

2021 HOUSE HUMAN SERVICES

HB 1298

2021 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1298
1/25/2021

Relating to participation in athletic events exclusively for males or females.

Chairman Weisz opened the hearing at 2:16 p.m.

Representatives	Attendance
Representative Robin Weisz	P
Representative Karen M. Rohr	P
Representative Mike Beltz	P
Representative Chuck Damschen	P
Representative Bill Devlin	P
Representative Gretchen Dobervich	P
Representative Clayton Fegley	P
Representative Dwight Kiefert	P
Representative Todd Porter	P
Representative Matthew Ruby	P
Representative Mary Schneider	P
Representative Kathy Skroch	P
Representative Bill Tveit	P
Representative Greg Westlind	P

Discussion Topics:

- Gender identity
- Title IX

Rep. Ben Koppelman, District 16 (2:16) introduced the bill, testified in favor, and submitted testimony #3097.

Sen. Janne Myrdal, District 10 (2:46) testified in favor.

Mark Jorritsma, Executive Director Family Policy Alliance of North Dakota (2:52) testified in favor and submitted testimony #2706.

Christopher Dodson, Executive Director North Dakota Catholic Conference (3:01) testified in favor and submitted testimony #2727.

Linda Thorson, Concerned Women for America of North Dakota (3:05) testified in favor and submitted testimony #2243.

Katie Fitzsimmons, Director of Student Affairs North Dakota University System (3:08) testified in opposition and submitted testimony #2746.

Luis Casas, Pediatric & Adult Endocrinologist (3:19) testified in opposition and submitted testimony #2420.

Madison Jansky, Licensed Social Worker (3:26) testified in opposition and submitted testimony #2484.

Kathy Anderson, President American Academy of Pediatrics (3:28) testified in opposition and submitted testimony #3147.

Gabriela Balf, NDPS (3:33) testified in opposition and submitted testimony #2761 and #3154.

Rachael Michaud, Senior Admission Representative Concordia College (3:45) testified in opposition and submitted testimony #2495.

Dave Williams, Bismarck North Dakota Chapter of Parents, Friends, and Allies of people who are Lesbian, Gay, Bisexual, Transgender, and Queer (3:45) testified in opposition and submitted testimony #2488.

Rebecca Quimby, Head Women's Soccer Coach Concordia College (3:52) testified in opposition and submitted testimony #2628.

Additional written testimony: #2198, #2323, #2356, #2357, #2358, #2374, #2377, #2378, #2381, #2388, #2395, #2396, #2404, #2407, #2410, #2411, #2412, #2418, #2451, #2459, #2485, #2486, #2489, #2497, #2504, #2511, #2526, #2533, #2536, #2552, #2553, #2556, #2564, #2574, #2581, #2591, #2603, #2617, #2623, #2631, #2636, #2656, #2662, #2665, #2704, #2705, #2732, #2737, #2741, #2743, #2756, #2771, #3139, #3161, #3180

Chairman Weisz adjourned at 3:58 p.m.

Tamara Krause, Committee Clerk

1/25/21

HB 1298

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1298 to you today.

I introduced this bill to ensure that all students continue to have an opportunity to participate on a level playing field with their peers without having to compete with a member of the opposite sex that is likely to have physical and physiological advantages.

Many of you may have enjoyed watching your daughters or granddaughter participate in a sport like basketball, volleyball, track, softball, or dance. Many of you may also have watched them participate in other competitive events such as music, speech and debate, or chess league. They may have even been fortunate enough to receive a college scholarship based on that activity.

How many of you are aware that that opportunity may have been thanks to a change in education policy in 1972? Title IX of the federal education code says:

“No Person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

In sports, Title IX requires that boys and girls, men and women, have an equal opportunity to participate, but does not require institutions to offer identical sports. It also requires that scholarships and other resources be applied equitably.

Now, in order to understand what the intent was of this law, and how it applies, we need to first look at the definition of sex and how it differed from the gender and what both terms meant in 1972. In order to put it in context, I have provided you the definition of both words in the Webster’s New World Dictionary--Second College Edition published in 1970, in which ***Sex is defined as: “either of the two divisions, male or female, into which persons, animals, or plants are divided***

with reference to their reproductive functions”, and Gender is defined as: “sex”. In Webster’s New Twentieth Century Dictionary—Second Edition published in 1979, the definitions are nearly identical.

Now that we have a context of what the sex meant when the Title IX law was written, let’s explore why that term was used. It is commonly understood that there are physical and physiological traits that differ between the sexes, and in order to provide equal opportunity in activities, it was necessary to determine how to ensure fair competition. In activities that do not involve athletic or physical competition, there is probably little reason to separate boys and girls, however in sports, the differences become obvious.

Women are smaller in stature than men, the average 18-year-old woman is 64.4 inches tall and weighs 126.6 pounds compared to men at 70.2 inches tall and a weight of 144.8 pounds. Women’s hearts are 25% smaller than men’s and they also have less red blood cell percentage which doesn’t allow their blood to carry as much oxygen. Their lung capacity is 30% less. They have 50% less upper body strength and 30% less lower body strength. A woman who is the same size as her male counterpart is only 80% as strong on average. Women have less bone mass and have less-durable ligaments than men. These differences consistently show up in the data.

According to a white-paper titled *“Comparing Athletic Performances—the Best Elite Women to Boys and Men”* (by Doriane Lambelet-Coleman and Wickliff Shreve), Males consistently outperform females of the same age and training by about 10-12% however it varies slightly by sport. In fact, boys under the age of 18 are even able to outperform adult women. For example, in 2017, the lifetime-best time record of 10.78 for US Champion Tori Bowie in the 100-meter was beaten 15,000 times by men and boys. Also in 2017, Allyson Felix’s 400-meter lifetime-best time record of 49.26 was outperformed by more than 15,000 times by males. The authors of the paper go on to say: **“This differential isn’t the result of boys and men having a male identity, more resources, better training, or superior discipline.”** These statistical comparisons play out in a similar way in all the track and field events. Other sports also show the differentials.

As you can see, there was a scientific reason to use sex (as defined at the time as biological sex) as the delineating factor to ensure opportunity for girls and

women. This has provided exponential opportunity for young women to shatter the glass ceiling that had previously been holding back their potential. Since Title IX was implemented in 1972, the participation in High School sports has gone from 295,000 girls compared with 3.7 million boys to 3.4 million girls compared to 4.6 million boys. The statistical trend is similar in college sports.

Across the nation—states, schools, and athletic organizations have been trying to grapple with individuals who want to participate in a sport that is intended for the opposite sex. In some instances, they have been allowing play solely on the stated ‘gender-identity’ of the individual to disastrous results. In Connecticut, a biological male, who reportedly has not ‘transitioned’ using female hormones at all, has consistently beat every female opponent, and is one of two biological males to win multiple female events and shatter state female records in track. In other instances, there have been policies set in place that limit this sort of crossover play to individuals taking hormone therapies such as the policy of the North Dakota High School Activities Association, which says:

NDHSAA Transgender Student Board Regulation

A transgender student will be defined as a student whose gender identity does not match the sex assigned to him or her at birth.

Any transgender student who is not taking hormone treatment related to gender transition may participate in a sex-separated interscholastic contest in accordance with the sex assigned to him or her at birth.

The following clarifies participation in sex-separated interscholastic contests of transgender students undergoing hormonal treatment for gender transition:

- A trans male (female to male) student who has undergone treatment with testosterone for gender transition may compete in a contest for boys but is no longer eligible to compete in a contest for girls.
- A trans female (male to female) student being treated with testosterone suppression medication for gender transition may continue to compete in a contest for boys but may not compete in a contest for girls until completing one calendar year of documented testosterone-suppression treatment.

However, these type of policies do not contemplate the effects of puberty and stature, and there is no agreed upon science or medical research that shows with certainty that all male advantages could be neutralized with hormone treatment

or what harm the long term effects of such treatment might be. To date in North Dakota, I am not aware of any biological males competing at the high school level as females, but it is occurring many places on the national level.

Recently, President Biden issued guidance through an executive order suggesting that his administration should treat 'gender identity' as a way of defining 'sex'. Although presidential executive orders cannot change the law, they can cause pressure on states and schools to follow suit. If we were to define 'sex' in this way in North Dakota, it would have massive consequences on women of all ages in our state. **In addition to reduced opportunity and competitiveness for women in sports this change could reduce the number of women receiving scholarships intended for women in sports, STEM, music, and other career targeted scholarships.**

For consistency throughout the state, it needs to be the Legislature that defines this. If we choose to do nothing, we will by default be allowing those opportunities of our women to be lost or greatly reduced as society attempts to remove any reference to biological sex and replaces it with social construct of self-identification. We will in essence be allowing the panels in the glass ceiling to be reconstructed and reinstalled over the heads of women in the name of feelings rather than science. As a husband, a father of a female athlete, and maybe someday a grandfather of a female athlete; I cannot sit back and let society strip away opportunity from women in our state.

Mr. Chairman and members of the committee, I request that you give this bill a Do-Pass recommendation. I would be happy to answer any questions that you may have.



Testimony in Favor of House Bill 1298

Mark Jorritsma, Executive Director
 Family Policy Alliance of North Dakota
 January 25, 2021

Good morning Chairman Weisz and distinguished members of the House Human Services Committee. My name is Mark Jorritsma and I am the Executive Director of Family Policy Alliance of North Dakota. I am testifying in favor of House Bill 1298 and respectfully request that you render a “DO PASS” on this bill.

Context

It may seem like an obvious statement, but boys and girls are biologically different from birth. Whether one agrees or disagrees that this is how it should be, science and common sense tell us that males are generally stronger than females. That difference shows up in size, strength, bone density, and even hearts and lungs. While females possess many biological advantages of their own, the areas of biological advantage for boys are those that are most often associated with athletic sports. Over and again, the courts have ruled that boys have a biological advantage over girls in most sports (Appendix A)

In contrast to this, some are lobbying to allow transgender boys (boys born biologically male but identifying as female) to compete in girls’ sports. What is the supposed basis for this requirement? Title IX of the 1964 Civil Rights Act is typically used to justify it.

Title IX, the federal law guaranteeing that girls must be given equal access to athletics programs at schools receiving federal funding, was designed to eliminate discrimination against women in education and athletics, while creating equal opportunities for women. Historically, Title IX has been used to advance women’s opportunities, but now some want to let biological men steal those very opportunities. Despite Title IX’s history of advancing opportunities for females, this current trend exploits Title IX to do just the opposite – letting biological males steal opportunities reserved for girls. Allowing boys to compete in girls’ sports reverses nearly 50 years of advances for women under Title IX.

So what is the result when biological boys compete in girls’ sports? Not surprisingly, they nearly always win.

- In Connecticut, three female track stars are embroiled in a federal lawsuit over a policy that allowed biological boys to compete in girls’ sports. While the girls were formerly top high school runners, two biological males entered as girls and took their athletic titles and opportunities to compete at a higher level.

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UNLEASHING CITIZENSHIP

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- Biological young men presenting as females are using their physical advantages to win girls' wrestling championships in Texas.
- Transgender males are easily winning track championships and shutting out girls in Alaska.
- The world record for the men's 100-meter dash, set by Usain Bolt, is 9.58 seconds. The world record for women, set by Florence Griffith-Joyner, is 10.49 seconds. Females have never broken what is referred to as the 10-second barrier, while Olympic male finalists consistently break the barrier.
- Transgender competitor Mary Gregory from the UK participated in a women's weightlifting event, winning the masters world squat record, open world bench record, masters world deadlift record, and masters world total record in one day, beating every other competing woman.
- Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys.
- Olympic, World, and U.S. Champion Allyson Felix's 400 meters lifetime best of 49.26 was beaten more than 12,000 times by men and boys around the world in just one year.
- One of the world's top marathon runners, Paula Radcliffe, shared that when the Boston marathon changed its rules to open qualifying times to biological men who identified as women, allowing biological men to take women's slots would make it even harder for women to enter.

These girls are not losing just the opportunity to win, but to also earn college scholarships and launch their own careers in athletics, coaching, and more. In a sense, it is the girls who are truly being excluded. They have been excluded from the sports that were designed to provide them with the space they need to reach their highest potential.

North Dakota Status

There is no law currently in the Century Code that directly addresses boys competing in girls' sports. The closest we have is from the North Dakota High School Activities Association (Appendix B). The policy of the NDHSAA regarding transgender-identified athletes looks like that of many other states and, unfortunately, the guidelines allow biological boys who have undergone testosterone suppression therapy for at least one year to be allowed to compete in girls' sports.

While we applaud the NDHSAA for seeking to set out guidelines, there are two problems. First, their regulations do not have the weight of law embodied in our Century Code and could be changed for innumerable reasons, as can the regulations of any other association. Second, boys taking testosterone suppressing drugs still have a clear biological advantage over girls when it comes to sports. (Appendix C).

Is this really an issue that North Dakotans have to address? Yes it is, particularly with the Biden Administration's recent and vocal support for transgender policy, via an Executive Order. Roughly 20 states already have antidiscrimination laws that give special privileges to transgender-identifying students, and this will undoubtedly only increase under the Biden Administration (Appendix D). The rest, like North Dakota, will get increasing pressure from the federal government and special interest groups to do the same.

Purpose of Bill

The initial Fairness in Women's Sports bill was sponsored by former NCAA basketball player and Division I coach Barbara Ehardt. As a coach and athlete, she brought a bill forward because she knew from experience that female athletes deserve fair competition—and that female athletes compete in their own divisions for a reason.

The proposed bill, HB1298, limits participation in girls' sports to biological girls, making clear that women's sports are for women only. It requires boys and girls to solely play on teams consistent with the biological sex initially indicated on their birth certificate. It is a fair, consistent, and documentable way of handling the issue.

This bill really comes down to two things. First, let's keep the playing field level for girls' sports. Let's not set back the clock 50 years and use federal antidiscrimination law against girls to actually discriminate against them in the name of social expediency.

Second, let's keep North Dakota a state where common sense rules. As North Dakotans, we need to say to DC, "We will not yield to your social agenda, because it directly conflicts with our personal values!" In the spirit of all we hold dear as North Dakotans, I ask you to please vote a "DO PASS" out of committee on HB 1298.

Thank you for your time and I would be happy to stand for any questions.

Appendix A

FEDERAL PROTECTIONS

For reasons of fundamental fairness and safety, girls have the right to play on a sex -segregated team that does not include biological boys. Courts have recognized there are fundamental physical differences between boys and girls that give boys a biological advantage in most sports. This is why we have sex-segregated teams in public schools and professional sports.



**45 CFR § 86.41 –
THE DEPARTMENT OF HEALTH & HUMAN SERVICES**

This is a federal regulation supporting Title IX. It prohibits discrimination on the basis of sex but specifies that educational institutions may have separate teams for members of each sex if selection is based upon competitive skill or if teams are competing in a contact sport

**34 CFR § 106.41(A)
THE DEPARTMENT OF EDUCATION**

This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

**O'CONNOR V. BD. OF ED., 449 U.S. 1301,
1307 (1980):**

If certain sports teams do not have “gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ program and deny them an equal opportunity to compete in interscholastic events.”

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Appendix B

NDHSAA Board of Directors

November 20, 2015 / Page 1

NDHSAA Transgender Student Board Regulation

A transgender student will be defined as a student whose gender identity does not match the sex assigned to him or her at birth.

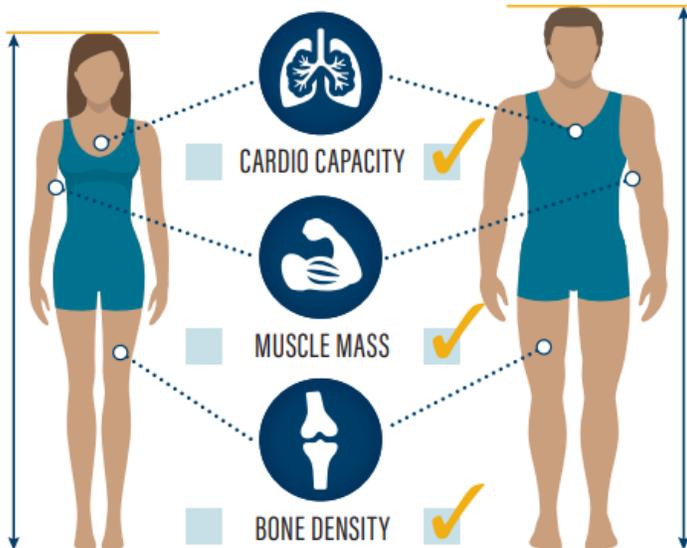
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Appendix C

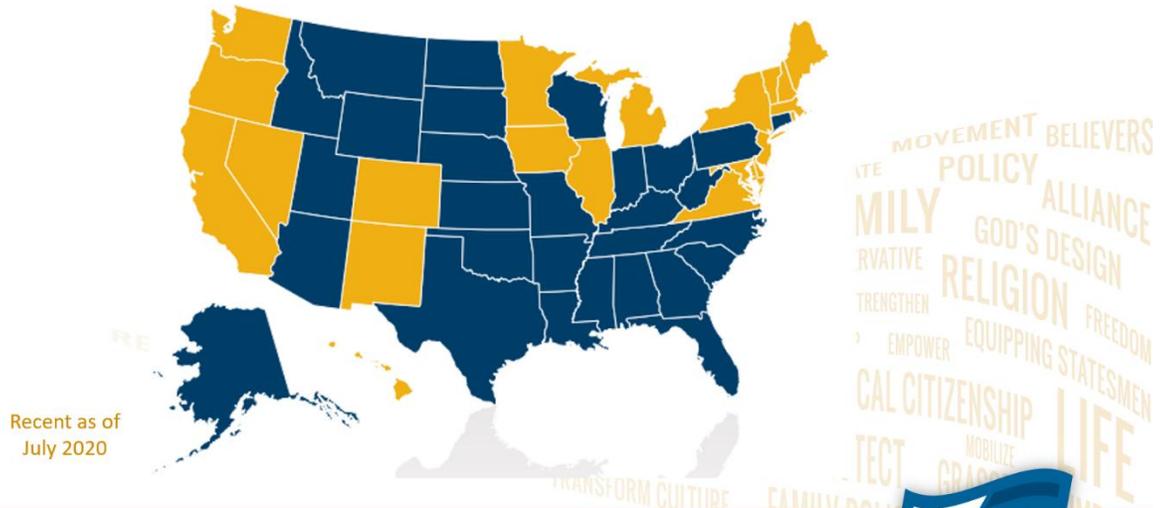
Physiology of Men vs. Women



- Testosterone: increases bone size, bone density, muscle strength and size, ligament strength, connective tissue strength, increases red blood cells etc.
- Testosterone is not the only thing that gives boys an advantage. Even if a boy is taking drugs to lower his testosterone levels (e.g., cross-sex hormones), he still has a performance advantage over girls because he naturally has longer and stronger bones (giving him a height advantage), greater bone density (making him less likely than girls to get injured in many respects) increased muscle mass, and greater cardiovascular capacity than girls.
- Testosterone level for transgender-identifying men is still 3x higher than what's allowable for women in professional sports.

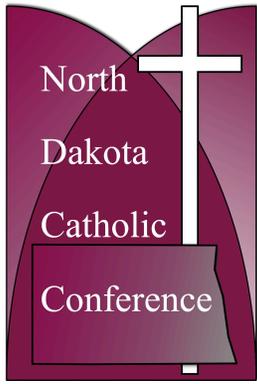
Appendix D

WHAT'S HAPPENING?



States in gold have anti-discrimination laws that provide special privileges to transgender-identifying students.





*Representing the Diocese of Fargo
and the Diocese of Bismarck*

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To: House Human Services Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1298
Date: January 25, 2021

True education aims at the formation of the human person as a unity of body, soul, and spirit, while pursuing the common good. It includes the social and physical aspects of athletics. As Pope Francis has said, "The Church is interested in sport because the person is at her heart, the whole person, and she recognizes that sports activity affects the formation, relations, and spirituality of a person."¹ In education and in sports, we must seek to avoid unequal treatment between men and women, and anything that debases human dignity, including rejection of a person's body. With these principles in mind, the North Dakota Catholic Conference supports HB 1298 for several reasons.

First, it assures fundamental fairness. We have made great strides not only in respecting the unique dignity of women and girls, but also in fostering a fair and equal environment that provides them opportunities to grow and succeed according to their created uniqueness. That environment is being threatened and HB 1298 protects it.

Second, youth have a right to safely participate in student athletics. Male competition in activities designated for females can be both unfair and, especially in high-contact sports, unsafe. Neither of these concerns is remediated by cross-sex hormone procedures, as they do not fully address disparities in average muscle mass, bone characteristics, and lung capacity once puberty is underway.²

Third, HB 1298 conforms to human dignity and proper pedagogy. We often hear, in support of allowing biological boys to compete against girls, that gender is a construct. In truth, gender ideology is a construct, untethered from biological and ontological reality. Allowing biological males to compete against biological females cooperates with and advances this false ideology, contrary to the proper purpose of both sports and education.

Fourth, HB 1298 prevents potential conflicts. Some schools, parents, or students might have philosophical or religious reasons preventing girls from competing against biological males, especially in contact sports. HB 1298 would prevent penalizing those schools and students.

Finally, HB 1298 recognizes that the legislature is the proper place to address this issue. As it stands now, an association consisting of non-elected individuals made a decision that imposed a certain ideology on our students. HB 1298 rectifies that mistake.

Every person, including students experiencing gender identity discordance, should be able to participate in student activities. The activities, however, should be in accord with fairness, safety, and the dignity of the human person. For these reasons we support HB 1298 and ask for a **Do Pass** recommendation.

¹ Pope Francis, Address to the Italian Tennis Federation, Rome, May 8, 2015.

² Tommy Lundberg and Emma Hilton, "Transgender women in the female category of sport: is the male performance advantage removed by testosterone suppression?" (May 13, 2020) (available at [https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20\(1\).pdf](https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf)), as pre-printed update of Lundberg 2019 study, *infra*); Expert Declaration of Gregory A. Brown, Ph.D., Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. (Jan. 7, 2020) (available at <https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20Report%20Executed.pdf?ver=1580495895886>); T. Lundberg, Ph.D. et.al., "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen," Karolinska Institutet, Department of Laboratory Medicine/ANA Futura, Division of Clinical Physiology. Huddinge, Sweden (Sep. 26, 2019) (available via bioRxiv, Cold Spring Harbor Laboratory, at <https://www.biorxiv.org/content/10.1101/782557v1>).

Furthermore, the safety of the students who undergo hormone treatments themselves is at risk when such procedures have unproven long-term results in developing bodies. See D. Getahun et al., "Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study," *Ann Intern Med* 169, no. 4 (2018); M.S. Irwig, "Cardiovascular Health in Transgender People," *Rev Endocr Metab Disord* 19, no. 3 (2018); P.W. Hruz, L.S. Mayer, and P.R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," *The New Atlantis*, 52 (2017); S. Maraka et al., "Sex Steroids and Cardiovascular Outcomes in Transgender Individuals: A Systematic Review and Meta-Analysis," *J Clin Endocrinol Metab* 102, no. 11 (2017); J. Feldman, G.R. Brown, M.B. Deutsch, et al., "Priorities for Transgender Medical and Healthcare Research," *Curr Opin Endocrinol Diabetes Obes* 23 (2016):180-87; D. Macut, I.B. Antić, and J. Bjekić-Macut, "Cardiovascular Risk Factors and Events in Women with Androgen Excess," *Journal of Endocrinological Investigation* 38, no. 3 (2015); E. Moore, A. Wisniewski, A. Dobs, "Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects," *J Clin Endocrinol Metab* 88 (2003): 3467-73.

CONCERNED
WOMEN *for* AMERICA
LEGISLATIVE ACTION COMMITTEE

January 25, 2021
House Human Services Committee
Testimony in Support of HB 1298

Chairman Robin Weisz and Members of the House Human Services Committee, my name is Linda Thorson. I am a former educator of 26 years and am the State Director of Concerned Women for America (CWA) of North Dakota. I am here today on behalf of our North Dakota members in support of HB 1298.

As the largest public policy women's organization in the nation and our state, CWA of North Dakota heartily supports HB 1298. Fair competition and equality in women's sports in North Dakota are under threat, and this legislation is the remedy. As the director of the state's largest public policy woman's organization, my remarks will address this issue's impact on girls' and women's sports.

Female athletics are a pathway to development, opportunity, and success for girls and women in America. So, when male-born athletes are permitted in women's sports as transwomen, female-born athletes will lose hard-fought opportunities, which came about through the feminist movement in the implementation of Title IX.

Allowing individuals who are assigned the opposite sex (male) at birth to participate on an athletic team directly violates Title IX and is discriminatory against girls. Title IX states in part: *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ..."*

Nearly 50 years ago, the first female race was held at the Boston Marathon. Women had to fight for their right to compete in contrast with men whose opportunities were much greater in the arena of sports. Leaders in the women's movement saw the need to provide a woman's only race to determine the fastest female marathon runner in Boston that year.

Physiological distinctions between the sexes also matter in protecting equal opportunity and a fair playing field. For example, puberty, testosterone, and innate biological differences give physical advantages to males that cannot be erased. Inherent male and female distinctions range from chromosomal and hormonal differences to physiological differences. Men generally have greater density and strength in bones, tendons, and ligaments, larger hearts, greater lung capacity, and higher red blood cell count.

Exercise physiology expert Dr. Gregory A. Brown of the University of Nebraska, published an exhaustive review of existing research, concluding that men and adolescent boys perform better in almost all sports than women and adolescent girls because of their inherent physiological advantages that develop during male puberty.

I urge you to support the victories of the women's movement, which opened the doors for women to compete on a level playing field, acknowledge biological science, and preserve women's sports, and vote "do pass" on HB 1298.



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HB 1298

House Human Services

January 25, 2021

Katie Fitzsimmons, NDUS Director of Student Affairs

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Chair Weisz and Committee Members: My name is Katie Fitzsimmons and I serve as the Director of Student Affairs at the North Dakota University System. I am representing the System Office, but not the State Board of Higher Education, which has not met since this bill was introduced, in opposition to HB 1298. The bill, if enacted, could require NDUS colleges and universities to violate federal Title VII and Title IX federal regulations and guidance, take a position that contradicts athletic conference guidelines, and add to the institutions' administrative burden by requiring the collection of birth certificates as part of the admission process for our 45,000 students. It may also be impossible to enforce. More on that in a moment.

What we call Title IX today was enacted as part of the Education Amendments of 1972, which was a follow-up to the Civil Rights Act of 1964. The relevant part of Title IX provides that: "No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Title IX regulations have evolved over the last 49 years, including a major overhaul last August. However, the most recent change occurred last week.

On January 20, 2021, President Joe Biden signed the "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." The Order is based on the 2020 Supreme Court case *Bostock v. Clayton County*, which held that Title VII's prohibition on discrimination "because of sex" covers discrimination on the basis of gender identity and sexual orientation. The Executive Order extends that reasoning to most laws and regulations that prohibit sex discrimination, expressly including Title IX, to apply to discrimination based on gender identity or sexual orientation. As a result, the NDUS is bound by the Executive Order for at least the next four years, unless it is withdrawn.

In short, if a campus were to require an athlete to participate on an athletic team that corresponds with the athlete's sex assigned at birth if that differed from their gender identity – even if they have legally had their gender changed - the athlete could file a complaint with the federal Department of Education's Office of Civil Rights (OCR) and maybe even sue the institution. The possible cost of these proceedings is impossible to estimate, but the

attorneys' fees alone could represent a substantial cost to the University System and North Dakota's taxpayers.

In addition, each NDUS institution is a member of an athletic association, each of which has adopted its own rules and guidelines about the treatment of transgender individuals in athletics. Bismarck State College, Dakota College at Bottineau, Lake Region State College, and Williston State College are members of the National Junior College Athletic Association (NJCAA). Section 5 of the NJCAA's bylaws, which bind all member schools, include a detailed set of rules regarding when transgender athletes may participate, and requires a medical exemption. Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA), while Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). The NAIA and NCAA have issued policies for athletic competition by transgender student athletes, including applying for a medical exemption, and have bylaws governing the nature of men's, women's, and mixed sports teams.

As a side note, all three athletic conferences specifically permit female athletes to participate on men's scholarship athletic teams without changing the designation of the team to a "mixed" team, and the female athlete then counts as a male athlete for Title IX equity calculation purposes. This bylaw is what allowed Sarah Fuller to score the first points by a female player on a NCAA Division I FBS college football team in her role as a backup kicker for the Vanderbilt University Commodores during the 2020 season. Would these policies result in men's teams violating HB 1298 – whether or not any female athletes actually participate – due to rules permitting female student athletes to participate on men's teams without changing the designation of the team to "mixed?" Based on the text of the bill, it is impossible to know.

These large athletic associations also use their influence in other ways. In 2016, the NCAA pulled seven planned championship events from the state of North Carolina, after that state passed HB2, a law limiting civil rights protections for LGBTQ individuals (also known as the "Bathroom Bill"), stating "NCAA championships and events must promote an inclusive atmosphere for all college athletes, coaches, administrators, and fans. Current North Carolina state laws make it challenging to guarantee that host communities can help deliver on that commitment if NCAA events remained in the state." In 2017, North Carolina repealed the most objectionable parts of the law and the NCAA resumed tournament play in the state.

A more recent case may be instructive. In 2020, Idaho passed HB 500, also known as the Fairness in Women's Sports Act, the first of its kind in the nation. It states: "athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex."

Currently, the law has been blocked in federal court, and the NCAA has stated that it is considering moving 2021 March Madness tournament games out of Boise because of the legislation. If HB 1298 were to pass, we can expect that the NCAA may target the Frozen Four regionals currently scheduled to take place at Scheels Arena in Fargo in March 2021, 2023, or 2025 – with UND as the host school – or a potential NDSU football playoff or championship game.

Though the University System recognizes that the possible threat of losing tournament hosting opportunities – and the accompanying economic benefits – may not itself constitute a reason to pass or reject this legislation, the impact bears discussion. We are incredibly fortunate as a state university system to recruit and retain talented student athletes under the direction of dedicated coaches and trainers. If those teams suffered the loss of hosting a tournament because of a state law, that could impact the experience for all of the system’s student athletes, coaches, communities, and fans.

Additionally, it will likely be impossible to enforce HB 1298 on NDUS campuses. The bill states that an individual’s birth sex may be proven by examining the “sex indicated on the individual’s original birth certificate issued at the time of birth.” However, the NDUS does not currently require student athletes, let alone all students, to provide copies of their original birth certificate to prove their assigned sex at birth for the purpose of athletics. Moreover, many NDUS students attend from out of state – including over half of both NDSU and UND students. Every state has a procedure for changing an individual’s birth certificate to reflect a gender transition, including North Dakota, and different rules for obtaining a copy of the original birth certificate. However, some states do not indicate on a birth certificate that a change to the sex was made, and several states make the original birth certificate confidential upon amendment, including North Dakota, which could make it difficult or impossible for students to prove the sex that was indicated on their original birth certificate.

Finally, whatever the intent of the drafters of the bill, the text broadly applies the restriction to all athletic activities sponsored by the state, and to any use of “an athletic facility, stadium, field, structure, or other property owned by or under the control of the state, political subdivision, or entity.” Therefore, it stands to reason that all intramural sporting activities (which often have different leagues divided by sex) or any of a wide range of athletic activities that are often divided by sex, including community leagues which might use NDUS or state facilities, would also be required to verify all participants’ assigned sex at birth using the individuals’ original birth certificates. To administer this requirement, NDUS campuses would be required to maintain original birth certificate records of all 45,000+ students which could result in additional administrative burden or cost and impose barriers for access for students who are unable to provide the required original birth certificate. It would also require campuses to police the rules and participants of every outside school or league that uses

NDUS facilities. It could transform a simple flag football sign-up sheet into a legal and logistical nightmare.

As stated earlier, the North Dakota State Board of Higher Education has not yet reviewed this bill and has not taken a position at this time. That notwithstanding, the North Dakota University System Office respectfully requests a do not pass on HB 1298, or for the committee to amend the bill to carve out the North Dakota University System so that its institutions may remain in compliance with current federal regulations, avoid unnecessary financial risk, remain congruent with athletic association guidelines, and avoid creating barriers to athletic competition participation. I thank you for your consideration and I stand for your questions.

As a pediatric and adult endocrinologist (a physician that that deals with the medicine of hormones), I oppose House Bill 1298 which attempts to prevent transgender youth from participating in athletics.

As the only pediatric endocrinologist in the state of North Dakota, I have the unique responsibility and privilege of caring for transgender youth and young adults seeking treatment to alleviate their gender dysphoria. I also care for children and adolescent with other chronic and serious endocrine medical conditions, which increases their risk for depression, anxiety, self-harm and suicide. However, it has only been those trans youth patients who have actually succeeded in suicide attempts.

It is a fact that student participation in sports have positive mental health effects in addition to the obvious effects it has on overall health and wellbeing. Excluding trans youth from participating in school sports will have significant mental health consequences in a group that already has the highest risk for attempted suicide and levels of depression.

Your bill assumes that transgender youth, particular transgender girls will have an unfair advantage over cis-girls. The risk of excluding transgender girls or women in sports will hurt all women. The policy proposed could subject any girl or woman to accusations and invasive tests because of concerns of being “too masculine” or “too good” for their sport to really be a cis-woman or cis-girl. As a pediatric endocrinologist, I have evaluated healthy young girls who come to me because they are too tall and measure well over two standard deviations above the normal for age and ultimately become tall women (often measuring six feet or taller). One could argue that they too could be discriminated against because they exceed the expected body type that could in theory advantage them in female sports.

Dr. Joshua D. Safer who contributed to the policies and standards set by the NCAA states that “a person’s genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance” and “that there is no inherent reason why their physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-gender woman”. In a study published in Science in 2018, Joanna Harper’s research found that a nonelite group of eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.

Since 2011, trans athletes have been able to compete on teams at NCAA member collegiate and universities consistent with their gender identity like all other student-athletes with no disruption to their gender’s collegiate sports. It is also my understanding that since the 2015 North Dakota High School Athletic Association’s policy about transgender students in sports, that no issues have come up about a specific transgender athlete’s unfair advantage.

It is clear that excluding trans youth from sports or other activities is harmful and are more likely to experience detrimental effects to their physical and emotional wellbeing when they are pushed out of affirming places, activities and communities. Transgender youth face discrimination and violence that makes it difficult to even stay in school. A 2015 U.S. Transgender Survey report

found that 22% of trans women who were perceived as trans in school were harassed so badly they had to leave school because of it and another 10% were kicked out.

So, it is my professional opinion that the House Bill 1298 will unjustly discriminate against transgender youth in our state and subject them to further harm and risk of mental health exacerbation and self-harm.

The NCAA and the NDHSAA have already set guidelines that address the concerns of trans youth's participation in sports. These guidelines are backed up by scientific data and by experts in the field of medicine, genetics and psychology.

Luis Casas, MD

Pediatric and Adult Endocrinologist

January 25th, 2021

Greetings Chairman Weisz and Committee Members,

My name is Madison Jansky, I am a licensed social worker in North Dakota, a member of the LGBTQ+ community, and a life-long resident of North Dakota.

Originally from Mandan, I currently live in Fargo with my fiancé Grace. In solidarity with the Transgender community of North Dakota, I am testifying in opposition to House Bill 1298, which would ban Transgender students from participating on sports teams that align with their gender identity.

ALL of our students deserve to gain confidence, self-discipline, and the chance to be part of a team. Not just that, House Bill 1298 goes beyond basketball courts, football fields, and hockey rinks. Students also deserve to feel reassured by decision-makers to pass policies that support and protect who they are, not threaten their lives and well-being.

At the end of 2019, the LGBTQ+ advocacy organization called The Trevor Project, released the results of their National Survey on LGBTQ Youth Mental Health. Out of 34,000 youths who responded:

- Over 13,000 respondents seriously considered attempting suicide-7,160 of which were transgender or non-binary
- Over 24,000 of LGBTQ+ youth reported feeling sad or hopeless for at least two weeks
- 2 out of 3 LGBTQ youth reported that someone tried to force or coerce them to change their sexual orientation or gender identity, with youth who have undergone conversion therapy more than twice as likely to attempt suicide as those who did not.
- 25,840 respondents felt that the recent political climate impacted their mental health or sense of self.

This discriminatory bill cannot be separated from these statistics. And supporters of House Bill 1298 do not get to separate these statistics from the bill. Those sitting silent as our kids, teens, and young adults suffer, do not get to separate themselves from these statistics. Someone's personal beliefs rooted in fear, hate, and misinformation do not represent the best interest of North Dakotans and should not be used to propose legislation.

I have the lived experience of being a queer student and resident in the state of North Dakota. I ask you to stop this bill from becoming law in our state. I have the personal and professional experience to know that this bill will cause nothing but harm to our community.

The country is watching, and our community is watching.

I encourage the committee to vote DO NOT PASS on HB 1298.

-Madison Jansky, LBSW

House Bill 1298 - In Opposition
Human Services Committee
67th Legislative Assembly in North Dakota
January 25, 2021

Good Morning Chairman Weisz, Vice Chair Rohr, and Human Services Committee Members,

My name is Kathy Anderson. I am President of the North Dakota American Academy of Pediatrics. I have been a general pediatrician in Bismarck for over 10 years, having served as chair of pediatrics at both CHI and Mid Dakota Clinic during that time. I am speaking in opposition to House Bill 1298.

As a woman of color, first generation American, female physician, I have been grouped as an "other", an outlier, for much of my life. As a multiracial individual raised in a multi-faith home, I have never fit neatly into anyone's box. I can remember in grade school sitting down to take standardized tests, and really being confused, conflicted, or troubled by how to answer those questions about race correctly, because I was really trying to do my best on those tests, and the fact that the questions were being asked, must have meant that it was important to answer them correctly. But I have learned that it is not my job to make anyone else feel more comfortable with me based on their ability to know "where to place me". Now, it is my job, as a pediatrician, as the president of North Dakota American Academy of Pediatrics, and as the District Diversity, Inclusion, and Equity Champion for AAP to advocate strongly in support of inclusive environments, and for inclusive policies for all of our children. Policies like this are no different from policies that excluded groups or treated groups differently based on race - they are rooted in discrimination, have no scientific basis, and will ultimately negatively effect the health, development, and safety of children within our state. I stand in strong opposition to any bill like this that unfairly, illegally, and inhumanely supports the differential treatment of any group.

American Academy of Pediatrics



North Dakota Chapter

DEDICATED TO THE HEALTH OF ALL CHILDREN™

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Dear Chairman Weisz and Members of the Human Services Committee:

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We oppose House Bill 1298, which seeks to block transgender youth from participating in athletics. House Bill 1298 is discriminatory, contrary to federal law and athletic policies, in opposition to positive social development, and inconsistent with science.

House Bill 1298 puts North Dakota at odds with federal law. On January 20, 2021, President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. This Order states, "Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or **school sports**." States that fail to comply with this law risk federal legal action and the loss of federal education funding.

House Bill 1298 further ignores established policies created by the National Collegiate Athletic Association (NCAA) in 2011 and the North Dakota High School Athletic Association in 2015, which specifically addresses and supports the participation of transgender athletes. The NCAA has removed postseason and championship events in states with laws that violate their policy.

The ability to participate in sports has been well documented to have a positive effect on mental health in kids of all ages. Involvement in sports, particularly as a member of a sports team, is an important way for youth to develop psychosocially and help form their social identity. Sports participation helps athletes develop self-esteem, correlates positively with overall mental health, and appears to have a protective effect against suicide. This is of particular importance due to the fact that risk factors for suicide are already dramatically higher in transgendered children with studies showing 56% of youth who identified as transgender reporting previous suicidal ideation, and 31% reporting a previous suicide attempt. Keeping transgender students connected with fellow peers and participating in activities is vital for their development and mental health.

In 2017, a systemic review of medical literature found, "There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery)." Any disingenuous attempts to defend this law by suggesting otherwise is flatly contradicted by research.

There is simply no place in North Dakota for the discriminatory policies proposed in Bill 1298 and we urge you to vote no.

Sincerely,

Grant Syverson, MD
Luis Casas, MD
David Newman, MD
Kathy Anderson, MD
Brenda Thurlow, MD
Tracie Newman, MD, MPH
Sarah Paur, CPNP
Jagila Minso, MD
Chris Tiongson, MD

Barbara Bentz, MD
Maria Weller, MD
Gabriela Balf, MD, MPH
Bonnie Kvistad, MD
Rebecca Preussler, PsyD
Justin Horner, MD
Alex Thompson, MD
Brandon Meyer, MD
Stephanie Antony, MD

Vanessa Nelson, MD
Jenifer Jones-Dees, MD
Stephen Tinguely, MD
Julie Erpelding-Kenien, MD
Kurt Kooyer, MD
Rebecca Schreier, MD
Natalie Dvorak, MD
Amy Oksa, MD



January 25th, 2021

From: ND Psychiatric Society

Re: Say NO to HB 1298

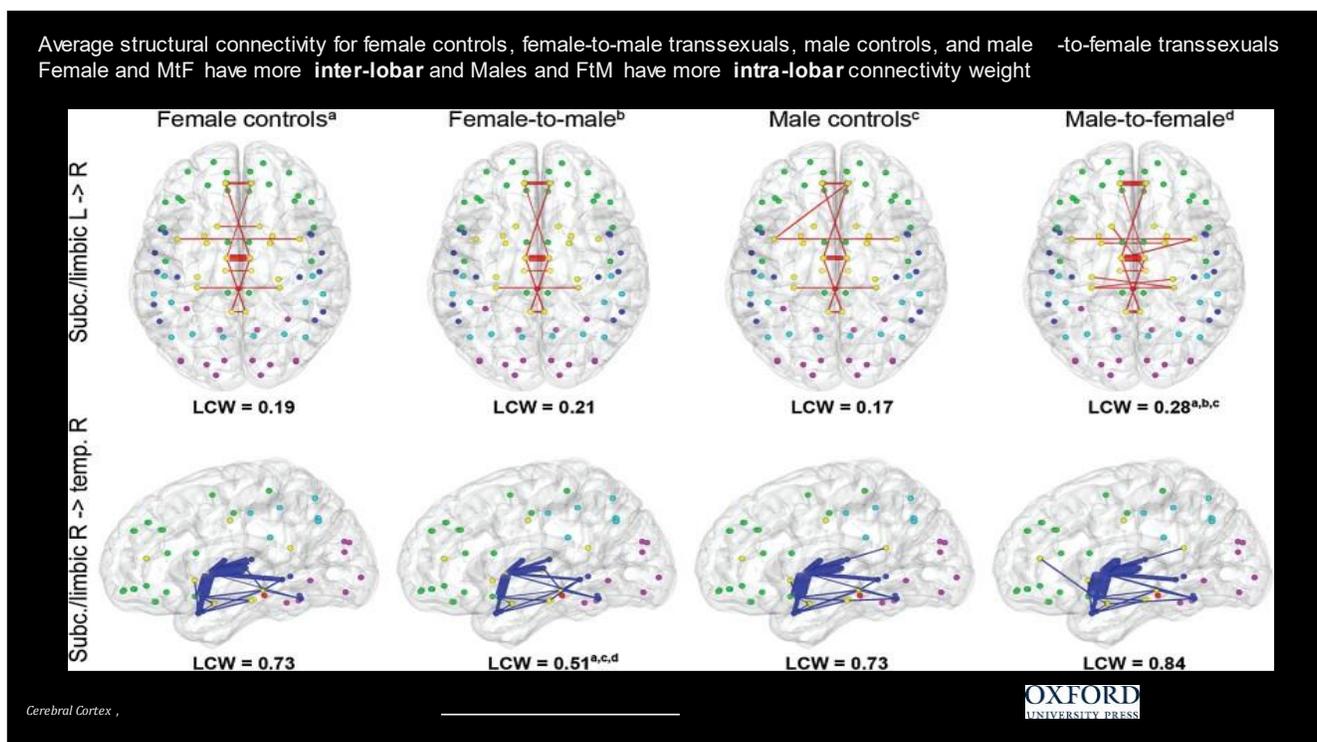
Esteemed Chairman Weisz and Members of the Human Services House Committee,

My name is Gabriela Balf and I am a psychiatrist in Bismarck and the immediate Past President of the NDPS, and I speak on my psychiatric society as well as on my behalf.

