH. A further constraint to undergoing the procedure is cost, which varies between R450 000 and R600 000, so disproportionately affecting individuals from lower socio-economic classes in South Africa.³⁵ The situation is exacerbated by the fact that medical-aid providers in South Africa are reluctant to cover gender procedures as they are categorised as “cosmetic”.³⁶ Indeed, gender-affirming procedures have only been paid for by one medical aid in the country, namely Bankmed.³⁷ Despite the fact that trans patients and advocates describe the procedures as non-cosmetic, medical aids have disagreed with this assertion and have, consequently, maintained the institutionalised erasure of transgender patients.

Many trans individuals are thus left with little choice but to turn to government hospitals, which provide the procedure for free. However,

²⁹ Katyal “The ‘Numerus Clausus’ of Sex” 2017 84(1) *University of Chicago Law Review* 391.

³⁰ Van Schalkwyk 2018 *Responsa Meridiana* 34.

³¹ Zaliznyak, Yuan, Bresee, Freedman and Garcia “How Early in Life do Transgender Adults Begin to Experience Gender Dysphoria? Why This Matters for Patients, Providers, and for Our Healthcare System” 2021 9 *Sexual Medicine* 6 8.

³² Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* (2010) 9.

³³ World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 7ed (2011) 17.

³⁴ *Ibid.*

³⁵ Crawford “How Can I Get on the Waiting List for Gender Reassignment Surgery?” (3 March 2022) <https://www.groundup.org.za/qanda/529/> (accessed 2023-05-23).

³⁶ *Ibid.*

³⁷ Furlong “Changing Your Gender in South Africa” (15 September 2015) https://www.groundup.org.za/article/changing-your-gender-south-africa_3305/ (accessed 2019-03-07).

waiting times at these facilities are approximately 20 years.³⁸ As a result of both WPATH's protocols and the financial costs of the procedure, an overwhelming majority of trans high school athletes are living their lives as a gender that differs from their birth sex.

3.3 The "dilemma" of transgender athletes

At the core of the sex-segregated approach to sports is the belief that females and males differ biologically. Numerous scientific studies have shown that, generally, females have objective physical disadvantages.³⁹ Females, on average, have less muscle mass and shorter limbs.⁴⁰

The athletic performance of prepubescent boys and girls is largely indistinguishable. However, upon the onset of puberty, which tends to coincide with entering high school, physical differences between the two sexes become blatantly manifest.⁴¹ Research indicates that if males and females were not separated, the latter would not have opportunities to compete in individual sports.⁴²

It has been argued by distinguished academics on trans sportspersons that the differences in the apparent physical competitive abilities between the sexes are exaggerated.⁴³ It has been asserted that physical differences, observed by researchers, between females and males do not reflect definite distinctions, but rather averages. Moreover, advantages that males enjoy in terms of strength and size (which are considered by some as the most important factors determining success in sports) may be overcome by natural talent and skill.⁴⁴

While it is true that not all girls are physically inferior to boys, the physical differences between males and females are pronounced to the extent that a school policy that did not distinguish between the sexes would result in the disenfranchisement of girls in high school sports.⁴⁵ Although some talented girls might compete against their male counterparts, such a policy would discourage the average girl from participating in sports.⁴⁶ It is submitted that there may be no need for sex segregation in sports that are primarily skills-based such as shooting or bowling.⁴⁷ However, a majority of sports reward attributes such as strength, speed and body size. It is in these sports, such

³⁸ Thomas "How South Africa's Healthcare System Is Failing Our Trans Community" (29 June 2022) <https://ewn.co.za/2022/06/29/how-south-africa-s-healthcare-system-is-failing-our-trans-community> (accessed 2023-05-23).

³⁹ Heather "Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology" 2022 19 *International Journal of Environmental Research and Public Health* 1.

⁴⁰ *Ibid.*

⁴¹ Skinner-Thompson and Turner "Title IX's Protections for Transgender Student Athletes" 2013 28 *Wisconsin Journal of Law, Gender & Society* 287.

⁴² Lenzi 2018 *American University Law Review* 853.

⁴³ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 35–36.

⁴⁴ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 37–38.

⁴⁵ Lenzi 2018 *American University Law Review* 854.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

as rugby and basketball, that boys would enjoy an undue competitive advantage.

