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Joseph Randall
Pace Law School

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A Changing Game: The Inclusion of Transsexual Athletes in the Sports Industry

Abstract

Joseph Randall explores the emerging trend in the sports industry towards the inclusion of transsexual athletes. He analyzes the impact of *Renee Richards v. United States Tennis Association*, the first case to speak on the legal rights of transsexual athletes, and then provides an overview of how the sports industry is gradually making it easier for transsexual athletes to compete in athletics. Randall ultimately concludes that in the interests of ethics and equality, the sports industry has a duty to afford all transsexual players an equal opportunity to play.

Cover Page Footnote

Joseph Randall graduated from the University of Delaware in 2009 and later served with City Year, a non-profit, Americorps program in Philadelphia. He is currently a student at Pace University School of Law and expects to earn his J.D. in May 2013.

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Joseph Randall¹

I. Introduction

Chaz Bono stirred up controversy in the Fall of 2011 when he was selected to participate on ABC's *Dancing with the Stars*, a popular reality television program where celebrities, athletes, and media personalities are paired with professional dancers to compete in an elimination-style dance contest. Bono, a post-operative female transsexual, made headlines and sparked strong reactions from critics who feared that his participation on the family-friendly show would endanger children.² Bono, however, is not the first transsexual individual to spark controversy for "taking center stage in a national competition of athletic prowess."³ In fact, transsexual athletes have stirred up controversy long before Bono's appearance on *Dancing with the Stars* riled critics and caused a media frenzy.

Transsexual athletes have been subjected to heavy scrutiny from the sports industry for years. Fellow riders appealed a victory earned by Canadian mountain biker Michelle Dumaresq, a male-to-female transsexual.⁴ Dumaresq's female competitors complained that her strength,

¹ Joseph Randall graduated from the University of Delaware in 2009 and later served with City Year, a non-profit, Americorps program in Philadelphia. He is currently a student at Pace University School of Law and expects to earn his J.D. in May 2013.

² See Hollie McKay, *Producers Defend Casting of Chaz Bono on 'Dancing With the Stars' as Debate Over Decision Heats Up*, FOX NEWS (Sept. 1, 2011), <http://www.foxnews.com/entertainment/2011/09/01/controversy-over-casting-chaz-bono-on-dancing-with-stars-prompts-producers-to/?intcmp=related#ixzz1eILqBRUW>; see Dr. Keith Ablow, *Don't Let Your Kids Watch Chaz Bono on "Dancing With The Stars,"* FOX NEWS (Sept. 2, 2011), <http://www.foxnews.com/opinion/2011/09/02/dont-let-your-kids-watch-chaz-bono-on-dancing-with-stars/> (Dr. Keith Ablow, a psychiatrist and contributor to Fox News, warned parents in an editorial that it would be dangerous for children to watch Bono compete on *Dancing with the Stars* because it would cause children to question their own gender identity and seek out sexual reassignment surgery).

³ Mary McNamara, *Television Review: Renee on ESPN*, LA TIMES (Oct. 4, 2011), <http://articles.latimes.com/2011/oct/04/entertainment/la-et-renee-review-20111004>.

⁴ See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 17 (2011).

endurance, and speed were “too suspiciously impressive” to be that of a woman and they went on to suggest “that Dumaresq compete in a separate, transgender category.”⁵ Dr. Renee Richards, a male-to-female transsexual tennis player, faced similar criticisms from her competitors: two female opponents “arrived at a tournament in Florida wearing shirts that read, ‘I am a Real Woman.’”⁶ As evidenced by the experiences of Dumaresq and Richards, male-to-female transsexual athletes are often viewed by their competitors as having an unfair advantage over players who are female at birth.

Richards, however, did not remain silent. In 1977, she brought a successful lawsuit against the United States Tennis Association after being barred from competing in the women’s division.⁷ Richards’ win represents a significant victory in helping transsexual athletes secure rights and protections in the sports industry. The last decade has seen a shift in governing bodies, such as the International Olympic Committee (IOC) in 2004⁸ and the National Collegiate Athletic Association (NCAA) in 2011⁹, amending their rules to allow transgender athletes to compete in concordance with their gender identity.

This paper explores the changing landscape of the sports industry for transsexual athletes. Transsexual athletes face significant legal and social hurdles in being granted equal access to compete in mainstream sports competitions. Nevertheless, a series of victories in the last forty years reveal an emerging trend in the sports industry towards the inclusion of transsexual players. As evidenced by the court’s holding in *Richards* and the changes in policies by the IOC and

⁵ *Id.*

⁶ Jill Pilgrim, David Martin, Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 535 (2003).

⁷ See *Richards v. U. S. Tennis Ass’n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

⁸ See *Transsexual Athletes OK for Athens*, CNN (May 18, 2004), <http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual/>.