I have treated mental health problems like anxiety, depression, Post Traumatic Stress of transgender adults ever since my internist years in CT. Since 2017 I received many referrals to address the mental health needs of adolescents and young adults who were seeing my former boss Kathy Blohm, PhD, one of the very few psychologists in Bismarck who were providing this type of care to the Trans population.

These kids have proved to be endearing to me, as their character strength, level of health literacy and resilience are way above their age. They have to be strong and smart, because not only do they suffer from a disproportionate increase in mental health problems¹, they also face severe minority stress², which further complicates their mental health.

Before I give you the astounding facts stacked in their disfavor, allow me to bring you inside one of these kids' mind:



This image³, as well as the sayings I hear all the time from my patients, can be translated as: “I am born in the wrong body”. This is one of numerous scientific answers to uninformed, simplistic statements like:” Boys are boys and girls are girls” (ID Gov. NY Times 4/1/2020). We also used to say Negroes are dumb⁴, women have no place in schools of medicine⁵ and Muslims are all jihadists⁶. A shorthand for “I don’t want to spend time educating myself about these people.” These are your constituents, or children

of your constituents, or friends of your constituents. In US, one of three people knows someone who is trans. Maybe in North Dakota is one in ten. Still.

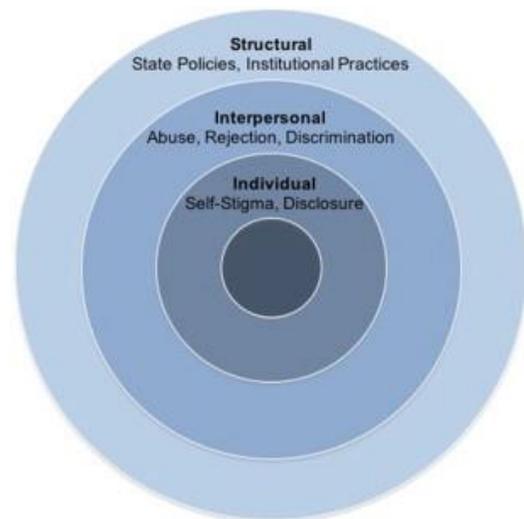
The stats are sobering: this inner despair translates into feeling inadequate, less than everybody else, unable to enjoy many activities in our binary world (pretty close to the definition of depression), worrying about their future and how they will ever play by the society's rules, and being the subject of thorough bullying like only kids (or insensitive adults) can provide.

Several sources summarized in ¹ place the lifetime prevalence of depression in transwomen at 51%, 48% for transmen. Anxiety lifetime prevalence at 40% for transwomen, 48% transmen. PTSD up to 42% in trans adults. Serious suicide ideation 87% and suicide attempts 41%. Are these people intrinsically damaged in some way?! The answer is clearly NO: once they get gender-affirming treatment, be that surgery or just hormones, their mental health becomes actually better than that of the general population^{7!!}

How can it be that, left to their own way of developing, trans people are doing so well? Because of the minority stress we inflict upon them.

Fear of rejection.

Stigma as a multi-level construct. ²



The 2015 US Transgender Survey data shows that, overall, discrimination doubles the risk for suicide (see attachment below).

Not allowing transkids to perform sports according to their gender identity, even after scientific evidence and federal policies indicate it appropriate, constitutes structural discrimination in our state. It inflicts harm upon an already disenfranchised population, who is looking up to you for leadership as part of your constituency.

On behalf of our patients, we thank the Human Service Senate Committee for listening to our presentation of scientific evidence.

Gabriela Balf-Soran, MD, MPH
Assoc Clin Prof – UND School of Medicine – Behavioral Sciences and Psychiatry Dept
ND Psychiatric Society Immediate Past-President
WPATH member

References:

Excerpts from the 2015 US Transgender Survey report (<http://www.ustranssurvey.org/reports>)

“Experiencing discrimination or mistreatment in education, employment, housing, health care, in places of public accommodations, or from law enforcement is associated with higher prevalence of suicide thoughts and attempts. For example, the prevalence of past-year suicide attempts by those who reported that they had been denied equal treatment in the past year because they are transgender was more than double that of those who had not experienced such treatment (13.4% compared to 6.3%).

Those who reported that their spouses, partners, or children rejected them because they are transgender reported higher prevalence of lifetime and past-year suicide attempts. Those who reported rejection by their family of origin, for example, reported twice the prevalence of past-year suicide attempts compared to those who had not experienced such rejection (10.5% compared to 5.1 %).

People who are not viewed by others as transgender and those who do not disclose to others that they are transgender reported lower prevalence of suicide thoughts and attempts. For instance, 6.3 percent of those who reported that others can never tell they are transgender attempted suicide in the past year compared to 12.2 percent of those who reported that others can always tell they are transgender.

The cumulative effect of minority stress is associated with higher prevalence of suicidality. For instance, 97.7 percent of those who had experienced four discriminatory or violence experiences in the past year (being fired or forced to resign from a job, eviction, experiencing homelessness, and physical attack) reported seriously thinking about suicide in the past year and 51.2 percent made a suicide attempt in the past year.”

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 - National Center for Health Statistics: https://www.cdc.gov/nchs/data/series/sr_02/sr02_175.pdf
 - Human Rights Campaign: <http://www.hrc.org/resources> (Resources for the LGBT focused on: adoption, young adult, coming out, federal advocacy, hate crimes, health and aging, HIV/AIDS, interracial marriage, parenting, and transgender)

HOUSE HUMAN SERVICES

HB 1298

January 25, 2021

Dear Chairman Weisz and the members of the committee:

Although it is not clearly stated in this bill, there is no denying that HB 1298 is intended to discriminate against young transgendered persons in our community. In 2015, the North Dakota High School Sports Association adopted a policy regarding the inclusion of transgendered athletes and this HB is seeking to undermine that policy.

Developmental psychology has long provided evidence that gender identity is usually irreversible by age 4. This does not, however, take into account the pressure of a child's environment to live up to an expected standard. Thus, many people who do not identify as the gender that they were assigned at birth due to the presence of certain sex organs, are not open about this internal conflict regarding their sense of self and identity. Current research shows that people who do not feel supported to express themselves as they identify are more likely to suffer from depression, substance use, and experience suicidal thoughts and engage in suicidal behavior. According to the American Psychiatric Association Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth, puberty is often a time of intensifying emotional distress for these adolescents, as the physical changes that occur at puberty are at opposition with the adolescent's gender identity. The APA supports the use of medications to suppress the onset of puberty and allow the adolescent more time for cognitive and emotional development, and possibly continuing with the gender affirmation process. If indicated, the adolescent will also engage in mental health services to treat any co-existing mental health concerns. According to the same position statement, the APA asserts that "Trans-affirming treatment, such as the use of puberty suppression, is associated with the relief of emotional distress, and notable gains in psychosocial and emotional development, in trans and gender diverse youth." The APA also has a Position Statement on Discrimination Against Transgender and Gender Diverse Individuals because being transgender or gender diverse implies no impairment in judgment, stability, reliability, or general social or vocational capabilities. Discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender diverse individuals.

According to the Family Acceptance Project, compared with peers from families that reported no or low levels of family rejection, lesbian, gay, bisexual, or transgender (LGBT) young adults who reported high levels of family rejection during adolescence were:

- 8.4 times more likely to report having attempted suicide
- 5.9 times more likely to report high levels of depression

- 3.4 times more likely to use illegal drugs
- 3.4 times more likely to report having engaged in unprotected sexual intercourse.

Conversely, according to the longitudinal study TransYouth Project, transgendered children who are allowed to socially transition report similar symptoms of depression, feelings of self-worth, and slightly higher rates of anxiety as the control population of cis-gender youth. A social transition is a nonmedical decision to allow a child to change his or her first name, pronouns, hairstyle, and clothing to live everyday life as one's asserted gender.

Families will respond to their LGBT children based on their own understanding and beliefs regarding sexual orientation and gender identity. These beliefs are often guided by their community, and this bill sends a message to the parents of our community, that our state does not accept transgendered children. Additionally, if children are not feeling supported in their homes, they could find acceptance and understanding from other aspects of their community, like at school and from their athletic departments. This bill impacts their participation in school sports and risks further alienating these young people.

This bill seeks to undermine existing policy set by the NDHSSA and NCAA, is in direct violation of an Executive Order recently signed by President Biden, and the scientific data refutes the need for any such legislation. For these reasons, we ask you to limit barriers for the youth of North Dakota to engage in their community. We encourage you to vote against HB 1298.

Respectfully signed by psychiatrists of North Dakota,

Stephanie Jallen, MD

Laura Schield, MD

Andrew J. McLean, MD, MPH

Lisa Schock, MD

Ahmad Khan, MD

Lori Esprit, MD

21.0140.01000

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1298

Introduced by

Representatives B. Koppelman, Meier, Paulson, Schauer, Skroch, Steiner, Vetter

Senators Clemens, Kannianen, Myrdal

1 A BILL for an Act to create and enact a new section to chapter 14-02.4 of the North Dakota
2 Century Code, relating to participation in athletic events exclusively for males or females.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 14-02.4 of the North Dakota Century Code is created
5 and enacted as follows:

6 **Athletic events exclusively for males or exclusively for females.**

- 7 1. The state, a political subdivision of the state, or an entity that receives public funding
8 from the state or from a political subdivision of the state may not:
- 9 a. Allow an individual who was assigned the opposite sex at birth to participate on
10 an athletic team sponsored or funded by the state, political subdivision, or entity
11 and which is exclusively for females or exclusively for males.
- 12 b. Sponsor an athletic event exclusively for males or exclusively for females that
13 allows participation by an individual who was assigned the opposite sex at birth.
- 14 c. Use or permit to be used an athletic facility, stadium, field, structure, or other
15 property owned by or under the control of the state, political subdivision, or entity
16 for an athletic event in which an individual who was assigned the opposite sex at
17 birth is allowed to participate in an athletic event conducted exclusively for males
18 or exclusively for females.
- 19 2. For purposes of this section, the sex assigned at birth is the sex indicated on the
20 individual's original birth certificate issued at the time of birth.



Letter of Opposition to Bill HB 1298

Dear Chairman Weisz and Members of the Committee,

My name is Dave Williams. I am the President of the Bismarck North Dakota Chapter of Parents, Friends, and Allies of people who are Lesbian, Gay, Bisexual, Transgender, and Queer or the short version, (PFLAG) Bismarck.

But, most importantly, I am the father of a transgender teenager, a human being of great integrity and courage, of whom I am very proud.

My teenager began the journey to their truth around age 11, about 4 or 5 years ago. As conservative parents, we felt it was just a phase and naturally opposed the reality that our child was transgender. As time has gone on, we have come to realize that our child's identity is not "just a phase." And we have had to change our views, become educated by top researchers, doctors and specialty psychologists, and come to grips as parents with the knowledge that being transgender is not a choice or a lifestyle. Being transgender is the realization that their gender identity is the opposite of their assigned sex at birth.

Our child has experienced gender dysphoria, which is the feeling of discomfort or distress that occurs in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics. This led to self-harm and thoughts of suicide. I can attest to the fact that this is a very real and scary experience for children and their parents alike. We have experienced the loss of family and friends over it, the shaming, and untruths. It has taken a lot of love, and therapy on all sides to both allow, support, and embrace this change. But once they were free to be themselves, our child became a regular teenager with all the everyday teenage problems.

One hurdle we had to cross was our child's desire to participate in track at the middle school level. We felt a great deal of trepidation to say the least- the fear for their safety and opening the door to being bullied. But our child convinced us that it was worth it to experience school sports and be a part of a team. We met with the coaches. They were professionals and treated our child like anyone else- no favoritism, no shaming; just practice hard and represent your school. The next hurdle was the teammates. Would they be proud athletes or bullies?

What we found was, as soon as they experienced that our child was just a kid playing sports, who worked hard and participated, any fear and need to shame our child turned to the support of a fellow competitor.

The real reason for sports in school was made very clear to us. Our child went from a reclusive outcast to being part of something and allowing our child to be who they are. I only wish the people in the stands would have taken cues from the team. But I guess you cannot expect that many miracles.

My family's experience and reality does make me want to take a stand and to state that:

- All kids, including transgender kids, deserve the same chances to be part of a team, to learn from one another, and to respect the game.
- Raising alarms about unfair advantages or locker room antics are all about fearmongering and have nothing to do with protecting kids.
- For kids especially, being transgender has no unfair medical advantage.

HB1298 is a bill to criminalize schools and programs that allow transgender students (kindergarten through college) to participate in sports. The impact a bill like this will have is to subject our trans youth to bullying and demeaning expectations. This is being done to kids behind their back and before some of them are old enough to understand what is being debated here in this committee and in the legislature.

Banning any kids from playing sports is against what sports participation is about. The truth is that NCAA and IOCC rules, which are used in North Dakota schools, have meant that trans people have been participating in athletics for years. Yet not one sport is dominated by trans athletes. Raising alarms about unfair advantages or locker room antics again, are all about fearmongering and have nothing to do with protecting our kids. Let them play!

Transgender kids are fierce fighters with integrity and honor. Their friends, family, teachers, coaches, doctors, and mentors know that these young people are smart, talented, and have incredible courage. These youth are a viable and vital part of the next generation of leaders.

I, we, implore you as human beings on this committee, to defend transgender kids' rights to achieve their full potential, in school and through athletics. As parents, families, and allies in North Dakota, we support every child's right to participate in athletics authentically — inclusive of transgender and nonbinary youth. — And we remind legislators that, while many of our targeted youth cannot yet vote, their families and allies do!

This is not a partisan issue. This is right versus wrong. House Bill 1298 is marginalizing Transgender children, to say, “you are less than others because of who you are, and you will not be included.”

A spiritual book many of us read gives an account of a being who was once reduced to a man and was literally put to death because people feared this person, because he was different, and taught a gospel of hope and inclusion. Please do not be those people.

I urge the committee to recommend Do Not Pass on House Bill 1298

Thank you,

Dave Williams

My name is Rebecca Quimby and I am currently the Head Women's Soccer Coach of Concordia College in Moorhead, MN. While Concordia is not located in North Dakota, we are still a strong part of the Fargo-Moorhead community. Since I have moved to the Fargo-Moorhead area I have coached youth soccer in North Dakota at the club level as well as recruited numerous North Dakota student-athletes to play soccer for Concordia College. Currently, of my team's 27 student-athletes, eight of them are North Dakota residents, and 11 have played soccer for their club or high school in North Dakota. We will add at least three more North Dakota student-athletes in 2021 who are already committed to play for Concordia.

I am writing to express my opposition to House Bill 1298. While I believe this bill is directed toward discriminating against transgender student-athletes I believe this bill also unintentionally prevents access to all female-athletes, whether they were born of that gender or not. Female-athletes that live in rural areas will be among those most affected. It is not uncommon for a female to compete on male athletic team if there is no female option available to them. While almost every high school may have a men's and women's basketball team, the same cannot be said for sports like soccer. Small rural areas often allow women to play for a men's team when no women's team is established. This would even further restrict the access that these women have and would create even larger obstacles for these student-athletes to overcome just to participate in athletics. Restricting that access will put restraints on the player pool in North Dakota, something that directly affects the success of my program. We are proud to have almost a third of our program from North Dakota but this statistic could change if talent and participation numbers in North Dakota were to decline.

I previously held positions as a division I assistant for both Youngstown State and Tennessee Tech. As permitted by the NCAA we often had male practice players train with our women's programs, which helped to develop our women's teams, and expand our practice rosters. These athletes, whose participation causes them to use a year of their NCAA eligibility, would no longer be permissible under your proposed legislation. While at Thomas More College I had the pleasure of coaching both the men's and women's team at the same time. We would often allow our men and women to interchangeably practice with the other team if they had to miss their regularly scheduled practice. This bill would have taken away from that freedom and commitment that we had to academics. Let's also not forget that a program such as NDSU would never be able to have their own Sarah Fuller to make history for the Bison as the Vanderbilt Football kicker did earlier this year.

I have devoted my life to women's athletics and have spent the past decade coaching at the Division I and III levels. While I have heard the concern that some may have for transgender participation in athletics, I can assure you that there is no real threat to athletics, specifically women's athletics. The NCAA has allowed transgender student-athletes to participate in college athletics since before I started coaching college sports without incident. Transgender student-athletes are not "stealing" scholarships, championships or opportunities from female student-athletes. I have never experienced any detriment to my program or women's athletics due to the NCAA's inclusive stance on transgender student-athletes. In my opinion, this bill is unnecessary and reckless. This bill would not make our athlete's safer because there is no impending risk.

I would like to add that this bill and others like it affect the overall perception of North Dakota and its relationship to minorities. Personally, this bill as well as other anti-LGBT legislation has encouraged me to live in Minnesota despite cheaper taxes, lower house prices and better commerce in

Fargo. I recently bought a house in Minnesota with my wife, Chelsea. I am sad to say that while we considered buying a home in North Dakota, ultimately we felt that our rights as an LGBT couple would be better protected in the state of Minnesota. As the success of my program and my community are tied to this bill I hope you will seriously consider both my personal and professional experience. Thank you for consideration.

Sincerely,

Rebecca Quimby

Testimony by Paige Gray
to the
House Human Services Committee
Hearing on House Bill 1298

January 25, 2021

1/21/2021

Dear Committee Members:

My name is Paige Gray and I became a permanent member of the Fargo-Moorhead community roughly six years ago. I am a current resident of North Dakota.

I am writing today to say that House Bill NO. 1298 is a travesty and is unbecoming of the spirit of North Dakota.

When I was growing up I was surprised to learn that North Dakota had a negative population growth. It was seen as a state with no opportunities that no sane young person would want to make a life for themselves in. After the oil boom I settled in Fargo due to the positive economic climate and I decided to give it a chance. The North Dakota of today might very well have a future, but our path forward isn't going to come about by enacting divisive and unnecessary laws that stigmatize our trans youth. This bill is a solution without any real problem to fix, and it scapegoats a vulnerable population for political ends in doing so.

This bill is out of step with the population that will bear the brunt of its enactment, which is young North Dakotans. PRII did a survey in 2019 about how Americans view transgender issues, and I'm going to excerpt the section about the younger generation here:

Younger Americans ages 18-29 (85%) are more likely than Americans ages 65 and older (75%) to say transgender people face at least some stigma in their community. But notably, young Americans are nearly twice as likely as seniors to believe transgender people face a lot of stigma (50% vs. 27%).

This report can be viewed in its entirety here: <https://www.prii.org/research/americas-growing-support-for-transgender-rights/>

Times are changing, and for the next generation the acceptance of transgender individuals is simply going to be a part of life. As a resident of this great state, I implore you, don't contribute to the stigma that exists for trans people and don't approve of a bill like this that is just spoiling for an ugly political fight. Please look into your hearts and find a compassionate and measured responses to these sorts of delicate issues, a responses befitting of a marginalized population that relies on the state for its protections.

Be on the right side of history and vote against House Bill NO. 1298

Thank you for your time and consideration

~ Paige Gary, Fargo ND



House Committee on Human Services
North Dakota State Capitol
600 E. Boulevard Ave
Bismarck, ND 58505

January 22, 2021

Re: Human Rights Campaign Opposition to H.B. 1298

Dear Chair Weisz and Members of the Committee,

The Human Rights Campaign (HRC), on behalf of its three million members and supporters nationwide, thanks you for the opportunity to submit testimony to help inform your deliberation on H.B. 1298. We strongly oppose this legislation and it is our hope that the committee will not advance it.

The Human Rights Campaign is America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender and queer (LGBTQ) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBTQ citizens and realize a nation that achieves fundamental fairness and equality for all. Transgender students, like all students, can benefit from participating in sports, and allowing them to participate in athletic activities consistent with their gender identity in no way disadvantages their fellow students. Transgender girls are girls, transgender women are women, and transgender boys and men are boys and men. Attempting to separate transgender youth from their peers is impractical, unfair, and unnecessary. Finally, similar legislation passed by Idaho last year has been enjoined by a federal court on the grounds that it is discriminatory and unconstitutional.

Many are rightly protective of the legacy of women's sports in this country. Importantly, advocates for women and girls in sports – such as the National Women's Law Center, the Women's Sports Foundation, Women Leaders in College Sports, and others – support trans-inclusive policies and oppose efforts to exclude transgender students from participating in sports. That's because while there are real issues facing women's sports, including a lack of resources devoted to supporting them, transgender participation in athletics is not one of them.

Rather, bills like these are a reincarnation of the narrative underpinning anti-transgender bathroom bills like North Carolina's infamous HB2 – they use fear-based arguments that suggest

transgender girls identify as such only to take advantage of female students, despite overwhelming evidence to the contrary. A widely-cited situation in Connecticut involves two transgender athletes out of an estimated 150,000 transgender youth across the country.¹ Further, collegiate and professional athletics associations have adopted policies, informed by experts, to ensure fair competition by adults. This bill is simply a solution in search of a problem. Public university athletic programs will be thrown into conflict with existing NCAA policy – note that the NCAA came out against the Idaho anti-transgender athletics bill, calling it “harmful to transgender student-athletes, and [in conflict with] with the NCAA’s core values of inclusivity, respect and the equitable treatment of all individuals”. The statement went on to reiterate that such legislation will be considered in the selection of host sites for tournaments and other NCAA events.²

This bill will suffer the same fate as Idaho’s H.B. 500: immediate challenge in court. The preliminary injunction granted by the District Court is currently on appeal to 9th Circuit. The District Court decisively rejected the arguments by the state - which are emulated in the justifications for this bill - concluding that “the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act’s categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.” The District Court also notes that “Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that “there is no legitimate reason to seek to bar all trans girls and women from girls’ and women’s sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail.”³

There is no reason for North Dakota to embark on a similarly futile path. It is simply not true that transgender girls and women pose any risk to women’s sports. A small percentage of

¹ Herman, Jody L. et al. “Age of Individuals Who Identify As Transgender in the United States”. Williams Institute, January 2017. <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>

² Full statement made on June 11, 2020, available at <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-idaho-transgender-law>:

“As we have previously stated, Idaho’s House Bill 500 and resulting law is harmful to transgender student-athletes and conflicts with the NCAA’s core values of inclusivity, respect and the equitable treatment of all individuals. Further, Board of Governors policy requires host sites to demonstrate how they will provide an environment that is safe, healthy, and free of discrimination, plus safeguards the dignity of everyone involved in the event. As such, the NCAA Board of Governors was scheduled to discuss the legislation and its implications to student-athletes at its August meeting. NCAA championships are open to everyone, and the Association is committed to assuring that its events are safe and healthy for all who attend. It is our clear expectation that all NCAA student-athletes will be welcomed, treated with respect, and have nondiscriminatory participation wherever they compete.”

³ *Hecox, et al. v. Little, et al.*, No. 1:2020cv00184 - Document 63 (D. Idaho 2020). 10 <https://law.justia.com/cases/federal/district-courts/idaho/iddce/1:2020cv00184/45676/63/>

people identify as being transgender, many transgender youth are not interested in playing sports, and those who do play want to play for the same reasons other youth like sports: because sports are fun. Transgender youth, depending on their age and personal circumstances, may or may not have embarked on any amount of medical transition. For those who have, it is critical to reiterate that transgender people do not gain an inherent competitive advantage in sports by virtue of transition. In fact, transgender women and girls compete at levels similar to all women and no female transgender athlete has qualified for the Olympics despite rules permitting participation that have been in place for more than a decade. At the high school level, 20 states already allow transgender kids to compete in sports consistent with their gender identity, and at the college level the NCAA has its own policy allowing athletes to participate in sports consistent with their gender identity.

Participation in sports is essential for young athletes to be able to stay fit, develop healthy habits, and learn the virtues of practice and teamwork. The history of sports in this country has been about opening up true, meaningful opportunities to participate in sports – and allowing transgender people to participate in sports furthers that goal, not threatens it.

For these reasons, we request you reject this harmful and discriminatory bill.

Sincerely,



Cathryn Oakley
State Legislative Director and Senior Counsel
Human Rights Campaign

*Please vote in favor of HB 1298

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting biological males from competing against biological females. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety of women and girls. I ask you to consider the ramifications of allowing males to compete against females. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please render a DO PASS out of committee on HG 1298.

Thank you.

Testimony by Jacob Thomas to the House Human Services Committee hearing on HB 1298 - January 25, 2021

Dear Committee Members:

I am Jacob Thomas, a lifelong resident of North Dakota and English Language Arts teacher working in Minot, ND. I am writing to encourage you to oppose House Bill 1298 because it needlessly targets an already vulnerable population.

In my time as a high school educator, I have been privileged to work with students of all gender identities and sexual orientations as the advisor of our school's Gender-Sexuality Alliance, a national, student-run organization whose main goal is to recognize and confront discrimination of any kind. The students who meet with me once a week are already feeling vulnerable because of peers, adults, and lawmakers like yourselves who feel the need to tell them where they are and are not allowed to express their true selves. In fact, according to the Centers for Disease Control, nearly one-third of high school students who identify as transgender have attempted suicide at some point in their lives. The microaggressions faced by trans students in everyday life, like being called the wrong pronouns, "dead naming" on official school documents, or *actual* aggressions, like bullying, assault, and legislators proposing a bill that, frankly, seems like a solution searching for a problem has a real and lasting effect on children already living through some of the hardest years of their lives.

In fact, based on my research, I couldn't find a single case of transgender athletes gaining an unfair advantage over competitors in the state of North Dakota. What I *could* find, though, are athletic organizations like the [NCAA \(National Collegiate Athletic Association\)](#), [IOC \(International Olympic Committee\)](#) and [USA Gymnastics](#) implementing inclusive trans athlete policies at the highest levels of competition. Furthermore, states across the country, including our neighbors South Dakota and Minnesota,

have inclusive policies in place for transgender high school athletes. Youth LGBTQ advocacy group GLSEN (Gay and Lesbian Student Education Network), in coordination with thirty other organizations and individuals has released a [“Model High School Policy”](#) for fairly and respectfully including athletes of all gender identities and sexual orientations.

The point is HB 1298, as it is currently written, is cowardly and cruel. It is ignoring that fact that the youth who would be most affected are already facing an uphill battle, are already struggling to achieve the acceptance and opportunities that every other student is entitled to under Title IX federal law. North Dakota now has the opportunity to uplift children who desperately need the help. For that reason, I encourage you all to vote no on HB 1298.

I appreciate your time and consideration.

– Jacob Thomas

Minot, ND.

Dear Committee Members,

I would like to take this opportunity to support HB 1298. I urge you to protect women's sports by disapproving the allowance of biological males to ever be a part of biological women's sports team. Not only is this completely asinine, but no matter how confused a man is, he should never be able to worm his way into a woman's sport to compete as a "woman". Clearly, and scientifically, the male body composition is much stronger than a woman's, and this would never be a fair and true competition for a male to compete against a female. This is a war on human sexuality, and it has no place among athletic events under the guise of equality.

Lori VanWinkle
Minot ND

*Please vote in favor of HB 1298

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting biological males from competing against biological females. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety of women and girls. I ask you to consider the ramifications of allowing males to compete against females. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please render a DO PASS out of committee on HG 1298.
Thank you.

Bill 1298 – January 24, 2021

I am in opposition to this bill. It is hateful and prejudicial and it goes against my values of treating humans with respect.

Sincerely, Mary Niehaus, 2438 Lilac Lane, Fargo, ND

Bill 1298

I oppose this legislation. This legislation is prejudicial against students who have gone through the difficult decision and process of becoming the person and gender they feel called to be. These decisions must be unbelievable difficult for anyone to go through. Once they have gone through this decision, it is unconscionable to force them to go back to their original gender to participate in a sport surrounded by a gender they do not feel part of. The athlete should be able to participate as the person and gender they currently associate with.

Testimony by Mary Niehaus
to the House Human Services Committee Hearing
on House Bill 1298

I am in opposition to this bill. I know several people who are trans-gender and have seen the difficulties they experience in society. I also understand the fairness in athletics, except I feel it is a bill in search of a problem and therefore it is hateful and prejudicial and it goes against my values of treating humans with respect.

Sincerely, Mary Niehaus, 2438 Lilac Lane, Fargo, ND

Dear Members of the North Dakota Legislature,

I oppose HB 1298 the anti-transgender bill before you. I have a transgender granddaughter and many transgender friends. This measure will do little to enhance high school athletics and, unfortunately, a great deal of psychological harm to our transgender young people in North Dakota. They are already suffering the psychological trauma of the conflict between the bodies of the gender which they were assigned at birth and their brains and spirits which call them to their true, other gender. They do not need yet another burden of discrimination thrust into their faces by this measure. Please let North Dakota be a state that welcomes people who are different, that is an inclusive home for all people.

January 25, 2021

Dear Chair Robin Weisz and Members of the House Human Services Committee:

I urge you to vote DO NOT PASS on HB 1298, which would prohibit young athletes from participating in sports activities, solely on the basis of their sex and gender identity.

In the United States, discrimination on the basis of sex is expressly prohibited and has repeatedly been upheld by the Supreme Court of the land. People who are male must be allowed to take home economics, for instance; people who are female must be allowed to run for student government; and people who are transgender, those whose identities complicate the simplistic categories of male and female, must also be allowed to participate in the full range of school activities, including school sports.

As an ordained minister, and also as the chosen mother of a beautiful transgender human being, I have been truly blessed by the presence of gender nonconforming people in my life. From many transgender people, I have learned that God's creation is both more vast and more intricate than I had ever imagined. Just as there are many colors in the rainbow and trees in the forest, there are many ways of expressing human identity and potential. Many of the transgender people whom I am privileged to call my loved ones come from Indigenous cultures that have, for centuries, reserved a special and sacred role for those who are Two Spirit.

Perhaps we North Dakotans of diverse backgrounds could learn from the original peoples of this place and offer transgender people full respect and participation in our communities – rather than arbitrary exclusion from activities such as sports, which should be open to girls, boys, and transgender students alike.

I urge your DO NOT PASS vote on HB 1298.

Thank you so much for taking the time to hear from the people of North Dakota. Let's let transgender students on the team.

Sincerely,

Rev. Karen I Van Fossan
Minister
Fargo-Moorhead Unitarian Universalist Church
121 9th St. S.
Fargo, ND 58103



January 22, 2021

Honorable Chair Robin Weisz
2639 First Street SE
Hurdsfield, ND 58451-9029

Honorable Chair Weisz and Members of the House Human Services Committee:

RE: TechNet Opposition to HB 1298

TechNet is the national, bipartisan network of technology companies that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50 state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents more than three million employees in the fields of information technology, e-commerce, clean energy, gig and sharing economy, venture capital, and finance. TechNet is committed to advancing the public policies and private sector initiatives that make the U.S. the most innovative country in the world.

I am writing today on behalf of our membership in opposition to HB 1298, as well as all attempts by the North Dakota Legislature to introduce and pass discriminatory legislation. Our member companies strongly believe any legislation which explicitly or implicitly targets LGBTQ+ people is an economic liability for the state of North Dakota. These exclusionary bills are particularly troubling while we are dealing with so many other pressing workforce and economic concerns amidst the COVID-19 crisis.

We're troubled by these anti-LGBTQ bills that could hurt our workforce and their families. We need our workers and their families – including any transgender members of their families – to feel welcome in the state where we operate. Discriminatory legislation like HB 1298 negatively impacts our ability to recruit and retain the best and brightest employees, and discourages local investment. We recognize the work North Dakota has done to help the technology sector grow and be competitive in a national and global economy, and we caution legislators from doing anything that would make it more challenging to compete for the talented and highly educated workers many of our companies are looking to hire.

As a nation, we decided long ago that discrimination is wrong and that everyone should have the same opportunities to succeed in life—and that should include transgender youth and their families. Transgender kids, like other students, deserve the same chances to learn teamwork, sportsmanship, leadership and self-discipline, and to build a

sense of belonging with their peers. When we tell transgender girls that they can't play girls' sports—or transgender boys that they can't play boys' sports—they miss out on this important childhood experience and all the lessons it teaches. HB 1298 will negatively impact non-transgender kids, too, by allowing any student to be subjected to invasive medical tests if their gender is called into question.

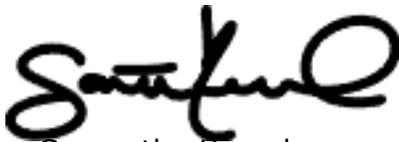
Operating in an inclusive state matters to our bottom line and to our values because we need all of our workforce and customers and their families to be welcome and safe, everywhere we operate, at the workplace and in their communities. TechNet members will continue to oppose all exclusionary measures that would damage North Dakota's reputation and make it more difficult to invest and create job opportunities within the innovation economy.

Our member companies are proud to continue our work with lawmakers to ensure North Dakota is a vibrant, competitive, and welcoming place for our customers, employees and their families. We strongly encourage you to not pass HB 1298.

For a complete list of TechNet members, visit: <http://technet.org/membership/members>.

We look forward to our continued engagement on this important issue.

Best Regards,

A handwritten signature in black ink, appearing to read 'Samantha Kersul', written in a cursive style.

Samantha Kersul
Executive Director, Washington and the Northwest
TechNet



**Statement by Anne Lieberman
Director of Policy & Programs, Athlete Ally,
before the House & Human Services Committee,
in opposition to House Bill 1298.**

Dear Chairman Weisz and Members of the House Human Services Committee:

Thank you for considering my concerns raised in opposition to House Bill 1298. This dangerous legislation has the potential to violate Title IX and targets an already vulnerable group of North Dakota students by denying them the life-saving opportunity to participate in sports.

As the Director of Policy & Programs at Athlete Ally, a national organization working to ensure everyone has equal opportunity to and experience in sport, I am extremely concerned about the ways sport is being weaponized to erase and exclude transgender youth in North Dakota¹. Youth sports play a significant role in children's lives and development². Nearly 70% of young people between the ages of 6-12 participate in some form of sport³. Sports can help children develop critical life skills like communication, teamwork, and leadership — and give them a community of peers with whom they can connect and develop life-long friendships⁴. These spaces are imperative for all young people, no matter their gender.

Transgender youth already face an uphill battle in nearly every part of their lives. 75% of transgender youth feel unsafe at school, with 70% of those students avoiding bathrooms because they felt unsafe or uncomfortable⁵. Nearly half of transgender youth

¹ For example, see www.savewomensports.com. For a similar group whose rhetoric is influencing the conversation in the UK, see www.fairplayforwomen.org.

² Holt, N. L. (Ed.). (2016). *Positive youth development through sport*. Chicago, IL: Routledge.

³ The Aspen Institute: Project Play. (2018). State of play 2018: Trends and developments. Retrieved from https://assets.aspeninstitute.org/content/uploads/2018/10/StateofPlay2018_v4WEB_2-FINAL.pdf

⁴ Turnnidge, J., Côté, J., & Hancock, D. J. (2014). Positive youth development from sport to life: Explicit or implicit transfer?. *Quest*, 66(2), 203-217.

⁵ GLSEN. (2017). *Separation and stigma: Transgender youth and school facilities*. Boulder, CO. Retrieved from <https://www.glsen.org/sites/default/files/Separation%20and%20Stigma%20-%20Full%20Report.pdf>

attempt suicide, and the transgender community is increasingly the target of violence and harassment⁶. Study after study shows sports can be a powerful tool for fighting depression, building community, and cultivating lasting self-confidence⁷.

HB 1298 does nothing to protect women and girls in sport and has the potential to violate Title IX. Leading national women's organizations including The Women's Sports Foundation and high profile female professional, Olympic, and Paralympic athletes have consistently expressed opposition to bills like HB 1298 for this reason⁸. Female athletes and women's organizations want lawmakers to focus on the real issues facing women and girls in sports -- like lack of resources for girls' teams, a dearth of female leadership in sports coaching and administration, and sexual harassment and assault toward girls and women in sports -- having a transgender teammate is not among the well-documented threats facing female athletes.⁹ Further, Title IX makes allowances for women to play on men's team in circumstances where there is not a women's team established or there are significant hurdles to doing so. HB1298 would not allow this to happen, meaning any institution that makes allowances to rectify the issues for women in sports could lose federal funding for noncompliance with Title IX¹⁰. In addition, HB 1298's additional emphasis on athletic venues would make North Dakota ineligible to host NCAA events, just as HB2 in North Carolina prompted the NCAA to move championships out of the state.

⁶ Toomey, R. B., Syvertsen, A. K., & Shramko, M. (2018). Transgender adolescent suicide behavior. *Pediatrics*, 142(4).

⁷ Babiss, L. A., & Gangwisch, J. E. (2009). Sports participation as a protective factor against depression and suicidal ideation in adolescents as mediated by self-esteem and social support. *Journal of Developmental & Behavioral Pediatrics*, 30(5), 376-384.

⁸ For example, see https://www.womenssportsfoundation.org/press_release/billie-jean-king-megan-rapinoe-and-candace-parker-join-nearly-200-athletes-supporting-trans-youth-participation-in-sports/; https://www.aclu.org/sites/default/files/field_document/womens-groups-sign-on-letter-trans-sports-4.1.19.pdf

⁹ For details on documented threats to women's sports, see the Women's Sports Foundation's 2020 *Chasing Equity* report at <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>

¹⁰ For a detailed explanation of Title IX, see <https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/>.

HB 1298 is part of a larger trend -- fueled and funded by out of state special interest groups -- to influence and interfere with state politics, particularly around youth identity. In 2021, 6 other states have already introduced bills targeting transgender youth and their ability to play sports. In 2020, 19 states introduced similarly horrific bills. Idaho was the only state to pass an anti-transgender sports law last session, and the law was preliminarily enjoined when the court rightly found that it likely violates the Constitution. All of these bills seek to single out transgender young people and subsequently increase bullying and harassment by preventing them from participating in the sport they love.

People often look to sports, and most often youth sports, to represent values that the rest of society should live by: fairness, respect, integrity, the ability to overcome adversity, inclusion, and equity. Acceptance of transgender youth in sport is about far more than just the ability to participate; it is an expression of the fundamental humanity of transgender youth that has a ripple effect in all areas of society.

Please send a clear, equitable, and unequivocal message to transgender youth in North Dakota that their lives, as people and as athletes, are valid and that they are equal members of their communities.

Thank you for your consideration, and I hope you will reject HB 1298.

January 24, 2020

Submitted by:

A handwritten signature in black ink, appearing to read 'Anne Lieberman'.

Anne Lieberman
Director of Policy & Programs, Athlete Ally
anne.lieberman@athleteally.org
(412)-849-4950

I am writing in opposition to HB 1298.

The North Dakota High School Activities Association has had a policy in place since 2015. I could find no challenges to this policy. Why, then, are the sponsors choosing to try and legislate something that is, apparently, not a problem?

How will this affect our high school teams that compete in other states? Our club-based teams that travel, sometimes to international venues? Our college teams?

Who will be policing the prohibition of the use of “athletic facilities, stadiums, fields..” for transgender athletes of visiting teams? Will the sponsors be doing bodily spot checks?

What of intersexed athletes?

This bill is short-sighted, over reaching and blatantly discriminatory.

My representative, Michael Howe (R)—22, has shared with me that he will vote no on this bill since the NDHSAA already has a policy in place. The NCAA also has policies in place. The International Olympic Committee has addressed this. Why is the North Dakota state legislature seeking to regulate something that is already regulated?

Thank you for your time.

Jan Macdonald Russell
Leonard, ND

Greetings Chairman Weisz and Committee Members,

I am writing to encourage lawmakers in North Dakota to reject HB 1298, which excludes transgender students from competing in the sport of the gender they identify with. Growing up in North Dakota, sports were a vital part of not only my physical development but also my social and emotional development. I ran cross country and played baseball at Fargo North and continued on to play baseball at NDSU. These experiences produced lifelong friendships, taught me the value of hard work and comradery, and provided the water my budding self-esteem needed. Simply put, without sports, I wouldn't be who I am today and many positive aspects of my life would have been wiped out before they ever got started.

We need to consider the detrimental effects of excluding transgender students from competing on sports teams that align with their gender identity. The loss of the social benefits of sports combined with the exclusionary message the state is sending will undoubtedly make the already tough lives of transgender students that much more difficult and in many cases lead to increased depression and a feeling of diminished self-worth (transgender suicide rates are significantly higher than the general population).

Transgender students should have the same opportunities I have had while playing sports in school. Adopting the exclusionary stance of HB 1298 will do nothing but bring hurt and pain to transgender youth in North Dakota. Please reject HB 1298.