Accordingly, the traditional model of school sports is challenged by the presence of trans learners. When South African high schools are drafting sports policies with respect to transgender learners, the intrinsic biological differences between the sexes must be acknowledged. A trans girl who has not undergone any medical intervention has a biological edge over her cisgender counterparts whose bodies produce considerably less testosterone.⁴⁸ Nevertheless, following approximately a year of medical intervention in the form of hormone therapy, any former physical advantage is significantly reduced.⁴⁹ These treatments have been shown to decrease the muscle mass and, in some cases, even the height of trans girls.⁵⁰ Moreover, the body-fat percentage of individuals who have undergone these treatments increases significantly. By the conclusion of the treatment, trans girls have comparable levels of estrogen and testosterone in their bodies to their cisgender peers.⁵¹

However, trans girls who have undergone these treatments may nevertheless enjoy some biological advantages over their cisgender peers. Hormone therapy cannot alter a trans girl's "male skeletal" structure, which includes the length of her limbs and the structure of her hips.⁵² Consequently, it has been argued that these individuals enjoy an undue competitive advantage in sports such as basketball and rugby, which generally favour large physical frames.⁵³

In situations where a trans girl began therapy before the full development of her male skeletal structure, it has been found that these physical differences are considerably diminished.⁵⁴ Therefore, concerns over fairness on the playing field in school sports are unfounded when a trans girl who took hormone blockers upon the onset of puberty did not develop secondary male sex characteristics.⁵⁵

Concerns regarding competitive fairness are not as complicated where trans boys who have not undergone any medical intervention compete against their cisgender counterparts. Research indicates that trans boys enjoy no perceptible biological advantage over cisgender boys. This is the case even when the trans boy is receiving testosterone treatments.⁵⁶ It is possible that these boys may violate a school or sporting association's anti-drug or doping rules that prohibit the use of certain performance-enhancing

⁴⁸ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 38.

⁴⁹ Harper "Race Times for Transgender Athletes" 2015 6(1) *Journal of Sporting Cultures and Identities* 8.

⁵⁰ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 39.

⁵¹ *Ibid.*

⁵² Lenzi 2018 *American University Law Review* 855.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Pilgrim, Martin and Binder "Far From the Finish Line: Transsexualism and Athletic Competition" 2003 13(2) *Fordham Intellectual Property, Media and Entertainment Law Journal* 498.

substances, such as testosterone.⁵⁷ However, a common-sense solution would be for the policy to include a medical exception that allows trans boys to undergo testosterone treatments provided that the level of testosterone in their bodies is not dissimilar from the average cis boy.⁵⁸

3 4 Potential benefits of sport participation for transgender learners

There are no conclusive statistics on the number of learners who participate in high school sports in South Africa. However, it is clear that those who do participate enjoy numerous academic, mental and physical benefits.⁵⁹ Participating in school sports reduces a learner's risk of obesity and heart disease.⁶⁰ Moreover, participating in school sports may get learners into the habit of being active, which may continue once they have left high school.⁶¹ In addition, physically active learners are less likely to suffer from mental illnesses, such as anxiety and depression, and tend to perform better academically than their non-active peers.⁶² Lastly, through participation in school sports, learners tend to learn values such as teamwork, perseverance and sportsmanship.⁶³

Transgender learners are a vulnerable group in South Africa, and they deserve equal access to the physical and mental benefits that are associated with participation in sports. It is common for trans learners to lack a sense of belonging in their school community.⁶⁴ Participation in sports can play a key role in reducing marginalisation and feelings of isolation. The acceptance of an openly trans player in a single-gender team can result in a powerful validation of a learner's identity.⁶⁵

Lastly, the adoption of trans-inclusive policies has the potential literally to save learners' lives. Alarming, almost half of trans people seriously consider suicide at least once during their life.⁶⁶ However, research shows that trans individuals are considerably less likely to self-harm when they have strong support systems and when they feel included in the wider

⁵⁷ Pilgrim, Martin and Binder 2003 *Fordham Intellectual Property, Media and Entertainment Law Journal* 513.

⁵⁸ Pilgrim, Martin and Binder 2003 *Fordham Intellectual Property, Media and Entertainment Law Journal* 498.

⁵⁹ Van Hout "Participation in Sport and the Perceptions of Quality of Life of High School Learners in Theewaterskloof" 2013 19(3) *African Journal for Physical, Health Education, Recreation and Dance* 612.

⁶⁰ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 46.

⁶¹ Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 297.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Reygan "Sexual and Gender Diversity in Schools: Belonging, In/Exclusion and the African Child" 2019 36 *Perspectives in Education* 2 98.

⁶⁵ Lenzi 2018 *American University Law Review* 856.

⁶⁶ Hatzenbuehler "The Influence of State Laws on the Mental Health of Sexual Minority Youth" 2017 171 *JAMA Pediatrics* 4 322.

community.⁶⁷ Accordingly, trans-friendly policies can be a matter of life and death for many trans learners.