⁹ See Marta Lawrence, *Transgender policy approved*, NCAA.ORG (Sept. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved>.

NCAA, it seems like the sports industry is slowly equalizing the playing field by affording transsexual players the opportunity to compete freely without regard to one's gender identity or newly assigned sex. In the interests of ethics and equality, the sports industry should continue to move forward in this direction.

II. Key Terms

A person's sex is rooted biology. Sex is "either of the two major forms of individuals that occur in many species...distinguished respectively as female or male especially on the basis of their reproductive organs and structures."¹⁰ Gender, on the other hand, is a sociocultural construction. It is "the behavioral, cultural, or psychological traits typically associated with one sex."¹¹ Transgender is an umbrella term that describes "individuals whose gender identity doesn't match the gender identity commonly experienced by those of the individuals' natal sex."¹²

Transsexual is a subcategory under the transgender umbrella. Three criteria are used to classify a transgender individual as transsexual: "(1) persistent discomfort about one's Birth-Sex, (2) at least two years of persistent preoccupation with acquiring the sex characteristics of the other sex, and (3) having reached puberty (the age at which the reproductive organs mature)."¹³

The focus of this paper is on transsexual athletes in the sports industry.

¹⁰ *Sex*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/sex> (last visited Mar. 25, 2012).

¹¹ *Gender*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/gender> (last visited Mar. 25, 2012).

¹² Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 10 (2011).

¹³ Jill Pilgrim, David Martin, Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 501 (2003) (citing the *American Psychiatric Association*).

III. Sex-based Exclusion in the Sports Industry

The law endorses segregation solely on the basis of sex in the sports industry. Title IX is a federal statute prohibiting sex-based discrimination in any federally-funded education program or activity.¹⁴ It is acceptable, however, for a federally-funded education program or activity to create separate teams for male and female students in contact sports.¹⁵ Title IX allows for the segregation of students exclusively on the basis of sex in sports activities that involve bodily contact, such as wrestling, rugby, and ice hockey.¹⁶ Justifications for sex-based segregation in sports are rooted in “concerns about safety, fairness, and social stigma.”¹⁷

A transsexual athlete faces the additional obstacle of being permitted to compete on the team that aligns with either his or her respective gender identity or newly assigned sex. For example, an athlete is placed in a difficult situation in the event where a governing body requires a male-to-female transsexual player to undergo DNA sex testing to ensure she is genetically female in order to compete as a woman. Though the athlete may have undergone sex-reassignment surgery, her chromosomes will still be that of a male, thereby barring her from participating in the sport. Such is the case of Dr. Renee Richards, a post-operative female transsexual who challenged a policy of the United States Tennis Association requiring female players to undergo a sex chromatin test to determine their eligibility to compete in the women’s league.¹⁸

¹⁴ See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1, 3 (2011).

¹⁸ See *Richards v. U. S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

IV. The Impact of Renee Richards on Transsexual Athletes in the Sports Industry

Renee Richards v. United States Tennis Association was the first case to speak on the legal rights of transsexual athletes in the sports industry. Dr. Richard Raksind, a Yale-educated ophthalmologist, was a nationally ranked tennis player in the men's 35-and-over bracket.¹⁹ At the age of 40, Raksind underwent sex reassignment surgery and adopted the name Renee Richards. She was prohibited by the United States Tennis Association (USTA) from competing as a woman in 1976's Women's Division of the United States Open Tennis Tournament. The USTA required Richards to take a sex-chromatin test—also referred to as the Barr body test—to verify she was female.²⁰

Richards sought injunctive relief against the USTA's policy requiring players to undergo a sex-chromatin test. She argued that the policy was discriminatory, violated the New York State Human Rights Law, and the test itself was an arbitrary and capricious method to prove one's sex.²¹ The Barr body test is a sex-chromatin test that "determines the presence of a second x chromosome in the 'normal female.'"²² It is "administered by having the individual rinse the mouth and obtaining a sample of cells by scraping the inner lining of the cheek. The sample is then transferred to a slide. Dye is applied and the smear is examined under a microscope."²³ According to Richards, the USTA lacked a rational basis for administering the test.²⁴ She questioned the accuracy of the Barr body test and criticized it for being grossly unfair, faulty, and an inherently inequitable method to exclude persons from competing in sports on the basis of gender.²⁵

¹⁹ *Id.* at 268.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 269.

²³ *Id.* at 270.

²⁴ *Id.* at 268.