Sincerely,

Aaron Seelig

1-24-2020

Dear legislators,

I am writing in opposition to the proposed bill to limit transgender participation in sports. My son did not transition until after high school, however while in school was out as a lesbian and was very involved in sports and in our school. Sports were very helpful in keeping our son in school. The sports arena provided a family type atmosphere which also aided in relieving some of the depression my son struggled with at that time in his life.

My wonder is if you limit transgender humans, what is next? And why is this necessary? For those of you with children, go home and ask them their feelings towards everyone, regardless of who they are or how they identify, should play sports. Listen to their answer. I'm willing to bet they will say, "Sure, why not? They're humans too." And they would be right.

Please end this legislation now.

Thank you,

Angie Moser

Mother

Greetings Chairman Weisz and Committee Members,

As a former North Dakota student-athlete, I was extremely disappointed to learn about North Dakota House Bill 1298, as this bill discriminates against transgender youth from playing on sports teams that align with their gender identity in North Dakota. North Dakota should strive to accept and include people, as opposed to limiting participation in athletics. My own experience as an athlete in North Dakota has provided positive benefits that continue to this day. Every North Dakota student deserves the chance to participate in athletics.

I ran track from fourth grade until college at NDSU, and I walked away from that experience with invaluable skills that continue to benefit me in my career as a Communication Professor at a community college. To this day, if I think of some challenging task I need to complete, all I must do is think of grueling track workouts to realize that what I need to do really isn't that hard. Track has given me a lot of grit and the ability to put things into perspective. I also gained the ability to work with others in small groups (e.g., relay team), and that experience is invaluable in my workplace. I also gained the power of applying positive self-fulfilling prophecies that continue to give me confidence to this day. I consistently tell myself, "You can do [insert task here]," and I visualize achieving that goal. I learned that skill through my involvement in track, as I worked hard to beat my own personal records in each race I ran. Finally, I'm lucky enough to maintain several long-lasting friendships from my experience on NDSU's track and field team. For that, I am extremely grateful.

I can't imagine how heartbreaking it would be as a student or a parent of a student who is transgender to learn that they are not allowed to participate in athletics like their peers. House Bill 1298 is discriminatory, and it sends a hard, cruel message to kids: you can't be who you are and play sports... I also am greatly concerned about what this bill says about North Dakota to the rest of the country. Dismissing this bill is vital for opening opportunities to *all* student-athletes in North Dakota, regardless of gender identity. North Dakota state legislators, please dismiss HB 1298.

Sincerely,

Anne Zmyslinski-Seelig

Committee members, my name is Jocelyn Backman and I am writing IN SUPPORT of HB 1298 relating to participation in athletic events exclusively for males or females.

- If we allow men to play women's sports, a woman will never again win in that sport
 - Transgender athletes have higher testosterone levels than biological women which will give them a competitive advantage
- Women will no longer qualify for scholarships, be competitive enough to in professional women's leagues
- The entire sports regime will be dominated by Men's leagues and Women's leagues that are all men
- If both men/women play on the same team, do they then share the same showers? Same bathrooms?
- Women will no longer feel safe playing sports when competing against men

Biblical reasons not to allow it:

- Deuteronomy 22:5
 - "A woman shall not wear a man's garment, nor shall a man put on a woman's cloak, for whoever does these things is an abomination to the LORD your God.
- Genesis 1:27
 - So God created man in his own image, in the image of God he created him; male and female he created them.

Thank you so much for your time.

Letter of Opposition to HB 1298

Dear Chairman Weisz and Members of the Committee,

My name is Sheila Williams. I am the mother of a transgender youth. I am writing this letter of opposition because I feel it would set all the progress of our Trans youth back to the beginning of their journey. Because a Trans youth and their peers have for the most part accepted the changes that have transpired. Now to participate in sports, they would have to confuse everyone by participating in their choice of sport based on what they used to be, not whom they are now.

As a mother experiencing this pursuit of personal truth in my child was quite a lot to take in. And it seemed like at the school level it was even more pronounced. These kids started out seeing my child as one sex and then had to accept them as the sex they found themselves to be as their journey moved forward. There was obviously a lot of bullying from the other kids at first. Then as they saw our child's progress some tended towards bullying, most tended towards let them be who they are. We saw some teachers who tended to want to shame and blame because of their inability to accept this was happening. It seemed to, as we were able to share what we had learned. Most began to come around and find it was quite easy to teach a Trans person once they got out of their own way.

I witnessed my child having to struggle with who they were on the inside and the shame because of what they looked like on the outside. This led to self-harm and constant thoughts of suicide because of being stuck in the middle between their truth and what others felt they needed to be, to be acceptable and included in friendships and as a classmate. Thankfully, there was orchestra. And an acceptance amongst the musicians and faculty, which greatly helped them cope with the other.

When my child entered middle school, they decided to go out for sports after school. Because of the desire to participate. This led to a lot of confidence building and the ability to surprise themselves with reaching for goals they did not feel were possible. It taught them to work hard and practice hard. One coach even commented that they were amazed that our child seemed to be one of the hardest working people out there on the field. First one out and last one to leave. Even though they are only able to participate for two years because of a nagging injury. It still instilled some great values which would have been almost impossible otherwise.

This was made possible by a school athletics policy of inclusion without bias, shaming or exclusion because of one's outward appearance.

As a parent that has a child that really hopes to again before high school ends participate in a sport.

I am asking that the committee recommend a Do not Pass on House Bill 1298

Sincerely – Sheila Williams

Testimony of Mia (My-ah) Halvorson (She/her)

House Human Services Committee

In Opposition of HB 1298: Athletic events exclusively for males or exclusively for females.

January 25, 2021

Dear Committee Members,

My name is Mia Halvorson, and I am currently a North Dakota resident and undergraduate student taking classes at both North Dakota State University and Minot State University. I am double majoring in Human Development Family Science and Social Work, with an emphasis on women and gender studies, adolescents, and marginalized communities – groups of people that certainly include transgender kids.

However, my understanding of what it means to be a young trans person is not merely academic. You see, I am transgender as well, and I would like to make it clear that being trans is not a choice. No individual would choose a life encumbered by discrimination and oppression - where our lives are under a microscope from society and the whims of elected officials. The repercussions if this bill passes would be an everlasting message – that all trans kids are second class North Dakotans despite just having the same goals as every other kid - succeeding as their true, authentic selves.

This harmful bill would also violate federal law since, as of January 20th, 2021, President Joseph R. Biden signed the Executive Order titled 'Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.' The first two sentences within Section 1, Paragraph 1 of this Executive Order state:

"Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."

The Executive Order can be reviewed in its entirety at the link provided: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

As a transgender individual, I have had the opportunity to watch as some states and countries have rewritten their laws to provide inclusion for the growing transgender community. I have also watched as other states and countries have passed damaging laws, degrading the same community. Please, do not make that mistake. Transgender individuals deserve an equal opportunity, just as every other person deserves.

Finally, the reasons that I have listed above are not the only reasons that I urge the opposition of HB 1298, but I trust that these reasons, along with the testimony of many others who have the best

interests of North Dakota kids in mind, are sufficient for you to make the right choice – voting no on HB 1298.

Thank you for the opportunity to share this testimony.

-Mia Halvorson

Please give this bill a Do Not Pass, it is a waste of all of our time.

1. This Legislation fails to create a fair or balanced playing field.

- a. Trans boys who undergo transition related treatment and some intersex students will be assigned female at birth, but be competitively no different than any non-trans boy.
- b. Some trans girls, who were assigned male at birth, will never go through male puberty or experience the benefits of testosterone on growth, muscle mass, or performance. It is extremely unfair to them to make them compete with boys.
- c. Texas enacted this exact legislation and it resulted in a trans boy winning the female wrestling division two years in a row, devastating the hopes and dreams of so many trans and cis girls who just wanted a fair playing field. Worth noting that this student did not want to compete with girls, he wanted to compete with boys, but the law prevented this.

2. This legislation is alarming government oversight not consistent with the values of the republican party.

- a. NDHSAA, NCAA, and the Olympics all have policy on transgender athletes, why are we regulating and imposing additional government oversight where it doesn't belong and where there hasn't been a problem?
- b. It will create problems for both trans and cisgender students alike.

3. It might open up the door for lawsuits

- a. How will this legislation play out with Title IX or Title XIV? Are we not opening our schools to meaningless and expensive lawsuits to pursue a problem that doesn't exist like we've seen in other states? This is an insult and slap to the face of our ND Education System.

Has any legislator who proposed this or any sitting committee member heard of one actual instance of this being a problem in our state? One real instance not based on speculation or fear? There are a number of other reasons why this legislation is simply bad. I ask that we let common sense rule the day here and allow schools to be flexible to specific needs of the children they serve.

Greetings Chairman Weisz and Committee Members,

As a former North Dakota student-athlete, I was heartbroken to read about North Dakota House Bill 1298, which seeks to discriminate against youth in North Dakota who wish to participate in athletics.

My experiences as a cross country and track runner helped me build self-confidence, learn leadership skills, work as a team member, and make lifetime friendships. When it came time to apply for college, I had access to grants and scholarships due to being a high school athlete. I also had an opportunity to be mentored by a great coach who I still reach out to for life advice. (Thanks, Coach Tim!)

Athletics is so much more than drills, games, and sportsmanship. Every student with the interest and drive to participate in high school athletics should have the chance, regardless of gender identity. I encourage North Dakota state legislators to dismiss HB 1298 for what it is, discriminatory and punitive. Had I been born 20 years earlier, I would have missed out on the chance to participate in cross country. Luckily, the NDHSAA had progressed to open doors for more students to play, allowing girls to run cross country a year after I was born. We need to keep opening doors, not closing them. North Dakota can do better for our youth. I urge the committee to recommend Do Not Pass on HB 1298.

Rebecca Donley
Minneapolis, MN

Greetings Chairman Weisz and Committee Members,

In regard to HB 1298, Janne Myrdal recently expressed concern that her daughters might be put at a disadvantage in sports if transgender students were allowed to play on teams that did not match their gender assigned at birth. I'd like her to consider this: As a 13-year old I was a 6 ft. tall, 190 lb. forward on my JV team who could palm a boys' regulation basketball. Because I was bigger and stronger than the typical 7th-grade girl, should I have not been allowed to play? I am a cisgender female, and would those physical stats have mattered any differently had I been a transgender girl?

People come in all shapes and sizes, especially during the school-age years. To blame size/strength discrepancies on transgender athletes is dishonest. The core intention of this bill is discrimination that doesn't need to happen. I urge the committee to recommend Do Not Pass on HB 1298.

Marla Fogderud
Fargo, ND



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Dear Chairman Weisz and Members of the Human Services Committee:

We oppose House Bill 1298, which seeks to block transgender youth from participating in athletics. House Bill 1298 is discriminatory, contrary to federal law and athletic policies, in opposition to positive social development, and inconsistent with science.

House Bill 1298 puts North Dakota at odds with federal law. On January 20, 2021, President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. This Order states, "Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or **school sports**." States that fail to comply with this law risk federal legal action and the loss of federal education funding.

House Bill 1298 further ignores established policies created by the National Collegiate Athletic Association (NCAA) in 2011 and the North Dakota High School Athletic Association in 2015, which specifically addresses and supports the participation of transgender athletes. The NCAA has removed postseason and championship events in states with laws that violate their policy.

The ability to participate in sports has been well documented to have a positive effect on mental health in kids of all ages. Involvement in sports, particularly as a member of a sports team, is an important way for youth to develop psychosocially and help form their social identity. Sports participation helps athletes develop self-esteem, correlates positively with overall mental health, and appears to have a protective effect against suicide. This is of particular importance due to the fact that risk factors for suicide are already dramatically higher in transgendered children with studies showing 56% of youth who identified as transgender reporting previous suicidal ideation, and 31% reporting a previous suicide attempt. Keeping transgender students connected with fellow peers and participating in activities is vital for their development and mental health.

In 2017, a systemic review of medical literature found, "There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery)." Any disingenuous attempts to defend this law by suggesting otherwise is flatly contradicted by research.

There is simply no place in North Dakota for the discriminatory policies proposed in Bill 1298 and we urge you to vote no.

Sincerely,

Grant Syverson, MD
Luis Casas, MD
David Newman, MD
Kathy Anderson, MD
Brenda Thurlow, MD
Tracie Newman, MD, MPH
Sarah Paur, CPNP
Jagila Minso, MD
Chris Tiongson, MD

Barbara Bentz, MD
Maria Weller, MD
Gabriela Balf, MD, MPH
Bonnie Kvistad, MD
Rebecca Preussler, PsyD
Justin Horner, MD
Alex Thompson, MD
Brandon Meyer, MD
Stephanie Antony, MD

Vanessa Nelson, MD
Jenifer Jones-Dees, MD
Stephen Tinguely, MD
Julie Erpelding-Kenien, MD
Kurt Kooyer, MD
Rebecca Schreier, MD
Natalie Dvorak, MD
Amy Oksa, MD
Rebecca Bakke, MD

*Please vote in favor of HB 1298

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting biological males from competing against biological females. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety of women and girls. I ask you to consider the ramifications of allowing males to compete against females. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please render a DO PASS out of committee on HG 1298.

Thank you.

Jan 25th, 2021

Greetings chairman Weisz and committee members, my name is Giahna Eilers, I'm a middle school student in Mandan, North Dakota and an ally to the LGBTQ+ community. In solidarity with the athletes at my school and the transgender community of North Dakota, I am testifying in opposition to house bill 1298 which would ban students from participating on sports teams that do not align with their assigned sex at birth. All student should have the chance to play any sport they want. Without a girl's football or wrestling team that is an opportunity female students wouldn't have. I personally know some girls who are on the boys wrestling team who would be disappointed to know they would not get to return to the team. Furthermore ,this bill discriminates against transgender students who want to play on the sports team that aligns with their gender identity. I encourage the committee to vote DO NOT PASS on HB 1298.

Giahna Eilers,
Middle school student in Mandan, North Dakota

January 24, 2021

Greetings,

My name is Rachel Anastasia Ginter, and I am an LGBTQ+ Ally. I am writing in opposition of North Dakota House Bill 1298.

As someone who has lived in the Fargo/Moorhead area during my undergrad, I find ND HB 1298, which would allow discrimination against Trans, Non-Binary, and intersex individuals from participating in gendered sports that do not align with their assigned sex at birth, an atrocious violation of their rights, but even more, a direct act to avoid a bigger conversation on things that may make us uncomfortable or go against a societal norm.

As someone who identifies as Cis-Gender, I now realize the privilege I have and grew up with. As a young child, I dreamed about partaking in extracurricular activities, such as varsity high school soccer. Although, I was not very good, it taught me real friendship, team building skills, and taught me I belonged and was wanted. To think that a child may have to entertain the idea that they are not wanted where they feel they belong, is such a pain that I fear they would never forget.

There are many statistics that show this direct correlation, which I could add in this letter, but I am sure you are already aware of these statistics, which is why I am writing to you as a human with empathy to implore you to re-think ND HB 1298.

Thank you,

Rachel Anastasia Ginter

I'd like to thank you for your time. My name is David Newman, and I'm a board certified endocrinologist. I specialize in andrology, which are sex hormones. I'm from North Dakota, and proud to have my medical degree from UND. I'm also proud to be one of the few hormone specialists in the state, and one of the fewer that treat gender dysphoria and provide transgender cares.

I understand where this bill is coming from. Parents and athletes want a level playing field. They don't want someone who has testosterone competing against someone who doesn't. They don't want a male competing against a female. But this isn't about males against females. These athletes are non transgender females competing against transgender females. Athletics are not always inherently fair. Testosterone levels vary considerably amongst non transgender males and non transgender females, and we don't routinely screen for common medical conditions that increase testosterone amongst cisgender female athletes, such as polycystic ovarian syndrome.

We don't have a lot of academic data regarding athletic performance of transgender individuals, but we do have precedence. North Dakota has had policies since 2015, and the NCAA since 2011. These policies work.

As a former high school athlete in the state, I benefited from not only the health benefits of physical activity, but also the camaraderie, leadership skills, and acceptance of a team. I firmly believe that transgender athletes should benefit from the inclusive nature of a team, rather than be subject to exclusions that can worsen their mental health.

Senator Roers earlier in the session made a point that a bill sought to address only two specific instances in recent years, and was too rare to warrant major changes to law. Transgender athletes are not a problem in North Dakota. Our current rules make sense on a local and national stage, and don't warrant changes. I'm proud of the work we have done in North Dakota regarding transgender healthcare and acceptance, and believe this bill would be a step in the wrong direction.

Sincerely,
David W Newman, MD

CONCERNED
WOMEN *for* **AMERICA**
 LEGISLATIVE ACTION COMMITTEE

Protecting Women's Sports for Female Athletes

The Issue:

Female athletics are a pathway to development, opportunity and success for girls and women in America. The passage of Title IX in 1972, the federal law that prohibits discrimination in education programs or activities on the basis of sex, resulted in huge increases in female sports' participation. It gave women the right and opportunity to compete in their own sports. Only one in 27 girls participated in school sports before Title IX. Since its enactment, two in five girls now participate in school sports.¹

Today, fair competition and equality in women's sports are under threat. Many U.S. states, interscholastic athletic conferences, and the Olympics currently allow biological males who claim transgender status as women or girls to compete in female sports. The Supreme Court's decision in an employment case, *Bostock v. Clayton County*, and Congress' so-called "Equality Act" redefine sex in civil rights law to include "gender identity," a self-defined perception, not biological reality. This intensifies the need for action to consider the impact and clarify the law.

Science, biology, and common sense expose the unfair advantage biological male athletes possess when pitted against female athletes in competition. Title IX must stand on the side of equality and protection for female athletes based on inherent and distinct biological differences. We must insist on fairness and equity in women's sports at every level.

The Facts:

Physiological distinctions between the sexes matter in protecting equal opportunity and a fair playing field.

- Puberty, testosterone, and innate biological differences give physical advantages to males that cannot be erased. Inherent male and female distinctions range from chromosomal and hormonal differences to physiological differences. Men generally have greater density and strength in bones, tendons, and ligaments, larger hearts, greater lung capacity, and higher red blood cell count.
- Exercise physiology expert Dr. Gregory A. Brown of the University of Nebraska published an exhaustive review of existing research, concluding that men and adolescent boys perform better in almost all sports than women and adolescent girls because of their inherent physiological advantages that develop during male puberty."²
- Researchers at the Karolinska Institute and University of Manchester concluded that after one year of treatment "the physical advantage enjoyed by biological males over females is only minimally reduced when testosterone is suppressed...Furthermore, the reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables."³

- Team USA sprinter Allyson Felix holds the most World Championship medals in history. Yet in 2018 alone, 275 high school boys ran faster times in the 400-meter on 783 occasions, exemplifying how allowing biological males to compete in female sports would be a detriment to females everywhere.⁴

The impact of transgender policies in female athletics is occurring at all levels of sport, including at the high school, college, and international levels.

- In Connecticut, high school female athletes were forced to compete in track against males identifying as girls, losing medals, state titles, and numerous other would-be-earned victories. The Connecticut Interscholastic Athletic Conference has been found in violation of Title IX for their transgender participation policy in a federal complaint.⁵
- Two Boise State female track athletes faced losses in the Big Sky Conference because a college runner previously on the University of Montana men's team claimed transgender status and competed on the women's team. They have joined as victims of the injustice in female athletics in defense of Idaho's Fairness in Women's Sports Act.⁶
- The NCAA is forcing female athletes to compete on an unfair playing field and lose their place on the podium. In 2019, the Division II NCAA national title in the women's 400-meter hurdles went to a male transathlete from Franklin Pierce University who had competed for three years on the men's team.
- The International Olympic Committee allows biological males identifying as women after one year of hormone treatment to compete in female Olympic sports after one year of male hormone suppression. Even the world's best female Olympic athletes would lose to thousands of male athletes—including those who would be second tier in the men's category—on any given day.⁷

Lawmakers and citizens are recognizing the unfairness of allowing biological males to compete in women's sports. They also face intense activist opposition in trying to act.

- Idaho's "Fairness in Women's Sports Act" is the first to be signed into law and is being challenged in federal court by the American Civil Liberties Union (ACLU).
- In 2020, lawmakers in 14 other states proposed similar legislation to ensure participation in women's sports is based on female biology, not gender identity.
- In a recent poll, 70-80 percent of Americans in ten battleground states responded NO to the question: "Should boys and men who say they identify as transgender be allowed to compete in girls' and women's athletics?"⁸
- In 2020, federal legislation to reclaim the purpose of Title IX and protect sports for women and girls based on biological sex was introduced in the U.S. House and Senate.
- In retaliation for Idaho's actions to protect fair competition for women and girls, trans activist groups are pressuring the NCAA to boycott the state of Idaho from hosting national tournaments.⁹

Under federal law, equal rights and opportunities for women and girls should not be denied on the basis of biological sex. The Executive Branch has made this clear.

- The U.S. Department of Justice provided clear legal analysis defending the biological basis for female athletics under Title IX and the constitutionality of Idaho's Fairness in Women's Sports Act.
"Allowing biological males to compete in all-female sports is fundamentally unfair to female athletes. Under the Constitution, the Equal Protection Clause allows Idaho to recognize the physiological differences between the biological sexes in athletics."¹⁰
- The U.S. Department of Education asserted that the Supreme Court decision in *Bostock* does not overrule biological sex under Title IX.
"The Supreme Court's opinion in *Bostock* does not affect the Department's position that its Title IX regulations authorize single-sex teams based only on biological sex at birth – male or female – as opposed to a person's gender identity."¹¹

¹ Women's Sports Foundation. (September 2, 2016). *Title IX and the Rise of Female Athletes in America*. Retrieved from: <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>

² Expert Declaration of Gregory A. Brown, Ph.D. (January 7, 2020). Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. Retrieved from: <https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20Report%20Executed.pdf?ver=1580495895886>

³ Emma Hilton, Ph.D. and Tommy Lundberg, Ph.D. (13 May 2020). University of Manchester, UK. and Karolinska Institute. Department of Laboratory Medicine/ANA Futura. Division of Clinical Physiology. Huddinge, Sweden. Retrieved from: [https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20\(1\).pdf](https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf)

⁴ Doriane Lambelet Coleman, Martina Navratilova, et al. Pass the Equality Act, But Don't Abandon Title IX, Washington Post (April 29, 2019). https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html.

⁵ Denny, D. (March 13, 2020). *The NCAA's black eye in women's sports*. Townhall. Retrieved from <https://townhall.com/columnists/doreendenny/2020/03/13/draft-n2564836>

⁶ Ridler, K. (May 28, 2020). *Idaho republican joins transgender sports lawsuit fight*. AP News. Retrieved from <https://apnews.com/93016b958a704517c897b16feef26dda>

⁷ Doriane Lambelet Coleman Oral Testimony on H.R. 5 before the U.S. House of Representatives Committee on the Judiciary April 2, 2019, available at <https://docs.house.gov/meetings/JU/JU00/20190402/109200/HHRG-116-JU00-Wstate-LambeletColemanP-20190402.pdf>.

⁸ APP and SPRY Strategies Release Polling Results from Ten Battleground States (July 22, 2020). Retrieved from: <https://americanprinciplesproject.org/elections/app-spry-strategies-release-polling-results-ten-battleground-states/>

⁹ ACLU letter to the NCAA Board of Governors (June 10, 2020). Retrieved from: https://images.saymedia-content.com/.image/cs_srgb/MTczMTcxNjc0MjMMDY5NjY4/final-ncaa-idaho-letter.pdf

¹⁰ U.S. Department of Justice. (June 19, 2020). *The Department of Justice Files Statement of Interest Defending the Constitutionality of Idaho's Fairness in Women's Sports Act*. Retrieved from: <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-defending-constitutionality-idaho-s-fairness>

¹¹ U.S. Department of Education Letter to Concerned Women for America. (September 1, 2020) Retrieved from: https://concernedwomen.org/wp-content/uploads/2020/09/CWA_9.1.2020-1.pdf



Greetings Chairman Weisz and Committee Members;

House Bill 1298 is an extremely broad and poorly defined bill aiming to prevent the participation of transgender athletes in public sports. Not only does the bill attempt to ban transgender athletes from participating in any municipal or state run sports such as high school or college competitions, it also bans them from participating in any competition held on public property, whether or not the competition is state sponsored. This sweeping language is imprecise and irresponsibly broad.

Last year, the U.S. Supreme Court ruled that protections from discrimination 'on the basis of sex' includes protections for transgender individuals from discrimination based on their gender identity. While the Supreme Court case specifically involved Title VII of the 1964 Civil Rights Act, the 11th circuit Federal Appeals court decided shortly after that this interpretation also extends to Title IX, disallowing any federally funded schools or universities from discriminating against transgender students. The North Dakota Human Rights Act also disallows discrimination on the basis of sex regarding participation in public services.

HB 1298 directly conflicts with North Dakota High School Activity Association (NDHSAA) policy, which specifically allows transgender athletes who are undergoing hormone replacement therapy to participate in High School athletic competitions with their chosen gender. Additionally, the language contained in the bill invites FERPA violations on the part of schools, and may result in lawsuits and loss of federal grants.

HB 1298 sets a dangerous precedent by disallowing certain members of our community from using public property and services, and conflicts directly with federal and state policy. HB 1298 also flagrantly impedes upon local control by disallowing city or county run organizations from including transgender athletes, and oversteps the bounds of state control by banning transgender athletes from participating in any competition taking place on city, county, or state property, regardless of municipal policy. We urge the committee to vote no in the interest of individual liberty and municipal sovereignty.

- Dakota Outright Board of Directors

Chairperson Weisz and members of the committee,

My name is Kristin Rubbelke and I am the Executive Director of the National Association of Social Workers North Dakota Chapter (NASW-ND). On behalf of NASW-ND, thank you for reading and considering our position on HB 1298.

NASW-ND opposes HB 1298 due to its intent to discriminate against North Dakota citizens.

NASW Ethical Standards state “[s]ocial workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability.”

Sports and athletic events are very important to the people of North Dakota, and HB 1298 discriminates against transgender adults, youth, and children by preventing them from participating in and enjoying the benefits of their chosen sports activities. The bill also serves to further isolate and ostracize transgender individuals and sends the message that they are not welcome or tolerated in North Dakota – a message that is far from the truth.

The NASW Code of Ethics asserts the inherent dignity and worth of every person and requires social workers to promote self-determination and support an individual’s capacity and opportunity to change and address his or her own needs. HB 1298 denies individual self-determination and opportunity.

Therefore, NASW-ND strongly opposes HB 1298 in its entirety and requests that it be withdrawn from consideration.

Sincerely,



Kristin Rubbelke, LSW
Executive Director
NASW-ND

House Bill 1298

Human Services Committee

Andrew Alexis Varvel

January 25, 2021

Chairman Weisz and Members of the
House Human Services Committee:

My name is Andrew Alexis Varvel. I live in Bismarck. This testimony is neutral.

Regardless of whether this bill passes or not, the North Dakota High School Activities Association should establish an intersex league for transgender athletes.

This compromise would mean that transgender athletes would have an opportunity to compete against one another in a league of their own. This solution would probably please nobody, probably displeasing both transgender activists from the LGBTQ+ community and traditional Christians. The trouble with either side taking a “my way or the highway” approach to this issue, though, is that one might get left by the side of the road while everybody else moves on.

HB 1298 probably exists due to widespread publicity about the litigation of *Soule v. Connecticut Association of Schools*, which has promoted a belief that transgender girls are outcompeting their cisgender peers in high school athletics. Whether or not you think this is true, these concerns need to be taken seriously.

You may wish to turn this legislation into a study resolution to investigate the relative competitiveness of transgender and cisgender athletes, residual effects from a transgender athlete's previous physiology, possible differences in risk taking between transgender and cisgender girls, and ethical considerations related to existing bans on the use of artificial steroids by high school athletes.

Thank you.

Andrew Alexis Varvel
2630 Commons Avenue
Bismarck, ND 58503
701-255-6639
mr.a.alexis.varvel@gmail.com

Dear Committee Members,

I am a former high school and college athlete in cross country and swimming. I paid for a majority of my college education with scholarships I earned through sports.

If you allow the transgender ideology to override biological science, you will crush the ability of women to attend post-secondary education through athletic scholarships. And not only will you crush their ability to afford a college education, you will crush all of the life skills girls and women learn as athletes.

As a female athlete, I learned more pertinent life skills on the playing field than I did in the classroom. I learned to lead, but I also learned to be a team player. I learned about true sacrifice and dedication and what those qualities look like and require. I learned about the blows of defeat and how to persevere. I learned how to celebrate and relish a championship, but to do so with grace and humility. I learned to be woman - a woman of character, a woman of virtue, and a woman that is worthy.

If we do not pass legislation to protect women's sports, girls and women will lose more than awards, scholarships, and education - they will lose their self-respect and their self-value. They will become another victim of the 'inclusion' culture that is killing America. Don't let it kill our girls and women in the great state of North Dakota.

Please recommend a 'Do Pass' on HB1298.

Respectfully,

McKenzie McCoy
Watford City, ND
District 39
M Diamond Consulting, LLC

January 25th, 2021

Chairman Weisz and Committee Members,

My name is Grace Griffin. I live in Fargo, North Dakota with my fiancé Madison. I'm currently in student teaching as part of my last semester of a teaching licensure program. I am testifying in opposition of House Bill 1298 as it would prevent individuals from participating in sports teams that do not align with their assigned sex at birth. As a member of the LGBTQ+ community and from the perspective of an educator, I was stunned and appalled by the contents of House Bill 1298. I believe every student deserves the chance to participate in organized athletic events. Participation in these sports teams provide a unique opportunity for young people to establish crucial social skills, grow self-confidence and develop lifelong friendships. Every student deserves a chance to participate in a school sports team and have these significant experiences. HB 1298 not only limits students opportunities to these experiences, it discriminates against transgender youth who desire opportunities to become self-confident, develop social skills and connect with peers over a shared interest. I urge the committee to consider the negative impacts of HB 1298 and to stand in opposition of this bill in favor of the health and well-being of young people in North Dakota.

Grace Griffin
College Student in Fargo, ND

Dear Committee Members,

I am a former high school and college athlete in cross country and swimming. I paid for a majority of my college education with scholarships I earned through sports.

If you allow the transgender ideology to override biological science, you will crush the ability of women to attend post-secondary education through athletic scholarships. And not only will you crush their ability to afford a college education, you will crush all of the life skills girls and women learn as athletes.

As a female athlete, I learned more pertinent life skills on the playing field than I did in the classroom. I learned to lead, but I also learned to be a team player. I learned about true sacrifice and dedication and what those qualities look like and require. I learned about the blows of defeat and how to persevere. I learned how to celebrate and relish a championship, but to do so with grace and humility. I learned to be woman - a woman of character, a woman of virtue, and a woman that is worthy.

If we do not pass legislation to protect women's sports, girls and women will lose more than awards, scholarships, and education - they will lose their self-respect and their self-value. They will become another victim of the 'inclusion' culture that is killing America. Don't let it kill our girls and women in the great state of North Dakota.

Please recommend a 'Do Pass' on HB1298.

Respectfully,

McKenzie McCoy
Watford City, ND
District 39
M Diamond Consulting, LLC

WRITTEN TESTIMONY IN OPPOSITION TO HB 1298

House Human Services Committee Hearing on House Bill 1298

Date of Hearing: 1/25/2021

Debra L. Hoffarth, 1320 11th Street SW, Minot, ND 58701

This written testimony is presented in opposition to HB 1298, which effectively prevents participation of transgender athletes in high school, collegiate, or club sports. Both the North Dakota High School Activities Association (NDHSAA), the National Collegiate Athletic Association (NCAA), and the International Olympic Committee (IOC) have rules in place on this issue. The purpose of these organizations is to promote athletes, with an eye toward preserving the well-being of the athlete and to promote fair play. HB 1298 seeks to ignore the work done by these organizations and instead enact a law that is discriminatory. Any thought that this somehow protects student athletes is misguided.

North Dakota law and federal law prohibit discrimination based upon sex. The North Dakota Human Rights Act prohibits discrimination based upon sex.¹ Title VII of the Civil Rights Act prohibits discrimination based upon sex, this includes gender identity.² Recently, the State of Idaho passed the Fairness in Women's Sports Act.³ The United States District Court of Idaho stayed the implementation of the law, as the Act is likely unconstitutional.⁴ Finally, President Biden recently issued an executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."⁵

As the parent of a transgender student, I can assure you that all a student wants (regardless of gender identity or sexual orientation) is to be accepted as who they are. 52% of transgender students have contemplated or attempted suicide.⁶ If those same students are surrounded by those who are affirming, the suicide rate lowers significantly.⁷ Excluding or marginalizing transgender students puts their mental health at risk.

Transgender students want to participate in school activities with their friends, have a community that is supportive, and be part of a team. They are not seeking an advantage to win awards. Sports teach students many things – confidence, sportsmanship, teamwork, leadership. Transgender students need these skills, just like any other student. What transgender athletes need is compassion and inclusion, not hatred and exclusion. All people within the State of North Dakota deserve dignity and respect.

Please oppose HB 1298.

Debra L. Hoffarth
1320 11th Street SW
Minot, ND 58701

¹ NDCC 14-02.4-01.

² *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

³ *Hecox v. Little*, No. 1:20-CV-00184-DCN (D. Idaho Aug. 17, 2020)

⁴ *Hecox v. Little*, No. 1:20-CV-00184-DCN (D. Idaho Aug. 17, 2020)

⁵ Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation | The White House- <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

⁶ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2020"

⁷ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2020"

Asher Hoffarth,

I am a Minot Citizen and a big activist for the LGBT+ community. I also identify as transgender. This bill if passed will be detrimental to transgender individuals mental health. People who identify as Transgender are more likely then their cisgender peers to attempt or think about suicide. The way we can help these individuals is to be in support. We need to show these people that they are loved and just as normal as everyone else because we are.

We don't do this to try and gain advantages. In fact, many of us face discrimination and lots of us in our day to day lives. We are often pushed to the side because of how we identify. Some face death threats, physical or emotional trauma, and even assault. We are no different than our peers.

For example, I use the men's restroom no matter the setting because that's what I am. People will look at me and know who I am. This causes anger to some people. I will get yelled at or named called just for trying to go to the bathroom.

I fear that if this bill passes I will loose my letter in cross country from my freshman year before my transition. I do not think that I should because I earned that just like everyone else that got one did.

This bill is discrimination and complete bigotry. The fact of the matter is that you are trying to give cisgender people a reason to discrimination against the LGBT+ community. This is not fair. My rights should never be up for debate. Especially by not some cisgender white men that aren't even affected by my life. I am tired of them trying to pull us back into the 20th century. The thing that makes me the most angry is that they don't know how us being who we are has affected our whole lives. We will forever be looked at differently because of people who are too stuck up to accept other people's life.

This is the 21st century. Can't we all just live our own lives. We all deserve equal rights. Everyone!

Greetings Chairman Weisz and Committee Members,

I am transgender, like many other North Dakotans, and I love my community here in ND and I love my family. And I stand in opposition to House Bill 1298.

North Dakota will have athletes who will perform at the national level. We must teach our young people how to compete within the rules of the NCAA, Olympic boards, and various professional organizations.

House Bill 1298 will negatively impact North Dakota's sports community. There are many small towns that give kids the opportunity to play sports in their communities. The way that House Bill 1298 is also written, it wants to ban trans people from using state facilities for sporting events.

Lawsuits should never be the answer to the anti-science approach that has been taken by the writers of these bills, who have been influenced by out of state special interest groups.

My other big fear I have is that I know that this will cause young people to feel suicidal because it will remove them from teams they've either inspired to be a part of or were already a part of. This could have the indirect consequence of breaking up some families.

I want to make sure people know that transgender people exist within every religion, political affiliation, and nationality. Transgender people across the United States have made major contributions and are a major part of the American workforce. I would hate to see a North Dakota student lose a scholarship because they weren't taught about transgender rights within the NCAA and the US as a whole.

Thank you for your time

Rebel Marie
Fargo, ND

Testimony**House Bill 1298—Relating to participation in athletic events exclusively for males or females****House of Human Services Committee****Senators Clemens, Kannianen, Myrdal; Representatives Koppelman, Meier, Paulson, Schauer, Skroch, Steiner, and Vetter****2021-01-24****Senators and Representatives:**

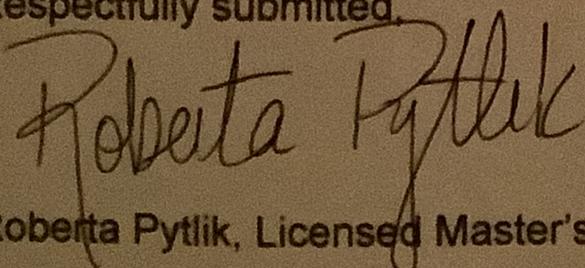
I am Roberta Pytlik of Fargo, ND, and I am a licensed addiction and professional clinical counselor. I work with adults managing all kinds of stressors and help them to find better understanding, self-awareness, and strategies to cope. Though I work primarily with adults, I have good understanding of some of the stressors that come with adolescence or raising adolescents. Thus, I am strongly opposed to this bill being put forth regarding adolescent athletes.

In addition to a number of peer-reviewed scientific studies that disprove the stance many of you take regarding the biological differences between boys and girls and potential game-related consequences of these, this bill is also untimely as we all continue to manage a global pandemic, and is unnecessary. It is my understanding that athletic organizations already have (and could write if they do not) policies and procedures in place to address managing the nuanced issues of transgender athletes' participation. It is unnecessary for legislation at the state level to dictate this and should be eliminated from this legislative session.

When statewide policies exist that harm children (and be very clear that this bill would do just that), it is difficult to undo both at your administrative level and on the personal levels of the families impacted. I have had the privilege of working with a number of individual who identify as transgender; their struggles are enough without limiting the way in which they participate in sports, or the funding that supports these organizations.

This concludes my testimony. Thank you for your time and consideration. If I can be of further assistance during this time of deliberation, please contact me at roberta.pytlik@gmail.com.

Respectfully submitted,



Roberta Pytlik, Licensed Master's Addiction and Professional Clinical Counselor

January 22, 2021

Human Services Committee
North Dakota Legislature
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

RE: Opposition to H.B. 1298 Relating to participation in athletic events exclusively for males or females.

Dear Chairman Robin Weisz, Vice Chairwoman Rohr, and fellow committee members,

The Trevor Project writes to express its strong opposition to H.B. 1298, a harmful bill which would effectively ban transgender youth from participating in school sports, denying them the health benefits and valuable life lessons of being part of a team and doing serious harm to their mental health. We humbly ask you to oppose H.B. 1298.

The Trevor Project is the world's largest suicide prevention and crisis intervention organization for LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning) young people. We work to save young lives by providing support through free and confidential suicide prevention and crisis intervention services and through our education, research, and advocacy programs.

At The Trevor Project, we constantly hear from transgender youth in crisis who want nothing more than to be recognized for who they are — and we know based on the work we do every day that respecting and affirming a young person's identity is essential to their mental health and well-being. Denying transgender youth the ability to participate in sports increases the kind of social isolation and stigma that contributes to self-harm and suicidality. Conversely, our research has shown that participating in sports has positive effects, as LGBTQ youth who participated in sports reported nearly 20% lower rates of depressive symptoms compared to those who did not, and more than a quarter of transgender and nonbinary youth (27%) who participated in sports reported their grades as being mostly A's compared to 19% who did not¹.

Additionally, research shows that denying equal access to school activities adds to the discrimination transgender and non-binary youth experience, exposing them to “an increased risk of experiencing depressed mood, seriously considering suicide, and attempting suicide².” In Trevor's 2020 National LGBTQ Youth Mental Health Survey, LGBTQ youth who reported having at least one LGBTQ-affirming space had 35% reduced odds of reporting a suicide attempt in the past year, with affirming schools being most strongly associated with reduced suicide attempts³.

Finally, we hope the legislature will keep in mind the effect of its actions on LGBTQ youth mental health directly; over 86% of LGBTQ youth said in our National Survey that recent politics had negatively influenced their well-being. Legislation like H.B. 1298 is neither necessary or helpful⁴. We can celebrate girls' sports and protect transgender youth from discrimination, making sure that all young people can access the lessons and opportunities that sports afford.



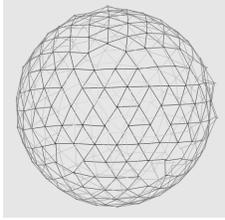
For these reasons, The Trevor Project asks that you please oppose H.B. 1298. Should you have any questions, or if we can be of assistance regarding this matter, please feel free to contact me at 202-768-4413 or Sam.Brinton@TheTrevorProject.org.

Sincerely,

Sam Brinton
Vice President of Advocacy and Government Affairs
The Trevor Project

References

- 1) The Trevor Project (2020). Research Brief: The Well-Being of LGBTQ Youth Athletes. Available at: <https://www.thetrevorproject.org/2020/08/31/research-brief-the-well-being-of-lgbtq-youth-athletes/>. Accessed on January 20, 2021.
- 2) Price-Feeney, Green, and Dorison, "Understanding the Mental Health of Transgender and Nonbinary Youth." *Journal of Adolescent Health*, 2020.
- 3) The Trevor Project (2020). Research Brief: LGBTQ and Gender-Affirming Spaces. Available at: <https://www.thetrevorproject.org/2020/12/03/research-brief-lgbtq-gender-affirming-spaces/>
- 4) The Trevor Project. "National Survey on LGBTQ Youth Mental Health 2020," July 15, 2020. <https://www.thetrevorproject.org/survey-2020/>.



SYNTHESIS.EARTH

01-25-21

RE: TESTIMONY IN OPPOSITION TO HB 1298

HB 1298 seeks to bar transgender men and women from competing in athletic events in North Dakota.

All mammals engage in forms of play. Play is an integral way of acquiring knowledge, testing limits, making friends, and learning how to improvise and compromise within the context of a rule set. Animals exposed to a robust play environment are well adapted socially, emotionally, and cognitively. Animals deprived of play environments are developmentally stunted for the rest of their lives.

Athletic competition is a formalized human version of play and has been used for over 100 years in primary and secondary educational settings to help teach adolescents the importance of sacrificing for something greater than themselves. Finding purpose within something greater than ourselves – such as that found in a team sport - is a basic human desire, one that is typically lacking in the rest of our highly individualized culture. Research indicates that those who play youth sports carry with them occupationally advantageous traits that persist throughout their lifetimes.

