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NCAA transgender student-athlete 'policy': analysis

The National Collegiate Athletic Association has recently approved a new transgender 'policy' to clarify the eligibility of transgender student athletes in US University sport. Shawn Markus Crincoli, an Associate Professor of Law with Touro College, examines whether it could be subject to challenge and assesses whether the NCAA 'policy' could provide a blueprint for other sporting organisations looking to implement a transgender policy.

In September 2011, the National Collegiate Athletic Association (NCAA) announced that its Executive Committee had approved a new policy to clarify the eligibility of transgender student-athletes to participate in NCAA sport¹. The NCAA is a private athletics association; it is not a governmental entity nor is it affiliated with any sport federation or professional sport league. Member institutions are bound by comprehensive rules regarding eligibility, amateurism, recruiting, financial aid, as well as practice and competition schedules. The transgender student-athlete 'policy' will be implemented widely; over 1,200 colleges and universities in the United States are members of the NCAA, which oversees competition in 23 different sports for some 400,000 student-athletes.

Though the NCAA has framed its announcement as introducing a new 'policy', what the NCAA has done may be more accurately described as a combination of promulgating specific rules regarding the eligibility of transgender student-athletes and issuing specific resources to assist university athletic administrators and coaches in conducting best practices for the inclusion of student-athletes. These resources

and rules are the by-product of a collaborative process that offered input from various constituencies identified as, 'NCAA member committees, including the Student-Athlete Advisory Committees, other sports governance consultants, the Women's Sports Foundation and the National Center for Lesbian Rights'².

This article evaluates the NCAA transgender student-athlete 'policy', examining both the eligibility rules and the resources distributed from the standpoint of legality, sound athletic policy and exportability to other sport associations.

Cross-sex hormone treatment & athlete eligibility³

Transgender or trans men who have received cross-sex hormone treatment are permitted to compete on men's or mixed teams by obtaining a medical exception for testosterone treatment. NCAA Bylaw 31.2.3 identifies testosterone as a banned substance and permits medical exception review for a demonstrated medical need. The rules promulgated recognise that a student-athlete 'diagnosed with Gender Identity Disorder, or gender dysphoria, and/or Transsexualism' has a *bona fide* medical reason for the use of testosterone as part of transition, and should not be viewed as violating anti-doping regulations by virtue of taking exogenous testosterone. In addition, trans men who do not take testosterone are permitted to participate on either men's or women's teams.

Under the new rules, transgender or trans women who have received cross-sex hormone treatment, namely testosterone suppressing medication, are permitted to compete on women's teams after they have completed one year of treatment. This is based on medical research that demonstrates a significant reduction in muscle

mass after treatment with anti-androgens and based on the fact that transgender student-athletes 'fall within the spectrum of physical traits found in athletes of their transitioned gender'⁴. Trans women who do not take testosterone suppressing medication are not permitted to compete on women's teams, though they may participate on men's or mixed teams.

The resource book & NCAA distributed materials

As part of its policy adoption, the NCAA distributed resources to member institutions. These materials include:

- a resource book published by the NCAA Office of Inclusion titled 'NCAA Inclusion of Transgender Student-Athletes';
- a CD containing the resource book;
- a slide presentation to educate administrators and student-athletes; and
- a 30-minute video on Transgender Student-Athletes, featuring Betsy Crane, director of graduate programs in human sexuality at Widener University and a subject-matter expert on transgender issues⁵.

The resource book provides information in plain language on:

- who transgender student-athletes are;
- why the NCAA needs a policy for the participation of transgender student-athletes;
- what the eligibility rules are; and
- the best practices for implementing these policies, particularly for dealing with issues such as locker or change rooms, uniforms or dress codes, dealing with the media, or interacting with the transgender student-athlete and other student-athletes.

In addition, the resource book contains appendixes of:

- definitions & terminology;

- additional resources; and
- legal status & information.