²⁵ *Id.*

An argument frequently made in support of segregating male and female athletes on the playing field is that it promotes fairness in the sport. Likewise, the USTA relied on a similar line of reasoning in defense of its policy requiring players to take a sex-chromatin test. “Sport organizers...justify sex-segregated sporting practices with claims that they ensure a fair playing field and preserve opportunities for female athletes who would be squeezed out or dominated by superior male athletes.”²⁶ The USTA believed “there is a competitive advantage for a male who has undergone ‘sex-change’ surgery as a result of physical training and development as a male,”²⁷ and therefore, its policy prevented any unfair disadvantage. In fact, there tends to be greater concern where a male-to-female transsexual seeks to compete on a women’s athletic team, as opposed to a female-to-male transsexual wishing to compete on a men’s athletic team.²⁸ Some view a female transsexual as not truly “female,” having the strength, speed, and muscle mass of a male, and therefore, possessing an athletic advantage over other female competitors.²⁹

The court ultimately ruled in favor of Richards. She was granted injunctive relief and the USTA’s policy was lifted. The court recognized that the USTA implemented its policy requiring players to undergo a sex-chromatin test for the 1976 U.S. Open as a direct response to Richards’ “application to the U.S. Open, and [her] frank presentation of her medical situation in a personal letter to the chairman of the U.S. Open.”³⁰ It was noted by the court that “until August 1976, there had been no sex determination test in the 95-year history of the USTA National Championships.”³¹ Sexual reassignment surgery cannot produce “the internal ductal organs or

²⁶ Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1, 3 (2011).

²⁷ *Richards*, 400 N.Y.S.2d at 268.

²⁸ See Frederick Dreier, *For Transgender Triathlete, a Top Finish in New York Is Secondary*, N.Y. TIMES, Aug. 5, 2011, at D6 (transgender males often face harsher social pushback than transgender females).

²⁹ See *Richards*, 400 N.Y.S.2d at 271.

³⁰ *Id.* at 268.

³¹ *Id.*

the gonadal identity of the opposite sex.”³² Thus, a female transsexual such as Richards would fail to pass a test that defines one’s sex solely by his or her DNA.

In ruling in favor of Richards, the court gave considerable weight to the testimony of the surgeon who conducted Richards’ sex-change operation. The surgeon’s testimony went directly against USTA’s argument that Richards would have a competitive advantage over other female players due to her male physique. “The removal of the testes, the main source of androgen (male hormones), decreases tremendously the male hormones in the blood and results in a decreased muscular mass [and] the structure of the muscle/fat ratio of the male is changed to a feminine type.”³³ He explained that Richards would not have an unfair advantage “when competing against other women. Her muscle development, weight, height and physique fit within the female norm...except for reproduction, Dr. Richards should be considered a woman, classified as a female and allowed to compete as such.”³⁴ The surgeon’s testimony served an important function of dispelling societal fears and concerns regarding supposed advantages a transsexual athlete might have. The court correctly discredited USTA’s exclusion of Richards on the basis of any physiological advantage she might have over her female counterparts.

The court’s decision in favor of Richards was also rooted in ethical considerations. It was inherently unfair for the USTA to deliberately condition Richards’ participation in the U.S. Open on her passing a sex-chromatin test since her DNA was still that of a male. The USTA’s policy was “grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of [New York]. It seems clear that [the USTA] knowingly instituted this test for the sole purpose of preventing [Richards] from participating in the tournament.”³⁵

³² *Id.* at 270.

³³ *Id.* at 271.

³⁴ *Id.*

³⁵ *Id.*

Moreover, the court recognized a state's duty to "assure that every individual within [the state] is afforded an equal opportunity to enjoy a full and productive life."³⁶ Accordingly, a state's failure in providing equal opportunities to its people "not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety, and general welfare of the state and its inhabitants."³⁷ The court appears to suggest that transsexual individuals are entitled to equal access to opportunities, just like any other group of people. The court got it right. Barring transsexual persons from equal opportunities is an unethical and unacceptable practice.

The court, however, did not declare the Barr body test invalid.³⁸ Rather, it held that the Barr body test should not be the sole criterion in determining a person's sex.³⁹ The implications of the court's decision on one's identity as transgender are revealing. "As the court in *Richards* pointed out, although it is generally true that XX embryos are destined to have female genitalia and XY embryos are destined to have male genitalia, significant variations in this configuration exist."⁴⁰ The true sex of an individual cannot be determined solely by a person's "chromosomes [or] birth-genitalia."⁴¹ The court suggests that multiple factors should be weighed when determining the sex of an individual. These factors include one's "external genital appearance, internal organ appearance, gonadal identity, endocrinological makeup, and psychological and social development."⁴² The court, therefore, was fairly progressive in how it perceived and defined "sex."

³⁶ *Id.* at 273.

³⁷ *Id.*

³⁸ *Id.* at 272.

³⁹ *Id.* at 273.

⁴⁰ Yael Lee Aura Shy, "Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports, 14 *Sports. L. J.* 95, 98 (2007).

⁴¹ *Id.*

⁴² *Id.* at 99.