If passed, HB 1298 would bar transgender men and women in North Dakota from accessing a fundamental state of being – play. If passed, it would prevent them from the opportunity to play competitive school-sanctioned team sports and prepare themselves to be socially, emotionally, and cognitively successful throughout their lifetime.

The proponents of HB 1298 have shown no clear or present benefit from disallowing transgender athletes from competing. Some say they simply seek to maintain “competitive balance”. “Competitive balance” is impossible and does not fall within the purview of legislative action. Certain biological and genetic differences will always exist; some people will be taller, faster, or stronger than others due to certain genetic and biological factors or predispositions. As such, the legislature has not and should not weigh in and dictate which biological or genetic differences do or do not allow for “competitive balance”. Humanity is

diverse; some of us are gifted certain athletic advantages by birth and some are not. The beauty of athletic competition is that we still play the games and strive for excellence regardless of whether we do or do not share in such genetic gifts or biological advantages. Transgender men and women are but two of many possible manifestations of human diversity and as such deserve the same measure of dignity as anyone else.

As has been shown, the societal ramifications of preventing transgender men and women from accessing basic human states of being – not only as adults but also as school children – has very clear negative outcomes both for individuals and for society at large. As such, we urge this committee to put forward a DO NOT PASS recommendation for this bill.

Sincerely,
Ryan Warner
Synthesis.Earth

January 24, 2021

Dear Committee Members:

I know several teens who live in North Dakota who are suffering now due to ignorance, hatred and unlawful acts by their fellow North Dakotans. Transgender teens suffer all because people in their communities and state wide fail to see that these kids are trying desperately to be their true authentic selves. Transgender kids are just like any other kid. Transgender kids want to be in sports, clubs and any other activity that they find interesting or gravitate to just as their peers do. There is no other reason or motive but to just have the same experience as any other kid in North Dakota. These kids want to play sports because they are drawn to that sport. The kid might be talented in that sport or want to develop the skills to play with their friends and classmates. Why is that so strange or difficult to understand?

House Bill # 1298 takes away that chance for these kids to not only participate in a sport of their liking but also takes away the chance to learn and participate as a member of a group. There is learning that is valuable in participating as one of many that must work together to achieve a common goal. Kids learn to communicate, to share not only duties but responsibilities in such a setting as a team would offer. Kids learn that they live amongst others who live differently from them and that exposure opens their eyes to not only economic differences as well as family dynamics. This is also a valuable learning opportunity that they will carry with them throughout their life.

This bill also adds additional stress and anxiety to transgender kids, which is detrimental to them. I have talked with several transgender teens in North Dakota who feel despair and are upset that they not looked at as equals to their cis peers. Transgender kids have taken to cutting themselves or contemplated suicide because of how they are treated not only by their community but also by their school. Bullying is a zero tolerance in our schools yet faculty, staff and administration and cis peers who bully, harass and yes, have even committed illegal acts towards transgender kids within the walls of North Dakota schools. Transgender kids must attend school and a school sport is one of a few bright spots in their school day that they could focus on and excites them. This bill is taking away any chance for these kids to grow and develop skills and come away with a sense of belonging and contribution to the communities they live in.

This bill is wrong and will cause harm to these kids. Anyone who is educated on transgender will see how this isn't helpful to anyone in North Dakota but only fosters hate, ignorance and gives the public a false impression that transgender kids want to play in sports that they identify in just to have an edge or step up on cis team members and those that they would compete against. Education would remove such ideas and fear. Education would help open the eyes, minds and hearts of many here who are behind this bill as well many who live in North Dakota.

Before you vote please, I encourage all of you, talk to a parent of a transgender kid; talk to a transgender child and hear from these people. These kids have stories that would make you sad, angry or disgusted. The parents fight for the rights of their transgender kid while other teens easily and without effort enjoy the very rights this state is trying to revoke.

Thank you.

Kristie Miller

As a resident of the State of North Dakota I am Opposed to the legislation proposed in House Bill 1298.

This legislation is Transphobic.

Transphobia is described as having or showing a dislike of or prejudice against transsexual or transgender people.

It is of my opinion that legislation should be used to increase the quality of life for all people. This legislation is not doing that. I do not believe that it is in the best interest of all people to exclude anyone from competition based on their sex. The idea that any sex is superior or incapable of competing equally is folly. People have always defied limits and naysayers, to prove that beyond a doubt there is no definitive answer to perceived normalcy. Men have become iconic women's clothing fashion designers and women have beaten men to become state wrestling champions. Ideas of sex and gender are evolving. One cannot limit their ideas simply to the past traditions and values. The future is evolving, enlightening and encouraging. When someone says a person can not do something it is only an invitation to be proven wrong. Anytime we exclude a human being we are closing doors to possibilities that person could achieve. There are exceptional humans doing exceptional things regardless of hurdles or handicaps. It is our job as a society to be open and to encourage those exceptional humans to succeed further to help create an exceptional world. Achievements and successes are what progress society regardless of who is doing it. Because it is in our best interest to all succeed in progress.

I believe this particular piece of legislation is written against our common interests of betterment. I believe it goes against federal rights Title IX law which states "No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Sports are supposed to be fun right? Its not sunshine, rainbows, winners and losers. Sure there's the agony of defeat and thrill of victory but...
Sometimes its just about being able to be seen on the field. A few minutes of glory.
Just let the kids play.

Charles Lee
a former North Dakotan high school wrestler.

HB 1298

I urge you to offer a "DO PASS" in regards to this bill.

I have two daughters and two sons and am well aware of the differences between their physical abilities given their biologic make up. Please support the rights of girls and women by allowing for them to compete against other biological girls and women. Please help protect their fundamental rights and safety by supporting this bill.

Erin McSparron

NDHSAA Transgender Student Board Regulation

A transgender student will be defined as a student whose gender identity does not match the sex assigned to him or her at birth.

Any transgender student who is not taking hormone treatment related to gender transition may participate in a sex-separated interscholastic contest in accordance with the sex assigned to him or her at birth.

The following clarifies participation in sex-separated interscholastic contests of transgender students undergoing hormonal treatment for gender transition:

- A trans male (female to male) student who has undergone treatment with testosterone for gender transition may compete in a contest for boys but is no longer eligible to compete in a contest for girls.
- A trans female (male to female) student being treated with testosterone suppression medication for gender transition may continue to compete in a contest for boys but may not compete in a contest for girls until completing one calendar year of documented testosterone-suppression treatment.

January 25th, 2021

RE: Opposition to HB 1298

Good Morning Chairman Weisz and Committee Members;

I am Brandi Hardy and I am the Legislative Coordinator for North Dakota Human Rights Coalition (NDHRC).

The NDHRC is opposed to HB 1298 for two main reasons; it's unconstitutional and harmful.

HB 1298 violates already existing policies, federally and statewide. Similar bills to HB 1298 have been introduced in 20 states and only passed in one, Idaho. After Governor Brad Little signed the bill into law, it was immediately challenged in federal court; *Hecox v. Little*, which is now on appeal at the Ninth Circuit Court of Appeals. This legal fight has had significant costs for Idaho due to litigation fees. If HB 1298 should become law, it will be likely to be extremely expensive for North Dakota and a waste of our taxpayer dollars. Dollars that could be far more useful during a pandemic and go towards jobs, healthcare, and economic services.

HB 1298 is unnecessary. North Dakota High Schools Activities Associations (NDHSAA) has already established a regulation to ensure ALL students had access to any school activity they wish to participate in, including sports. These regulations were set into place on November 20, 2015. That was six years ago.

Many important life lessons are learned in sports; such as, leadership, confidence, self-respect, and what it means to be part of a team. By passing HB 1298, transgender students would be singled out and more vulnerable to bullying, rejection, and violence. This will lead to higher rates of self-harm and suicide, which are already significantly higher with transgender students. However, according to the Trevor Project, the world's largest suicide and crisis prevention organization for LGBTQ young people. LGBTQ youth who participate in sports reported nearly 20% lower rates of depression. Even better, transgender youth who participated in sports reported grades as mostly A's.

HB 1298 could also single out girls in rural communities where there is not the funding or population for separate boys and girls teams. It is common for girls to join hockey, football, wrestling, and other physical activities alongside their male classmates. HB 1298 would take away opportunities from the very girls this bill claims to protect.

NDHRC urges the committee to vote DO NOT PASS on HB 1298. If there are further questions regarding my testimony, my contact information is listed below.

Brandi Hardy
Legislative Coordinator
NDHRC
brandihardy60@gmail.com

*Please vote in favor of HB 1298

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting biological males from competing against biological females. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety of women and girls. I ask you to consider the ramifications of allowing males to compete against females. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please render a DO PASS out of committee on HG 1298. Thank you.

24 January 2021

Megan Casper
833 50th St. S.
Fargo, ND 58103

To whom it may concern,

I am submitting this testimony in firm opposition to bill **House Bill 1298**, being heard by the Health and Human Services Commission on Monday, January 25th, 2021.

My name is Megan Casper and I am a resident of Fargo with two small children. I also work with children and teens, from ten years old to high school age. I have been around children, taught children, and taken care of children all my life. I also double majored in Elementary Education and Religion at Concordia College.

As a champion and advocate for children and teens, reading this bill made my heart feel sick. House Bill 1298 states that athletes wouldn't be able to play for a sports team that aligns with their gender identity—which would be nothing less than absolutely devastating to the children and teens I serve.

Sports are a vital and vibrant part of any child's development. Participating in sports fosters community, relationships, fellowship, and teamwork. For many of the students I've worked with, their lives wouldn't be complete without sports. During the times when sports were suspended or canceled—many students reported feeling more anxious, depressed, and withdrawn. Students form strong friendships through sports, and their coaches are often some of the folks that leave the greatest lasting impact on their childhood and teen years.

For children and teens who are transgender—life isn't easy. According to the Trevor Project, trans youth reported significantly higher rates of suicidality, victimization, and depression, as compared to their cisgender peers.¹ Growing into who they are, discovering their strengths, spreading their wings—these are all things that every youth should experience throughout their childhood and teenage years. **By barring transgender youth from playing with the sports team of their gender identity, we are saying they don't matter, that discomfort and lack of understanding is worth more than their growth, development, and well-being..**

¹ <https://www.thetrevorproject.org/2019/02/22/research-brief-data-on-transgender-youth/>

House Bill 1298 is a huge injustice to the youth of North Dakota. I pray mercy, grace, and love win this day and that this bill is not adopted by the commission. Thank you for your time and for hearing my testimony.

Sincerely,

Megan Casper

HOUSE HUMAN SERVICES

HB 1298

January 25, 2021

Dear Chairman Weisz and the members of the committee:

Although it is not clearly stated in this bill, there is no denying that HB 1298 is intended to discriminate against young transgendered persons in our community. In 2015, the North Dakota High School Sports Association adopted a policy regarding the inclusion of transgendered athletes and this HB is seeking to undermine that policy.

Developmental psychology has long provided evidence that gender identity is usually irreversible by age 4. This does not, however, take into account the pressure of a child's environment to live up to an expected standard. Thus, many people who do not identify as the gender that they were assigned at birth due to the presence of certain sex organs, are not open about this internal conflict regarding their sense of self and identity. Current research shows that people who do not feel supported to express themselves as they identify are more likely to suffer from depression, substance use, and experience suicidal thoughts and engage in suicidal behavior. According to the American Psychiatric Association Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth, puberty is often a time of intensifying emotional distress for these adolescents, as the physical changes that occur at puberty are at opposition with the adolescent's gender identity. The APA supports the use of medications to suppress the onset of puberty and allow the adolescent more time for cognitive and emotional development, and possibly continuing with the gender affirmation process. If indicated, the adolescent will also engage in mental health services to treat any co-existing mental health concerns. According to the same position statement, the APA asserts that "Trans-affirming treatment, such as the use of puberty suppression, is associated with the relief of emotional distress, and notable gains in psychosocial and emotional development, in trans and gender diverse youth." The APA also has a Position Statement on Discrimination Against Transgender and Gender Diverse Individuals because being transgender or gender diverse implies no impairment in judgment, stability, reliability, or general social or vocational capabilities. Discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender diverse individuals.

According to the Family Acceptance Project, compared with peers from families that reported no or low levels of family rejection, lesbian, gay, bisexual, or transgender (LGBT) young adults who reported high levels of family rejection during adolescence were:

- 8.4 times more likely to report having attempted suicide
- 5.9 times more likely to report high levels of depression

- 3.4 times more likely to use illegal drugs
- 3.4 times more likely to report having engaged in unprotected sexual intercourse.

Conversely, according to the longitudinal study TransYouth Project, transgendered children who are allowed to socially transition report similar symptoms of depression, feelings of self-worth, and slightly higher rates of anxiety as the control population of cis-gender youth. A social transition is a nonmedical decision to allow a child to change his or her first name, pronouns, hairstyle, and clothing to live everyday life as one's asserted gender.

Families will respond to their LGBT children based on their own understanding and beliefs regarding sexual orientation and gender identity. These beliefs are often guided by their community, and this bill sends a message to the parents of our community, that our state does not accept transgendered children. Additionally, if children are not feeling supported in their homes, they could find acceptance and understanding from other aspects of their community, like at school and from their athletic departments. This bill impacts their participation in school sports and risks further alienating these young people.

This bill seeks to undermine existing policy set by the NDHSSA and NCAA, is in direct violation of an Executive Order recently signed by President Biden, and the scientific data refutes the need for any such legislation. For these reasons, we ask you to limit barriers for the youth of North Dakota to engage in their community. We encourage you to vote against HB 1298.

Respectfully signed by psychiatrists of North Dakota,

Stephanie Jallen, MD

Laura Schield, MD

Andrew J. McLean, MD, MPH

Lisa Schock, MD

Ahmad Khan, MD

Lori Esprit, MD

January 25, 2021

Dear Chairman Weisz and Members of the House Human Services Committee:

The ACLU of North Dakota strongly opposes House Bill 1298, legislation that is deeply harmful to transgender young people in North Dakota who deserve to be treated fairly by their government and to live free from discrimination on the same terms as their peers.

We oppose HB 1298 for four main reasons:

1) It's unconstitutional.

A similar bill to HB 1298 passed in Idaho in 2020. It was the first of its kind in the country. As promised during debate of the bill, civil rights organizations quickly challenged the law's constitutionality in the case *Hecox v. Little*. After months of litigation, a federal judge sided with Ms. Hecox, a transgender athlete, and held that the law was unconstitutional.

The ruling was grounded in the Equal Protection Clause of the Fourteenth Amendment — the idea that all similarly situated people be treated alike. The court determined the Idaho law treated transgender young people differently than other young people solely because they were transgender. Specifically, it allowed cisgender athletes to compete on athletic teams consistent with their gender identity but prohibited transgender athletes from doing the same.

If passed, HB 1298 will face the same fate: immediate and expensive litigation paid for by taxpayers, only to be struck down. And this has occurred on previous occasions to laws passed by this body in recent years. But it need not be this way. Instead of continuing down the same risky path, this committee should reconsider its approach, defeat this bill, and focus instead on the many more important issues facing our state.

2) It violates federal law.

Even if HB 1298 is somehow found to be constitutional, it still violates federal law. First, the Department of Education has used its Title IX authority to investigate schools alleged to be illegally discriminating based on sex. Since HB 1298 does just that, an investigation is all but certain if it passes.

Second, a recent executive order directs federal agencies to be on the lookout for the exact discrimination created by HB 1298. It specifically clarifies: “children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” Passing HB 1298 would thus be in direct violation of the order.



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Dane DeKrey
Advocacy Director



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Advocacy Director

This is bad for North Dakota because violation of federal law could cause the state to lose its federal funds for education, which in 2019 was more than \$141 million. And this is not some empty threat. In 2016, the Department of Justice sued North Carolina over a bill similar to HB 1298 and threatened to pull federal funding because of the law's targeting of transgender youth in schools.

The same risk will be present if HB 1298 passes.

3) It will hurt North Dakota collegiate athletics.

The broadness of HB 1298 will also cause issues with the NCAA. This is because the NCAA specifically allows and encourages transgender athletes to participate on teams that align with their gender identity. Thus, if HB 1298 becomes law, it will set up a scenario North Dakotans are all too familiar with — a possible showdown with the NCAA.

The last time this happened, the University of North Dakota founds itself on the losing side of a battle over its mascot and nickname. If history has taught our state anything, it's that picking a fight with the NCAA is an expensive mistake. And so it begs the question of every person on this committee: do you want to do this at the risk of jeopardizing UND hockey or NDSU football? The answer is obviously no.

4) It will hurt North Dakota's economy.

Besides threats of adverse action by the federal government, passing HB 1298 will also trigger negative responses from the business community. Examples of such backlash are present across the country.

In Indiana, a bill that discriminated against LGBTQ people cost the state millions of dollars in lost revenues after businesses boycotted the state. Similarly, in North Carolina a bill that targeted transgender people's ability to use the bathroom of their choosing cost the state over \$3.75 billion from boycotts. Finally, in South Dakota bills like HB 1298 have consistently been rejected out of fear of their effect on the state's financial services industry.

The message from these examples is clear — passing HB 1298 *will* be harmful to North Dakota. First, it may cause companies to stop doing business in the state. But second, and more important, it may cause companies thinking about doing business in the state to reconsider. Given our state's current fragile economy, North Dakotans can afford neither.

For so many reasons, HB 1298 is bad for North Dakota. We urge a do not pass.

Sincerely,

Dane DeKrey
ACLU of North Dakota



My name is James Falcon and I am one of the Co-Directors of Magic City Equality in Minot, North Dakota. We are an educational nonprofit organization that provides information and training related to LGBTQ2S+ (lesbian, gay, bisexual, transgender, queer/questioning, and Two Spirit) issues. We are testifying **in opposition** to HB 1298 relating to students' participation in sports designated exclusively for males or females.

“Exclusive” means the exact opposite of our mission. We believe in equality for all. The population we represent are already excluded from participating in several events throughout their adolescence. Many youths in North Dakota look forward to homecoming dances, proms, and athletic events. Throwing up laws that prevent children from participating is not only exclusionary, it also sends a message to our LGBTQ2S+ youth: “You are not accepted here.” According to research, LGBTQ2S+ students who compete in high school sports report feeling a positive sense of belonging at school. The psychological benefits of sports specifically include improved emotional regulation, decreased hopelessness and suicidality, fewer depressive symptoms, and higher self-esteem. [www.glsen.org]

Students who participate in sports have higher feelings of belonging and school pride. Denying a child the opportunity to participate in the same athletic events as their peers is harmful and teaches children that “different” is wrong. If there are concerns in athletics that stem from feelings of

“unfairness,” don’t punish the students. An eligibility policy is already in place with the North Dakota High School Activities Association (NDHSAA). We have the knowledge and the skills to include all athletes. Let’s come together to work on policies that promote inclusion and a true team spirit. Let’s use some teamwork and change the playbook to accommodate more children – not fewer.

Magic City Equality is one of many state agencies ready to roll up their sleeves and work toward an inclusive rewriting of the guidelines. Your consideration is very much appreciated.

On behalf of Magic City Equality, as well as the LGBTQ2S+ community in Minot, as well as North Dakota, we urge you to oppose HB 1298.

IN FAVOR: HB 1298

Dear House Members of the Human Services Committee,

I urge you to **support HB 1298.**

Males are males. Females are females. Gender specific sports are to even the playing field, which is why they were established in the first place.

I believe gender misidentity is a mental issue.

Also, separate, gender-specific locker rooms are for the safety of our children. I urge you to help us protect our kids.

Thank you very much for your time and consideration.

Tara Dukart
Hazen, ND

As a pediatric and adult endocrinologist (a physician that that deals with the medicine of hormones), I oppose House Bill 1298 which attempts to prevent transgender youth from participating in athletics.

As the only pediatric endocrinologist in the state of North Dakota, I have the unique responsibility and privilege of caring for transgender youth and young adults seeking treatment to alleviate their gender dysphoria. I also care for children and adolescent with other chronic and serious endocrine medical conditions, which increases their risk for depression, anxiety, self-harm and suicide. However, it has only been those trans youth patients who have actually succeeded in suicide attempts.

It is a fact that student participation in sports have positive mental health effects in addition to the obvious effects it has on overall health and wellbeing. Excluding trans youth from participating in school sports will have significant mental health consequences in a group that already has the highest risk for attempted suicide and levels of depression.

Your bill assumes that transgender youth, particular transgender girls will have an unfair advantage over cis-girls. The risk of excluding transgender girls or women in sports will hurt all women. The policy proposed could subject any girl or woman to accusations and invasive tests because of concerns of being “too masculine” or “too good” for their sport to really be a cis-woman or cis-girl. As a pediatric endocrinologist, I have evaluated healthy young girls who come to me because they are too tall and measure well over two standard deviations above the normal for age and ultimately become tall women (often measuring six feet or taller). One could argue that they too could be discriminated against because they exceed the expected body type that could in theory advantage them in female sports.

Dr. Joshua D. Safer who contributed to the policies and standards set by the NCAA states that “a person’s genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance” and “that there is no inherent reason why their physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-gender woman”. In a study published in Science in 2018, Joanna Harper’s research found that a nonelite group of eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.

Since 2011, trans athletes have been able to compete on teams at NCAA member collegiate and universities consistent with their gender identity like all other student-athletes with no disruption to their gender’s collegiate sports. It is also my understanding that since the 2015 North Dakota High School Athletic Association’s policy about transgender students in sports, that no issues have come up about a specific transgender athlete’s unfair advantage.

It is clear that excluding trans youth from sports or other activities is harmful and are more likely to experience detrimental effects to their physical and emotional wellbeing when they are pushed out of affirming places, activities and communities. Transgender youth face discrimination and violence that makes it difficult to even stay in school. A 2015 U.S. Transgender Survey report

found that 22% of trans women who were perceived as trans in school were harassed so badly they had to leave school because of it and another 10% were kicked out.

So, it is my professional opinion that the House Bill 1298 will unjustly discriminate against transgender youth in our state and subject them to further harm and risk of mental health exacerbation and self-harm.

The NCAA and the NDHSAA have already set guidelines that address the concerns of trans youth's participation in sports. These guidelines are backed up by scientific data and by experts in the field of medicine, genetics and psychology.



Luis Casas, MD

Pediatric and Adult Endocrinologist

*Please vote in favor of HB 1298

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting biological males from competing against biological females. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety of women and girls. I ask you to consider the ramifications of allowing males to compete against females. If we do not pass legislation to protect women's sports, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please render a DO PASS out of committee on HG 1298.
Thank you.

I would like to look at one word: Advantage. That word, that singular word, advantage, thrown into discussion on transgender student athletes is a fallacy.

Transgender students are surviving. Transgender students are often undergoing hardships most adults hearing/reading this today could not even fathom. As the parent of and spouse of amazing transgender individuals it is blatantly obvious to me that the world does them no favors! They belong to one of the most targeted demographics in the WORLD!

And now, here in my home state, where North Dakota nice is flouted as a selling point of sorts; my child faces legislation that aims to degrade and demean their right to exist as they are, a trans student with athletic aspirations. North Dakota is better than this. Transgender student athletes exist. Administration in my city has been learning and growing their education on the benefits of inclusion with the Transgender community and it is a wonderful thing to see. Be better than this bill, for my child and all trans kids in ND.

2021 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Pioneer Room, State Capitol

HB 1298
2/9/2021

Relating to participation in athletic events exclusively for males or females.

Chairman Weisz opened the committee hearing at 11:10 a.m.

Representatives	Attendance
Representative Robin Weisz	P
Representative Karen M. Rohr	P
Representative Mike Beltz	P
Representative Chuck Damschen	P
Representative Bill Devlin	P
Representative Gretchen Dobervich	P
Representative Clayton Fegley	P
Representative Dwight Kiefert	P
Representative Todd Porter	P
Representative Matthew Ruby	P
Representative Mary Schneider	P
Representative Kathy Skroch	P
Representative Bill Tveit	P
Representative Greg Westlind	P

Discussion Topics:

- Exclusive sporting events for males
- Title IX
- Female eligibility in a boys sport

Rep. Ben Koppelman (11:16) presented proposed Amendment 21.0140.01008 and Christmas Tree version #6104 & #6116.

Rep. Bill Tveit (11:31) made motion to adopt Amendment 21.0140.01008.

Rep. Kathy Skroch (11:32) second

Voice Vote – Motion Carried

Rep. Todd Porter (11:32) made motion to further amend “in subsection 3 to place a period after males and then overstrike if females are under represented among the school’s athletes and possess the interest and ability to participate.”

Rep. Matthew Ruby (11:33) second.

Voice Vote – Motion Carried

Rep. Bill Tveit (11:34) made motion **Do Pass As Amended**

Rep. Kathy Skroch (11:34) second

Representatives	Vote
Representative Robin Weisz	Y
Representative Karen M. Rohr	Y
Representative Mike Beltz	N
Representative Chuck Damschen	Y
Representative Bill Devlin	A
Representative Gretchen Dobervich	N
Representative Clayton Fegley	N
Representative Dwight Kiefert	Y
Representative Todd Porter	Y
Representative Matthew Ruby	Y
Representative Mary Schneider	N
Representative Kathy Skroch	Y
Representative Bill Tveit	Y
Representative Greg Westlind	N

Motion Carried 8-5-1 Do Pass As Amended

Bill Carrier: Rep. Kathy Skroch

Chairman Weisz adjourned at 11:39 a.m.

Tamara Krause, Committee Clerk

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1298

Page 1, line 9, replace "who was assigned" with "of"

Page 1, line 9 replace "at birth" with "who is under eighteen years of age or who is enrolled in high school"

Page 1, line 13, replace "who was assigned" with "of"

Page 1, line 13, replace "at birth" with "who is under eighteen years or age or who is enrolled in high school"

Page 1, line 16, replace "who was assigned" with "of"

Page 1, line 16, remove "at"

Page 1, line 17, replace "birth" with "who is under eighteen years of age or who is enrolled in high school"

Page 1, line 19, remove the first "the"

Page 1, line 19, replace "assigned at birth is the sex indicated on the" with "means an"

Page 1, line 20, replace "original birth certificate issued at the time of" with "biological sex and is based solely on an individual's reproductive biology and genetics at"

Page 1, after line 20 insert:

"3. This section may not be construed to prohibit a female from participating in a school-sponsored athletic team or event that is exclusively for males if females are underrepresented among the school's athletes and possess the interest and ability to participate."

Renumber accordingly

February 9, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1298

Page 1, line 9, replace "who was assigned" with "of"

Page 1, line 9, replace "at birth" with "who is under eighteen years of age or who is enrolled in high school"

Page 1, line 12, replace "that" with "which"

Page 1, line 13, replace "who was assigned" with "of"

Page 1, line 13, replace "at birth" with "who is under eighteen years of age or who is enrolled in high school"

Page 1, line 16, after "event" insert "exclusively for males or exclusively for females"

Page 1, line 16, replace "who was assigned" with "of"

Page 1, line 16, remove "at"

Page 1, line 17, replace "birth" with "who is under eighteen years of age or who is enrolled in high school"

Page 1, line 17, remove "in an athletic event conducted exclusively for males"

Page 1, line 18, remove "or exclusively for females"

Page 1, line 19, remove the first "the"

Page 1, line 19, replace "assigned at birth is the sex indicated on the" with "means an"

Page 1, line 20, replace "original birth certificate issued at the time of" with "biological sex and is based solely on an individual's reproductive biology and genetics at"

Page 1, after line 20, insert:

"3. This section may not be construed to prohibit a female from participating in a school-sponsored athletic team or event that is exclusively for males."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1298: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1298 was placed on the Sixth order on the calendar.

Page 1, line 9, replace "who was assigned" with "of"

Page 1, line 9, replace "at birth" with "who is under eighteen years of age or who is enrolled in high school"

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Page 1, after line 20, insert:

"3. This section may not be construed to prohibit a female from participating in a school-sponsored athletic team or event that is exclusively for males."

Renumber accordingly

Sixty-seventh
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1298

Introduced by

Representatives B. Koppelman, Meier, Paulson, Schauer, Skroch, Steiner, Vetter

Senators Clemens, Kannianen, Myrdal

1 A BILL for an Act to create and enact a new section to chapter 14-02.4 of the North Dakota
2 Century Code, relating to participation in athletic events exclusively for males or females.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new section to chapter 14-02.4 of the North Dakota Century Code is created
5 and enacted as follows:

6 **Athletic events exclusively for males or exclusively for females.**

- 7 1. The state, a political subdivision of the state, or an entity that receives public funding
8 from the state or from a political subdivision of the state may not:
- 9 a. Allow an individual ~~who was assigned~~of the opposite sex ~~at birth~~who is under
10 eighteen years of age or who is enrolled in high school to participate on an
11 athletic team sponsored or funded by the state, political subdivision, or entity and
12 which is exclusively for females or exclusively for males.
- 13 b. Sponsor an athletic event exclusively for males or exclusively for females that
14 allows participation by an individual ~~who was assigned~~of the opposite sex ~~at birth~~-
15 who is under eighteen years of age or who is enrolled in high school.
- 16 c. Use or permit to be used an athletic facility, stadium, field, structure, or other
17 property owned by or under the control of the state, political subdivision, or entity
18 for an athletic event in which an individual ~~who was assigned~~of the opposite sex
19 ~~at birth~~who is under eighteen years of age or who is enrolled in high school is
20 allowed to participate in an athletic event conducted exclusively for males or
21 exclusively for females.
- 22 2. For purposes of this section, ~~the sex assigned at birth is the sex indicated on-~~
23 ~~them~~means an individual's ~~original birth certificate issued at the time of~~biological sex
24 and is based solely on an individual's reproductive biology and genetics at birth.

1 3. This section may not be construed to prohibit a female from participating in a
2 school-sponsored athletic team or event that is exclusively for males if females are
3 underrepresented among the school's athletes and possess the interest and ability to
4 participate.

21.0140.01008
Title.

Prepared by the Legislative Council staff for
Representative B. Koppelman
January 27, 2021

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1298

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Page 1, line 9 replace "at birth" with "who is under eighteen years of age or who is enrolled in high school"

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Page 1, line 20, replace "original birth certificate issued at the time of" with "biological sex and is based solely on an individual's reproductive biology and genetics at"

Page 1, after line 20 insert:

- "3. This section may not be construed to prohibit a female from participating in a school-sponsored athletic team or event that is exclusively for males if females are underrepresented among the school's athletes and possess the interest and ability to participate."

Renumber accordingly

2021 SENATE JUDICIARY

HB 1298

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1298
3/16/2021

Relating to participation in athletic events exclusively for males or females

Hearing called to order, [2:30] all senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Title IX and definition of sex vs gender
- Competition among biological and gender identified persons
- Values of sportsmanship
- Tourism & Sports Dollars on Economy
- Litigation costs and Idaho Transgender case (john ward)

Representative B Koppelman, [2:29] testified in favor

Representative Louser, [2:46], District 5, Minot, provided Oral testimony in favor

Garrett Owen, [2:52], Senior at Magic City Campus Minot, provided Oral testimony in favor

Representative Skroch, [2:54], provided Oral testimony in favor

Beth Stelzer, [2:58], Save Women's Sports, testified in favor #9010, #9011, #9012, #9013, #9014

Mark Jorritsma [3:04], **Executive Director Family Policy Alliance of ND** testified in favor #9580

Margo Knorr [3:08,] 4 time All American Female athlete testified, in favor #9400, #9431

Natasha Chart [3:11], Executive Director Women's Liberation Front, testified in favor #9591

Barbara Ehardt [3:18], Representative of ID, testified in favor #9439

Linda Thorson State [3:21], Director Concerned Women for America of ND testified in favor #9159, #9158

Christopher Dodson [3:24], Executive Director ND Catholic Conference, testified in favor #9405

Ray Hacke [3:29], Staff Attorney Pacific Justice Institute Center for Public Policy testified in favor #9181 #9182

Brandi Hardy [3:33], Legislative Coordinator ND Human Rights Coalition testified in opposition #9384

Katie C Fitzsimmons [3:37], Director of Student Affairs ND University System testified in opposition #9544

Mary Jo Dunne [3:47], testified in opposition #9650

Nick Archuleta [3:51], President ND United testified in opposition #9566

Charley Johnson President [3:54], CEO Fargo Moorhead CVB testified in opposition #8980

John Ward [4:02], ACLU provided Oral testimony in opposition

Truman L Hamburger, [4:09], VP Director of Development, Student Advocates of ND High School Democrats of America, testified in opposition #9054

Olivia Data [4:12] Century HS Student, Bismarck Chapter of Student Advocates, provided Oral testimony in opposition

Olivia Data [4:12] Century HS Student, Bismarck Chapter of Student Advocates, provided Oral testimony in opposition

Dr Kathy Anderson [4:18] President ND American Academy of Pediatrics NDAAP testified in opposition #9574

Katrina Koesterman, [4:26] President of Tristate Transgender, testified in opposition #9333

Zander Mueller [4:29] LGBT Community Member Secretary of Communication HERO Club testified in opposition #9191

Additional written testimony:

8979,8989,8998,9002,9019,9020,9032,9035,9040,9083,9097,9132,9142,9143,9145,9146,
9147,9161,9172,9175,9176,9177,9179,9183,9185,9186,9193,9202,9208,9211,9224,9226,
9223,9238,9239,9240,9241,9246,9247,9248,9254,9259,9260,9262,9265,9271,9285,9299,
9303,9304,9310,9315,9331,9346,9347,9358,9363,9367,9368,9369,9371,9374,9375,9377,
9395,9396,9402,9408,9409,9411,9417,9418,9421,9423,9429,9430,9432,9434,9436,9446,
9449,9451,9454,9458,9461,9476,9489,9491,9500,9517,9518,9523,9527,9533,9539,9540,
9542,9543,9546,9549,9553,9554,9555,9556,9557,9564,9567,9568,9569,9576,9577,9578,
9579,9581,9583,9584,9585,9586,9590,9593,9594,9598,9600

Chair D. Larson adjourned the Hearing [4:35]

Jamal Omar, Committee Clerk

EXPERT DECLARATION OF GREGORY A. BROWN, Ph.D.

I, Dr. Gregory A. Brown, declare as follows:

Qualifications

1. I serve as Professor of Exercise Science in the Department of Kinesiology and Sport Sciences at the University of Nebraska Kearney. I have served as a tenured (and nontenured) professor at universities for over a decade.
2. I teach classes in Exercise Physiology.
3. In August 2002, I received a Doctor of Philosophy degree from Iowa State University, where I majored in Health and Human Performance, with an emphasis in the Biological Bases of Physical Activity. In May 1999, I received a Master of Science degree from Iowa State University, where I majored in Exercise and Sport Science, with an emphasis in Exercise Physiology.
4. I have received many awards over the years, including the Mortar Board Faculty Excellence Honors Award, College of Education Outstanding Scholarship / Research Award, and the College of Education Award for Faculty Mentoring of Undergraduate Student Research.
5. I have authored more than 40 refereed publications and more than 50 refereed presentations in the field of Exercise Science. I have authored chapters for multiple books in the field of Exercise Science. And I have served as a peer reviewer for over 25 professional journals, including The American Journal of Physiology, the International Journal of Exercise Science, and The Journal of Applied Physiology.
6. My areas of research have included the endocrine response to testosterone prohormone supplements in men and women, the effects of testosterone prohormone supplements on health and the adaptations to strength training in men, the effects of energy drinks on the physiological response to exercise, and assessment of various athletic training modes in males and females. Articles that I have published that are closely related to topics that I discuss in this declaration, and to articles by other researchers that I cite and discuss in this declaration, include:
 - a. Studies of the effect of ingestion of a testosterone precursor on circulating testosterone levels in young men. Douglas S.

King, Rick L. Sharp, Matthew D. Vukovich, Gregory A. Brown, et al., *Effect of Oral Androstenedione on Serum Testosterone and Adaptations to Resistance Training in Young Men: A Randomized Controlled Trial*, JAMA 281: 2020-2028 (1999); G. A. Brown, M. A. Vukovich, et al., *Effects of Anabolic Precursors on Serum Testosterone Concentrations and Adaptations to Resistance Training in Young Men*, INT J SPORT NUTR EXERC METAB 10: 340-359 (2000).

- b. A study of the effect of ingestion of that same testosterone precursor on circulating testosterone levels in young women. G. A. Brown, J. C. Dewey, et al., *Changes in Serum Testosterone and Estradiol Concentrations Following Acute Androstenedione Ingestion in Young Women*, HORM METAB RES 36: 62-66 (2004.)
- c. A study finding (among other things) that body height, body mass, vertical jump height, maximal oxygen consumption, and leg press maximal strength were higher in a group of physically active men than comparably active women, while the women had higher percent body fat. G. A. Brown, Michael W. Ray, et al., *Oxygen Consumption, Heart Rate, and Blood Lactate Responses to an Acute Bout of Plyometric Depth Jumps in College-Aged Men And Women*, J. STRENGTH COND RES 24: 2475-2482 (2010).
- d. A study finding (among other things) that height, body mass, and maximal oxygen consumption were higher in a group of male NCAA Division 2 distance runners, while women NCAA Division 2 distance runners had higher percent body fat. Furthermore, these male athletes had a faster mean competitive running speed (~3.44 min/km) than women (~3.88 km/min), even though the men ran 10 km while the women ran 6 km. Katherine Semin, Alvah C. Stahlnecker, Kate A. Heelan, G. A. Brown, et al, *Discrepancy Between Training, Competition and Laboratory Measures of Maximum Heart Rate in NCAA Division 2 Distance Runners*, JOURNAL OF SPORTS SCIENCE AND MEDICINE 7: 455-460 (2008).

7. I attach a copy of my current Professional Vita, which lists my education, appointments, publications, research, and other professional experience.

8. I have been asked to offer my opinions about whether males have inherent advantages in athletic performance over females, and if so the scale and physiological basis of those advantages, to the extent currently understood by science. I have also been asked to offer my opinion as to whether the sex-based performance advantage enjoyed by males is eliminated if feminizing hormones are administered to male athletes who identify as transgender.

9. The opinions in this declaration are my own, and do not necessarily reflect the opinions of my employer, the University of Nebraska.

10. I have not been compensated for my time spent in preparing this declaration.

Overview

11. Based on my professional familiarity with exercise physiology and my review of the currently available science, including that contained in the sources I cite in this declaration, it is my professional opinion that:

a. At the level of elite competition, men, or adolescent boys, have an advantage over women, or adolescent girls, in almost all athletic contests;

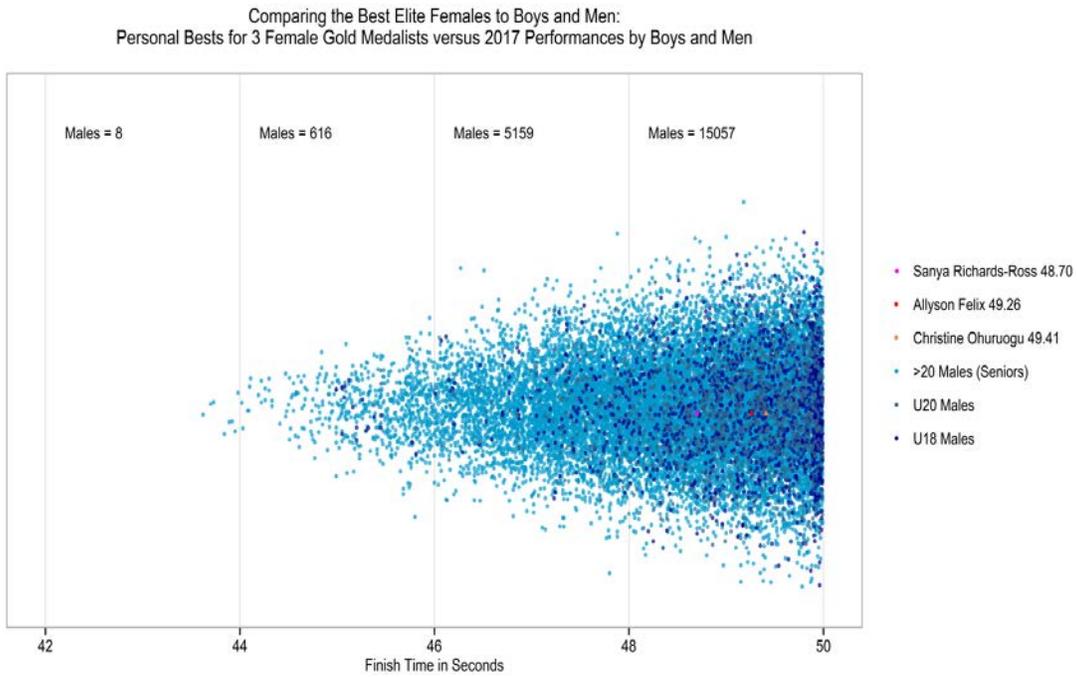
b. Biological male physiology is the basis for the performance advantage that men, or adolescent boys, have over women, or adolescent girls, in almost all athletic contests; and

c. Administration of androgen inhibitors and cross-sex hormones to men, or adolescent boys, after male puberty, and administration of testosterone to women or adolescent girls, after female puberty, does not eliminate the performance advantage of men or adolescent boys over women or adolescent girls in almost all athletic contests.

12. In short summary, men, and adolescent boys, perform better in almost all sports than women, and adolescent girls, because of their inherent physiological advantages that develop during male puberty. In general, men, and adolescent boys, can run faster, output more physical power, jump higher, and exercise greater physical endurance than women, and adolescent girls.

13. Indeed, while after the onset of puberty males are on average taller and heavier than females, a male performance advantage over females has been measured in weightlifting competitions even between males and females matched for body mass.

14. These performance advantages are also very substantial, such that large numbers of men and even adolescent boys are able to outperform the very top-performing women. To illustrate, Doriane Coleman, Jeff Wald, Wickliffe Shreve, and Richard Clark created the figure below (last accessed on Monday, December 23, 2019 at <https://bit.ly/35yOyS4>), which shows that the *lifetime best performances* of three female Olympic champions in the 400m event—including Team USA’s Sanya Richards-Ross and Allyson Felix—would not match the performances of literally thousands of boys and men, *just in 2017 alone*, including many who would not be considered top tier male performers:



15. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which “compares the number of boys—males under the age of 18—whose results in each event in 2017 would rank them above the single very best elite [adult] woman that year:”

TABLE 1 – World’s Best Woman v. Under 18 Boys			
Event	Best Women’s Result	Best Boys’ Result	# of Boys Outperforming
100 Meters	10.71	10.15	124 ⁺
200 Meters	21.77	20.51	182
400 Meters	49.46	45.38	285
800 Meters	1:55.16*	1:46.3	201+
1500 Meters	3:56.14	3:37.43	101+
3000 Meters	8:23.14	7:38.90	30
5000 Meters	14:18.37	12:55.58	15
High Jump	2.06 meters	2.25 meters	28
Pole Vault	4.91 meters	5.31 meters	10
Long Jump	7.13 meters	7.88 meters	74
Triple Jump	14.96 meters	17.30 meters	47

16. Coleman and Shreve also created the table below (last accessed on Monday, December 23, 2019 at <https://bit.ly/37E1s2X>), which compares the number of men—males over 18—whose results in each event in 2017 would have ranked them above the very best elite woman that year.