4 CURRENT POLICIES FOR INCORPORATING TRANSGENDER ATHLETES INTO SEX-SEGREGATED SPORTS

4.1 The Olympic model

Prior to 2003, the International Olympic Committee (IOC) required all female athletes to undergo sex-verification testing.⁶⁸ This policy subjected female athletes, both those with and without intersex conditions, to humiliating treatment.⁶⁹ Indeed, it was only after undergoing testing that several individuals became aware of their intersex condition.⁷⁰

In 2004, the IOC adopted its first transgender-inclusive policy.⁷¹ This policy made provision for transgender athletes to compete in athletic meets that are congruent with their gender identity. The IOC was commended for being progressive. However, the policy was criticised for being overly rigid. The policy required athletes to undergo gender reassignment surgery and to undergo hormonal therapy for a period of two years. Once this had been done, the athlete had to obtain official government recognition of their new sex status.⁷² It is submitted that this particular requirement demonstrated a lack of understanding of the issues that trans individuals encounter, such as the prohibitive cost, and the fact that a significant number of countries do not recognise sex changes.⁷³

The IOC's revised policy, adopted in 2015, has been praised for being more consistent with prevailing notions of gender.⁷⁴ The current guidelines do not require an athlete to obtain official government recognition of their new sex status. Moreover, the requirement of undergoing gender reassignment surgery was discarded.⁷⁵ The new policy allows for trans men to compete in the male category without any exceptions. Trans women, on the other hand, are required to complete hormone therapy before they can compete in the female category.⁷⁶ The requirements for trans women effectively require them to take a two-year break from competing. The policy requires their testosterone levels to be suppressed for a minimum of 12 months before their first event in the female category. Given that it takes a

⁶⁷ *Ibid.*

⁶⁸ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 22.

⁶⁹ Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 289.

⁷⁰ Leong "Against Women's Sports" 2017 95(5) *Washington University Law Review* 26.

⁷¹ Buzuvis 2011 *Seton Hall Journal of Sports & Entertainment Law* 21.

⁷² *Ibid.*

⁷³ Ghoshal and Knight *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority* (Human Rights Watch World Report) 2016.

⁷⁴ Lenzi 2018 *American University Law Review* 858.

⁷⁵ Shrader "Uniform Rules: Addressing the Disparate Rules That Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity" 2017 51(2) *University of Richmond Law Review* 659.

⁷⁶ Lenzi 2018 *American University Law Review* 858.

year, on average, for a trans woman's testosterone levels to be sufficiently suppressed, the rule is effectively a two-year requirement.⁷⁷

4 2 The high school model

The South African Schools Act⁷⁸ regulates all schools in South Africa. However, the Act is silent on the issue of school sports. Currently, there is no national school sports policy in South Africa, as the 2009 Draft School Sport Policy for Public Schools in South Africa was never officially adopted. It was intended that the policy would apply to all schools in South Africa and would regulate the delivery of school sports to all learners.⁷⁹ In terms of the policy, school sports committees must draft the sport policy for each particular school.⁸⁰ In the absence of the policy, the formulation of school sports policies differs from school to school. Typically, the principal and school governing board are involved in the process. The policies that have been developed by schools in South Africa can broadly be placed into three categories – namely, restrictive policies, partially inclusive policies and fully inclusive policies.⁸¹

5 ANALYSIS AND DISCUSSION

The Constitution is the supreme law of the Republic of South Africa and any law or conduct that is inconsistent with it is invalid.⁸² Section 9 of the Constitution prohibits the State and any person from unfairly discriminating against individuals or groups of individuals on 16 listed grounds, and on grounds that are analogous to them.⁸³ Although gender identity is not a listed ground in the Constitution, it could be argued that it is an analogous ground, and thus that discrimination on the ground of gender identity is, despite the lack of explicit constitutional recognition, prohibited by the Constitution. Some academics strongly favour this view.⁸⁴ However, owing to the principle of subsidiarity,⁸⁵ the debate concerning whether “gender identity” is an analogous ground in South Africa's Constitution is not material to the object of this article.

⁷⁷ *Ibid.*

⁷⁸ 84 of 1996.

⁷⁹ The Department of Basic Education & Department of Sports and Recreation “The 2009 Draft School Sport Policy for Public Schools” (2009) 4.

⁸⁰ The Department of Basic Education & Department of Sports and Recreation “The 2009 Draft School Sport Policy for Public Schools” 10.

⁸¹ Lenzi 2018 *American University Law Review* 845. These categories are engaged with further in the next section of the article.

⁸² S 2 of the Constitution.

⁸³ S 9(3) of the Constitution.

⁸⁴ See Thoreson *Beyond Equality: The Post-Apartheid Counternarrative of Trans and Intersex Movements in South Africa* (2013).

⁸⁵ In the case of *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) par 73, the Constitutional Court, in its explanation of the operation of the principle of subsidiarity, stated that “where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right, or alternatively challenge the legislation as being inconsistent with the Constitution”.