V. The Inclusion of Transsexual Athletes in the Sports Industry

Dr. Renee Richards' victory was instrumental in advancing the legal rights of transsexual athletes in the sports industry. Following Richards' win, transsexual athletes went on to experience additional success in being able to compete in accordance with their gender identity or newly "assigned" sex. Several sports governing bodies in recent years have "revised their rules to permit transsexual athletes to compete as their 'corrected' sex."⁴³

In 2004, the International Olympic Committee (IOC) was the first major sports governing body to fashion a policy that created specific provisions regarding the inclusion of transgender players.⁴⁴ Under the IOC's policy, transsexual athletes would be permitted "to compete if the athlete's sex reassignment surgery took place before puberty."⁴⁵ However three criteria must be satisfied if a transsexual athlete who underwent sex reassignment surgery after puberty wishes to compete as his or her newly "assigned" sex: (1) Surgical changes must have been completed, including external genitalia and removal of gonads. (2) Legal recognition of their assigned sex must have been conferred by appropriate official authorities. (3) Hormone therapy must have been given for long enough to immunize any "gender related advantages" (at least two years after surgery).⁴⁶

Similarly, the National Collegiate Athletic Association (NCAA) changed its policy regarding the participation of transgender student-athletes. The policy was approved in August 2011 and allows "transgender student-athletes to participate in sex-separated sports activities so long as the athlete's use of hormone therapy is consistent with the NCAA policies and current

⁴³ *Id.* at 108

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

medical standards.”⁴⁷ The NCAA’s policies and medical standards provide that “a trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men’s team but is no longer eligible to compete on a women’s team without changing the team status to a mixed team.”⁴⁸ In such a case, a “mixed team is eligible only for men’s championships.”⁴⁹ On the other hand, “[a] trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status.”⁵⁰ However, the team will maintain its women’s status after the trans female student-athlete completes “one calendar year of documented testosterone-suppression treatment.”⁵¹

Under both the IOC and NCAA policies, transsexual athletes are afforded the opportunity to compete in accordance with their gender identity.⁵² These revised policies make it easier for transsexual athletes to participate in sports competitions by helping them bypass many of the obstacles that would normally inhibit their efforts to compete. The IOC and NCAA are just two of a number of other sports organizations that have enacted policies mandating the inclusion of transgender athletes. Additional governing bodies that contain similar policies include the United States Golf Association (USGA) and USA Track & Field and Triathlon.⁵³

In 2008, the Ladies Professional Golf Association (LPGA) revised its policy to allow

⁴⁷ Marta Lawrence, *Transgender policy approved*, NCAA.ORG (Sept. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Frederick Dreier, *For Transgender Triathlete, a Top Finish in New York Is Secondary*, N.Y. TIMES, Aug. 5, 2011, at D6, available at <http://www.nytimes.com/2011/08/06/sports/for-transgender-triathlete-a-top-finish-is-secondary.html>.

transsexual athletes to compete following a federal lawsuit filed against the organization by Lana Lawless.⁵⁴ Lawless, a former police officer and male-to-female transsexual, was crowned the 2008 women's world champion in long-drive golf.⁵⁵ In her lawsuit, Lawless argued that the LPGA's "requirement that competitors be 'female at birth' violates California civil rights law."⁵⁶ Lawless' lawsuit against the LGPA illustrates that transsexual athletes continue to struggle to be afforded equal opportunities in the sport industry. However, her victory, in addition to major policy changes by the IOC and NCAA, signal a shift in the sports industry towards the inclusion of transsexual athletes.⁵⁷

VI. Conclusion

It is a significant feat that the sports industry is gradually becoming more inclusive of transsexual players. Sports teams benefit by being able to recruit and retain top talent. The gradual inclusion of transsexual players in the sports industry also sends a strong social policy message of the importance of accepting transsexual individuals in mainstream society.

From an ethical standpoint, the inclusion of transsexual players promotes fairness and equality. The IOC and NCAA should be commended for their policy changes that support the inclusion of transsexual athletes. The sports industry is a highly regulated industry where ethical violations are not taken lightly.⁵⁸ For an industry that prides itself in ensuring fairness and sportsmanship, it would be hypocritical and a wholly unfair practice for it to deprive qualified

⁵⁴ See Katie Thomas, *L.G.P.A. Will Allow Transgender Players to Compete*, N.Y. TIMES, Dec. 2, 2010, at B19, available at <http://www.nytimes.com/2011/08/06/sports/for-transgender-triathlete-a-top-finish-is-secondary.html>.

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See Yael Lee Aura Shy, "Like Any Other Girl": *Male-to-Female Transsexuals and Professional Sports*, 14 Sports. L. J. 95, 109 (2007).

⁵⁸ In recent years, sports governing bodies have punished players who took steroids and other performing-enhancing substances.

and competent transsexual players the opportunity to compete. The sports industry has an ethical duty to continue to afford all transsexual players an equal opportunity to play.