

Testimony in Opposition to HB 1249, HB 1489, HB 1473

Christina Sambor, Lobbyist No. 312 – Legislative Coordinator, North Dakota Human Rights Coalition, Youthworks

North Dakota House Human Services Committee

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Chairman Weisz and Members of the Committee:

My name is Christina Sambor, I am submitting testimony on behalf of the North Dakota Human Rights Coalition and Youthworks to oppose the various bills set for hearing this morning that seek to exclude transgender students from participation in sports.

The attached law review article, Joseph Brucker, Beyond Bostock: Title IX Protections for Transgender Athletes, 29 Jeffrey S. Moorad Sports L.J. 327 (2022), sets forth a comprehensive analysis of the history of civil rights law and trans athletes. In sum, the United States Department of Education has held, since 2010, that Title IX protects LGBT students from sex discrimination. It has further interpreted that bathrooms and locker room facilities should be applied to transgender students consistent with their gender identity, rather than their sex assigned at birth. Since May 13, 2016, departments have been directed to treat a student's gender identity the same as a person's sex for purposes of Title IX. The same guidance clarified that while a school may operated sex-segregated athletic teams when based on competitive skill or in contact sports, schools may not rely on overly broad generalizations or stereotypes about the differences between transgender students and students of the same gender identity or others' discomfort with transgender students. While this guidance was reversed under the Trump Administration, it has since been re-established by the Biden Administration.

The U.S. Supreme Court decided three consolidated cases collectively known as "Bostock" on June 15, 2020. The Bostock Decision held that Title VII of the Civil Rights Act prohibits discrimination in the workplace based on sexual orientation or gender identity. That holding is enforced by North Dakota's Department of Labor and Human Rights, which now accepts complaints of discrimination based on sexual orientation or gender identity. Federal courts have recognized that cases interpreting Title VII's provisions are relevant to and can be useful in analysis of claims of Title IX discrimination. On June 16, 2021, the US Department of Education released a Notice of Interpretation applying the Bostock prohibition on discrimination on the basis of sexual orientation or gender identity to Title IX claims. Based upon all of this information, laws, such as those proposed by HB 1249, HB 1489, are susceptible to legal challenges and will likely be held to violate Title IX. In addition, the Equal Protection Clause of the Fourteenth Amendment

has also provided a basis upon which courts have struck down bans on transgender athletes and students, notably striking down the assignment of bathroom usage by sex listed on a birth certificate. Recently, Idaho's law banning transgender women and girls from sports teams was enjoined citing the legal arguments that I previously discussed.

The arguments that often support this type of legislation assume that inclusion of trans women and girls in sports team will have a negative effect on girls and women generally. These arguments are unfounded. Twenty-four (24) states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade. Many of these states actually saw higher participation rates in athletics among cisgender women after the policies were implemented. Trans athletes are in general quite rare, and transgender athletes dominating elite women's sports has not materialized. The Olympics have had trans-inclusive policies since 2004 and no transgender athletes have qualified. California has had a law on the books since 2013 allowing trans athletes to compete on the team that matches their gender identity without issue.

The idea that trans girls have an unfair advantage is rooted in the idea that testosterone causes physical changes that increase muscle mass. But other conditions, such as polycystic ovarian syndrome similarly elevate testosterone levels. Should we block those individuals from competition based on an unfair biological advantage? In addition, claiming that trans girls uniformly have a competitive advantage ignores the fact that they suffer from higher rates of bullying, anxiety and depression, making training more difficult, and experience higher levels of homelessness and poverty because of family and societal rejection.

The impact of these laws is to deny trans students access to exercise, companionship, team building, social support and the myriad other benefits of competitive sports in the name of unsubstantiated fears. In the vast majority of cases, the only result of trans athletes participating in sports would be the avoidance of the rejection and psychological harm that comes from exclusion. Please recommend a do not pass on HB 1249, HB 1489, HB 1473.