The consequence of the application of this principle is that litigants who claim that they have been discriminated against but who do not seek to challenge the constitutionality of legislation must rely on the provisions of PEPUDA.⁸⁶ Therefore, a trans plaintiff challenging a discriminatory high school sports policy will have to rely on PEPUDA.

PEPUDA was enacted to give effect to section 9(4) of the Constitution, which affirms that discrimination by private individuals, and not only by the State, is prohibited. Section 1 of PEPUDA defines discrimination as “any act or omission, including a policy which directly or indirectly withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds”. Prohibited grounds listed in section 1 of PEPUDA include the 16 grounds listed in section 9(3) of the Constitution, as well as “any other ground where discrimination based on that other ground undermines human dignity”.

The Act acknowledges that discrimination can occur through an act or omission. Therefore, it is not only policies that expressly exclude trans learner athletes from participating in sports teams that are subject to scrutiny under PEPUDA. The inclusion of the word “omission” means that silence in policies on the issue of trans participation in sports teams may also qualify as discrimination.

In light of the above, it is clear that policies that differentiate between transgender and cisgender learners constitute discrimination as they result in the withholding of opportunities from transgender individuals. The opportunity in question is the opportunity that cisgender learners have to participate in sports teams that are congruent with their gender identity.

Although trans learners may not have this opportunity and, therefore, policies of this nature discriminate against them, whether this discrimination has occurred on a prohibited ground is contested. In jurisdictions such as the United States of America, discrimination against trans persons is considered to be sex or gender discrimination.⁸⁷

However, it is argued that South African courts should not adopt this approach, as doing so may be misleading. These categories are typically used in cases in which “women” and “men” receive different treatments.⁸⁸ Dealing with discrimination against transgender persons as discrimination on the basis of gender identity would be more accurate.

PEPUDA does not explicitly prohibit discrimination on the ground of gender identity. However, the Act does prohibit discrimination on any ground that causes or perpetuates systematic disadvantage or undermines human dignity.⁸⁹ In *Hoffmann v South African Airways*,⁹⁰ the Constitutional Court held that discrimination on the ground of HIV is prohibited by the Constitution (despite the fact that HIV status is not listed in section 9(3)), as

⁸⁶ De Vos, Freedman, Brand, Gevers, Govender, Lenaghan, Mailula, Ntlama and Sibanda *South African Constitutional Law in Context* (2014) 452.

⁸⁷ See *Glenn v Brumby* 663 F.3d 1312 (11th Cir. 2011).

⁸⁸ See Smith “Equality Constitutional Adjudication in South Africa” 2014 14(2) *African Human Rights Law Journal*.

⁸⁹ S 1 of 4 of 2000.

⁹⁰ 2000 (11) BCLR 1211 (CC).

discrimination on this ground undermines the dignity of HIV-positive individuals.⁹¹ This judgment is helpful as it demonstrates what factors a court will look at when determining whether discrimination on a particular ground perpetuates systematic disadvantage or undermines human dignity.

In *Hoffmann*, the court stated that HIV-positive people have been stigmatised and marginalised and, therefore, constitute a vulnerable minority.⁹² It stated that the existence of societal prejudice results in an “assault” on the dignity of HIV-positive persons; allowing discrimination on this basis would therefore have a “devastating” impact on HIV-positive persons.⁹³

The same logic could be applied to the discrimination faced by trans persons. Despite South Africa’s progressive Constitution, transgender individuals face discrimination in areas such as housing and in the workplace, which hinders them from attaining qualifications and employment.⁹⁴ Workplace discrimination, societal prejudice and hostility experienced by trans individuals pose serious barriers to their well-being and livelihoods.⁹⁵

Trans high school learners, in particular, are a vulnerable group. A significant majority of transgender learners at South African schools have experienced discrimination in the form of bullying.⁹⁶ Moreover, reports indicate that sometimes teachers are responsible for the bullying. In primary school, gender identities are less prominent as learners are less easily identifiable with regards to their gender or sexuality. Trans learners at these institutions avoid drawing attention to themselves, and therefore “fit” into the normative gender binary. Where trans learners are bullied in primary school, it is often not because they are “trans” but because they are mistakenly considered to be “gay” as a result of their gender expression. In light of the above, bullying of trans learners is less common in primary school than it is in high school.

In high school, the intensity of bullying increases and a lack of protection from teachers leaves trans learners particularly vulnerable.⁹⁷ The intensity and nature (emotional, physical and verbal) of the bullying experienced by trans learners depends on several interrelated factors, such as the locality of the school (rural or urban), the socio-economic circumstances of the school (middle-class or working class), the personality of the trans learners and the manner in which they express their gender identity.⁹⁸ As a result of puberty

⁹¹ *Hoffmann v South African Airways supra* 28.

⁹² *Hoffmann v South African Airways supra* 32.