TABLE 2 – World’s Best Woman v. Number of Men Outperforming			
Event	Best Women’s Result	Best Men’s Result	# of Men Outperforming
100 Meters	10.71	9.69	2,474
200 Meters	21.77	19.77	2,920
400 Meters	49.46	43.62	4,341
800 Meters	1:55.16*	1:43.10	3,992+
1500 Meters	3:56.14	3:28.80	3,216+
3000 Meters	8:23.14	7:28.73	1307+
5000 Meters	14:18.37	12:55.23	1,243
High Jump	2.06 meters	2.40 meters	777
Pole Vault	4.91 meters	6.00 meters	684
Long Jump	7.13 meters	8.65 meters	1,652
Triple Jump	14.96 meters	18.11 meters	969

17. These advantages result, in large part, from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty. Higher testosterone levels cause men, and adolescent boys, to develop more muscle mass, greater muscle strength, less body fat, higher bone mineral density, greater bone

strength, higher hemoglobin concentrations, larger hearts and larger coronary blood vessels, and larger overall statures than women, and adolescent girls. In addition, maximal oxygen consumption (VO₂max), which correlates to ~30-40% of success in endurance sports, is higher in both elite and average men and boys than in comparable women and girls when measured in regards to absolute volume of oxygen consumed and when measured relative to body mass. Testosterone is also associated with increased aggressiveness, which may offers competitive advantages for men over women.

18. Although androgen deprivation may modestly decrease some physiological advantages that men and adolescent boys have over women and adolescent girls, it cannot fully eliminate those physiological advantages once an individual has passed through male puberty. For example, androgen deprivation does not reduce bone size, does not alter bone structure, and does not decrease lung volume or heart size. Nor does androgen deprivation in adult men completely reverse the increased muscle mass acquired during male puberty.

19. In this declaration, I present, in the headings marked with Roman numerals, certain of my opinions about sex-based differences in human physiology and the impact of those differences on the athletic performance of men and women. For each of these opinions, I then provide a brief overview, and a non-exhaustive summary of studies published in science journals or other respected sources that support and provide in part the basis of my opinion, also quoting relevant findings of each article.

20. In particular, I cite nine articles published in scientific journals. I provide capsule summaries of those nine articles below.

a. The first resource I cite is David J. Handelsman, Angelica L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018). This article correlates data about performance differences between males and females with data from over 15 liquid chromatography-mass spectrometry studies of circulating testosterone in adults, as a function of age. The authors conclude, among other things, that “[f]rom male puberty onward, the sex difference in athletic performance emerges as circulating concentrations rise as the testes produce 30 times more testosterone than before puberty, resulting in men having 15- to 20-fold greater circulating testosterone than children or women at any age.” (804)

b. The second resource I cite is Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010). This

article analyzes results from 82 athletic events since the beginning of the modern Olympic era, and concludes in part that while a wide sex-based performance gap existed before 1983, due to a likely combination of physiological and non-physiological reasons, the sex-based performance gap stabilized in 1983, at a mean difference of $10.0\% \pm 2.94$ between men and women for all events. (214)

c. The third resource I cite is Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013). This article analyzes results from a study of the relationship between performance and age in races of several lengths, and reports in part that “[i]n all races [studied], women were significantly slower than men.” (7)

d. The fourth resource I cite is Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013). This article analyzes results from various triathlon events over the course of about 15 years, and reports in part a sex-based performance gap between the sexes of no less than 10% in every component event, with this sex-based performance gap increasing with age.

e. The fifth resource I cite is Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex, and Sport Discipline*, 10:6 PLOS ONE 1 (2015). This article analyzes the 100 all-time best Norwegian male and female track and field results (in persons aged 11 to 18) from the 60m and 800m races, and the long jump and high jump events. The results show that sex-specific differences that arise during puberty significantly affect event results, with males regularly outperforming females after age 12.

f. The sixth resource I cite is David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017). This article analyzes results from a secondary quantitative analysis of four published sources that report performance measures in swimming meets, track and field events, and hand-grip strength. The results show in part that the onset and tempo of sex-based performance divergence were very similar for all performance measures, and that this divergence closely paralleled the rise of circulating testosterone in adolescent boys.

g. The seventh resource I cite is Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 ASIAN J. OF ANDROLOGY 653 (2011). This article highlights specific

research that indicates pubertal testosterone increases result in significant physiological advantages for men and adolescent boys, compared to women and girls, after the onset of male puberty.

h. The eighth resource I cite is Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 J. MED ETHICS 395 (2019). This article confirms from available science that higher testosterone levels provide an all-purpose benefit in sport, and that the current International Olympic Guidelines rule requiring males who identify as transgender to keep testosterone levels under 10 nmol/L for 1 year does not eliminate (or even come close to eliminating) the performance advantage of their male physiology.

i. The ninth resource I cite is Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004). This article analyzes results from a study that compared pretreatment physiological measurements in 17 female-to-male transsexuals with the measurements after one year of cross-sexual treatment in 19 male-to-female transsexuals undergoing sex reassignment therapy. The results in part confirmed that androgen deprivation in male-to-female transsexuals increases the overlap in muscle mass with women but does not reverse certain effects of androgenization that had occurred during male puberty.

21. I explain my opinions and the results of these studies in more detail below.

Opinions

I. Biological men, or adolescent boys, have an advantage over women, or adolescent girls, in almost all athletic contests.

22. As one team of researchers has recently written, “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger, muscles and bones as well as a higher circulating hemoglobin level.” David J. Handelsman, Angelic L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018).

23. In fact, biological men, and adolescent boys, substantially outperform comparably aged women, and adolescent girls, in competitions involving running

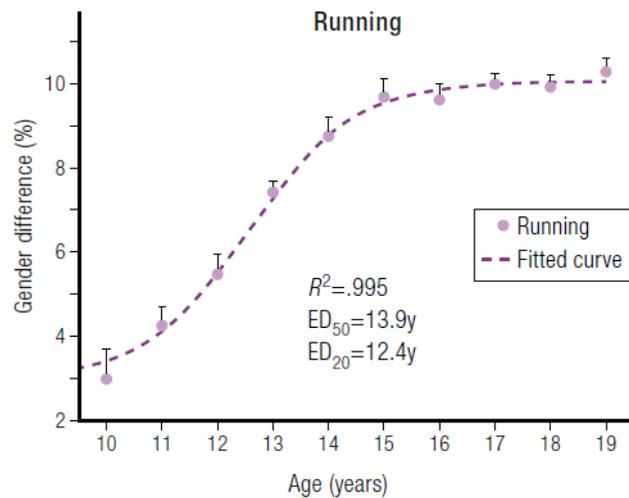
speed, swimming speed, cycling speed, jumping height, jumping distance, and strength (to name a few, but not all, of the performance differences). These performance advantages for men, and adolescent boys, are inherent to the biological differences between the sexes and are not due to social or cultural factors, as evidenced by minimal to no change in the percentage differences between males and females in world class and record setting performances in the past 40 years.

24. I highlight below key findings about male performance advantages from seven studies or datasets.

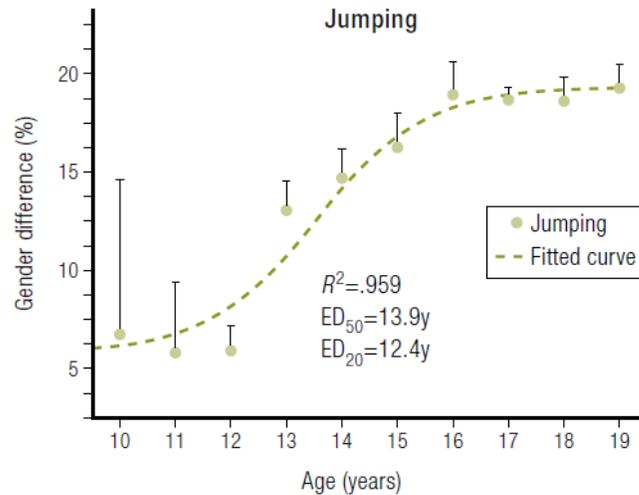
A. David J. Handelsman, Angelica L. Hirschberg, et al., *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39:5 ENDOCRINE REVIEWS 803 (2018):

25. The Handelsman et al. (2018) authors demonstrate a consistent pattern of divergence of athletic performance, in favor of males, across the years of puberty and strongly correlating to increasing testosterone levels in adolescent males. The pattern is observed in events exercising a variety of muscle systems. In sum, the Handelsman et al. (2018) authors report: “Corresponding to the endogenous circulating testosterone increasing in males after puberty to 15 to 20 nmol/L (sharply diverging from the circulating levels that remain <2 nmol/L in females), male athletic performances go from being equal on average to those of age-matched females to 10% to 20% better in running and swimming events, and 20% better in jumping events.” (812)

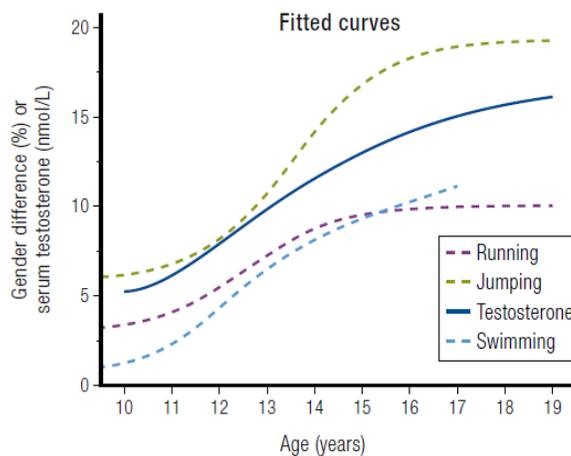
26. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) in running events, including 50m to 2 miles.” (813)



27. Taken from Handelsman’s Figure 1, the chart below indicates “sex differences in performance (in percentage) according to age (in years) ... in jumping events, including high jump, pole vault, triple jump, long jump, and standing jump.” (813)



28. Taken from Handelsman’s Figure 1, the chart below indicates “a fitted sigmoidal curve plot of sex differences in performance (in percentage) according to age (in years) in running, jumping, and swimming events, as well as the rising serum testosterone concentrations from a large dataset of serum testosterone of males. Note that in the same dataset, female serum testosterone concentrations did not change over those ages, remaining the same as in prepubertal boys and girls. Data are shown as mean and SEM of the pooled sex differences by age.” (813)



29. These authors also note the significance, for athletic competition, of the subjective nature of “gender identity” in current understanding: “Prompted by biological, personal, and societal factors, volitional expression of gender can take on virtually any form limited only by the imagination, with some individuals asserting they have not just a single natal gender but two genders, none, a distinct third gender, or gender that varies (fluidly) from time to time....” For this reason, the authors conclude: “[I]f gender identity were the basis for eligibility for female sports, an athlete could conceivably be eligible to compete at the same Olympics in both female and male events. These features render the unassailable personal assertion of gender identity incapable of forming a fair, consistent sex classification in elite sports.” (804)

B. Valérie Thibault, Marion Guillaume, et al., *Women & Men in Sport Performance: The Gender Gap has not Evolved Since 1983*, 9 J. OF SPORTS SCIENCE & MEDICINE 214 (2010):

30. The Thibault et al. authors note that there was a large but narrowing sex-based performance gap between men’s and women’s Olympic athletic performances before 1983, which could hypothetically be attributed to a combination of social, political, or other non-physiological reasons, in addition to physiological reasons. However, “the gender gap in Olympic sport performance has been stable since 1983” (219) “at a mean difference of $10.0\% \pm 2.94$ between men and women for all [Olympic] events.” (222)

31. Since then, even when performances improve, the “progressions are proportional for each gender.” (219-20)

32. The results of this study “suggest that women’s performances at the high level will never match those of men” (219) and that “women will not run, jump, swim or ride as fast as men.” (222) The authors conclude that this gap, now stable for 30+ years, is likely attributable to physiology, and thus that “[s]ex is a major factor influencing best performances and world records.” (222)

33. Breaking these performance advantages out by event, the authors report the following sex-based performance gaps in Olympic sport competitions since 1983:

a. “The gender gap ranges from 5.5% (800-m freestyle, swimming) to 36.8% (weightlifting).” (222)

b. Olympic world records in running events indicate that men perform “10.7% (± 1.85)” better than women since gender gap stabilization. (217)

c. Olympic world records in jumping events indicate that men perform “17.5% (\pm 1.11)” better than women since gender gap stabilization. (217)

d. Olympic world records in swimming events indicate that men perform “8.9 % (\pm 1.54)” better than women since gender gap stabilization. (218)

e. Olympic world records in cycling sprint events indicate that men perform “6.95% (\pm 0.16)” better than women since gender gap stabilization. (219)

f. Olympic world records in weightlifting events indicate that men perform “36.8% (\pm 6.2)” better than women since gender gap stabilization. Note that the Olympics first introduced women’s weightlifting events in 1998, and “no breakpoint date has been detected yet.” (219)

34. “The top ten performers’ analysis reveals a similar gender gap trend with a stabilization in 1982 at 11.7%” when averaged across all events. (222)

C. Beat Knechtle, Pantelis T. Nikolaidis, et al., *World Single Age Records in Running from 5 km to Marathon*, 9 FRONTIERS IN PSYCHOLOGY 1 (2013):

35. A comparison of performances in races of a variety of distances showed that “[i]n all races, women were significantly slower than men. The estimated sex differences ... were increasing” as race distances increased from 8km.¹

D. Romuald Lepers, Beat Knechtle, et al., *Trends in Triathlon Performance: Effects of Sex & Age*, 43 SPORTS MED 851 (2013):

36. Based on data from a variety of elite triathlon and ultra-triathlon events spanning 22 years, the Lepers et al. authors reported that “elite males appear to run approximately 10–12 % faster than elite females across all endurance running race distances up to marathon, with the sex difference narrowing as the race distance increases. However, at distances greater than 100 km, such as the 161-km ultramarathon, the difference seems even larger, with females 20–30 % slower than males.” (853)

¹ Throughout this Declaration, in the interest of readability I have omitted internal citations from my quotations from the articles I cite. The sources cited by these authors may of course be found by reference to those articles.

37. Lepers and Knechtle Table 1 below shows the “[m]ean sex differences in time performance for swimming, cycling, running and total time at different national and international triathlons.” (854)

Event	Sex difference in time performance (%)			
	Swim	Cycle	Run	Total
Short distance (1.5–40–10 km): [30, 79]				
Zurich (Switzerland) from 2000 to 2010				
Top five elite overall	15.2	13.4	17.1	14.8
Top five AG, from 18 to 54 years	18.5	15.5	18.5	17.1
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	13.3	10.7	7.5	12.0
Half Ironman (1.9–90–21 km): [31, 79]				
Rapperswil (Switzerland) from 2007 to 2010				
Top five elite overall	14.1	12.3	12.5	12.6
Top five AG, from 18 to 54 years	22.3	16.4	19.2	17.6
World Championship from 2009 to 2011				
Top ten AG, from 18 to 64 years	12.4	11.2	14.5	12.6
Off-road triathlon (1.5–30–10 km): [9]				
World championship (Maui, USA) from 2007 to 2009				
Top ten elite overall	12.4	19.6	18.4	18.2
Ironman (3.8–180–42 km): [2, 32, 34]				
World championship (Kona, Hawaii, USA) from 1988 to 2007				
Top ten elite overall	9.8	12.7	13.3	12.6
Top ten AG, from 18 to 64 years	12.1	15.4	18.2	15.8
Zurich (Switzerland) from 1995 to 2010				
Top ten elite overall	14.0	13.2	18.2	14.9

38. “[F]or ultratriathlons, it has been shown that with increasing length of the event, the best females became relatively slower compared with the best males. Indeed, if the world’s best performances are considered, males were 19 % faster than the females in both Double and Triple Ironman distance, and 30 % faster in the Deca-Ironman distance.” (854)

39. “The average sex difference in swimming performance during triathlon for race distances between 1.5 and 3.8 km ranged between approximately 10 and 15 % for elite triathletes.” (854)

40. Lepers and Knechtle Table 2 below shows the “[m]ean percentage differences in times for swimming, cycling, running and total event between the top ten females and males ... in 2012 at four international triathlons:” (855)

Event	Sex difference in performance in top ten athletes in 2012 (mean ± SD)			
	Swim	Cycle	Run	Total
Hawaii Ironman Triathlon (3.8–180–42 km)	14.1 ± 7.9	13.1 ± 2.3	7.3 ± 2.9	11.3 ± 0.5
Olympics Triathlon (1.5–40–10 km) with drafting	11.8 ± 2.0	11.3 ± 0.6	14.7 ± 0.8	14.1 ± 7.9
Hy-Vee Triathlon (1.5–40–10 km) without drafting	8.6 ± 4.8	10.2 ± 3.5	8.6 ± 4.4	9.3 ± 0.5
World Championship Off-Road Triathlon (1.5–30–10 km)	15.2 ± 15.5	22.6 ± 4.4	15.1 ± 6.7	17.3 ± 2.9

41. “[T]he sex difference in performance between the best male and female ultraswimmers is more generally close to 11–12 %, which corresponds to values observed for swimming in triathlon.” (855)

42. “Sex differences in triathlon cycling vary from 12 to 16% according to the level of expertise of participating triathletes for road-based triathlons.” (855)

43. “In track cycling, where females are generally weaker than males in terms of power/weight ratios, the performance gap between males and females appears to be constant (<11 %) and independent of the race distance from 200 to 1,000 m.” (855)

44. “In ultra-cycling events, such as the ‘Race Across America,’ sex difference in performance was around 15 % among top competitors. Greater muscle mass and aerobic capacity in males, even expressed relative to the lean body mass, may represent an advantage during long-distance cycling, especially on a relatively flat course such as Ironman cycling, where cycling approximates to a non-weight-bearing sport. Indeed, it has been shown that absolute power output (which is greater for males than for females) is associated with successful cycling endurance performance because the primary force inhibiting forward motion on a flat course is air resistance.” (855-56)

45. “Interestingly, for elite triathletes, the sex difference in mountain bike cycling during off-road triathlon (<20 %) is greater than cycling sex differences in conventional road-based events. Mountain biking differs in many ways from road cycling. Factors other than aerobic power and capacity, such as off-road cycling economy, anaerobic power and capacity, and technical ability might influence off-road cycling performance. Bouts of high-intensity exercise frequently encountered

during the mountain biking leg of off-road triathlon (lasting <1 h 30 min for elite males and <2 h for elite females) can result from (1) having to overcome the constraints of gravity associated with steep climbs, (2) variable terrain necessitating wider tires and thus greater rolling resistance, and (3) isometric muscle contractions associated with the needs of more skilled bike-handling skills, not so often encountered in road cycling. However, in particular, lower power-to-weight ratios for female than for male triathletes inevitably leave them at a disadvantage during steep climbs.” (856)

46. “During the 1988–2007 period, the top ten elite males have run the Hawaii Ironman marathon on average 13.3 % faster than the top ten females.” (856)

E. Espen Tønnessen, Ida Siobhan Svendsen, et al., *Performance Development in Adolescent Track & Field Athletes According to Age, Sex & Sport Discipline*, 10:6 PLOS ONE 1 (2015):

47. While both sexes increase performance across the teen years, the Tønnessen et al. authors found performance advantages for male athletes associated with the onset of puberty and becoming increasingly larger across the years of puberty, in a chronological progression that was closely similar across diverse track and field events.

48. “The current results indicate that the sex difference evolves from < 5% to 10–18% in all the analyzed disciplines from age 11 to 18 yr. The gap widens considerably during early adolescence before gradually stabilizing when approaching the age of 18. This evolution is practically identical for the running and jumping disciplines. The observed sex differences at the age of 18 are in line with previous studies of world-class athletes where a sex difference of 10–12% for running events and ~19% for jumping events has been reported.” (8)

49. “Male and female athletes perform almost equally in running and jumping events up to the age of 12. Beyond this age, males outperform females. Relative annual performance development in females gradually decreases throughout the analyzed age period. In males, annual relative performance development accelerates up to the age of 13 (for running events) or 14 (for jumping events) and then gradually declines when approaching 18 years of age. The relative improvement from age 11 to 18 was twice as high in jumping events compared to running events. For all of the analyzed disciplines, overall improvement rates were >50% higher for males than for females. The performance sex difference evolves from < 5% to 10-18% in all the analyzed disciplines from age 11 to 18 yr.” (1)

50. “Recent studies of world-class athletes indicate that the sex difference is 10–12% for running events and ~19% for jumping events.” (2)

51. Tønnessen and Svendsen’s Table 1 below shows the “[e]xpected progressions in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 4)

Table 1. Expected progressions in running and jumping performance for 11–18 yr old males and females.

Age (yr)	60 m		800 m		Long Jump		High Jump	
	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression (s and %)	Girls Progression (s and %)	Boys Progression m (%)	Girls Progression m (%)	Boys Progression m (%)	Girls Progression m (%)
11–12	-0.35 (4.1)	-0.35 (4.0)	-6.4 (4.4)	-7.3 (4.8)	+0.35 (7.4)	+0.36 (7.9)	+0.11 (7.4)	+0.10 (7.2)
12–13	-0.48 (5.8)	-0.25 (2.9)	-8.7 (6.2)	-5.5 (3.8)	+0.43 (8.6)	+0.30 (6.0)	+0.12 (7.9)	+0.09 (6.3)
13–14	-0.29 (3.7)	-0.16 (2.0)	-5.9 (4.5)	-3.6 (2.6)	+0.50 (9.0)	+0.21 (4.1)	+0.13 (8.1)	+0.06 (3.6)
14–15	-0.10 (1.3)	-0.02 (0.2)	-5.2 (4.1)	-2.2 (1.6)	+0.34 (5.6)	+0.13 (2.4)	+0.08 (4.3)	+0.04 (2.4)
15–16	-0.17 (2.3)	-0.08 (1.0)	-3.2 (2.7)	-1.6 (1.2)	+0.28 (4.4)	+0.10 (1.8)	+0.07 (3.6)	+0.03 (1.8)
16–17	-0.10 (1.4)	-0.07 (0.8)	-2.3 (1.9)	-1.5 (1.2)	+0.19 (2.9)	+0.06 (1.1)	+0.05 (2.5)	+0.01 (0.6)
17–18	-0.05 (0.7)	-0.02 (0.2)	-1.5 (1.4)	-0.6 (0.4)	+0.17 (2.5)	+0.02 (0.4)	+0.04 (1.9)	+0.01 (0.5)

Data are mean (standard deviation) for top 100 Norwegian male and female performers in each discipline.

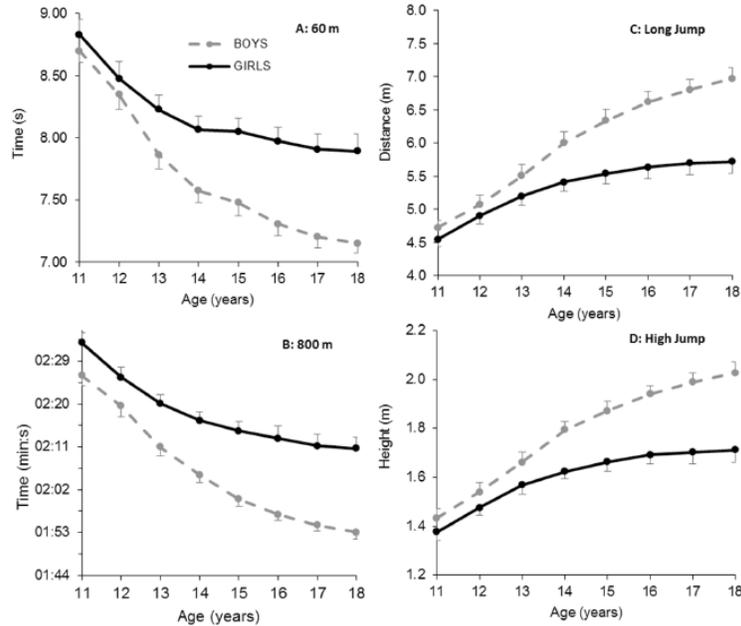
52. Tønnessen and Svendsen’s Table 2 below shows the “[s]ex ratio in running and jumping performance for 11-18 [year] old males and females,” as deduced from “[t]he 100 all-time best Norwegian male and female 60-m, 800-m, long jump and high jump athletes in each age category” (1, 6)

Table 2. Sex ratio in running and jumping performance for 11–18 yr old males and females.

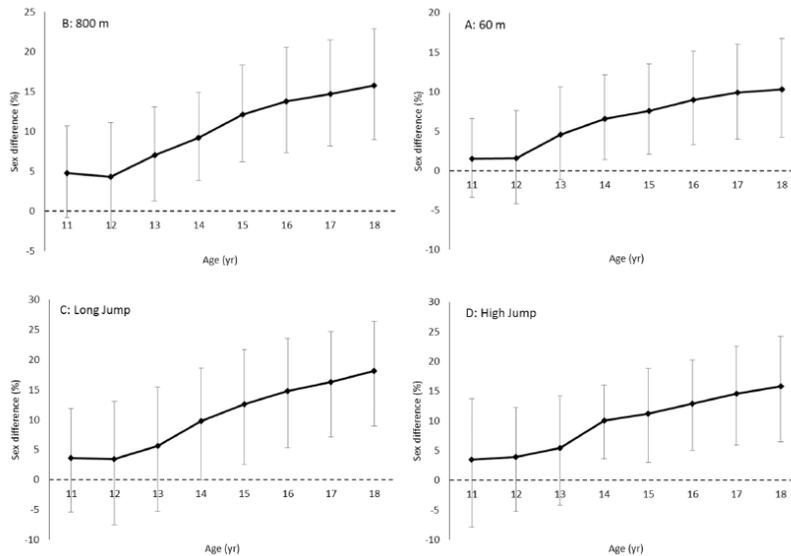
	60 m	800 m	Long Jump	High Jump
11	0.99	0.95	0.96	0.97
12	0.98	0.96	0.97	0.96
13	0.96	0.93	0.94	0.95
14	0.94	0.92	0.90	0.90
15	0.93	0.89	0.87	0.89
16	0.92	0.88	0.85	0.87
17	0.91	0.87	0.84	0.85
18	0.91	0.86	0.82	0.84

Data are calculated from mean results of top 100 Norwegian male and female performers in each discipline.

53. Tønnessen and Svendsen's Figure 1 below shows "[p]erformance development from age 11 to 18 in running and jumping disciplines. Data are mean \pm [standard deviation] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in each discipline:" (4)



54. Tønnessen and Svendsen's Figure 3 below shows the "[s]ex difference for performance in running and jumping disciplines from age 11 to 18. Data are mean and 95% [confidence intervals] for 60 m, 600 m, long jump, and high jump for top 100 Norwegian male and female performers in each discipline:" (6)



55. As for the 60m race, the tables and charts above illustrate:

a. “[B]oys improve 0.3–0.5 [seconds] over 60 m sprint each year up to the age of 14 [years] (very large to nearly perfect annual effect), 0.1–0.2 [seconds] annually from 14 to 17 [years] (moderate to large annual effect), and 0.05 [seconds] from age 17 to 18 [years] (moderate effect). Relative annual improvement peaks between 12 and 13 [years] (5.8%; nearly perfect effect), and then gradually declines to 0.7% between age 17 and 18 [years] (moderate effect).” (3)

b. “On average, boys improve their 60 m performance by 18% from age 11 to 18 [years]. Girls improve 0.35 [seconds] over 60 m from age 11 to 12 [years] (4%; very large effect). Then, absolute and relative annual improvement gradually slows and almost plateaus between age 14 and 15 (0.02 s; 0.2%; trivial effect). From age 15 to 17, annual improvement increases somewhat to 0.07–0.08 [seconds] (~1%; moderate effect) before plateauing again between age 17 and 18 (0.02 s; 0.2%; trivial effect). In total, girls improve their 60-m performance by 11% from age 11 to 18 [years].... [T]he sex difference for 60 m sprint evolves from 1.5% at age 11 to 10.3% at the age of 18.... [T]he sex ratio for 60 m running performance develops from 0.99 at age 11 to 0.91 at age 18.” (4-5)

56. As for the 800m race, the tables and charts above illustrate:

a. “[B]oys improve 6–9 [seconds] over 800 m each year up to age 14 [years] (very large to nearly perfect annual effect). Relative annual improvement peaks between age 12 and 13 (6.2%; nearly perfect effect), then gradually decreases to 1.5 [seconds] between age 17 and 18 (1.4%; moderate effect).” (5)

b. “On average, boys enhance their 800-m performance by 23% from age 11 to 18. For girls, both absolute and relative annual performance development gradually decreases across the analysed age stages. The improvement is slightly above 7 [seconds] between age 11 and 12 [years] (4.8%; very large effect), decreasing to only 0.6 [seconds] from age 17 to 18 (0.4%; small effect).... [G]irls enhance their 800-m performance by 15% from age 11 to 18. The 800 m performance sex difference evolves from 4.8% at the age of 11 to 15.7% at the age of 18.... [T]he sex ratio for 800 m running performance develops from 0.95 at age 11 to 0.86 at age 18.” (5)

57. As for the long jump, the tables and charts above illustrate:

a. “[A]nnual long jump improvement among boys gradually increases from 35 cm between age 11 and 12 [years] (7.4%; very large effect) to 50 cm between age 13 and 14 (9%; very large effect). Both absolute and relative annual development then gradually falls to 17 cm between age 17 and 18 (2.5%; moderate effect).” (5)

b. “[B]oys, on average, improve their long jump performance by 48% from age 11 to 18 yr. For girls, both absolute and relative annual performance enhancement gradually falls from age 11 to 12 [years] (36 cm; 7.9%; very large effect) until nearly plateauing between 17 and 18 [years] (2 cm; 0.4%; trivial effect). Overall, girls typically improve their long jump performance by 26% throughout the analysed age stages. The sex difference in long jump evolves from 3.6% at the age of 11 to 18% at the age of 18.... [T]he sex ratio for long jump performance develops from 0.96 at age 11 to 0.82 at age 18.” (5)

58. As for the high jump, the tables and charts above illustrate:

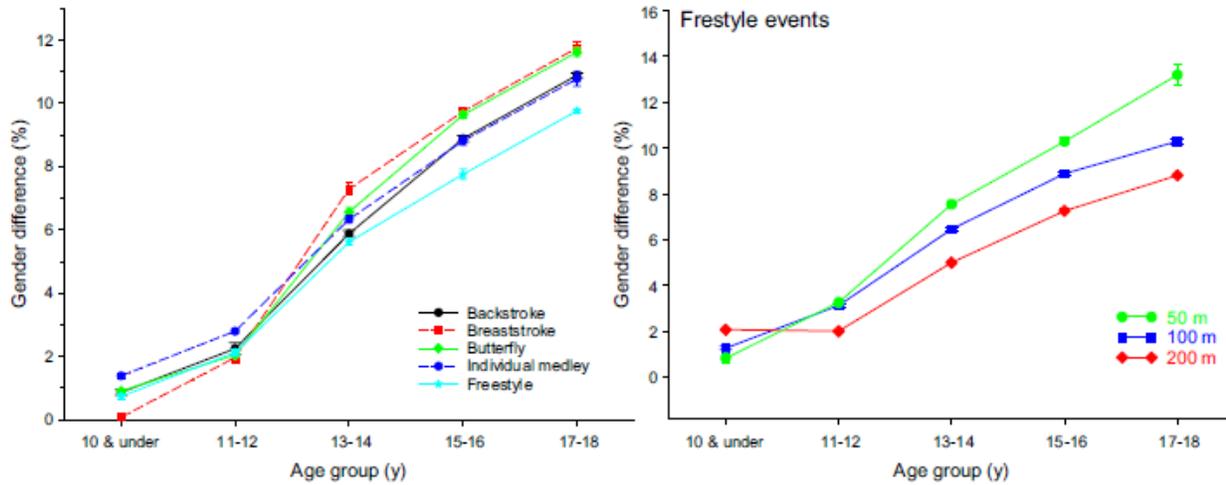
a. “[B]oys improve their high jump performance by 11–13 cm each year up to the age of 14 (7–8%; very large annual effects). Both absolute and relative annual improvement peaks between age 13 and 14 (13 cm; 8.1%; very large effect), then gradually decreases to 4 cm from age 17 to 18 (1.9%; moderate annual effect).” (6)

b. “Overall, boys improve their high jump performance by, on average, 41% from age 11 to 18. For girls, both absolute and relative annual improvement decreases from 10 cm from age 11 to 12 [years] (7.2%; very large effect) until it plateaus from age 16 (1 cm; ~0.5%; small annual effects). Overall, girls typically improve their high jump performance by 24% from age 11 to 18. The sex difference in high jump performance evolves from 3.5% at the age of 11 to 16% at the age of 18.... [T]he sex ratio for high jump performance develops from 0.97 at age 11 to 0.84 at age 18.” (6-7)

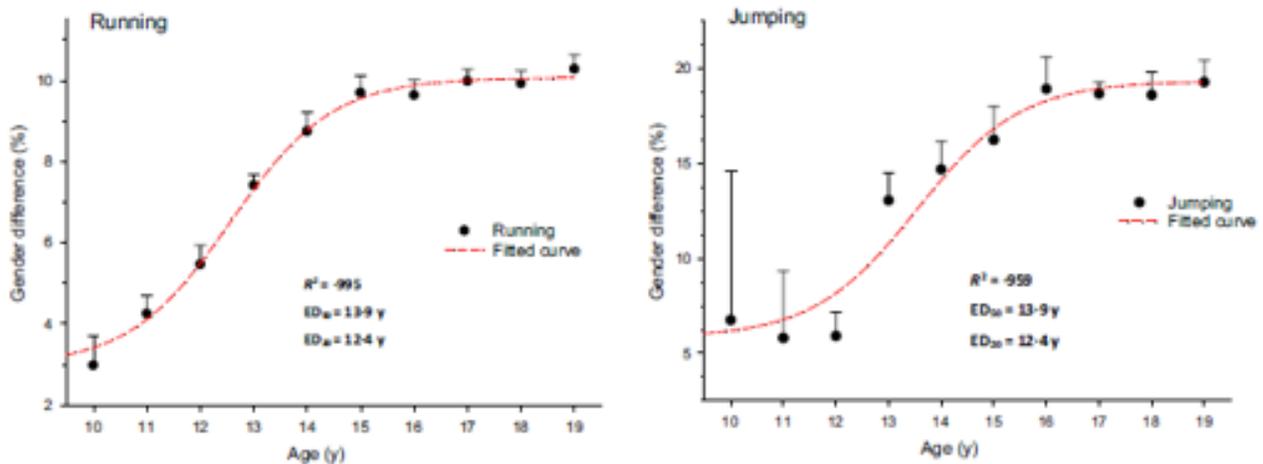
F. David J. Handelsman, *Sex Differences in Athletic Performance Emerge Coinciding with the Onset of Male Puberty*, 87 CLINICAL ENDOCRINOLOGY 68 (2017):

59. Analyzing four separate studies, Handelsman (2017) found very closely similar trajectories of divergence of athletic performance between the sexes across the adolescent years, in all measured events.

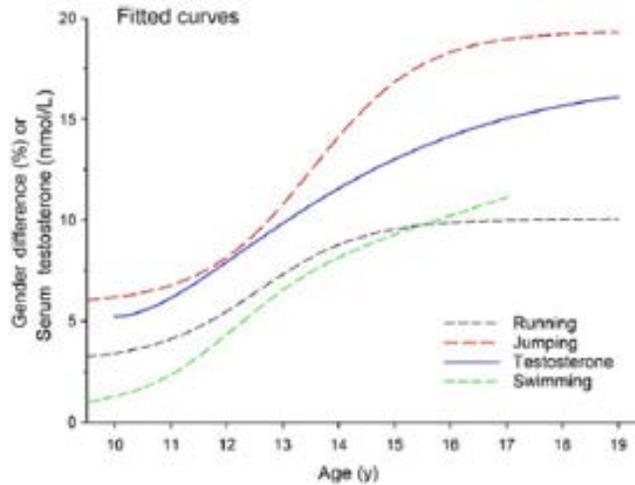
60. As illustrated by Figure 1 of Handelsman (2017) below, study results showed that “[i]n swimming performance, the overall gender differences were highly significant” (69)



61. As illustrated by Figure 2 of Handelsman (2017) below, “[i]n track and field athletics, the effects of age on running performance showed that the prepubertal differences of 3.0% increased to a plateau of 10.1% with an onset (ED_{20}) at 12.4 years and reaching midway (ED_{50}) at 13.9 years. For jumping, the prepubertal difference of 5.8% increased to 19.4% starting at 12.4 years and reaching midway at 13.9 years.” (70)



62. As also illustrated in Figure 2 of Handelsman (2017), the author found a strong correlation between the increasing male performance advantage and blood serum testosterone levels, and reported: “The timing of the male advantage in running, jumping and swimming was similar [across events] and corresponded to the increases in serum testosterone in males.” (70)



G. International Weightlifting Federation “World Records”:

63. I accessed weightlifting records as posted by the International Weightlifting Federation at <https://www.iwf.net/results/world-records/>. The records collected below are as of November 1, 2019.

64. As the chart below illustrates, junior men’s and women’s world records (age 15-20) for clean and jerk lifts indicate that boys or men perform better than girls or women even when they are matched for body mass. Similar sex differences can be found for the snatch event on the International Weightlifting Federation website.

Junior Men’s and Women’s World Records (ages 15-20) for Clean and Jerk			
Men’s weight (kg)	Record (kg)	Women’s weight (kg)	Record (kg)
56	171	58	142
62	183	63	147
69	198	69	157
77	214	75	164
85	220	90	160
94	233	+90	193

II. Biological male physiology is the basis for the performance advantage that men, or adolescent boys, have over women, or adolescent girls, in almost all athletic contests.

65. Common observation and knowledge tell us that, across the years of puberty, boys experience distinctive physical developments that largely explain the performance advantages I have detailed above. These well-known physical developments have now also been the subject of scientific measurement and study.

66. At the onset of male puberty the testes begin to secrete greatly increased amounts of testosterone. Testosterone is the primary “androgenic” hormone. It causes the physical traits associated with males such as facial and body hair growth, deepening of the voice, enlargement of the genitalia, increased bone mineral density, increased bone length in the long bones, and enhanced muscle growth (to name just a few of testosterone’s effects). The enhanced muscle growth caused by testosterone is the “anabolic” effect often discussed when testosterone is called an anabolic steroid.

67. Women lack testes and instead have ovaries, so they do not experience similar increases in testosterone secretion. Instead, puberty in women is associated with the onset of menstruation and increased secretion of “estrogens.” Estrogens, most notably estradiol, cause the feminizing effects associated with puberty in women which include increased fat tissue growth in the hips, thighs, and buttocks, development of the mammary glands, and closure of the growth plates in long bones. The smaller amount of muscle growth typically seen in women during puberty explains in part the athletic performance gap between men, and boys after the onset of puberty, and women and girls.