The NCAA's efforts to ensure that its members comply with non-discrimination laws

NCAA member institutions exist in all 50 States and in Washington, D.C., some universities are public, whereas others are private. Due to jurisdictional differences based on region or public vs. private status, higher education institutions that are NCAA members are subject to different laws that would protect the rights of student-athletes to be free from discrimination based on sex or gender identity. The new NCAA policies aim to create a unified set of eligibility rules and best practice guidelines that can be applied by any college or university to ensure inclusive practices, without regard for whether that institution is required to do so by law.

Indeed, Appendix C of the resource book identifies which federal, state, and local laws might afford transgender student-athletes rights to equal access and opportunity in sport. It also notes that many educational institutions have adopted their own non-discrimination policies that include gender identity or expression. The resource book cautions each school to be aware of and enforce its own specific legal requirements.

Analysis of the specific eligibility rules

Non-discrimination laws & fundamental rights

For the vast majority of NCAA member institutions, the transgender student-athlete policy likely affords protections either consistent with or even beyond those that are provided by law. Nonetheless, there are several aspects of the rules that may form the basis for a legal challenge.

While the eligibility rules appear

The law requires trans women to be permitted to compete in women's sport, whether or not they have taken testosterone suppressing medication

to be carefully crafted to avoid violating non-discrimination laws, the challenge most likely to succeed may be a claim that the law requires trans women to be permitted to compete in women's sport, whether or not they have taken testosterone suppressing medication for one year. The NCAA eligibility rule aims to strike a balance between allowing a transgender student-athlete to participate in her affirmed gender against any real or perceived advantage that a trans woman would have over a non-trans woman, in the absence of testosterone suppressing medication. Nonetheless, this rule differentiates between transgender women and other women, which could trigger heightened scrutiny by a court in some jurisdictions. Since the NCAA does not regulate other athletic advantages that female athletes may have as a result of genetic diversity such as height, vision, or even androgen production, it is not certain that applying a hormone-based policy to trans women would be upheld in all jurisdictions.

In addition, the rule requiring that trans women take testosterone suppressing treatment to be eligible to participate may be legally problematic, because anti-androgen usage causes infertility. The right to procreate is guarded in the US Constitution (and many state constitutions) as a fundamental right. While laws and regulatory policies requiring that transgender individuals undergo hormone treatment and/or surgical procedures that cause sterility have not yet been contested on the ground that they interfere with a fundamental human right protected in the Constitution, increased legal protections for gender identity and increased awareness about transgender people suggest that such claims

may not be far off. Accordingly, NCAA members that are public institutions would not necessarily be able to mandate that a university-aged student-athlete agree to medical treatment tantamount to forced sterilisation as a condition of participation in collegiate sport.

It is also conceivable that there are jurisdictions in which someone could legally challenge the validity of the rule permitting trans men who do not take hormones to participate in women's sport or that someone could challenge the validity of a rule permitting trans women to participate in women's sport at all, even after cross-sex hormone treatment. However, these claims are more remote and less likely to succeed than the primary claim identified above that a trans woman must be allowed to compete in women's sport, even without hormone treatment.

Sound athletic policy & exportability

The NCAA eligibility rules and resource materials represent one of the most comprehensive policies for regulating transgender athletes offered to date⁷. Thus, it is important to consider to what extent the new NCAA 'policy', as defined by the rules and resources, creates a sound athletic policy and ought to model or act as a template for other athletic associations or institutions.

There is a lot to applaud in the rules themselves, the resource materials and the collaborative nature in which this overarching policy was created, announced and then distributed. Among the strengths are:

- the proactive and prospective nature of the policy;
- the clear writing and language used in the resource materials, which allows for more widespread education & easy implementation;

- the rejection of barriers to participation inconsistent with any measure of equity in athletic performance, such as legal status or surgical procedures, in favour of a research-based approach; and
- the inclusion of many voices in the creation of the policy, including, but not limited to, experts in transgender issues in law, medicine, and athletics, as well as student-athletes.