⁹³ *Hoffmann v South African Airways supra* 28.

⁹⁴ Moloi *KwaZulu-Natal Transgender and Gender Non-Conforming Needs Assessment Report: 2012* 12.

⁹⁵ *Ibid.*

⁹⁶ Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* 19.

⁹⁷ Sanger *Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa* 22.

⁹⁸ *Ibid.*

(and its accompanying socialisation), gender differences and gender roles become more pronounced in high school.

Although there are reported instances of individual teachers supporting trans learners, it is nevertheless clear that there is an absence of support systems that guarantee structured and comprehensive interventions.⁹⁹ Owing to the absence of systems that address the specific needs of transgender learners, an overwhelming majority of them enter a school environment that is potentially unwelcoming.¹⁰⁰ Accordingly, it is likely that a court will find that discrimination on the ground of gender identity is an analogous ground of discrimination, and that PEPUDA prohibits such discrimination.

However, a court's determination that gender identity is a prohibited ground of discrimination in terms of PEPUDA would not be the end of the enquiry. The court would have to consider the factors listed in section 14 of PEPUDA to determine whether the discrimination in the particular circumstance is unfair and hence unlawful. It is these factors that are applied to the three different categories of sports policies considered in this article. Jurisprudence indicates that the primary question that the court will ask when weighing up these factors is whether a legitimate purpose exists behind the discrimination that outweighs the interests of the complainant to be protected from discrimination.¹⁰¹

6 THE THREE SETS OF POLICIES

In this section of the paper, the author explains the three broad categories of policies and considers their compliance with the provisions of PEPUDA. Once the lawfulness of these three sets of policies has been determined, the author recommends which set South African high schools should adopt.

6.1 The restrictive approach

In terms of the restrictive approach, trans learners are prohibited, without exception, from participating in teams that do not correspond to their sex as classified in the population registry.¹⁰² It is possible for trans learners to have their sex, as classified in the population registry, changed in terms of the Alteration of Sex Description and Sex Status Act.¹⁰³ The Act states that certain classes of individual may apply to the Department of Home Affairs to have the sex description in their birth record changed – namely, intersex people, people whose sexual characteristics have evolved naturally, and people who have undergone surgical or medical sex reassignment.¹⁰⁴ Trans people are distinguishable from intersex people and therefore will not be able to have their sex description changed in terms of this provision.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 98.

¹⁰² Lenzi 2018 *American University Law Review* 860.

¹⁰³ 49 of 2003.

¹⁰⁴ S 2(1) of 49 of 2003.

Furthermore, a very low percentage of human beings experience the natural evolution of their sexual characteristics.¹⁰⁵ Therefore, an overwhelming majority of trans people can only change their sex, in terms of the Act, by undergoing surgical or medical sex reassignment.

Section 6 of PEPUDA provides:

“Neither the State nor any person may unfairly discriminate against any person.”

To determine whether a set of policies unfairly discriminates against transgender individuals, the test set out by the Constitutional Court in *Harksen v Lane NO*¹⁰⁶ must be applied. This test states that if there is a differentiation between people or categories of people, then a rational connection must be present between the distinction and a legitimate purpose that the policy seeks to address.¹⁰⁷ In the case of restrictive policies, there is a differentiation between cisgender individuals who are permitted to participate in sports teams that are consistent with their gender identity, while transgender learners are unable to do so without meeting onerous requirements.

There are five legitimate purposes on which a school could potentially rely for policies of this nature to be declared fair and therefore lawful. These are: preserving athletic opportunities for girls; shielding boys from potential stigma; preventing injury; preventing gender fraud; and promoting competitive fairness. These purposes are evaluated in light of the *Harksen* test to determine whether discrimination in terms of restrictive policies can be rendered fair.

6 1 1 *Preserving athletic opportunities for girls*

School officials may argue that sporting opportunities for cisgender girls may be threatened should transgender girls be permitted to participate in sports teams that correspond with their gender identity.¹⁰⁸ However, this argument is unconvincing. As a relatively low portion of adolescents identify as trans,¹⁰⁹ it is unlikely that the participation of trans girls in girls' sports will result in a substantial decrease in the opportunities that are available to cisgender girls. Accordingly, there is no rational connection between the differentiation and the purported purpose.

¹⁰⁵ Bertelloni, Maggio, Federico, Baroncelli and Hiort “17β-Hydroxysteroid Dehydrogenase-3 Deficiency: A Rare Endocrine Cause of Male-To-Female Sex Reversal” 2006 22 *Gynecological Endocrinology* 9 488.

¹⁰⁶ 1998 (1) SA 300 (CC).

¹⁰⁷ *Harksen v Lane NO supra* par 42.

¹⁰⁸ See *Clark v Ariz. Interscholastic Ass'n* 695 F.2d 1126, 1131 (9th Cir. 1982).