A. Handelsman, Hirschberg, et al. (2018)

68. In addition to documenting objective performance advantages enjoyed by males as I have reviewed above, Handelsman and his co-authors also detail physiological differences caused by male puberty—and by developments during puberty under the influence of male levels of testosterone in particular—that account for those advantages. These authors state: “The striking male postpubertal increase in circulating testosterone provides a major, ongoing, cumulative, and durable physical advantage in sporting contests by creating larger and stronger bones, greater muscle mass and strength, and higher circulating hemoglobin as well as possible psychological (behavioral) differences. In concert, these render women, on average, unable to compete effectively against men in power-based or endurance-based sports.” (805)

69. First, Handelsman et al. explain that all of these physiological differences appear to be driven by male levels of circulating testosterone. “The available, albeit incomplete, evidence makes it highly likely that the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance. This is based on the dose-response effects of circulating testosterone to increase muscle mass and strength, bone size and strength (density), and circulating hemoglobin, each of which alone increases athletic capacity, as well as other possible sex dichotomous, androgen-sensitive contributors such as mental effects (mood, motivation, aggression) and muscle myoglobin content. These facts explain the clear sex difference in athletic performance in most sports, on which basis it is commonly accepted that competition has to be divided into male and female categories.” (823)

70. “Prior to puberty, levels of circulating testosterone as determined by LC-MS are the same in boys and girls They remain lower than 2 nmol/L in women of all ages. However, from the onset of male puberty the testes secrete 20 times more testosterone resulting in circulating testosterone levels that are 15 times greater in healthy young men than in age-similar women.” (806) “[T]he circulating testosterone of most women never reaches consistently >5 nmol/L, a level that boys must sustain for some time to exhibit the masculinizing effects of male puberty.” (808)

71. “The characteristic clinical features of masculinization (e.g., muscle growth, increased height, increased hemoglobin, body hair distribution, voice change) appear only if and when circulating testosterone concentrations rise into the range of males at mid-puberty, which are higher than in women at any age even after the rise in circulating testosterone in female puberty.” (810)

72. “[The] order-of-magnitude difference in circulating testosterone concentrations is the key factor in the sex difference in athletic performance due to androgen effects principally on muscle, bone, and hemoglobin.” (811)

73. “Modern knowledge of the molecular and cellular basis for androgen effects on skeletal muscle involves effects due to androgen (testosterone, DHT) binding to the AR that then releases chaperone proteins, dimerizes, and translocates into the nucleus to bind to androgen response elements in the promoter DNA of androgen-sensitive genes. This leads to increases in (1) muscle fiber numbers and size, (2) muscle satellite cell numbers, (3) numbers of myonuclei, and (4) size of motor neurons. Additionally, there is experimental evidence that testosterone increases skeletal muscle myostatin expression, mitochondrial biogenesis, myoglobin expression, and IGF-1 content, which may augment energetic and power generation of skeletal muscular activity.” (811)

74. **Muscle mass** is perhaps the most obvious driver of male athletic advantage. “On average, women have 50% to 60% of men’s upper arm muscle cross-sectional area and 65% to 70% of men’s thigh muscle cross-sectional area, and women have 50% to 60% of men’s upper limb strength and 60% to 80% of men’s leg strength. Young men have on average a skeletal muscle mass of >12 kg greater than age-matched women at any given body weight. Whereas numerous genes and environmental factors (including genetics, physical activity, and diet) may contribute to muscle mass, the major cause of the sex difference in muscle mass and strength is the sex difference in circulating testosterone.” (812)

75. “Dose-response studies show that in men whose endogenous testosterone is fully suppressed, add-back administration of increasing doses of testosterone that produce graded increases in circulating testosterone causes a dose-dependent (whether expressed according to testosterone dose or circulating levels) increase in muscle mass (measured as lean body mass) and strength. Taken together, these studies prove that testosterone doses leading to circulating concentrations from well below to well above the normal male range have unequivocal dose-dependent effects on muscle mass and strength. These data strongly and consistently suggest that the sex difference in lean body mass (muscle) is largely, if not exclusively, due to the differences in circulating testosterone between men and women. These findings have strong implications for power dependent sport performance and largely explain the potent efficacy of androgen doping in sports.” (813)

76. “Muscle growth, as well as the increase in strength and power it brings, has an obvious performance enhancing effect, in particular in sports that depend on strength and (explosive) power, such as track and field events. There is convincing evidence that the sex differences in muscle mass and strength are sufficient to account for the increased strength and aerobic performance of men compared with women and is in keeping with the differences in world records between the sexes.” (816)

77. Men and adolescent boys also have distinct athletic advantages in **bone size, strength, and configuration.**

78. “Sex differences in height have been the most thoroughly investigated measure of bone size, as adult height is a stable, easily quantified measure in large population samples. Extensive twin studies show that adult height is highly heritable with predominantly additive genetic effects that diverge in a sex-specific manner from the age of puberty onwards, the effects of which are likely to be due to sex differences in adult circulating testosterone concentrations.” “Men have distinctively greater bone size, strength, and density than do women of the same age. As with muscle, sex differences in bone are absent prior to puberty but then

accrue progressively from the onset of male puberty due to the sex difference in exposure to adult male circulating testosterone concentrations.” (818)

79. “The earlier onset of puberty and the related growth spurt in girls as well as earlier estrogen-dependent epiphyseal fusion explains shorter stature of girls than boys. As a result, on average men are 7% to 8% taller with longer, denser, and stronger bones, whereas women have shorter humerus and femur cross-sectional areas being 65% to 75% and 85%, respectively, those of men. These changes create an advantage of greater bone strength and stronger fulcrum power from longer bones. (818)

80. **Male bone geometry** also provides mechanical advantages. “The major effects of men’s larger and stronger bones would be manifest via their taller stature as well as the larger fulcrum with greater leverage for muscular limb power exerted in jumping, throwing, or other explosive power activities.” (818) Further, “the widening of the female pelvis during puberty, balancing the evolutionary demands of obstetrics and locomotion, retards the improvement in female physical performance, possibly driven by ovarian hormones rather than the absence of testosterone.” (818)

81. Beyond simple performance, the greater density and strength of male bones provides higher protection against stresses associated with extreme physical effort: “[S]tress fractures in athletes, mostly involving the legs, are more frequent in females with the male protection attributable to their larger and thicker bones.” (818)

82. In addition to advantages in muscle mass and strength, and bone size and strength, men and adolescent boys have **greater hemoglobin levels** in their blood as compared to women and girls, and thus a greater capability to transport oxygen within the blood, which then provides bioenergetic benefits. “It is well known that levels of circulating hemoglobin are androgen-dependent and consequently higher in men than in women by 12% on average.... Increasing the amount of hemoglobin in the blood has the biological effect of increasing oxygen transport from lungs to tissues, where the increased availability of oxygen enhances aerobic energy expenditure.” (816) “It may be estimated that as a result the average maximal oxygen transfer will be ~10% greater in men than in women, which has a direct impact on their respective athletic capacities.” (816)

B. Louis Gooren, *The Significance of Testosterone for Fair Participation of the Female Sex in Competitive Sports*, 13 *Asian J. of Andrology* 653 (2011)

83. Gooren et al. like Handelsman et al., link male advantages in height, bone size, muscle mass, strength, and oxygen carrying capacity to exposure to male testosterone levels: “Before puberty, boys and girls hardly differ in height, muscle and bone mass. Pubertal testosterone exposure leads to an ultimate average greater height in men of 12–15 centimeters, larger bones, greater muscle mass, increased strength and higher hemoglobin levels.” (653)

C. Thibault, Guillaume, et al. (2010)

84. In addition to the testosterone-linked advantages examined by Handelsman et al. (2018), Thibault et al. note sex-linked differences in body fat as impacting athletic performance: “Sex has been identified as a major determinant of athletic performance through the impact of height, weight, body fat, muscle mass, aerobic capacity or anaerobic threshold as a result of genetic and hormonal differences (Cureton et al., 1986; Maldonado-Martin et al., 2004; Perez-Gomez et al., 2008; Sparling and Cureton, 1983).” (214)

D. Taryn Knox, Lynley C. Anderson, et al., *Transwomen in Elite Sport: Scientific & Ethical Considerations*, 45 *J. MED ETHICS* 395 (2019):

85. Knox et al. analyze specific testosterone-linked physiological differences between men and women that provide advantages in athletic capability, and conclude that “[E]lite male athletes have a performance advantage over their female counterparts due to physiological differences.” (395) “Combining all of this information, testosterone has profound effects on key physiological parameters that underlie athletic performance in men. There is substantial evidence regarding the effects on muscle gain, bone strength, and the cardiovascular and respiratory system, all of which drive enhanced strength, speed and recovery. Together the scientific data point to testosterone providing an all-purpose benefit across a range of body systems that contribute to athletic performance for almost all sports.” (397-98)

86. “It is well recognised that testosterone contributes to physiological factors including body composition, skeletal structure, and the cardiovascular and respiratory systems across the life span, with significant influence during the pubertal period. These physiological factors underpin strength, speed and recovery with all three elements required to be competitive in almost all sports. An exception is equestrian, and for this reason, elite equestrian competition is not gender-

segregated. As testosterone underpins strength, speed and recovery, it follows that testosterone benefits athletic performance.” (397)

87. “High testosterone levels and prior male physiology provide an all-purpose benefit, and a substantial advantage. As the IAAF says, “To the best of our knowledge, there is no other genetic or biological trait encountered in female athletics that confers such a huge performance advantage.” (399)

88. These authors, like others, describe sex-linked advantages relating to **bone size and muscle mass**. “Testosterone also has a strong influence on bone structure and strength. From puberty onwards, men have, on average, 10% more bone providing more surface area. The larger surface area of bone accommodates more skeletal muscle so, for example, men have broader shoulders allowing more muscle to build. This translates into 44% less upper body strength for women, providing men an advantage for sports like boxing, weightlifting and skiing. In similar fashion, muscle mass differences lead to decreased trunk and lower body strength by 64% and 72%, respectively in women. These differences in body strength can have a significant impact on athletic performance, and largely underwrite the significant differences in world record times and distances set by men and women.” (397)

89. Knox et al. also identify the relatively higher percentage of **body fat** in women as both inherently sex-linked, and a disadvantage with respect to athletic performance. “Oestrogens also affect body composition by influencing fat deposition. Women, on average, have higher percentage body fat, and this holds true even for highly trained healthy athletes (men 5%–10%, women 8%–15%). Fat is needed in women for normal reproduction and fertility, but it is not performance enhancing. This means men with higher muscle mass and less body fat will normally be stronger kilogram for kilogram than women.” (397)

90. Knox et al. detail the relative performance disadvantage arising from the oestrogen-linked **female pelvis shape**: “[T]he major female hormones, oestrogens, can have effects that disadvantage female athletic performance. For example, women have a wider pelvis changing the hip structure significantly between the sexes. Pelvis shape is established during puberty and is driven by oestrogen. The different angles resulting from the female pelvis leads to decreased joint rotation and muscle recruitment ultimately making them slower.” (397)

91. “In short, higher testosterone levels lead to larger and stronger bones as well as more muscle mass providing a body composition-related performance advantage for men for almost all sports. In contrast, higher oestrogen levels lead to changes in skeletal structure and more fat mass that can disadvantage female athletes, in sports in which speed, strength and recovery are important.” (397)

92. Knox et al. break out multiple sex-linked contributions to a male advantage in **oxygen intake and delivery**, and thus to energy delivery to muscles. “Testosterone also influences the cardiovascular and respiratory systems such that men have a more efficient system for delivering oxygen to active skeletal muscle. Three key components required for oxygen delivery include lungs, heart and blood haemoglobin levels. Inherent sex differences in the lung are apparent from early in life and throughout the life span with lung capacity larger in men because of a lower diaphragm placement due to Y-chromosome genetic determinants. The greater lung volume is complemented by testosterone-driven **enhanced alveolar multiplication rate** during the early years of life.” (397)

93. “Oxygen exchange takes place between the air we breathe and the bloodstream at the alveoli, so more alveoli allows more oxygen to pass into the bloodstream. Therefore, the greater lung capacity allows more air to be inhaled with each breath. This is coupled with an improved uptake system allowing men to absorb more oxygen. Once in the blood, oxygen is carried by haemoglobin. Haemoglobin concentrations are directly modulated by testosterone so men have higher levels and can carry more oxygen than women. Oxygenated blood is pumped to the active skeletal muscle by the heart. The left ventricle chamber of the heart is the reservoir from which blood is pumped to the body. The larger the left ventricle, the more blood it can hold, and therefore, the more blood can be pumped to the body with each heartbeat, a physiological parameter called ‘stroke volume’. The female heart size is, on average, 85% that of a male resulting in the stroke volume of women being around 33% less. Putting all of this together, men have a much more efficient cardiovascular and respiratory system, with testosterone being a major driver of enhanced aerobic capacity.” (397)

E. Lepers, Knechtle, et al. (2013)

94. Lepers et al. point to some of these same physiological differences as explaining the large performance advantage they found for men in triathlon performance. “Current explanations for sex differences in [maximal oxygen uptake] among elite athletes, when expressed relative to body mass, provide two major findings. First, elite females have more (<13 vs. <5 %) body fat than males. Indeed, much of the difference in [maximal oxygen uptake] between males and females disappears when it is expressed relative to lean body mass. Second, the hemoglobin concentration of elite athletes is 5–10 % lower in females than in males.” (853)

95. “Males possess on average 7–9 % less percent body fat than females, which is likely an advantage for males. Therefore, it appears that sex differences in percentage body fat, oxygen-carrying capacity and muscle mass may be major factors for sex differences in overall triathlon performance. Menstrual cycle, and

possibly pregnancy, may also impact training and racing in female athletes, factors that do not affect males.” (853)

F. Tønnessen, Svendsen, et al. (2015)

96. Tønnessen et al. likewise point to some of the same puberty and testosterone-triggered physiological differences discussed above to explain the increasing performance advantage of boys across the adolescent years, noting that “[T]here appears to be a strong mechanistic connection between the observed sex-specific performance developments and hormone-dependent changes in body composition during puberty.” (7) “Beyond [age 12], males outperform females because maturation results in a shift in body composition. Our results are in line with previous investigations exploring physical capacities such as [maximal oxygen uptake] and isometric strength in non-competitive or non-specialized adolescents.” (7)

97. “[S]ex differences in physical capacities (assessed as [maximal oxygen uptake] or isometric strength in the majority of cases) are negligible prior to the onset of puberty. During the adolescent growth spurt, however, marked sex differences develop. This can primarily be explained by hormone dependent changes in body composition and increased red blood cell mass in boys.” (2)

98. “Sexual dimorphism during puberty is highly relevant for understanding sex-specific performance developments in sports. The initiation of the growth spurt in well-nourished girls occurs at about 9–10 yrs of age. Age at peak height velocity (PHV) and peak weight velocity (PWV) in girls is 11–12 and 12–13 yrs, respectively, with an average 7–9 cm and 6–9 kg annual increase. The growth spurt and PHV in girls occurs approximately 2 years earlier than for boys. However, the magnitude of the growth spurt is typically greater in boys, as they on average gain 8–10 cm and 9–10 kg annually at PHV and PWV, respectively. Girls experience an escalation in fat mass compared to boys. Fat free mass (FFM) (also termed lean muscle mass) is nearly identical in males and females up to the age of 12–13 yrs. FFM plateaus in females at 15–16 years of age, but continues increasing in males up to the age of 19–20 yrs. On average, boys and girls increase their FFM by 7.2 and 3.5 kg/year⁻¹, respectively, during the interval near peak height velocity. Corresponding estimates for changes in absolute fat mass are 0.7 and 1.4 kg/year⁻¹, while estimates for relative fatness are -0.5% and +0.9%/year⁻¹ in boys and girls, respectively.” (2)

99. “During puberty, boys begin to produce higher levels of circulating testosterone. This affects the production of muscle fibers through direct stimulation of protein synthesis. Higher testosterone levels result in more muscle mass, which in turn facilitates greater power production and more advantageous ground reaction

forces during running and jumping. Adolescent weight gain in boys is principally due to increased height (skeletal tissue) and muscle mass, while fat mass remains relatively stable. In contrast, during puberty girls begin to produce higher levels of circulating estrogen and other female sex hormones. Compared to their male counterparts, they experience a less pronounced growth spurt and a smaller increase in muscle mass, but a continuous increase in fat mass, thereby lowering the critical ratio between muscular power and total body mass.” (7)

100. “The relatively greater progress in jumping exercises can also be explained by growth and increased body height during puberty. The increase in body height means that the center of gravity will be higher, providing better mechanical conditions for performance in jumping events.” (8)

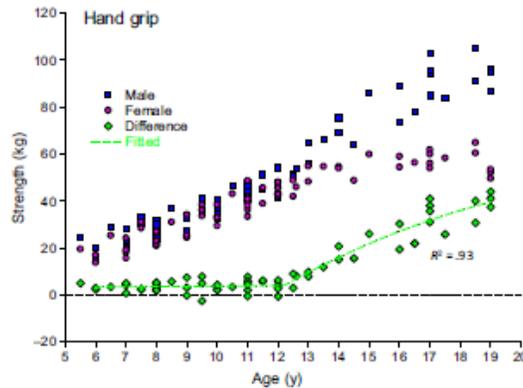
G. Louis J. G. Gooren & Mathijs C. M. Bunck, *Transsexuals & Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004):

101. In their study of performance of transsexual athletes, Louis et al. note that “[b]efore puberty, boys and girls do not differ in height, muscle and bone mass. Recent information shows convincingly that actual levels of circulating testosterone determine largely muscle mass and strength.” (425) “Testosterone exposure during puberty leads ultimately to an average greater height in men of 12–15 cm, larger bones and muscle mass, and greater strength.” (425)

H. Handelsman (2017)

102. Handelsman (2017) notes the existence of a “stable and robust” performance gap between males and females, with no narrowing “over more than three decades” (71), observing that “[i]t is well known that men’s athletic performance exceeds that of women especially in power sports because of men’s greater strength, speed and endurance. This biological physical advantage of mature males forms the basis for gender segregation in many competitive sports to allow females a realistic chance of winning events. This physical advantage in performance arises during early adolescence when male puberty commences after which men acquire larger muscle mass and greater strength, larger and stronger bones, higher circulating haemoglobin as well as mental and/or psychological differences. After completion of male puberty, circulating testosterone levels in men are consistently 10-15 times higher than in children or women at any age.” (68)

103. To illustrate, Figure 3 of Handelsman (2017) below indicates, “the age trends in hand-grip strength showed a difference in hand-grip strength commencing from the age of 12.8 years onwards (Figure 3). Prior to the age of 13 years, boys had a marginally significant greater grip strength than girls ($n=45$, $t=2.0$, $P=.026$), but after the age of 13 years, there was a strong significant relationship between age and difference in grip strength ($n=18$, $r=.89$, $P<.001$).” (70)



104. Handelsman (2017) in particular focuses on the correlation between the development of this performance gap and the progress of male adolescence and circulating testosterone levels in boys. “The strength of the present study is that it includes a wide range of swimming as well as track and field running and jumping events as well as strength for nonathletes for males and females across the ages spanning the onset of male puberty. The similar timing of the gender divergence in each of these settings to that of the rise in circulating testosterone to adult male levels strongly suggests that they all reflect the increase in muscular size and strength although the impact of other androgen-dependent effects on bone, haemoglobin and psychology may also contribute.” (71-72)

105. “In this study, the timing and tempo of male puberty effects on running and jumping performance were virtually identical and very similar to those in swimming events. Furthermore, these coincided with the timing of the rise in circulating testosterone due to male puberty. In addition to the strikingly similar timing and tempo, the magnitude of the effects on performance by the end of this study was 10.0% for running and 19.3% for jumping, both consistent with the gender differences in performance of adult athletes previously reported to be 10%-12% for running and 19% for jumping.” (71)

106. “In the swimming events, despite the continued progressive improvements in individual male and female event records, the stability of the gender difference over 35 years shown in this study suggests that the gender differences in performance are stable and robust.” (71)

107. “The similar time course of the rise in circulating testosterone with that of the gender divergences in swimming and track and field sports is strongly suggestive that these effects arise from the increase in circulating testosterone from the start of male puberty.” (71) “It is concluded that the gender divergence in athletic performance begins at the age of 12-13 years and reaches adult plateau in the late teenage years. Although the magnitude of the divergence varies between athletic skills, the timing and tempo are closely parallel with each other and with the rise in circulating testosterone in boys during puberty to reach adult male levels.” (72)

108. Handelsman (2017) notes several specific physiological effects of male levels of circulating testosterone that are relevant to athletic performance:

a. “Adult male circulating testosterone also has marked effects on bone development leading to longer, stronger and denser bone than in age-matched females.” (71)

b. “A further biological advantage of adult male circulating testosterone concentrations is the increased circulating haemoglobin. Men have ~10 g/L greater haemoglobin than women with the gender differences also evident from the age of 13-14 years.” (71)

109. Handelsman (2017) also observes that “exposure to adult male testosterone concentrations is likely to produce some mental or psychological effects. However, the precise nature of these remains controversial and it is not clear whether, or to what extent, this contributes to the superior elite sporting performance of men in power sports compared with the predominant effects on muscle mass and function.” (71)

I. Centers for Disease Control & Prevention, “National Health Statistics Reports Number 122,” CDC (2018):

110. To obtain data on height, weight, and body mass differences between men and women, I accessed the “National Health Statistics Reports Number 122” published by the Centers for Disease Control & Prevention, at <https://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf>, which is based on data through 2016.

111. The average height for a U.S. adult man is 5 feet 9 inches and for a U.S. adult woman the average height is 5 feet 4 inches. (3)

112. The average weight for a U.S. adult man is 197.8 lbs. and for a U.S. adult woman the average weight is 170.5 lbs. (6)

113. The average body mass index for a U.S. adult man is 29.1, and the average body mass index for a U.S. adult woman is 29.6. (3)

III. Administration of cross-sex hormones to men, or adolescent boys, after male puberty does not eliminate their performance advantage over women, or adolescent girls, in almost all athletic contests.

114. So far as I am aware, secondary school leagues do not have rules requiring testosterone suppression as a condition of males qualifying to compete in girls' athletic events based on a claim of a female gender identity. At the collegiate level, the "NCAA Policy on Transgender Student-Athlete Participation" requires only that such males be on unspecified and unquantified "testosterone suppression treatment" for "one calendar year" prior to competing in women's events. The International Olympic Committee requires that males be on testosterone suppression treatment that successfully reduces testosterone to less than 10 nmol/L in order to compete in women's events.

115. In fact, the effects of hormone administration of testosterone suppression on elite athletes remains largely unquantified from a scientific perspective due to the lack of research in this population.

116. That said, it is obvious that some effects of male puberty that confer advantages for athletic performance—in particular bone size and configuration—cannot be reversed once they have occurred.

117. In addition, some studies have now determined that other physiological advantages conferred by male puberty are also not fully reversed by later hormonal treatments associated with gender transition. Specifically, studies have shown that the effects of puberty in males including increased muscle mass, increased bone mineral density, increased lung size, and increased heart size, are not completely reversed by suppressing testosterone secretion and administering estrogen during gender transition procedures in males.

118. For example, suppressing testosterone secretion and administering estrogen in post pubescent males does not shrink body height to that of a comparably aged female, nor does it reduce lung size or heart size. Indeed, while testosterone suppression and estrogen administration reduce the size and density of skeletal muscles, the muscles remain larger than would be expected in a typical female even when matched for body height or mass. A general tenet of exercise science is that larger muscles are stronger muscles due to larger muscles containing more contractile proteins. Thus, while gender transition procedures will impair a male's athletic potential it is still highly unlikely to be reduced to that of a

comparably aged and trained female. I review below relevant findings from several studies.

A. Handelsman, Hirschberg, et al. (2018)

119. Handelsman et al. (2018) note that in “transgender individuals, the developmental effects of adult male circulating testosterone concentrations will have established the sex difference in muscle, hemoglobin, and bone, some of which is fixed and irreversible (bone size) and some of which is maintained by the male circulating testosterone concentrations (muscle, hemoglobin).” (824)

120. “[D]evelopmental bone effects of androgens are likely to be irreversible.” (818)

121. With respect to muscle mass and strength, Handelsman et al. (2018) observe that suppression of testosterone in males to levels currently accepted for transsexual qualification to compete in women’s events will still leave those males with a large strength advantage. “Based on the established dose-response relationships, suppression of circulating testosterone to <10 nmol/L would not eliminate all ergogenic benefits of testosterone for athletes competing in female events. For example, according to the Huang *et al.* study, reducing circulating testosterone to a mean of 7.3 nmol/L would still deliver a 4.4% increase in muscle size and a 12% to 26% increase in muscle strength compared with circulating testosterone at the normal female mean value of 0.9 nmol/L. Similarly, according to the Karunasena *et al.* study, reducing circulating testosterone concentration to 7 nmol/L would still deliver 7.8% more circulating hemoglobin than the normal female mean value. Hence, the magnitude of the athletic performance advantage in DSD athletes, which depends on the magnitude of elevated circulating testosterone concentrations, is considerably greater than the 5% to 9% difference observed in reducing levels to <10 nmol/L.” (821)

B. Gooren (2011)

122. In addition to noting that the length and diameter of bones is unchanged by post-pubertal suppression of androgens (including testosterone) (653), Gooren found that “[i]n spite of muscle surface area reduction induced by androgen deprivation, after 1 year the mean muscle surface area in male-to- female transsexuals remained significantly greater than in untreated female-to-male transsexuals.” (653) “Untreated female-to-male transsexuals” refers to biological females, who will have hormonal levels ordinarily associated with women.

123. As I have explained above, greater muscle surface area translates into greater strength assuming comparable levels of fitness.

C. Knox, Anderson, et al. (2019)

124. In their recent article, Knox et al. reviewed the physiological effects of reducing circulating testosterone levels below 10nmol/L, the level current accepted by the International Olympic Committee (IOC) (2015) guidelines as adequate to permit males to enter as women in Olympic competition.

125. Knox et al. note the unarguable fact that 10nmol/L is a far higher level of circulating testosterone than occurs in women, including elite women athletes. “Transwomen [meet IOC guidelines] to compete with testosterone levels just under 10 nmol/L. This is more than five times the upper testosterone level (1.7 nmol/L) of healthy, premenopausal elite cis-women athletes. Given that testosterone (as well as other elements stemming from Y-chromosome-dependent male physiology) provides an all-purpose benefit in sport, suggests that transwomen have a performance advantage.” (398)

126. As to **bone strength**, Knox et al. report that a “recent meta-analysis shows that hormone therapy provided to transwomen over 2 years maintains bone density so bone strength is unlikely to fall to levels of cis-women, especially in an elite athlete competing and training at high intensity. Increased bone strength also translates into protection against trauma, helping with recovery and prevention of injury.” (398)

127. Based on a review of multiple studies, Knox et al. report that, in addition to bone size, configuration, and strength, “hormone therapy will not alter ... **lung volume or heart size** of the transwoman athlete, especially if [that athlete] transitions postpuberty, so natural advantages including joint articulation, stroke volume and maximal oxygen uptake will be maintained.” (398)

128. With respect to **muscle mass and strength**, Knox et al. found that “healthy young men did not lose significant muscle mass (or power) when their circulating testosterone levels were reduced to 8.8 nmol/L (lower than the IOC guideline of 10 nmol/L) for 20 weeks. Moreover, retention of muscle mass could be compensated for by training or other ergogenic methods. In addition, the phenomenon of muscle memory means muscle mass and strength can be rebuilt with previous strength exercise making it easier to regain muscle mass later in life even after long intervening periods of inactivity and mass loss.” (398)

129. Indeed, Knox et al. observe that oestradiol—routinely administered as part of hormone therapy for transwomen—is actually known to *increase* muscle mass, potentially providing an *additional* advantage for these athletes over women. “While testosterone is the well-recognised stimulator of muscle mass gain, administration of oestradiol has also been shown to activate muscle gain via

oestrogen receptor- β activation. The combination of oestradiol therapy and a baseline testosterone of 10 nmol/L arguably provides transwomen athletes with an added advantage of increased muscle mass, and therefore power.” (398)

130. Summing up these facts, Knox et al. observe: “A transwoman athlete with testosterone levels under 10 nmol/L for 1 year will retain at least some of the physiological parameters that underpin athletic performance. This, coupled with the fact that [under IOC rules] transwomen athletes are allowed to compete with more than five times the testosterone level of a cis-woman, suggests transwomen have a performance advantage.” (398) Indeed, considering the magnitude of the advantages involved, Knox et al. conclude that the physiological advantages resulting from male puberty that are not negated by post-pubertal hormonal therapy “provide a strong argument that transwomen have an intolerable advantage over cis-women.” (399)

D. Gooren & Bunk (2004)

131. Measuring the concrete significance of the fact that bone size and configuration cannot be changed after puberty, Gooren and Bunk reported that “[Male-to-female transsexuals] were on average 10.7 cm taller (95% CI 5.4–16.0 cm) than [female-to-male transsexuals] (7).” (427)

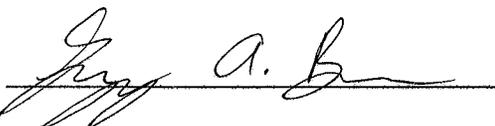
132. With respect to muscle mass, Gooren and Bunk reported what other authors have since described in more detail: “After 1 year of androgen deprivation, mean muscle area in [male-to-female transsexuals] had decreased significantly but remained significantly greater than in [female-to-male transsexuals] before testosterone treatment.” (427) To be clear, female-to-male transsexuals “before testosterone treatment” are biological females with natural female hormone levels.

133. “The conclusion is that androgen deprivation in [male-to-female transsexuals] increases the overlap in muscle mass with women but does not reverse it, statistically.” (425)

E. Likely effects of proposed more stringent testosterone suppression requirements.

134. There have been reports that the IOC plans to reduce the acceptable level of circulating testosterone in males seeking to compete in women’s events to 5 nmol/L. However, more recent reports indicate that this proposal has been put on hold due to objections that this lower level would still not eliminate the physiological advantage of such males over women. See “*IOC delays new transgender guidelines after scientists fail to agree*,” THE GUARDIAN, Sept. 24, 2019.

135. I am not aware of studies measuring the impact on athletic performance of reducing circulating testosterone in males to 5 nmol/L. However, in light of the facts reviewed above concerning physiological characteristics that are irreversible after male puberty, it is clearly correct that a reduction of the IOC requirement to this level would not eliminate the physiological advantage of males over women. Further, given that the *mean* female concentration of circulating testosterone is 0.9 nmol/L (Handelsman et al. (2018) (821)), with the *high* end of the normal female range being about 1.7 nmol/L (Knox et al. (2019) (398)), a level of 5 nmol/L of circulating testosterone remains between *300% and 500% higher* than normal female levels. Given the findings of Huang et al. and Karunasena et al. reported in Handelsman et al. (2018) (821) and quoted above concerning the effects of suppressing circulating testosterone in adult males to 7.3 and 7 nmol/L respectively (just 46% and 40% respectively above the IOC's proposed 5 nmol/L level), it is reasonable to expect that males in whom testosterone is suppressed to 5 nmol/L will also continue to enjoy physiological advantages even in somewhat malleable parameters including muscle size, muscle strength, and circulating hemoglobin, as compared to females.

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Transgender women in the female category of sport: is the male performance advantage removed by testosterone suppression?

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Abstract

Sex dimorphism starts during early embryogenesis and is further manifested in response to hormones during puberty. As this leads to physical divergence that is measurably different between sexes, males enjoy physical performance advantages over females within competitive sport. While this advantage is the underlying basis of the segregation into male and female sporting categories, these sex-based categories do not account for transgender persons who experience incongruence between their biological sex and their experienced gender identity. Accordingly, the International Olympic Committee determined criteria by which a transgender woman may be eligible to compete in the female category, requiring total serum testosterone levels to be suppressed below 10 nmol/L for at least 12 months prior to and during competition. Whether this regulation removes the male performance advantage has not been collectively scrutinized. Here, we aim to review how differences in biological characteristics between biological males and females affect sporting performance and assess whether evidence exists to support the assumption that testosterone suppression in transgender women removes the male performance advantage. In this review, we report that the performance gap between males and females amounts to 10-50% depending on sport. The performance gap is more pronounced in sporting activities relying on muscle mass and strength, particularly in the upper body. Longitudinal studies examining the effects of testosterone suppression on muscle mass and strength in transgender women consistently show very modest changes, where the loss of lean body mass, muscle area and strength typically amounts to approximately 5% after 1 year of treatment. Thus, current evidence shows that the biological advantage enjoyed by transgender women is only minimally reduced when testosterone is suppressed. Sports organizations may therefore be compelled to reassess current policies regarding participation of transgender women in the female category of sport.

Key words: androgens, athletic performance, cross-hormone therapy, gender dysphoria, muscle, sex hormones, sporting policies, strength, transgender men, transgender women

Introduction

Sporting performance is strongly influenced by a range of physiological factors, including muscle force and power-producing capacity, anthropometric characteristics, cardiovascular capacity and metabolic factors. Many of these physiological factors differ significantly between biological males and females as a result of androgen-directed development of secondary sex characteristics. This confers large sporting performance advantages on biological males over females.

Within directly competing groups (e.g. elite athletes, comparable level of high school athletes), the physiological advantages conferred by biological sex appear, on assessment of performance data, insurmountable. Further, in sports where contact, collision or combat are important for gameplay, widely different physiological attributes may create safety and athlete welfare concerns, necessitating not only segregation of sport into male and female categories, but also, for example, into weight and age classes. Thus, to ensure that both men and women can enjoy sport in terms of fairness, safety and inclusivity, most sports are divided, in the first instance, into male and female categories.

Segregating sports by biological sex does not account for transgender persons who experience incongruence between their biological sex and their experienced gender identity, and whose legal sex may be different to that recorded at birth^{1,2}. More specifically, transgender women (observed at birth as biologically male but identifying as women) may, before or after cross-hormone treatment, wish to compete in the female category. This has raised concerns about fairness and safety within female competition, and the issue of how to fairly and safely accommodate transgender persons in sport has been subject to much scrutiny¹⁻⁸.

The current International Olympic Committee (IOC) policy⁹ on transgender athletes states that *"it is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition."* Yet the policy also states that *"the overriding sporting objective is and remains the guarantee of fair competition"*. As these goals may be seen as conflicting if male performance advantages are carried through to competition in the female category, the IOC concludes that *"restrictions on participation are appropriate to the extent that they are necessary and proportionate to the achievement of that objective."*

Accordingly, the IOC determined criteria by which transgender women may be eligible to compete in the female category. These include a solemn declaration that her gender identity is female and the maintenance of total serum testosterone levels below 10 nmol/L for at least 12 months prior to competing and during competition⁹. Whilst the scientific basis for this testosterone threshold was not openly communicated by the IOC, it is surmised that the IOC believed this testosterone criteria sufficient to mitigate the sporting advantages of biological males over females.

Several studies have examined the effects of testosterone suppression on the changing biology, physiology and performance markers of transgender women. In this review, we aim to assess whether evidence exists to support the assumption that testosterone suppression in transgender women removes these advantages. To achieve this aim, we first review the differences in biological characteristics between biological males and females, and examine

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how those differences affect sporting performance. We then evaluate the studies that have measured elements of performance and physical capacity following testosterone suppression in transgender women, and evaluate whether these findings support the supposition of fairness (i.e. removal of the male performance advantage) as per current sporting guidelines.

The development of male and female bodies

Humans reproduce sexually via the fusion of two gametes to generate a new individual. Male gametes – sperm – are small, numerous and motile, while female gametes – ova – are large, fewer in number and immobile. In addition to ova production, females also gestate, birth and feed live young. In accordance with these different reproductive roles, males and females have different reproductive anatomies. The physical divergence between reproductive anatomies begins during early embryogenesis, when bipotential gonads are triggered to differentiate into testes or ovaries, the tissues that will produce sperm in males and ova in females, respectively ¹⁰. This fate choice is determined by genetic information inherited at conception, specifically the SRY (sex-determining region Y) gene harbored by the Y chromosome. Thus, XY males will activate the SRY gene and trigger testes differentiation, while XX females differentiate ovaries in the absence of SRY activity ^{11,12}.

Gonad differentiation into testes or ovaries determines, via the specific hormone milieu each generates, downstream events in reproductive anatomy development ¹³. Testosterone production in the male testes is required for maturation of the testes itself ¹⁴, development of male-specific internal genitalia (in conjunction with another testes-specific hormone, anti-Mullerian hormone¹⁵), and development of the bipotential external genitalia field into male-typical structures (via its local conversion to dihydrotestosterone ¹⁶). In contrast, female ovaries produce estrogen required, via a network of signals, for ovarian maturation, and low levels of testosterone permits development of female-specific internal and external genitalia ^{17,18}.

The effects of sex-specific hormones continue after embryonic development of reproductive anatomy is complete ¹⁹. At puberty, under the control of hormones shared between sexes (e.g. growth hormone), both sexes will, for example, gain height and bone density, get oily skin, and experience the onset of sexual desire ²⁰. In males, production of testosterone in the testes increases dramatically and drives reproductive maturation - testes increase in size and begin to produce sperm, penile size increases, and ejaculation occurs. Under the control of ovarian estrogen, females will initiate egg maturation and begin to ovulate and menstruate, their labia majora will grow, their pelvis will widen in anticipation of childbirth and their breasts grow to prepare for lactation and feeding of young.

The biological basis for sporting performance advantages in males

Secondary sex characteristics that develop during puberty have evolved under sexual selection pressures to improve reproductive fitness and thus generate anatomical divergence beyond the reproductive system, leading to adult body types that are measurably different between sexes. This phenomenon is known as sex dimorphism. Broadly, and with reference

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to physical performance capacity, males are bigger and stronger than females. It follows that, within competitive sport, males enjoy significant performance advantages over females, predicated on the superior physical capacity developed during puberty in response to testosterone. Indeed, prior to puberty there are inconsequential differences in athletic performance between males and females²¹, and sporting competitions before puberty are often mixed-sex. From puberty onwards, testosterone levels increase 20-fold in males, but remain low in females, resulting in circulating testosterone concentrations at least 15 times higher in males than in females of any age^{22,23}. Thus, the biological effects of elevated testosterone, which include changes in muscle mass, strength, anthropometric variables and hemoglobin levels, drive the divergence of athletic performances between males and females²³. It is acknowledged, that this divergence has been compounded historically by a lag in the cultural acceptance of, and financial provision for, females in sport that may have had implications for the rate of improvement in athletic performance in females. Yet, since the 1990s, the difference in performance records between males and females has been relatively stable, suggesting that biological differences explain most of the male advantage, and are insurmountable²⁴.

Table 1 outlines physical attributes that are major parameters underpinning the male performance advantage^{25,26,35,27-34}. Males have: larger and denser muscle mass, and stiffer connective tissue, with associated capacity to exert greater muscular force more rapidly and efficiently; reduced fat mass, and different distribution of body fat and lean muscle mass, which increases power to weight ratios and upper to lower limb strength in sports where this may be a crucial determinant of success; longer and larger skeletal structure, which creates advantages in sports where levers influence force application, where longer limb/digit length is favorable, and where height, mass and proportions are directly responsible for performance capacity; superior cardiovascular and respiratory function, with larger blood and heart volumes, higher haemoglobin concentration, greater cross-sectional area of the trachea and lower oxygen cost of respiration^{23,36-38}.

Sports performance differences between males and females

An overview of elite adult athletes

A comparison of adult elite male and female achievements in sporting activities can quantify the extent of the male performance advantage. We searched publicly available sports federation databases and/or tournament/competition records to identify sporting metrics in various events and disciplines, and calculated the performance of males relative to females. Although not an exhaustive list, examples of performance gaps in a range of sports with various durations, physiological performance determinants and force requirements are shown in Figure 1.

The smallest performance gaps were seen in rowing, swimming and running (11-13%), with low variation across individual events within each of those categories. The performance gap increases to an average of 16% in track cycling, with higher variation across events (from 9% in the 4000m team pursuit to 24% in the flying 500m time trial). The performance gap is 18% in jumping events (long jump, high jump, triple jump). Performance differences larger than

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20% are generally present when considering sports that include extensive upper body contributions. The gap between fastest recorded tennis serve is 20%, while the gaps between fastest recorded baseball pitches and field hockey drag flicks exceed 50%.

Sports performance relies to some degree on the magnitude, speed and repeatability of force application, and, with respect to the speed of force production (power), vertical jump performance is on average 33% greater in elite men than women, with differences ranging from 27.8% for endurance sports to in excess of 40% for precision and combat sports³⁹. Because implement mass differs, direct comparisons are not possible in throwing events in track and field athletics. However, the performance gap is known to be substantial, and throwing represents the widest sex difference in motor performance from an early age⁴⁰. In Olympic javelin throwers, this is manifested in differences in the peak linear velocities of the shoulder, wrist, elbow and hand, all of which are 13-21% higher for male athletes compared with females⁴¹.

The increasing performance gap between males and females as upper body strength becomes more critical for performance is likely explained to a large extent by the observation that males have disproportionately greater strength on their upper compared to lower body, while females show the inverse^{42,43}. This different distribution of strength compounds the general advantage of increased muscle mass in upper body dominant disciplines. Males also have longer arms than females, which allows greater force production from the arm lever when, for example, throwing a ball, punching or pushing.

Olympic weightlifting

In Olympic weightlifting, where weight categories differ between males and females, the performance gap is between 31-37% across the range of competitive body weights between 1998-2020 (Figure 1). It is important to note that at all weight categories below the top/open category, performances are produced within weight categories with an upper limit, where strength can be correlated with "fighting weight", and we have focused our overall analysis on these categories.

To explore strength-mass relationships further, we compared Olympic weightlifting data between equivalent weight categories which, to some extent, limit athlete height, to examine the hypothesis that male performance advantage may be largely (or even wholly) mediated by increased height and lever-derived advantages (Table 2). Between 1998 and 2018, a 69 kg category was common to both males and females, with the male record holder (69 kg, 1.68 m) lifting a combined weight 30.1% heavier than the female record holder (69 kg, 1.64 m). Weight category changes in 2019 removed the common 69 kg category and created a common 55 kg category. The current male record holder (55 kg, 1.52 m) lifts 29.5% heavier than the female record holder (55 kg, 1.52 m). These comparisons demonstrate that males are approximately 30% stronger than females of equivalent stature and mass. However, importantly, male weightlifting performance gaps increase with increasing bodyweight, particularly in the absence of weight limits. In the top/open weight category of Olympic weightlifting, there is no competitive pressure to restrict bodyweight and, in the absence of weight (and associated height) limits, maximum male lifting strength exceeds female lifting strength by nearly 40%. This is further manifested in powerlifting, where the male record

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(total of squat, bench press and deadlift) is 65% higher than the female record in the open weight category of the World Open Classic Records. Further analysis of Olympic weightlifting data shows that the 55 kg male record holder is 6.5% stronger than the 69 kg female record holder (294 kg vs 276 kg), and that the 69 kg male record is 3.2% higher than the record held by a 108 kg woman (359 kg vs 348 kg). This Olympic weightlifting analysis reveals key differences between male and female strength capacity. It shows that, even after adjustment for mass, biological males are significantly stronger (30%) than females, and that females who are 60% heavier than males do not overcome these strength deficits.

Perspectives on elite athlete performance differences

We have quantified the performance gap between adult elite males and adult elite females across various disciplines. The translation of these advantages, assessed as the performance difference between the very best males and very best females, are significant when extended and applied to larger populations. In running events, for example, where the male-female gap is approximately 11%, it follows that many thousands of males are faster than the very best females. For example, about 10 000 males have run faster than the current Olympic female champion (World Athletics, personal communication, July 2019). This has also been described elsewhere ^{44,45}, and illustrates the true effect of an 11% typical difference on population comparisons between males and females. This is further apparent upon examination of selected junior male records, which surpass adult elite female performances by the age of 14-15 years (Table 3), demonstrating superior male athletic performance over elite females within a few years of the onset of puberty.

These data overwhelmingly confirm that testosterone-driven puberty, as the driving force of development of male secondary sex characteristics, underpins sporting advantages that are so large no female could reasonably hope to succeed without sex segregation in most sporting competition. To ensure, in light of these analyses, that female athletes can be included in sporting competition in a fair and safe manner, most sports have a female category whose purpose is the protection of both fairness and, in some sports, safety/welfare of athletes who do not benefit from the physiological changes induced by male levels of testosterone.

Performance differences in non-elite individuals

The male performance advantages described above in athletic cohorts are similar in magnitude in untrained people. Even when expressed relative to fat-free weight, VO_{2max} is 12 to 15% higher in males than in females ⁴⁶. Records of lower-limb muscle strength reveal a 50% difference in peak torque between males and females consistently across the lifespan ²⁸. Hubal et al. ⁴⁷ tested 342 women and 243 men for isometric (maximal voluntary contraction) and dynamic strength (one-repetition maximum; 1RM) of the elbow flexor muscles and performed magnetic resonance imaging (MRI) of the biceps brachii to determine cross-sectional area. The males had 57% greater muscle size, 109% greater isometric strength, and 89% greater 1RM strength than age-matched females. This reinforces the finding in athletic cohorts that sex differences in muscle size and strength are more pronounced in the upper body.