The NCAA policy also has some weaknesses, such as:

- the adoption of a hormone-based approach for eligibility of university-aged trans women, without regard for the incentives this may create for young athletes to rush to begin cross-sex hormone treatment to participate in sport (with serious consequences, including - though not limited to - infertility);
- the lack of acknowledgement that transgender student-athletes do not have equal access to cross-sex hormone treatment, due to age, socio-economic status, and geographic location; and
- no clear mechanism for gauging institutional compliance.

Is the NCAA policy exportable?

The materials distributed, particularly the main resource book, could easily be adapted by any sport association and much of the writing and information provided would be helpful to any school or university attempting to create best practices for handling the inclusion of transgender student-athletes. Furthermore, the process of creating the materials and the specific eligibility rules most certainly should serve as a template for other institutions and associations about how to best go about using a collaborative process that will ensure that all relevant constituencies have an opportunity to be heard, while still protecting

the rights of a distinct minority that is often misunderstood by athletic administrators, coaches and participating athletes.

It may be that the least exportable aspect of the NCAA 'policy' is the actual eligibility rules themselves. There are - and will increasingly be - jurisdictions and contexts in which these rules are insufficiently inclusive of transgender athletes to avoid violating non-discrimination or human rights laws. At the same time, there will be other jurisdictions and contexts in which the same set of rules may go beyond what the law requires and beyond the capacity of a particular association to ensure the privacy or confidentiality of an athlete.

The NCAA's new eligibility rules offer a compromise approach between the onerous obligations that the International Olympic Committee (IOC) has placed on transgender athletes and a liberal approach that would permit all athletes to participate within their affirmed gender, independent of any medical treatment. The membership of the NCAA itself is large and diverse - the obligations and capabilities of a large research-oriented public university participating in one division of the NCAA differ greatly from those of a small, private college participating in another division. While other sport associations may wish to follow a similar process to the NCAA or aim to model their resources based on the NCAA's template, they may find that the actual eligibility rules or some of the best practices suggested do not meet their own specific needs, capabilities, or core values.

Conclusion

In conclusion, the NCAA 'policy' - the specific rules, resources and process in which they were created and distributed - forms a new *lex sportiva* for how transgender

athletes ought to be regulated. The process and resources form an excellent model for how local, regional, national or international sport bodies may wish to adopt policies of inclusion for transgender athletes. The eligibility rules themselves may best be regarded as a promising beginning in cultivating prospective inclusive policies that allow trans athletes to participate in sport consistent with their affirmed gender.

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1. www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/september/transgender+policy+approved
2. Id. The National Center for Lesbian Rights and It Takes a Team!, an initiative of the Women's Sports Foundation, co-sponsored a national think tank, which culminated in the publication in October 2010 of a report entitled, 'On the Team: Equal Opportunity for Transgender Student Athletes'. The report and think tank provided significant input into the NCAA process, resources and rules. The report is available at: www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901
3. NCAA Inclusion of Transgender Student-Athletes, p. 12-13. Available at: www.ncaa.org/wps/wcm/connect/fd9a78804841f93953f9fbf5e8bc9cc/Transgender_Handbook_2011_Final.pdf?MOD=AJPERES&CACHEID=f9a78804841f93953f9fbf5e8bc9cc
4. Quoting Dr. Nick Gorton, Id. at p.7.
5. http://s3.amazonaws.com/ncaa/web_video/diversity_inclusion/transgenderSA.html
6. There is also one Canadian NCAA member institution: Simon Fraser (Burnaby, BC). http://sportsillustrated.cnn.com/2009/writers/joe_lemire/08/05/canadian.hoops/index.html
7. By comparison, the International Olympic Committee's 'Stockholm Consensus', issued in 2004, consists of one page. Text available at: www.olympic.org/news?articleid=56230