¹⁰⁹ Husakouskaya “Becoming a Transgender/Intersex Internal Migrant in Urban Gauteng: Challenges and Experiences of Transition While Seeking Access to Medical Services” 2015 1(1) *Studentisches Online-Journal der Universität Oldenburg* 57.

6 1 2 *Shielding boys from potential stigma*

Schools may support the restrictive policy on the basis that cisgender boys may be embarrassed if they were to lose to a perceived “girl”. However, on the strength of the *Hoffmann* judgment, it is clear that personal prejudice cannot justify unfair discrimination.¹¹⁰ The court stated that prejudice, whether direct or indirect, cannot be tolerated if we are to achieve the goal of equality as fashioned in our Constitution.¹¹¹ Therefore, the purported purpose behind the differentiation is illegitimate.

6 1 3 *Safeguarding against gender fraud*

Some officials may assert that, in the absence of strict gender binaries, there is an increased risk of gender fraud.¹¹² Proponents of this argument assert that it is conceivable that a cisgender boy may exploit trans-friendly policies and pretend to be transgender in order to face a lower level of competition. This argument is wholly discredited by empirical evidence and displays a deep misunderstanding of the notion of “gender identity”.¹¹³ The aspiration of a trans person to transition is a genuine one.¹¹⁴ Moreover, in the last 40 years that sex-verification testing has been done by the IOC, there has not been a single reported incident of gender fraud.¹¹⁵ Therefore, no credible evidence exists to suggest that a cisgender boy, in order to gain competitive advantage, would expose himself to transphobic prejudice.

In order to address the gender fraud concern, schools could include a clause in their policy requiring a learner’s gender identity to be genuinely held.¹¹⁶ In the event that a learner contests the sincerity of a trans competitor’s status, the trans learner could be put under an obligation to prove that their identity has been consistently affirmed in a constant fashion.¹¹⁷ It is acknowledged that this proposal would place a burden on the trans child. However, it is submitted that such a burden is consistent with PEPUDA, as it is rationally connected to safeguarding against gender fraud in high school sports in order to ensure fairness in competition and would therefore be a legitimate purpose.

6 1 4 *Preventing injury*

The safety of learners is of paramount importance. However, this concern cannot justify the use of a restrictive policy. With respect to trans boys, there is no legitimate safety concern that could justifiably prevent them from

¹¹⁰ *Hoffmann v South African Airways supra* 37.

¹¹¹ *Ibid.*

¹¹² Lenzi 2018 *American University Law Review* 882.

¹¹³ *Ibid.*

¹¹⁴ Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* 9.

¹¹⁵ Martowicz, Budgett, Pape, Mascagni, Engebretsen, Dienstbach-Wech, Pitsiladis, Pigozzi and Erdener “Position Statement: IOC Framework on Fairness, Inclusion and Nondiscrimination on the Basis of Gender Identity and Sex Variations” 2023 57 *British Journal of Sports Medicine* 28.

¹¹⁶ Lenzi 2018 *American University Law Review* 883.

¹¹⁷ *Ibid.*

competing on boys' teams.¹¹⁸ It is indisputable that some females are physically able to compete with males. Furthermore, in these circumstances, a trans boy plaintiff would be voluntarily assuming the risk of injury.¹¹⁹ South African law recognises that there are instances in which an individual may voluntarily engage in behaviour that poses a substantial risk of injury. The individual will, subsequently, not be able to sue for any resulting injuries.

In *Hattingh v Roux*,¹²⁰ the Western Cape High Court held that delictual liability may be excluded owing to the application of the *volenti non fit injuria* (voluntary assumption of risk) principle in the case of sports injuries that occur in the ordinary course of the practice of sports. However, in order for the principle to apply, six requirements have to be met. These requirements essentially consider whether the person, who freely and voluntarily gave consent, had the capacity to give consent, and whether the individual was aware of the nature and extent of the risk of potential prejudice.¹²¹ Provided that a trans boy plaintiff satisfies these requirements, there is no reason for a trans boy who has a biologically female body to be barred from participating on boys' teams. It is submitted that a policy that allows trans boys to participate in boys' sports teams is consistent with our existing law and respects the autonomy of the individual. Accordingly, a policy that bars a trans boy from participating in boys' sports teams will be unlawful on the grounds that there is no legitimate purpose behind the discrimination.