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Recently, sexual dimorphism in arm force and power was investigated in a punch motion⁴⁸ in non-trained individuals. The power produced during a punch was 162% greater in males than in females, and the least powerful man produced more power than the most powerful woman. This highlights that sex differences in parameters such as mass, strength and speed may combine to produce even larger sex differences in sport-specific actions, which often are a product of how various physical capacities combine. For example, power production is the product of force and velocity, and momentum is defined as mass x velocity. The momentum and kinetic energy that can be transferred to another object, such as during a tackle or punch in collision and combat sports, are therefore dictated by: the mass; force to accelerate that mass, and; resultant velocity attained by that mass. As there is a male advantage for each of these factors, the net result is likely synergistic in a sport-specific action, such as a tackle or a throw, that widely surpasses the sum of individual magnitudes of advantage in isolated fitness variables. Indeed, already at 17 years of age, the average male throws a ball further than 99% of 17-year-old females⁴⁹, despite no single variable (arm length, muscle mass etc.) reaching this numerical advantage. Similarly, punch power is 162% greater in men than women⁴⁸ even though no single parameter that produces punching actions achieves this magnitude of difference.

Is the male performance advantage lost when testosterone is suppressed in transgender women?

The current IOC criteria for inclusion of transgender women in female sports categories requires testosterone suppression below 10 nmol/L for 12 months prior to and during competition. Given the IOC's stated position that the "*overriding sporting objective is and remains the guarantee of fair competition*"⁹, it is reasonable to assume that the rationale for this requirement is that it reduces or eliminates the male performance advantages described previously, thus permitting fair and safe competition. To determine whether this medical intervention is sufficient to mitigate the male performance advantage, which we describe above, we performed a systematic search of the scientific literature addressing the anthropometric and muscle characteristics of transgender women. Search terms and filtering of peer-reviewed data is given in Supplementary Table S1.

Anthropometrics

Given its importance for the general health of the transgender population, there are multiple studies of bone health, and reviews of these data. To summarise, transgender women often have low baseline (pre-intervention) bone mineral density (BMD), attributed to low levels of physical activity, especially weight-bearing exercise, and low Vitamin D levels^{50,51}. However, transgender women generally maintain bone mass over the course of at least 24 months of testosterone suppression. There may even be small but significant increases in BMD at the lumbar spine^{52,53}. Some included studies present data pertaining to maintained BMD in transgender women after many years of testosterone suppression⁵⁴. One such study⁵⁴ concluded that "*BMD is preserved over a median of 12.5 years*". In support, no increase in fracture rates was observed over 12 months of testosterone suppression⁵². Current advice, including that from the International Society for Clinical Densitometry, is that transgender women, in the absence of other risk factors, do not require monitoring of BMD^{50,55}.

Given the maintenance of BMD and the lack of a plausible biological mechanism by which testosterone suppression might affect skeletal measurements such as bone length and hip width, we conclude that height and skeletal parameters remain unaltered in transgender women, and that sporting advantage conferred by skeletal size and bone density would be retained despite testosterone reductions compliant with the IOC's current guidelines.

Muscle and strength metrics

As discussed earlier, muscle mass and strength are key parameters underpinning male performance advantages. Strength differences range between 30% and 100%, depending upon the cohort studied and the task used to assess strength. Thus, given the important contribution made by strength to performance, we sought to examine studies that have assessed strength changes after prolonged testosterone reduction. Studies retrieved in our literature search covered both longitudinal and cross-sectional analyses. Given the superior power of the former study type, we will focus on these.

The pioneer work by Gooren and colleagues, published in part in 1999⁵⁶ and in full in 2004⁵⁷, reported the effects of 1 and 3 years of testosterone suppression and estrogen supplementation in 19 transgender women (age 18-37 years). After the first year of therapy, testosterone levels were reduced to 1 nmol/L, well within typical female reference ranges, and remained low throughout the study course. As determined by MRI, thigh muscle area had decreased by 9% from baseline measurement. After 3 years, thigh muscle area had decreased by a further 3% from baseline measurement (total loss of 12% over three years of treatment). However, when compared with the baseline measurement of thigh muscle area in transgender men (who are born female and experience female puberty), transgender women retained significantly higher thigh muscle size. The final thigh muscle area, after three years of testosterone suppression, was 13% larger in transwomen than in the transmen at baseline ($p < 0.05$). The authors concluded that testosterone suppression in transgender women does not reverse muscle size to female levels.

Since Gooren and Bunck⁵⁷, 11 longitudinal studies^{51,58,67,59-66} have examined the effects of testosterone suppression on lean body mass or muscle size in transgender women. The collective evidence from these studies suggests that 1 year of testosterone suppression to female-typical reference levels results in a modest loss of lean body mass or muscle size (Table 4). No study has reported muscle loss exceeding the 12% found by Gooren and Bunck after 3 years of therapy. Notably, studies have found very consistent changes in lean body mass after 1 year of treatment, where the change has always been between -3 to -5% on average, with slightly greater reductions in the arm compared with the leg region⁶³.

Thus, given the large baseline differences in muscle mass between males and females (Table 1; approximately 40%), the reduction achieved by 12 months of testosterone suppression can reasonably be concluded to be small relative to the initial superior mass. We therefore conclude that the muscle mass advantage males possess over females, and potentially the performance implications thereof, are not removed by 12 months of testosterone suppression.

To provide more detailed information on not only gross body composition but also thigh muscle volume and contractile density, Wiik et al.⁶⁶ recently carried out a comprehensive battery of MRI and computed tomography (CT) examinations before and after 12 months of successful testosterone suppression and estrogen supplementation in 11 transgender women. Thigh volume (both anterior and posterior thigh) and quadriceps cross-sectional area decreased 4-5% after the 12-month period, supporting previous results of modest effects of testosterone suppression on muscle mass (see Table 4). The more novel measure of radiological attenuation of the quadriceps muscle, a valid proxy of contractile density^{68,69}, showed no significant change in transgender women after 12 months of treatment, whereas the parallel group of transgender men demonstrated a 6% increase in contractile density with testosterone supplementation. This suggests that the force producing capacity per unit of muscle cross-sectional area (i.e. specific force) is intact in the transgender women after 1 year of treatment.

As indicated earlier (e.g. Table 1), the difference in muscle strength between males and females is often more pronounced than the difference in muscle mass. Unfortunately, few studies have examined the effects of testosterone suppression on muscle strength or other proxies of performance in transgender individuals. The first such study was published online approximately one year prior to the release of the current IOC policy on inclusion of transgender women in female sports categories. In this study, van Caenegem et al.⁵¹ reported that hand-grip strength was reduced from baseline measurements by 7% and 9% after 1 and 2 years, respectively, of cross-hormone treatment in transgender women.

In a recent multicenter study⁶⁵, examination of 249 transgender women revealed a decrease of 4% in grip strength after 1 year of cross-hormone treatment, with no variation between different testosterone level, age or BMI tertiles (all transgender women studied were within female reference ranges for testosterone). Despite this modest reduction in strength, transgender women retained a 17% grip strength advantage over transgender men (observed at birth as biologically female but identifying as men) measured at baseline.

Although grip strength provides an excellent proxy measurement for general strength in a broad population, specific assessment within different muscle groups is more valuable in a sports-specific framework. Wiik et al.,⁶⁶ having determined that thigh muscle mass reduces only modestly, and that no significant changes in contractile density occur with 12 months of testosterone suppression, provided, for the first time, data for isokinetic strength measurements of both knee extension and knee flexion. They reported that muscle strength was similar after 12 months of testosterone suppression compared to baseline. As a result, transgender women remained about 50% stronger than a reference group of females and the group of transgender men at baseline.

These longitudinal data comprise a clear pattern of very modest to negligible changes in muscle mass and strength in transgender women suppressing testosterone for at least 12 months. Muscle mass and strength are key physical parameters that constitute a significant, if not majority, portion of the male performance advantage in sport, and thus our analysis strongly suggests that the reduction in testosterone levels required by many sports federation transgender policies is insufficient to remove or reduce the male advantage by any meaningful degree.

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Although less powerful than longitudinal studies, we identified one major cross-sectional study that measured muscle mass and strength in transgender women. In this study⁷⁰, 23 transgender women and 46 healthy age- and height-matched control males were compared. The transgender women were recruited at least 3 years after sex reassignment surgery, and the mean duration of cross-hormone treatment was 8 years. The results showed that transgender women had 17% less lean mass and 25% lower peak quadriceps muscle strength than the control males. This cross-sectional comparison suggests that a mean treatment duration of 8 years substantially reduces muscle mass and strength in transgender women. However, the typical gap in lean mass and strength between males and females at baseline measurements (Table 1) typically exceeds the differences reported by Lapauw et al. and implies a retained physical advantage even after 8 years of testosterone suppression.

Endurance performance and cardiovascular parameters

No controlled longitudinal study has explored the effects of testosterone suppression on endurance-based performance. Sex differences in endurance performance are generally smaller than for events relying more on muscle mass and strength, and may even disappear at ultra-endurance distances⁷¹. Using an age grading model designed to normalize times for masters/veteran categories, Harper⁷² analyzed self-reported race times for eight transgender women runners of various age categories who had, over a 7 year period, competed in sub-elite middle distance races within both the male and female categories. The age-graded scores for these eight runners were the same in both categories, suggesting that the cross-hormone treatment resulted in reduced running performance by approximately the size of the typical male advantage. However, factors affecting performances in the interim, including training and injury, were uncontrolled for over periods of years.

Circulating hemoglobin levels are androgen-dependent and typically reported as 12% higher in males compared with females²³. As hemoglobin levels appear to decrease by 11-14% with cross-hormone therapy in transgender women^{57,66}, and indeed significantly in athletes with Differences of Sex Development (DSD) where those athletes are sensitive to testosterone⁴⁵, oxygen-carrying capacity is most likely reduced with concomitant performance penalty. Moreover, the typical increase in body fat noted in transgender women^{73,74} may also be a disadvantage for sporting activities where body weight (or fat distribution) presents a marginal disadvantage. Whether these changes reduce performance results in transgender women endurance athletes to an extent that the male advantage is removed remains unknown.

Discussion

The data presented here demonstrates that the male physical performance advantage over females, attributed to superior anthropometric and muscle mass/strength parameters achieved at puberty, is not removed by the current regimen of testosterone suppression permitting participation of transgender women in female sports categories. Rather, it appears that the male performance advantage is largely retained by transgender women and thus remains substantial. This raises concerns about the overriding sporting objective of fair and

safe competition that sporting governing bodies have often attempted to balance against inclusion of transgender women in female sport⁹. Whilst available evidence is strong and convincing to suggest that strength, skeletal- and muscle-mass derived advantages will largely remain, certain elements do warrant further research for application to highly-trained and elite contexts.

Athletic status

The current body of evidence pertaining to physiological changes observed in transgender women after at least 12 months of testosterone suppression has been obtained from cohorts of transgender women who are measured as having regular or even low activity⁷⁵. The extent of musculoskeletal changes in athletic transgender women, particularly those engaged in intensive strength, weight-bearing and/or resistance training, is unknown. One possible hypothesis is that strength training throughout testosterone suppression might minimise even the modest changes observed in non-athletic cohorts. However, it is also possible that transgender women with greater trained muscle mass at baseline may experience larger decreases in mass and strength than non-athletic transgender women. This remains a gap in current data.

The focus on muscle mass and strength

We acknowledge that changes in strength measurements are not always correlated in magnitude to changes in muscle mass; muscle mass (or total mass) is not the only contributor to strength⁷⁶. Indeed, the importance of the nervous system, e.g. muscle agonist activation (recruitment and firing frequency) and antagonist co-activation, for muscle strength must be acknowledged⁷⁷. In addition, factors such as fiber types, biomechanical levers, pennation angle, fascicle length and tendon/extracellular matrix composition may all influence the ability to develop muscular force⁷⁸. While there is currently limited to no information on how these factors are influenced by testosterone suppression, impact seems to be minute, given the modest changes noted in muscle strength during cross-hormone treatment.

It is possible that estrogen replacement may affect the sensitivity of muscle to anabolic signaling and have a protective effect on muscle mass⁷⁹ explaining, in part, the modest change in muscle mass with testosterone suppression and accompanying cross-hormone treatment. Indeed, this is supported by research conducted on estrogen replacement therapy in other targeted populations^{80,81} and in several different animal models, including mice after gonadectomy⁸² and ovariectomy⁸³.

Testosterone limits

The appropriate testosterone limit for participation of transgender women in the female category has been a matter of debate recently, where sports federations such as World Athletics and World Rugby recently lowered the eligibility criterion of free circulating testosterone to <5nmol/L. This was likely based, at least in part, on a thorough review by Handelsman et al.²³, where the authors concluded that, given the nonoverlapping, bimodal distribution of circulating testosterone between males and females, and making an allowance

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for females with mild hyperandrogenism (e.g. with polycystic ovary syndrome), the appropriate testosterone limit should be 5 rather than 10 nmol/L.

From the longitudinal muscle mass/strength studies summarised here, however, it is apparent that most therapeutical interventions to date result in almost complete suppression of testosterone levels (Table 4). Thus, with regard to transgender women athletes, we question whether current circulating testosterone level cut-off can be a meaningful decisive factor, when in fact not even suppression down to around 1 nmol/L removes the anthropometric and muscle mass/strength physical advantage in any significant way.

In terms of the duration of testosterone suppression, one could argue that if one year of treatment is not sufficient to remove the male advantage, then perhaps extending the time frame of suppression could be a viable option. However, based on the studies reviewed in here, evidence is lacking that this would diminish the male advantage to a justifiable degree. On the contrary, it appears that the net loss of lean mass and grip strength is not substantially decreased at year 2 or 3 of cross-hormone treatment (Table 4). This indicates that a plateau or a new steady state is reached within the first year of treatment, a phenomenon also noted in transgender men, where the increase in muscle mass seems to stabilise between the first and the second year of testosterone treatment⁸⁴.

Perspectives

We have shown that under testosterone suppression regimes commonly required by sports federations to permit inclusion of transgender women in female sports categories, evidence for loss of the male performance advantage, established by testosterone at puberty and translating in elite athletes to a 10-50% performance advantage, is lacking. Rather, the data shows that the physical advantage enjoyed by biological males over females is only minimally reduced when testosterone is suppressed as per current and historical policies. Furthermore, the reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables. These data significantly undermine the intent of these policies, particularly given the stated prioritization of fairness as an overriding objective (as per the IOC policy). If those policies are purported to promote fairness, inclusion and safety of biologically female athletes, this review compels sporting organizations to reassess their policies regarding inclusion of transgender women.

From a medical-ethical point of view, it may be questioned as to whether a requirement to lower testosterone below a certain level to ensure sporting participation can be justified at all. If the advantage persists to a large degree, as evidence suggests, then a stated objective of targeting a certain testosterone level to be eligible will not achieve its objective and may drive medical practice that an individual may not want or require, without achieving its intended benefit.

The research conducted so far has studied untrained transgender women. Thus, while this research is important to understand the isolated effects of testosterone suppression, it is still uncertain how transgender women athletes, perhaps undergoing advanced training regimens during the therapy, would respond. It is also important to recognize that performance in most

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sports may be influenced by factors outside muscle mass and strength. Thus, there is certainly a need for more focused research on this topic, including more comprehensive performance tests in transgender athletes. Moreover, since inclusiveness and fairness must be balanced against athlete safety, proper risk assessment should be conducted within respective sport.

If transgender women remain, either with restriction or in full, excluded from the female category of sport, the important question is whether or not this exclusion, or conditional exclusion, is necessary and proportionate to the goal of ensuring fair, safe and meaningful competition. Regardless of what the future will bring in terms of revised transgender policies, it is obvious that different sports differ vastly from each other in terms of physiological determinants of success, which then create safety considerations and may alter the importance or magnitude of performance advantages. Thus, one could certainly argue against universal transgender guidelines in sport and instead propose that each individual sports federation should evaluate their own conditions for inclusivity, fairness and safety.

Conflict of Interest

The authors declare no conflict of interest.

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Figure legends

Figure 1. The male performance advantage over females across various sporting disciplines. The female level is set to 100%. In sport events with multiple disciplines, the male value has been averaged across disciplines, and the error bars represent the range of the advantage. The metrics were compiled from publicly available sports federation databases and/or tournament/competition records.

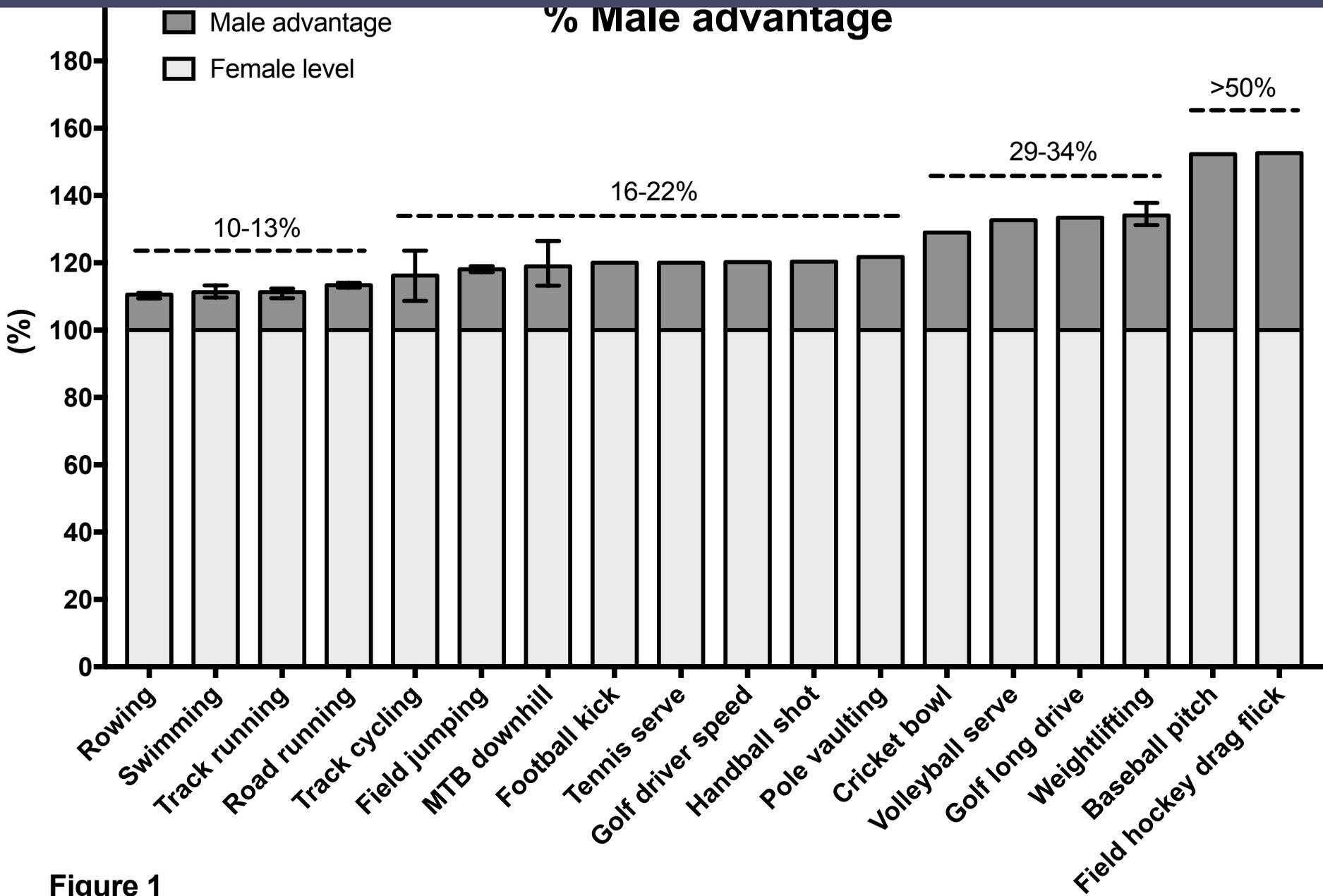


Figure 1

Table 1. Selected physical difference between untrained/moderately trained males and females. Female levels are set as the reference value.

Variable	Magnitude of sex difference	References
Body composition		
Lean body mass	45%	Lee et al. (25)
Fat%	-30%	
Muscle mass		
Lower body	33%	Janssen et al. (26)
Upper body	40%	
Muscle strength		
Grip strength	57%	Bohannon et al. (27)
Knee extension peak torque	54%	Neder et al. (28)
Anthropometry and bone geometry		
Femur length	9.4%	Jantz et al. (29)
Humerus length	12.0%	Brinckmann et al. (30)
Radius length	14.6%	
Pelvic width relative to pelvis height	-6.1%	
Tendon properties		
Force	83%	Lepley et al. (31)
Stiffness	41%	
VO2 max		
Absolute values	50%	Pate et al. (32)
Relative values	25%	
Respiratory function		
Pulmonary ventilation (maximal)	48%	Åstrand et al. (33)
Cardiovascular function		
Left ventricular mass	31%	Åstrand et al. (33)
Cardiac output (rest)	22%	Best et al. (34)
Cardiac output (maximal)	30%	Tong et al. (35)
Stroke volume (rest)	43%	
Stroke volume (maximal)	34%	
Hemoglobin concentration	11%	

Table 2. Olympic weightlifting data between equivalent male-female and top/open weight categories.

	Sex	Weight (kg)	Height (m)	Combined record (kg)	Strength to weight ratio	Relative performance
2019 record in the 55 kg weight-limited category						
Liao Qiuyun	F	55	1.52	227	4.13	
Om Yun-chol	M	55	1.52	294	5.35	29.5%
1998-2018 record in the 69 kg weight-limited category						
Oxsana Slivenko	F	69	1.64	276	4.00	
Liao Hui	M	69	1.68	359	5.20	30.1%
Comparative performances for top/open categories (all time heaviest combined lifts)						
Tatiana Kashirina	F	108	1.77	348	3.22	
Lasha Talakhadze	M	168	1.97	484	2.88	39.1%

F= Female, M=Male

Table 3. Selected junior male records in comparison with adult elite female records.

Event	Schoolboy male record	Elite female (adult) record
100m	10.20 (age 15)	10.49
800m	1:51.23 (age 14)	1:53.28
1500m	3:48.37 (age 14)	3:50.07
Long jump	7.85 m (age 15)	7.52 m
Discus throw	77.68 m (age 15)	76.80 m

m=meters

Time format: minutes:seconds.hundredths of a second

Table 4. Longitudinal studies of muscle and strength changes in adult transgender women undergoing cross-sex hormone therapy. Studies reporting measures of lean mass, muscle volume, muscle area or strength are included. Muscle/strength data is calculated in reference to baseline cohort data and, where reported, reference female (or transgender men before treatment) cohort data.

Study	Participants (age)	Therapy	Confirmed serum testosterone levels	Muscle/strength data	Comparison with reference females
Gooren and Bunck 2004 ⁵⁷	N=19 TW 26±6 yr	T suppression + E supplementation	≤1 nmol/L at 1 and 3 yr	Thigh area 1 yr -9% / 3 yr -12%	Thigh area 1 yr 16% / 3 yr 13%
Haraldsen et al. 2007 ⁵⁸	N=12 TW 29±8 yr	E supplementation	<10 nmol/L at 3 mo and 1 yr	LBM 3 mo / 1 yr - small changes, unclear magnitude	
Mueller et al. 2011 ⁵⁹	N=84 TW 36±11 yr	T suppression + E supplementation	≤1 nmol/L at 1 and 2 yr	LBM 1 yr -4% / 2 yr -7%	
Wierckx et al. 2014 ⁶⁰	N=53 TW 31±14 yr	T suppression + E supplementation	<10 nmol/L at 1 yr	LBM 1 yr -5%	LBM 1 yr 39%
Van Caenegem et al. 2015 ⁵¹	N=49 TW 33 ±14 yr	T suppression + E supplementation	≤1 nmol/L at 1 and 2 yr	LBM 1 yr -4% / 2 yr -0.5% Grip strength 1 yr -7% / 2 yr -9% Calf area 1 yr -2% / 2 yr -4% Forearm area 1 yr -8% / 2 yr -4%	
Gava et al. 2016 ⁶¹	N=40 TW 31 ±10 yr	T suppression + E supplementation	<5 nmol/L at 6 mo and ≤ 1 nmol/L at 1 yr	LBM 1 yr -2%	
Auer et al. 2018 ⁶²	N=72 TW 35 ±1 (SE) yr	T suppression + E supplementation	<5 nmol/L at 1 yr	LBM 1 yr -3%	LBM 1 yr 27%
Klaver et al. 2018 ⁶³	N=179 TW 29 (range 18-66)	T suppression + E supplementation	≤1 nmol/L at 1 yr	LBM 1 yr total -3% arm region -6% trunk region -2% android region 0% gynoid region -3% leg region -4%	LBM 1 yr total 18% arm region 28% leg region 19%
Figuera et al. 2018 ⁶⁴	N=46 TW 34±10	E supplementation with or without T suppression	<5 nmol/L at 3 mo ≤1 nmol/L at 31 mo	ALM 31 mo -4% from the 3 mo visit	

Scharff et al. 2019 ⁶⁵	N=249 TW 28 (inter quartile range 23-40)	T suppression + E supplementation	≤1 nmol/L at 1 yr	Grip strength 1 yr -4%	Grip strength 1 yr 21%
Wiik et al. 2019 ⁶⁶	N=11 TW 27±4	T suppression + E supplementation	≤1 nmol/L at 4 mo and at 1 yr	Thigh volume 1 yr -5% Quad area 1 yr -4% Knee extension strength 1 yr 2% Knee flexion strength 1 yr 3%	Thigh volume 1 yr 33% Quad area 26% Knee extension strength 41% Knee flexion strength 33%

N = number of participants. TW – transgender women. yr – year. mo – month. T – testosterone. E – estrogen. ± standard deviation (unless otherwise indicated in text). LBM – lean body mass. ALM – appendicular lean mass. Tack et al.⁶⁷ was not included in the table since some of the participants had not undergone full puberty at treatment initiation.

Executive Summary

Dissertation Title: *Assessing the potential transgender impact on girl champions in American high school track and field.*

By

Gabriel A. Higerd, Doctor of Education in Sports Management

Presented December 2020

Introduction

The intersection of the transgender movement and sport is at the forefront of sport policy discussions. The rise in the numbers, as well as the cultural acceptance of transgender individuals, have accelerated the need to create modern transgender sport policies. President Joe Biden has said, “Let’s be clear: Transgender equality is the civil rights issue of our time. There is no room for compromise.” Meanwhile, pushback from states, legislators, and organizations who want to restrict sports participation based on biology is growing. The goal of this research was to assist those seeking to make informed, evidence-based transgender policy decisions.

The purpose of the study was to investigate the underlying basis for post-pubertal sex segregation in sport and assess the probability of a female classification state sport champion being transgender. This research answered three questions: (1) Is there a statistically significant relationship in the performances of female and male high school track and field athletes? This question assesses whether biological males and females are really different [vs. just a social construct] and determines the scale of that difference. (2) Is there a statistically significant relationship between event distance and the percentage of males that are superior performers to the best female? This question assesses what percentage of males are better than the best female in certain events and whether distance matters. (3) Is there a statistically significant probability of one or more biological male (46, XY) transgender individuals being a girls’ champion in an event. In other words, if male athletes came out as trans at the same rates as other teens, how often would a biological female win?

Research Methods

The study investigated roughly one million (920,115) American high school track and field performances available through the track and field database Athletic.net. The sample was from five states (CA, FL, MN, NY, WA), over three years (2017 – 2019), in eight events (high jump, long jump, 100M, 200M, 400M, 800M, 1600M, and 3200M). The participation in these events were 400,929 female and 519,186 male (44% female, 56% male). Biological males and females are identified in the study by their genetic karyotype of 46, XY and 46, XX respectively.

Statistical correlation and regression analysis were used to answer the first two research questions. A statistical simulation involving over 1.1 million random number generated trials developed the probability of trans dominance in the female classification.

Results

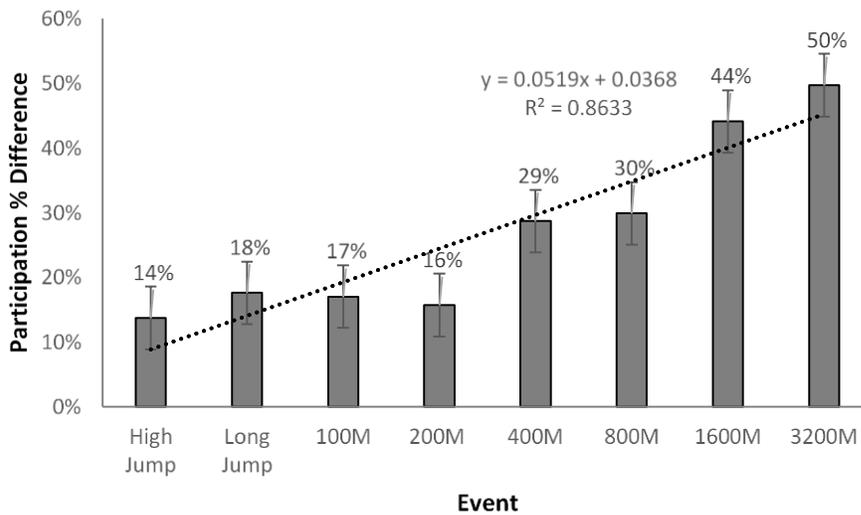
Interestingly, girls' participation percentage difference in comparison to boys was the closest (14%) in events that are more dependent on power and speed (e.g., high jump, long jump, 100M), and furthest (50% difference) in participation in events that rely on endurance (e.g., 1600M, 3200M).

Difference in Participation by Sex

	<i>n</i> 46, XX	<i>n</i> 46, XY	% Difference by Sex
High Jump	23,390	26,843	13.7%
Long Jump*	45,705	54,506	17.6%
100M*	79,663	94,447	17.0%
200M*	75,192	88,045	15.7%
400M	52,050	69,517	28.7%
800M	56,670	76,599	29.9%
1600M**	43,914	68,787	44.1%
3200M**	24,345	40,442	49.7%
Total	400,929	519,186	25.7%

Note. *N* = 920,115. 44% Female and 56% Male. States = CA, FL, MN, NY, WA. 2017, 2018, 2019 outdoor seasons. *Excludes 2017 MN. **Excludes NY.

Difference in Participation Between Boys and Girls and Event Distance

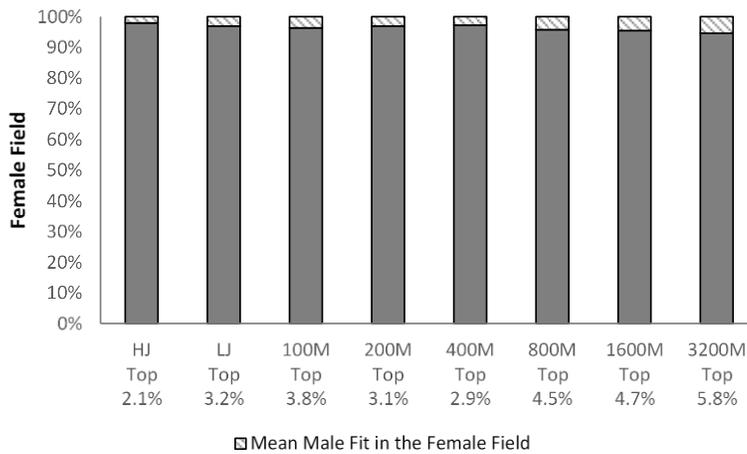


Note. *N* = 920,115. 400,929 female, 519,186 male. High jump = 15M and long jump = 30M for regression and correlation. $r = .93$, $R^2 = .87$, $F(1, 6) = 38.58$, $p < .001$.

Not surprisingly, in each of the eight events, there was a significant difference in performance by sex. The average differences in performance by sex ranged from 14% at the low end in the 100M, to 24% at the high end in the long jump, and the average difference of all the events is 18% in favor of males.

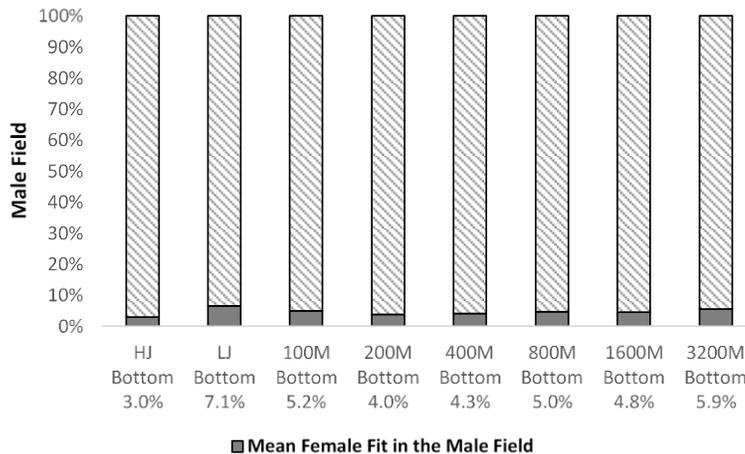
To some those percentage numbers are not immediately shocking. However, explaining the data another way, is that the average boy is better than 94%-98% of girls (top 2%-6% of the female field). The average girl is worse than 93%-97% of boys (bottom 3%-7% of the male field). Approximately one-third or more (32%-43%) of boys are better than 99% of girls. The best girl in the state would never get even remotely close to winning if there were not sex segregation. Boys that are better than the best girl in each event (potential female champions) ranged from 8-9% of all boys in the long jump, 100M and 200M, to 14-16% of all boys in the high jump, 400M, 800M, 1600M, and 3200M.

Mean Male Performance Fit Among the Female Field



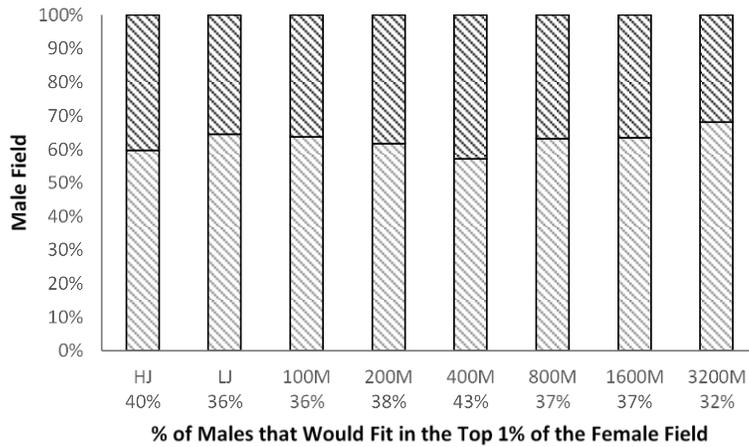
Note. The average male performance is better than 94.2%-97.9% of female performances.

Mean Female Performance Fit Among the Male Field



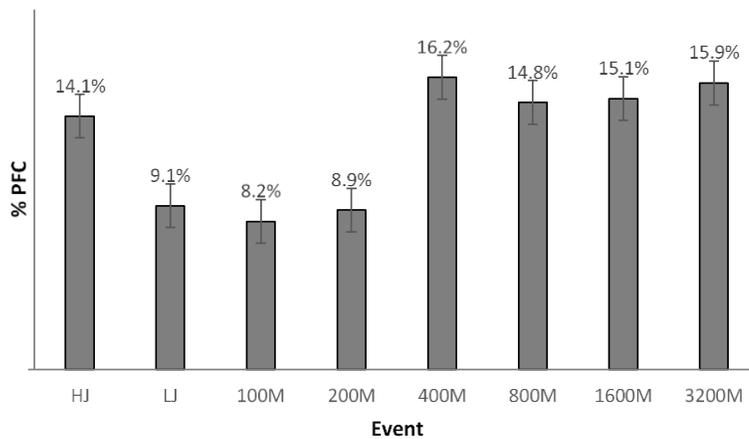
Note. The average female performance is worse than 92.9%-97% of male performances.

Percentage of Male Performances That Fit in the Top 1% of the Female Field



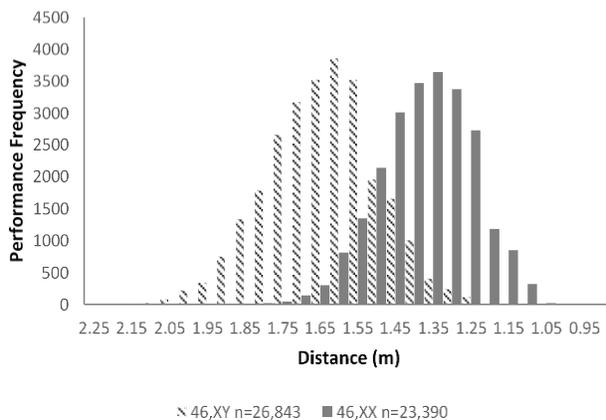
Note. 32%-43% of male performances fit within the top 1% of female performances.

Percentage of Male Performances Better than the Best Female



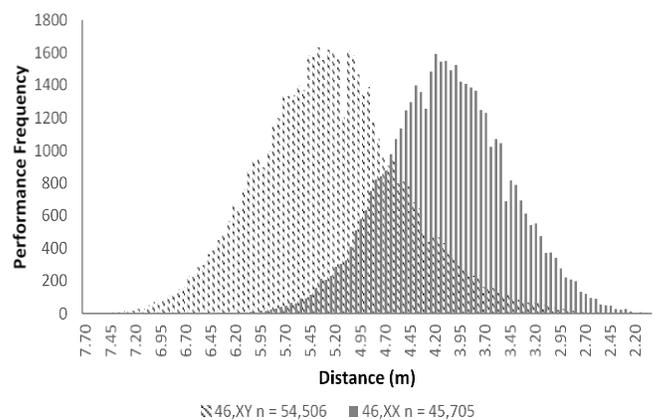
Note. HJ = high jump, LJ = long jump. PFC = potential female champion. The average percent PFC totals varied from 8.23%-16.24%, with the smallest occurring in the sprint events and the largest in the 400M.

High Jump Performance Distribution by Sex



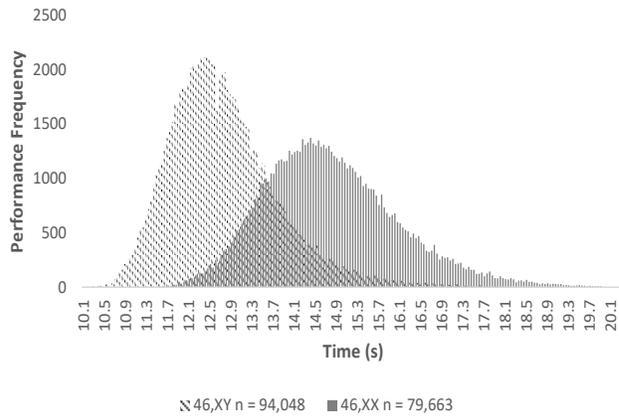
Note. Mean difference = 18.18%. Mode 46, XX = 1.32 46, XY = 1.52
Range 46, XX = .94, 46, XY = 1.09.

Long Jump Performance Distribution by Sex



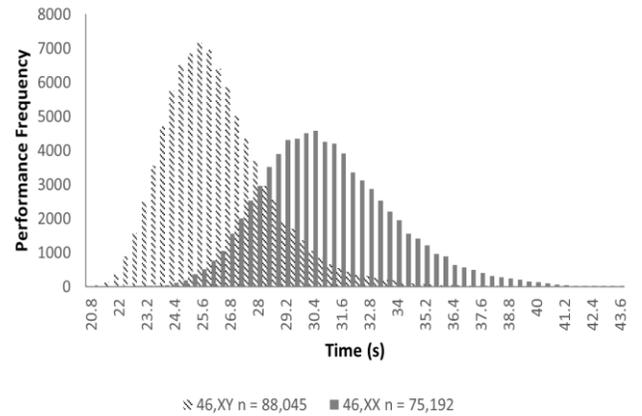
Note. Mean difference = 24.14%. Mode 46, XX = 3.96 46, XY = 5.18
Range 46, XX = 4.72, 46, XY = 5.29

100 Meter Performance Distribution by Sex



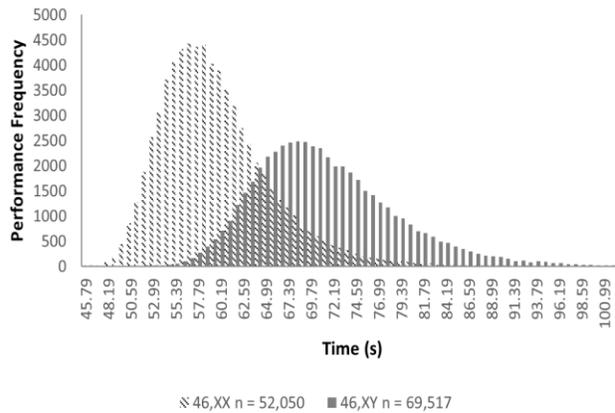
Note. Mean difference = 14.38%. Mode 46, XX = 14.50 46, XY = 12.43
Range 46, XX = 9.14, 46, XY = 8.57.