However, different considerations arise in the event of a trans girl competing against cisgender girls. In high-contact sports, such as boxing, wrestling, rugby and martial arts, a trans girl may be physically superior to her cisgender competitors.¹²² Cisgender girls may have legitimate safety concerns in these circumstances. This worry may be counterbalanced by weight divisions. However, it is submitted that a school would have a legitimate reason for preventing trans girls from competing in these circumstances in the absence of medical intervention, and therefore, a rational connection between the differentiation and purported purpose exists.¹²³

6.1.5 Promoting competitive fairness

School administrators may be concerned that, in the absence of a restrictive policy, playing fields will not be level. This worry is unconvincing with respect to trans boys, who are likely to be disadvantaged by participating in boys' sports teams, as cisgender boys will, on average, be stronger and larger.¹²⁴ Nevertheless, it may be legitimate to monitor the testosterone levels of trans

¹¹⁸ Lenzi 2018 *American University Law Review* 883.

¹¹⁹ *Ibid.*

¹²⁰ 2011 (5) SA 135 (WCC).

¹²¹ Ahmed "Voluntary Assumption of Risk as a Defence, Excluding Delictual Liability With Regard to Sports Injuries: *Hattingh v Roux* 2011 (5) SA 135 (WCC)" 2012 33(2) *Obiter* 415.

¹²² Lenzi 2018 *American University Law Review* 883.

¹²³ Lenzi 2018 *American University Law Review* 884.

¹²⁴ *Ibid.*

boys to ensure that they do not gain an unfair advantage over their cisgender peers.¹²⁵

Different considerations of fairness apply in circumstances in which trans girls participate in girls' teams. As some trans girls may be biologically male, they may unfairly dominate their cisgender competitors. In America, the appellate court of New Jersey has found that a rule preventing biological males from competing against biological females is justified on the basis of average physiological differences.¹²⁶ It is submitted that a South African court is likely to reach the same conclusion, as the promotion of competitive fairness is a legitimate objective that may be undermined by the presence of biological males in girls' sports teams. However, these concerns may be addressed by requiring trans girls to reduce the level of certain hormones, such as testosterone, which have been shown to give them an advantage over their cisgender counterparts.¹²⁷ Including this requirement in a school policy would adequately address fair-play concerns.

6 2 The fully inclusive approach

A fully inclusive policy allows trans learners to participate in teams that are congruent with their gender identity. In light of the multiple social challenges faced by trans individuals, as illuminated earlier in the article, it is indisputable that ensuring that trans athletes feel accepted and have their identity validated is a legitimate purpose. Accordingly, school officials may justify fully inclusive policies on this basis.

It is submitted that a constitutional challenge by a cisgender girl who was omitted from a team in favour of a trans girl is unlikely to succeed. The promotion of greater inclusion at the expense of "perfect competition" would be deemed legitimate. In cases of contact sports, a female plaintiff may challenge these policies on the basis that competing against an opponent with a male body endangers her. Nevertheless, a court may find the policy lawful as it is aimed at achieving legitimate educational goals that were detailed under heading 3 4 above.

6 3 The partially inclusive approach

A partially inclusive policy requires trans girls to undergo specific medical procedures in order to participate in girls' teams. However, the policy does not require trans boys to undergo any interventions of this nature. Unlike the restrictive approach, partially inclusive policies do not require the learners to change their sex as classified in the population registry. Owing to concerns of injury and fair competition, there would be a legitimate reason to require trans girls to undergo medical intervention, in the form of hormonal therapy, before they can compete in girls' sports teams.

It is submitted that these policies are lawful, as trans girls are not denied access to participate in sports. Rather, they are merely confined to the boys'

¹²⁵ *Ibid.*

¹²⁶ Griffin and Carroll *On the Team: Equal Opportunities for Transgender Student Athletes* 16.

¹²⁷ Leong 2017 *Washington University Law Review* 41

sports teams. Despite the fact that there is evidence that suggests that it is detrimental to the health and well-being of trans girls to not have their identity universally affirmed,¹²⁸ school officials may determine that the interests of their cisgender counterparts weigh more heavily. This is because maintaining a level playing field and reducing the risk of injury are legitimate goals. Partially inclusive policies impose differentiations that are rationally connected to achieving these legitimate goals.

The issue of discriminatory athletic policies that facilitate safety and fair play has not come before South African courts yet, but American courts have consistently upheld policies of this nature.¹²⁹ It is likely that a South African court may determine that these policies are aimed at achieving a legitimate purpose – that is, maintaining the integrity of girls' sports.

However, these policies are not necessarily lawful and compliant with PEPUDA. One can imagine a situation in which a trans girl plaintiff, who is similar to her cisgender counterparts in terms of ability and physicality, may successfully challenge the policy's application to her.¹³⁰ This is so, as the test for determining the fairness of policies in terms of PEPUDA considers the specific circumstances of the complainant.¹³¹

It is submitted that, in order to prevent policies from being declared unlawful by courts, school officials should include an exemption in their policies that allows trans girls who can prove that, despite not undergoing any medical intervention, they pose no risk of injury or physical superiority by competing in girls' sports teams.¹³²

7 WHAT SET OF POLICIES SHOULD SOUTH AFRICAN HIGH SCHOOLS ADOPT?

A court is likely to determine that both fully inclusive and partially inclusive policies are compliant with PEPUDA and are lawful. Accordingly, high school sports policymakers have a choice regarding which of these two policies to adopt.

There are several reasons why it is not ideal for South African schools to adopt partially inclusive policies. The financial constraints of medical procedures faced by trans individuals who wish to align their gender with their sex have been explained earlier in this article. As a result of these constraints, a partially inclusive policy may unduly burden a learner who cannot afford medical intervention. Moreover, these policies may pressurise a trans girl who would otherwise not desire medical intervention to pursue it.¹³³ These trans girls who do not seek medical intervention, for either of the two aforementioned reasons, will be barred from participating in girls' sports

¹²⁸ Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 298.

¹²⁹ *Sandison v Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995).

¹³⁰ Lenzi 2018 *American University Law Review* 888.

¹³¹ S 14 of 4 of 2000.

¹³² *Ibid.*

¹³³ Shell "Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?" 2016 48 *Texas Tech Law Review* 1072.

teams and will, therefore, be unable to make a complete social transition. This circumstance is highly undesirable as research demonstrates that a complete social transition significantly improves the emotional well-being of a trans individual.¹³⁴ In addition, there is a concern that trans girls may be effectively “outed” to their classmates should they be barred from competing in girls’ sports teams in the absence of medical intervention.

The above concerns demonstrate reasons why the partially inclusive approach should not be adopted by South African high schools. However, these reasons do not, in themselves, illustrate why fully inclusive policies should be adopted. In addition to the fact that fully inclusive policies do not suffer from the aforementioned difficulties, these policies are also more in line with constitutional values. Dignity, alongside equality and freedom, is one of the founding values of the Constitution.¹³⁵ Furthermore, the Constitution provides that everyone has inherent dignity and has the right to have their dignity respected and protected.¹³⁶ Therefore, as both sets of policies are constitutional, the policy that best protects the rights of trans learners to have their dignity respected and protected should be preferred.

While partially inclusive policies do not adequately protect and respect the dignity of trans learners as they may result in their “outing”, the case of Yearwood, who won the girls’ state championship, illustrates how fully inclusive policies can affirm the dignity of trans individuals.¹³⁷ Kate Hall, who finished second in the 100m sprint behind Yearwood, stated:

“I can’t really say what I want to say, but there’s not much I can do about it ... You can’t blame anyone ... From what I know [Yearwood] is really nice and that’s all that matters. She’s not rude and obnoxious.”¹³⁸

This incident, albeit an anecdotal one, suggests that preventing the trans girls from participating in girls’ sports teams may not be worth the emotional toll that they face from exclusion. What occurs in circumstances like this is larger than a single athletics event or a particular athlete. High school sports should serve broader educational goals, which should include teaching high school learners that their trans peers deserve the chance to live their truth in full, including participating in sports teams that are congruent with their gender identity. The fact that high schools should serve broader educational goals is consistent with the Preamble of the South African Schools Act, which expresses the need for South African high schools to be involved in the project of combatting all forms of unfair discrimination and intolerance in society.

8 CONCLUSION

The legality of sports policies adopted by high schools in respect of trans learners has never been tested in South Africa. However, this, and related issues, have arisen in various jurisdictions such as the United States of

¹³⁴ Skinner-Thompson and Turner 2013 *Wisconsin Journal of Law, Gender & Society* 298.

¹³⁵ S 1 of the Constitution.

¹³⁶ S 10 of the Constitution.

¹³⁷ Lenzi 2018 *American University Law Review* 844.

¹³⁸ *Ibid.*

America and Canada. This article has considered the three categories of policies into which South African high school sports policies fall – namely, the fully inclusive approach, the partially inclusive approach and the restrictive approach.

The author has shown that the restrictive approach is inconsistent with PEPUDA and therefore unlawful, as there exists no legitimate purpose that could justify such a policy. As legitimate reasons exist for the implementation of partially inclusive policies, the author has argued that these are lawful. The same argument applies to fully inclusive policies.

Accordingly, when deciding which policies to adopt, a school must consider what values it seeks to promote. While it is imperative to acknowledge the dignity of trans learners, legitimate concerns over fairness of competition and safety exist. The Constitution, which is the supreme law of the land, has a key role to play in weighing up these competing interests. As dignity is both a right that is granted to everyone in the Constitution and one of the founding values of the Constitution, the author has argued that fully inclusive policies should be favoured as they result in the validation of trans learners' dignity. Moreover, high school sports should seek to achieve broader educational goals, such as teaching cisgender learners to tolerate, accept and celebrate their trans peers who are fully living their truth by participating in sports teams that are consistent with their gender identity.