200 Meter Performance Distribution by Sex



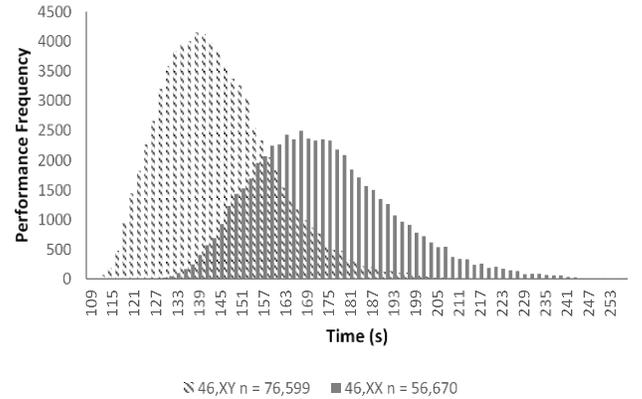
Note. Mean difference = 16.17%. Mode 46, XX = 29.57, 46, XY = 25.10
Range 46, XX = 20.81, 46, XY = 17.83

400 Meter Performance Distribution by Sex



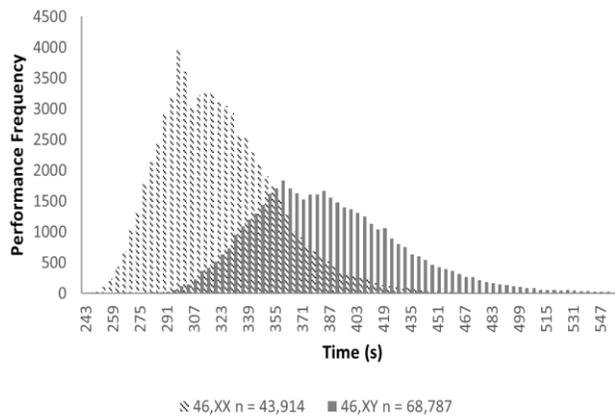
Note. Mean difference = 17.62%. Mode 46, XX = 70 46, XY = 57.54
Range 46, XX = 50.68, 46, XY = 47.56

800 Meter Performance Distribution by Sex



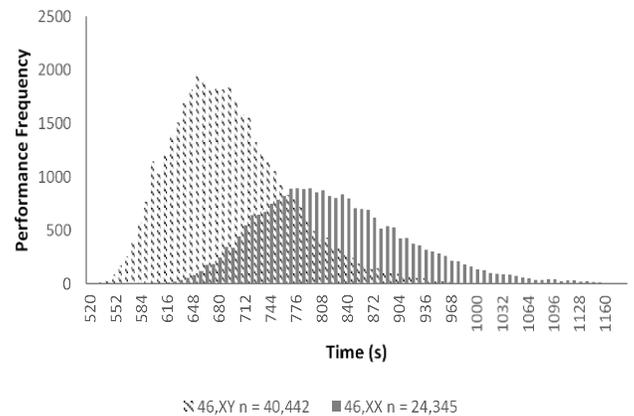
Note. Mean difference = 17.96%. Mode 46, XX = 161.8 46, XY = 134
Range 46, XX = 144.22, 46, XY = 110.37

1600 Meter Performance Distribution by Sex



Note. Mean difference = 17.81%. Mode 46, XX = 354.72, 46, XY = 287.79
Range 46, XX = 284.01, 46, XY = 225.38

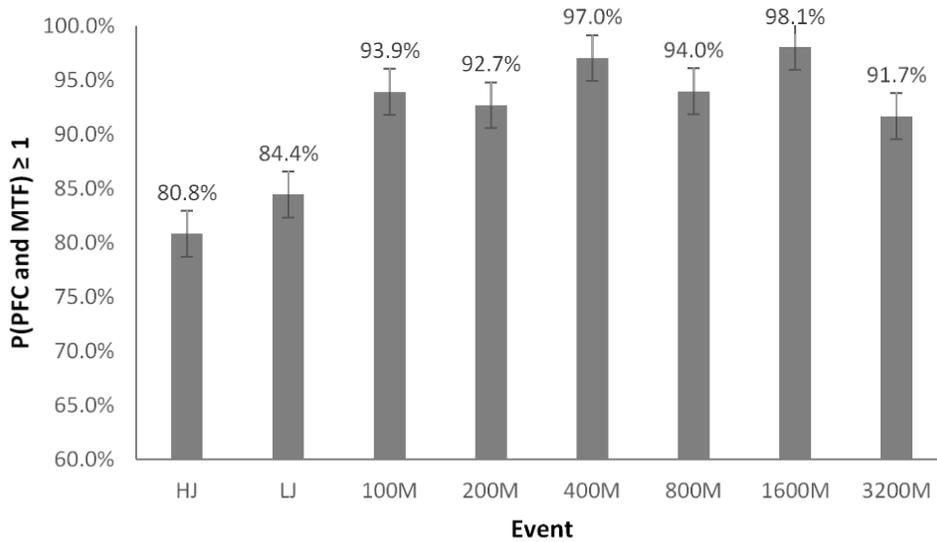
3200 Meter Performance Distribution by Sex



Note. Mean difference = 16.83%. Mode 46, XX = 805 46, XY = 662.17
Range 46, XX = 586.06, 46, XY = 500.99

The Monte Carlo computer generated simulation found that biological females, if assumptions hold, are likely to be beat by transgender biological males in every event. The assumptions were that transgender population density estimates (from the Williams Institute at UCLA) are true, representative of high school track and field athletes, and being transgender is an independent, uniformly distributed attribute among the boy sample. The Williams estimated percentage of transgender persons age 13 to 17 in the given states are: CA., 0.85%; FL., 0.78%; MN., 0.85%; NY., 0.79%; WA., 0.70%. **Assumptions holding, there is a simulated 81%-98% probability of transgender dominance occurring in the female track and field events.**

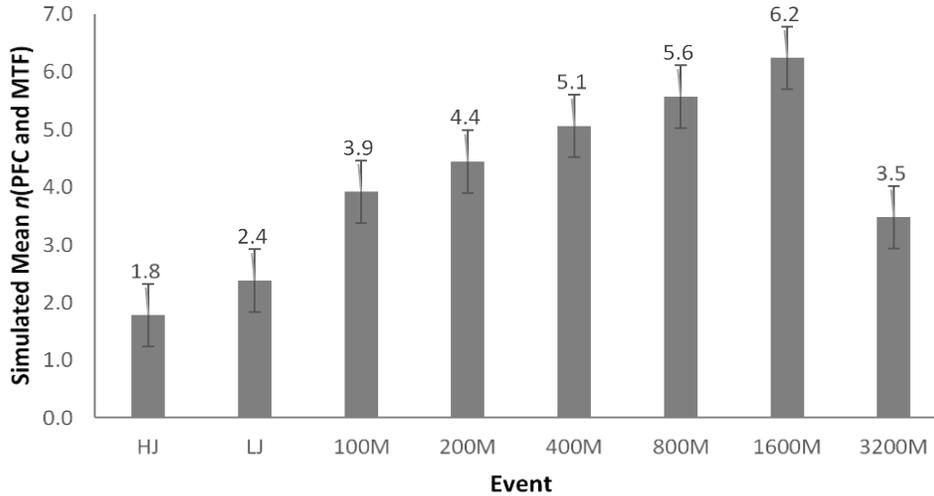
Probability of One or More 46,XY Potential Female Champions Being MTF Transgender



Note. Post hoc regression analysis of the results result in a non-significant relationship between $P(n[\text{PFC and MTF}] \geq 1)$ and distance ($p = .44$). $R^2 = .10$, $F(1, 6) = .68$, $r = .32$.

Additionally, in the simulation trials where there was at least one transgender athlete better than all the girls, there was an average of two to three trans champions (event dependent). Thus, in the majority of cases, the entire girls' podium (top performers in the state) would be transgender athletes.

Average Size of Simulated MTF Transgender Athletes atop the Female Standings

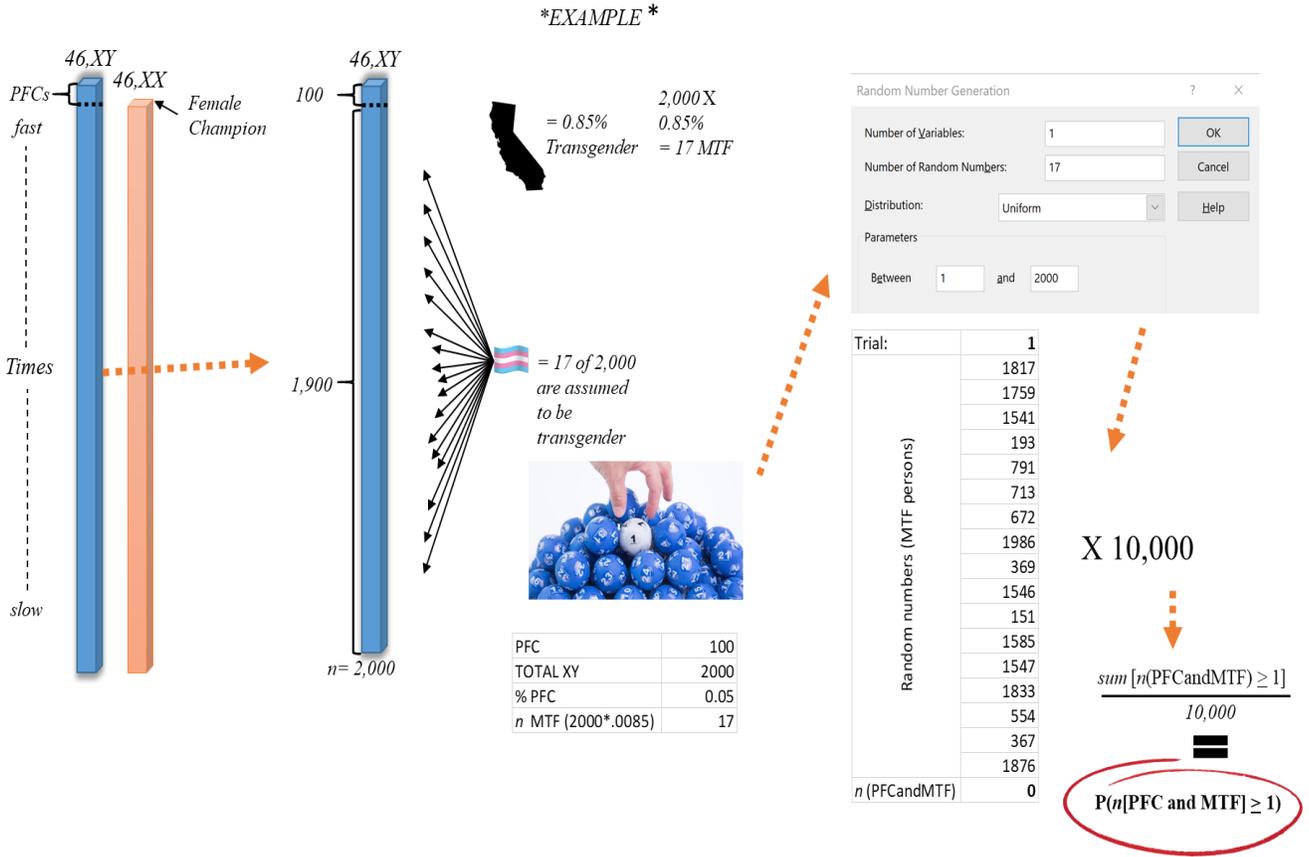


Note. Total simulations = 111, trials $n = 1,110,000$. Mean Size of $n(\text{PFC and MTF}) \geq 1$ when $P(n[\text{PFC and MTF}] \geq 1)$. Post hoc regression analysis of the results reveal a non-significant relationship between mean size of $n(\text{PFC and MTF}) \geq 1$ when $P(n[\text{PFC and MTF}] \geq 1)$ and distance ($p = .56$). $R^2 = .06$, $F(1, 6) = .38$, $r = .24$.

Conclusion

Biology matters in sport performance. The data provides sufficient and strong evidence to support post-pubertal sex segregation in sport. If biological females are to win female events at the state level, policies should restrict participation to biological females only. Female sport is an invaluable asset and societal good. The findings provide critical data for policymakers to make informed, evidence-based decisions that protect and promote competitive female sport.

Appendix: Monte Carlo Simulation Model



Strength comparisons in untrained men and trained women athletes

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ABSTRACT

MORROW, JAMES R., JR. and W.W. HOSLER. Strength comparisons in untrained men and trained women athletes. *Med. Sci. Sports Exercise*, Vol. 13, No. 3, pp. 194-198, 1981. The purpose was to compare untrained college men with trained collegiate women basketball and volleyball players in terms of absolute and relative upper and lower body strength. Absolute and relative strength comparisons were also made between the two groups of women athletes. Eighty subjects were included in each group. Relative strength was expressed per unit of weight, height, biacromium, and biiliac widths. It was hypothesized that while men are significantly stronger than trained women athletes, such differences may be removed once body size characteristics are controlled. MANOVA and MANCOVA were utilized to test hypotheses. Results indicate that untrained men have greater upper and lower body strength than trained women athletes in terms of both absolute and relative strength. Women basketball players have greater absolute and relative lower body strength than women volleyball players. The two groups of women athletes are alike in terms of upper body absolute and relative strength.

ISOKINETICS, SEX COMPARISON, STRENGTH, WOMEN ATHLETES

Men and women have been compared on a variety of physiological parameters (23). Various comparative techniques have been utilized by researchers reporting strength characteristics of men and women (2,5,8,11,16,17,19,20,22,25,26). In some cases, comparisons have been made in terms of absolute strength only. Results indicate that while absolute strength differences exist between the sexes, there is a great deal of variability in the amount of difference. Results depend upon the study reported and the strength measurements obtained. In other studies, various means have been utilized to express strength in relative terms. The methods utilized to express strength in relative terms have included the development of strength-to-weight ratios (strength/weight), strength-to-lean body weight ratios (strength/lbw), expressing weight changes in terms of percent change, expressing weight per unit of muscle cross-sectional area, and covariance techniques. Perhaps the most widely utilized technique is to express strength in one of the ratio forms.

Strength differences would appear to have an effect upon successful performance in activities such as basket-

ball and volleyball. Morrow, Jackson, Hosler, and Kachurik (21) have reported that strength is one of the dimensions that differentiates successful and less successful women's intercollegiate volleyball teams. It has been suggested that trained women athletes may be as strong as untrained men; it has also been suggested that strength differences in men and women are primarily attributable to differences in body size characteristics. Thus, it was the purpose of this paper to compare trained intercollegiate women basketball players and volleyball players with untrained college-age men in terms of absolute and relative strength for the upper and lower body. Second, absolute and relative strength comparisons were made between the two groups of women athletes.

METHODS

Subjects for the study included trained intercollegiate women athletes (basketball and volleyball players) and untrained college-age men. The women subjects from the volleyball and basketball teams were selected from more than two dozen universities and colleges throughout the Southwest. Data were gathered during regional tournaments for the respective sports and informed consent was obtained from each participant as well as from each coach. Eighty basketball players and 80 volleyball players were randomly selected from larger samples of subjects. Eighty men were randomly selected from a larger sample of subjects. All men were enrolled in required or elective physical education classes; none of the men were physical education majors and none of them were on an intercollegiate athletic team of any type. Informed consent was obtained from each man.

All data were collected by trained individuals. The same persons collected data on all subjects. The following measurements were obtained on each subject: height, weight, biacromium width, biiliac width, isokinetic bench (BP), and leg press (LP) scores. Anthropometric measurements were taken according to the procedures outlined by Behnke and Wilmore (1).

Isokinetic bench and leg press scores were obtained using bench and leg press apparatus Models 7153 and

7154, respectively (Lumex Inc., Bayshore, N.Y.). Each subject was given three submaximal practice trials on each instrument at 20°/s and then instructed to perform four maximal exertions; all were permitted to rest after each trial. The average of the four trials was used as the criterion score for each subject. Strip chart readings were obtained for each subject and the output is interpreted as the maximal force exerted in the range of movement.

Investigators (3,4,18,22,24) have reported on the intercorrelations between strength and various anthropometric characteristics for both men and women. Lamphiear and Montoye (16) investigated muscular strength and body size, and found that most of the explained variation in strength variables could be accounted for by five body-size variables: height, weight, biacromial diameter, arm girth, and triceps skinfold thickness.

Based upon the reported intercorrelations between various anthropometric and strength characteristics, it was decided to express relative strength for this study in terms of the subject's weight, height, biacromium and biiliac widths. Thus, these four anthropometric characteristics were utilized as covariates when developing a relative strength score for each subject.

Initially, trained women athletes were compared with untrained men in terms of absolute and then relative strength. The basketball and volleyball women were then compared in terms of absolute and relative strength. Relative strength measures were expressed by extracting the covariation in strength that was related to the four anthropometric characteristics. The controlled variables were weight, height, biacromium and biiliac widths. Thus, relative strength is defined as a residualized variable resulting from control of mean group differences in body size characteristics. The methodology utilized is an extension of that suggested by Dubois (6), Katch (12,13), and Katch and Katch (14) and similar to that used by Hoffman, Stauffer, and Jackson (11). Analysis consisted of two multivariate analysis of variance Helmert (7) contrasts (C1: men contrasted with women; C2: basketball contrasted with volleyball) to investigate differences in absolute strength. Multivariate analysis of covariance was utilized with similar Helmert contrasts in order to determine the differences between contrasted groups in terms of relative strength. Post hoc univariate analyses and discriminant analysis were utilized to further investigate absolute and relative strength differences once a significant multivariate result was obtained.

RESULTS

Anthropometric means and standard deviations for the groups are presented in Table 1. Results of C1 (men vs women) indicated that the untrained men differed significantly from the trained women athletes in terms of absolute strength ($F[2,236] = 209.81$; $p < 0.01$). Univariate F results were: LP ($F[1,237] = 158.61$; $p < 0.01$) and BP

TABLE 1. Anthropometric and strength variables for young men and women athletes.

	Basketball		Volleyball
	Men	Women	Women
N	80	80	80
Age	20.71 ^a 2.22	19.61 1.27	19.35 1.48
Weight (kg)	74.50 12.09	65.58 8.13	63.94 6.93
Height (cm)	176.69 7.12	171.69 7.31	169.82 6.04
Biacromium (cm)	40.81 2.05	37.77 1.77	37.77 1.56
Biiliac (cm)	28.44 1.88	29.13 1.80	27.93 1.42
Leg Press (kg)	226.73 48.90	177.74 36.30	143.78 26.10
Bench Press (kg)	83.54 20.91	43.17 11.70	40.73 10.29

^a First entry is mean; second is standard deviation

($F[1,237] = 407.00$; $p < 0.01$). Men and women differed significantly on both of the absolute strength measures. The discriminant analysis results indicate the ability of the dependent variable to contribute to group differences when the other dependent variable is controlled. Only the bench press had a significant ($p < 0.01$) discriminant coefficient indicating that the bench press significantly differentiates between the groups when leg press is controlled. However, when differences between upper body strength (bench press) are controlled, lower body strength does not contribute significantly toward group differentiation. Relative strength differences were then determined based upon multivariate analysis of covariance. Results indicate when body composition characteristics are controlled, untrained men and trained women differ in terms of relative strength ($F[2,23] = 93.91$; $p < 0.01$). Univariate and discriminant analysis results are similar to those in absolute strength. Differences exist in both upper and lower body relative strength ($p < 0.01$). However, when correction is made for upper body relative strength differences, the groups are similar in lower body relative strength. Adjusted kg means for the strength tests were: men LP = 219.38, BP = 79.28; basketball women LP = 181.84, BP = 45.03; and volleyball women LP = 147.03, BP = 43.13, with the four body-size characteristics controlled. The relative strength values for the groups are in the same order as those of absolute strength. However, the magnitude of the differences is not as large as those found in absolute strength. In terms of absolute isokinetic strength, the women's values are 71% and 50% of those for the men on leg press and bench press, respectively. When strength is expressed in relative terms, these values increase to 75% and 56%, respectively.

The second contrast (C2) compared the basketball women and the volleyball women in terms of absolute

strength. Results indicate that the women differed in terms of absolute strength ($F[2,236] = 17.19$; $p < 0.01$). Univariate results indicate that the women differed primarily in terms of lower body strength, with basketball players being stronger (LP: $F[1,237] = 31.52$; $p < 0.01$, and BP: $F[1,237] = 1.05$; $p > 0.05$). Discriminant analysis results indicate that the women differed primarily in terms of lower body strength.

MANCOVA was again utilized to compare the women in terms of relative strength. The multivariate test was significant ($F[2,231] = 17.94$; $p < 0.01$), indicating that the contrasted groups differed in terms of relative strength (i.e., strength per unit of weight, height, biacromium, and biiliac). Univariate results indicate that differences were primarily in lower body strength. Discriminant analysis results again indicated that when either of the dependent variables was controlled, LP was best able to contribute significantly toward group differentiation.

DISCUSSION

Several authors (6,12,13,14) have reported on the problems that arise with the ratio method of "controlling" for body size characteristics. In general, the problem is that the relative strength (ratio) is perceived to be statistically independent of the subject's weight (or lean weight, depending upon the ratio developed). Such a ratio is, in fact, not independent of the "controlled" variable. As a consequence of such studies, it has been suggested that well-trained women athletes may be as strong as untrained men in terms of absolute strength (9,10). It was assumed that the women would necessarily then be as strong or stronger in terms of relative strength. Wilmore (25) reported that women were relatively stronger than men in terms of lower body strength when a strength-to-lean body weight ratio was developed. The women were considerably weaker in terms of relative and absolute upper body strength. Montoye and Lamphiear (19) also reported results based upon this ratio method of adjustment.

The utilization of covariance techniques (6,12,13,14,-15,27) permits one to calculate a residualized variable which is statistically independent of the covariate(s). That is, if one wished to control for weight differences in strength, the subject's weight would be controlled by extracting the covariation in strength that was due to weight. The result would be a strength score for the subject which is statistically independent of the subject's weight. Thus, a better estimate of the subject's "relative strength" is developed. The measure would be interpreted as strength per unit of weight. Such a procedure can be expanded to include more than one covariate. Thus, group differences on the covariates are controlled.

Hoffman, Stauffer, and Jackson (11) have utilized the covariance technique to investigate upper and lower body strength differences in college-age men and women. Their results indicate that relative differences exist between col-

lege-age men and women in upper body strength but not in lower body strength. The subjects in their study had "relative strength" expressed per unit of height and lean body weight.

It has been suggested that untrained men would not be as strong as "sport"-trained women athletes. The results of this study do not support this contention. Results indicate that men and women differ in terms of upper and lower body absolute strength. That the present results differ from those reported by others (18,25) may lie in the fact that strength measures for this study were isokinetic, whereas cited research has consisted of isotonic and isometric data. The present results in absolute strength appear to be of the most importance when considering the inclusion of men and women on the same athletic team. Regardless of one's relative strength, any time that force is important in an athletic event, that person with greatest mass will ultimately provide the greatest force for a given acceleration. Thus, men would ultimately have greater potential for force development than would the women. Therefore, it would appear appropriate not to include men and women in the same activity if strength is related to successful performance. This would be particularly true of events where one body contacts another. There are, however, sporting events such as tennis, badminton, and golf wherein skill can offset strength advantages.

The relative strength (controlled for body size characteristics) results indicate that untrained men remain significantly stronger than well-trained women in terms of both upper and lower body strength. Results do indicate that once differences in upper body strength are adjusted for, the contrasted groups do not differ in lower body strength. The general statement, however, is that untrained men remain stronger in upper and lower body relative strength than trained women intercollegiate basketball players and volleyball players.

Results of C2 indicate that women athletes generally differ in absolute strength characteristics. Univariate results indicate that differences are primarily exhibited in lower body strength. Similar results are obtained when utilizing relative strength as defined in this paper. Perhaps the differences that exist in lower body strength for the women are reflective of the differential training modalities utilized by the coaches in such sporting events.

The passage of Title IX legislation has led to the enhancement of interscholastic athletic programs for women in this country. An outgrowth of the legislation is that women are becoming more involved in physical training programs. As a result, it has been suggested that men and women be permitted to participate together on various athletic teams. There have been court cases wherein individuals of one sex have attempted to receive the court's permission to join an athletic team of the opposite sex. Generally, each of these decisions becomes precedent-setting because of the originality of the legislation. Two such

cases have involved volleyball and basketball teams at the high school level. The present results, if generalizable to the high school setting, would indicate that it may be inappropriate for members of both sexes to play on the same team. Perhaps it would be better to speak in terms of "separate but equal" athletic programs for men and women, rather than teams comprised of both sexes. The present results are based upon mean group differences. The distributions of absolute strength curves overlap for the men and women. For example, a LP score of 223 kg for women (95th percentile) represents the 45th percentile for the men. Likewise, a BP score of 61 kg for women (95th percentile) represents the 14th percentile for the men. Thus, there are some women who are stronger than some men. This fact should be taken into account when generalizing the present results and when making individual decisions about team membership.

In summary, it appears that untrained men and trained women differ significantly in terms of absolute and relative strength. Both absolute and relative strength differences exist in upper and lower body strength measures. Women basketball players and volleyball players differ significantly in terms of absolute and relative strength. However, differences are primarily found in the lower body.

Further research is needed to identify strength characteristics of various other women athletes. Of particular interest would be comparisons between untrained men and well-trained women from sporting events which are typically depicted as strength oriented. Further investigations should include direct measurement of additional body composition characteristics (e.g., body density, lean weight, and/or fat weight).

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To: North Dakota Senate Judiciary Committee
From: Save Women's Sports
Date: Sunday, March 14, 2021
RE: Please protect females sports by supporting HB 1298



Dear Committee Members,

On behalf of the following concerned individuals and organizations, and women and girls across North Dakota we ask you to please protect female sports HB 1298. Your efforts to preserve women's sports will impact millions of young women. The physical advantages that males have over females are very real and unchangeable, resulting in performance differentials of up to over 30%.

No matter what medical intervention is attempted, a male body will never be transformed into a female body. It can only be made to appear more female. Once a person is born male, every cell and structure of the body will remain fundamentally male.

Currently, society is being manipulated into believing that people can literally change their birth determined sex if they simply proclaim that they are a different "gender". Please note that the two words do NOT mean the same thing: "sex" is biological, while "gender" relates to social behavior and the way someone wishes to be viewed by others. Sex is a fact; gender is an idea.

Policies that enable a biological male to self-declare as "female" and to trespass upon female-only space have proven to be unfair towards females. In Connecticut, for example, such policies allow two biological males to dominate high school girls track in field. Between them, they have set 17 individual state meet records—setting times that females can never touch. Altogether high school girls have missed more than 85 opportunities to advance to the next level of competition. The desires of a few male-bodied individuals should never be used as an excuse to override the basic rights to privacy, fair play, and respect that women have fought so hard to attain.

In the realm of sports, it is obviously unethical to allow a male athlete to compete against female athletes. The advantages enjoyed by the male body result in a blatant disadvantage for female athletes. Such discrimination undermines the very purpose of Title IX.

The graphic on page three provides a useful summary of this issue and I have also provided my personal testimony. Please feel free to use it as you wish to educate others. If males who identify as transgender can compete on women's sports teams and in women's sporting events, there will be men's sports, there will be co-ed sports, but there will no longer be women's sports.

Furthermore, please let my team know if we can be of any assistance. The future of female sports depends on you. Please support HB 1298. Thank you for your vital support!

For more information and resources on this subject please proceed to our website www.savewomenssports.com.

Sincerely,
Beth Stelzer
Founder of Save Women's Sports

Linda Blade, PhD Kinesiology
Sport Performance Professional
President of Athletics Alberta

Jennifer S. Bryson
Former College Athlete
Let All Play, Founder

Natasha Chart
Board Chair
Women's Liberation Front

Jade Dickens
Masters Powerlifting World Champion
Founding Member of XX Fair Play Rights

Autumn Caycedo, MD
Former Collegiate Rower, Army Veteran

Misha Fayant
Multi Time Powerlifting World Champion
Founding Member of XX Fair Play Rights

Robert Fausett
Former U.S. National Taekwondo Team Coach
2012 Olympic Taekwondo Coach

Bob Higgins
Member of Save Women's Sports
43 Years of Experience in Road Cycling

Kristopher Hunt, MD FACEP
USA Powerlifting Medical Director

Emily Kaht
Marathon Runner
Save Women's Sports Ambassador

Heidi Kay
Amateur Powerlifter
Member of Save Women's Sports

Meg Kilgannon
Member of Save Women's Sports

Angela Riniker, Track Coach
Former NCAA 400 Meter Hurdles Champion
8 Time All American

joey brite
Founder of Can I Get A Witness

Ashley Lesniewski, MSN, APRN, FNP-C,
Amateur Cyclist

Anthony D. Lunsford
Father of Daughter Athletes
Author, Coach, and Business Owner

Donna Marts
Multi Time Powerlifting World Champion
Founding Member of XX Fair Play Rights

Jane Rice
Masters Powerlifter

Elizabeth Richardson, MD FACOG
Champion Powerlifter

Jennifer Rosener MSN APRN NP-C
Member of Save Women's Sports

Jennifer Wagner-Assali, MD FAAOS
5-time National Champion Master Track Cycling

Mary Verrandeaux
Tour de France Finisher

Representative Barbara Ehardt
Sponsor of Idaho's "Fairness in women's Sports Act"

Sharon Dierberger
Clinical Exercise Physiologist

Lyndsey Halik
Save Women's Sports Ambassador

Gabriel Higerd, Ed.D., CSCS
Transgender Sport Policy Researcher
Certified Strength and Conditioning Specialist

Tanya Ditty
Vice President of Field Operations
Concerned Women for America

Rebekah Lair
Masters Bench Press World Champion
Founding Member of XX Fair Play Rights



FAST FACTS SPORTS

The strongest 10% of females can only beat the bottom 10% of men in hand grip tests.²⁸ Hand grip is one of the most widely-used markers for **strength**.



Men are **faster** than women. In running, swimming, rowing, kayaking, and short distance and long distance, women's speed world records are all about 90% of their



men's speed world records.²⁹ Each year, **hundreds** of men easily beat the world's best time in the women's marathon.³⁰

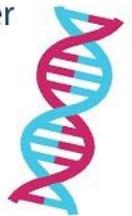
Men have broader shoulders, and larger feet and hands, all of which grant an **advantage** in sports like volleyball, swimming, and basketball.



Male marathon runners have **lower body fat** percentages than female marathon runners.³¹



Men have a greater amount of fast twitch muscle fibers, which give men



explosive power.³²

On average, men are physically stronger than women.³³

Men have **66%** more upper-body muscle than women,

and **50%** more lower-body muscle.³⁴



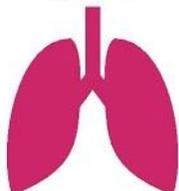
There is a **10%** performance gap between male and female athletes in most sports and it hasn't narrowed as women train harder.³⁵



Men have **higher hemoglobin levels**, allowing their body to oxygenate muscles more quickly and efficiently.³⁶



Men have **larger hearts and lungs**. A larger heart can pump more blood to the body and larger lungs allow for the body's tissues to receive more oxygen.



Men have bigger and stronger bones. A larger skeletal structure means men's bodies can hold **more muscle** and **larger bones** facilitate leverage.³⁷



Men are **taller**, giving them an advantage in sports like basketball or volleyball.



My name is Beth Stelzer. I'm a former med. lab. tech., now a wife, mom, powerlifter, and founder of the non-partisan coalition Save Women's Sports, here in support of HB 1298.

I found Powerlifting later in life. It has empowered me through many life struggles. My husband brought me to watch the State Championships for my Birthday in 2018 hoping it would give me the courage to compete. I surpassed many obstacles, including the loss of a pregnancy, to achieve my goal in 2019.

However, activists disrupted the entire meet because a male was not allowed to compete as a female. They have now filed a lawsuit against USA Powerlifting.

In powerlifting, the male competitive advantage crests at over 30 percent. When half a kilogram can determine the winner; this type of advantage is huge! Studies continue to confirm that even after hormone replacement they are not mitigated. Among many other advantages, the Y chromosome continues to program the permanently increased number of myonuclei in a male's muscles to recover and grow bigger, easier and faster than females.

The women's world bench press holder is outlifted by her male counterpart, at the same body weight and age group, by over 200lbs! After years of training, I am proud to say I can lift over 300 lbs off of the ground. My son, age 10, started training a few hours a week can already lift 200. It will not be long, and he will be outlifting me, no matter how hard I train.

Fairness, privacy, and safety for females must be insured and protected. Like most females, I would never have bothered to even start my fitness journey if I'd have had to compete against males. There would be no point.

Male participation in female sports is a growing problem across the world. We should not idly wait until a female in North Dakota is seriously injured to do something.

Countless females who share my concerns. Many have been directly harmed by males who took championships, destroyed long-standing records, and denied females the rewards of their years of hard work. Those who speak up risk losing opportunities, sponsorships, and their jobs. We are slurred as transphobic, bigoted, and even racist. I have received death threats for trying to preserve fairness for females. Out of fear, we have become the silenced majority. I share my story to represent those women and because it should not rest upon the shoulders of young women like those in Connecticut to fight this.

If we continue to allow males to compete in female sporting events, there will be men's sports and there will be co-ed sports, but sports for women and girls will end.

This bill is simply to protect females. You are one of 27 states to introduce legislation to protect female sports this session. Please be the join Mississippi and Idaho in making the protection of females in sports a law. Support HB 1298 and save sports for women and girls. Thank you.



Testimony in Support of House Bill 1298

Mark Jorritsma, Executive Director
Family Policy Alliance of North Dakota
March 16, 2021

Good afternoon Madam Chair Larson and members of the Senate Judiciary Committee. My name is Mark Jorritsma and I am the Executive Director of Family Policy Alliance of North Dakota. I am testifying in favor of House Bill 1298 and respectfully request that you render a “DO PASS” on this bill.

Context

It may seem like an obvious statement, but boys and girls are biologically different from birth. Whether one agrees or disagrees that this is how it should be, science and common sense tell us that males are generally stronger than females. That difference shows up in size, strength, bone density, and even hearts and lungs. These areas of biological advantage for boys are often directly associated with athletic performance. Over and over again, the courts have ruled that boys have a biological advantage over girls in most sports (Appendix A).

In contrast to this, some are lobbying to allow boys born biologically male but identifying as female to compete in girls’ sports. What is the supposed basis for this requirement? Title IX of the 1964 Civil Rights Act is often used to justify it. However, Title IX was designed to *eliminate* discrimination against women in education and athletics, but the current trend exploits Title IX to do just the opposite – let biological males steal opportunities reserved for girls. This is undoubtedly why just this legislative session, over two dozen states are currently considering or have already passed bills similar to this one, protecting girls’ sports.

So, what is the result when biological boys compete in girls’ sports? Not surprisingly, they nearly always win.

- In Connecticut, three female track stars are in the middle of a federal lawsuit over a policy that allowed biological boys to compete in girls’ sports. While the girls were formerly top high school runners, two biological males entered as girls and took their athletic titles and stole their opportunities to compete at a higher level. Please note that each of these girls has provided written testimony on this bill and I would strongly encourage you to read them – they are truly heartbreaking stories about what happens when boys are allowed to compete in girls’ sports.

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UNLEASHING CITIZENSHIP

FamilyPolicyAlliance.com/NorthDakota

- Biological young men presenting as females are using their physical advantages to win girls' wrestling championships in Texas.
- Transgender males are easily winning track championships and shutting out girls in Alaska.
- The world record for the men's 100-meter dash, set by Usain Bolt, is 9.58 seconds. The world record for women, set by Florence Griffith-Joyner, is 10.49 seconds. Females have never broken what is referred to as the 10-second barrier, while Olympic male finalists consistently break the barrier.
- Transgender competitor Mary Gregory from the UK participated in a women's weightlifting event, winning the masters world squat record, open world bench record, masters world deadlift record, and masters world total record in one day, beating every other competing woman.
- Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys.
- One of the world's top marathon runners, Paula Radcliffe, shared that when the Boston marathon changed its rules to open qualifying times to biological men who identified as women, allowing biological men to take women's slots would make it even harder for women to enter.

These girls are not losing just the opportunity to win, but to also earn college scholarships and launch their own careers in athletics, coaching, and more. In a sense, it is the girls who are truly being excluded. They have been excluded from the sports that were designed to provide them with the space they need to reach their highest potential.

North Dakota Status

There is no law currently in the Century Code that directly addresses boys competing in girls' sports. The closest we have is a policy from the North Dakota High School Activities Association (Appendix B).

While we applaud the Association for seeking to set out guidelines, there are two key problems. First, their regulations do not have the weight of law embodied in our Century Code and could be changed for innumerable reasons, as can the regulations of any other association.

Second, the guidelines allow biological boys who have undergone testosterone suppression therapy for at least one year to be allowed to compete in girls' sports as physically equal, despite evidence to the contrary. I would refer you to Appendix C and to the written testimony from the Executive Director of the American College of Pediatricians which has been submitted online.

Is this really an issue that North Dakotans need to address? Yes it is, particularly with the Biden Administration's recent and vocal support of transgender policies. North Dakota will only get increasing pressure from the federal government and special interest groups to discriminate against our female athletes.

The Bill Itself

The proposed bill, HB1298, limits participation in girls' sports to biological girls, making clear that women's sports are for women only. It is a fair, consistent, and documentable way of handling the issue.

However, this bill really comes down to two things. First, let's keep the playing field level for girls' sports. Let's not set back the clock 50 years and use federal antidiscrimination law against girls to actually discriminate against them in the name of social expediency.

Second, let's keep North Dakota a state where common sense rules. As North Dakotans, we need to tell DC that we will not yield to their social agenda being imposed on us, because it directly conflicts with our values.

For these reasons, I ask you to please vote a "DO PASS" out of committee on HB 1298. Thank you for your time and I would be happy to stand for any questions.

Appendix A

FEDERAL PROTECTIONS

For reasons of fundamental fairness and safety, girls have the right to play on a sex -segregated team that does not include biological boys. Courts have recognized there are fundamental physical differences between boys and girls that give boys a biological advantage in most sports. This is why we have sex -segregated teams in public schools and professional sports.



**45 CFR § 86.41 –
THE DEPARTMENT OF HEALTH & HUMAN SERVICES**

This is a federal regulation supporting Title IX. It prohibits discrimination on the basis of sex but specifies that educational institutions may have separate teams for members of each sex if selection is based upon competitive skill or if teams are competing in a contact sport

**34 CFR § 106.41(A)
THE DEPARTMENT OF EDUCATION**

This federal regulation explicitly prohibits discrimination on the basis of sex. But if the sport is a competitive or contact sport, this law permits sex -segregated teams in sports.

**O'CONNOR V. BD. OF ED., 449 U.S. 1301,
1307 (1980):**

If certain sports teams do not have “gender -based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ program and deny them an equal opportunity to compete in interscholastic events.”

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Appendix B

NDHSAA Board of Directors

November 20, 2015 / Page 1

NDHSAA Transgender Student Board Regulation

A transgender student will be defined as a student whose gender identity does not match the sex assigned to him or her at birth.

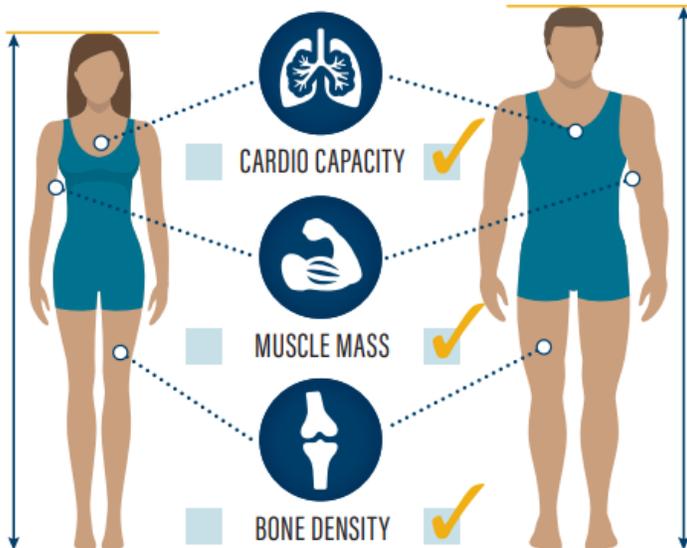
Any transgender student who is not taking hormone treatment related to gender transition may participate in a sex-separated interscholastic contest in accordance with the sex assigned to him or her at birth.

The following clarifies participation in sex-separated interscholastic contests of transgender students undergoing hormonal treatment for gender transition:

- A trans male (female to male) student who has undergone treatment with testosterone for gender transition may compete in a contest for boys but is no longer eligible to compete in a contest for girls.
- A trans female (male to female) student being treated with testosterone suppression medication for gender transition may continue to compete in a contest for boys but may not compete in a contest for girls until completing one calendar year of documented testosterone-suppression treatment.

Appendix C

Physiology of Men vs. Women



- Testosterone: increases bone size, bone density, muscle strength and size, ligament strength, connective tissue strength, increases red blood cells etc.
- Testosterone is not the only thing that gives boys an advantage. Even if a boy is taking drugs to lower his testosterone levels (e.g., cross-sex hormones), he still has a performance advantage over girls because he naturally has longer and stronger bones (giving him a height advantage), greater bone density (making him less likely than girls to get injured in many respects) increased muscle mass, and greater cardiovascular capacity than girls.
- Testosterone level for transgender-identifying men is still **3x** higher than what's allowable for women in professional sports.

Dear Chairmen and Committee Members,

I am writing in support of House Bill 1298. As a 4 time All American athlete it is with great joy that I am able to write and proclaim the accomplishments of my youth. I have had many doors opened to me that prior to my generation were only opened for biologically born males in Track and field. I was a female, protected by my governing officials, making sound laws that guarded the integrity of women's athletics. Please vote yes and protect our daughter's future competition in biologically born female sports. It is vital that the advancements made for biological females continue into the future.

If we fail to protect biological female athletics with the utmost vigilance they will cease to exist. Without this law the NDHSA has proven untrustworthy to protect women's athletics. They have already made destructive decisions that will destroy many females opportunity to succeed and have scholarships in athletics. Just as males have enjoyed success in generations prior to title nine, biological females needed an avenue to succeed provided by title nine. Now that avenue needs to be protected. The most vulnerable sport has been Track and Field. It needs to remain sanctioned for biologically born females only. If this bill is not given a Do Pass and made law, women's track and field will be no longer be a place for fair sport for biologically born females. We must protect fair sport for biologically born females.

All participation must be based on biology at birth to maintain the integrity of the sport and it must remain a "clean" sport with no biological enhancements that start at birth by nature of being born a biological male. If not protected, track and field will no longer be a true sport. It will become just a display, similar to a pageant and subjective reasoning, rather than a competition of biologically same athletes free of drug enhancements and man made biological modifications that could be endless.

Sincerely, Margo Knorr

Dear Chairman and Committee Members,

I forgot one last important reference to help guide you in your decision making .

Even the intersex athlete Casto Semenya, who was more genetically male than female has recently been declined permission to participate in the up coming Olympics in female track and field events. More than likely she would be welcomed onto the males team if she can qualify. So there still is a place for her to compete and have athletic experiences in completion with biologically and genetically more similar athletes, males.

Which proves....Biology does indeed matter in athletic competition. Although Castor's was a unique case of genetic composition not being discovered by even herself with out genetic testing, the Olympic committee could not deny she was more male than female. I am hoping you to will come around to protecting female athletics with this bill.

<https://www.nytimes.com/2020/09/08/sports/olympics/caster-semenya-court-ruling.html>

Sincerely, Margo Knorr

Testimony in Support of House Bill 1298

**Natasha Chart, Executive Director
Women's Liberation Front
March 16th, 2021**

Good afternoon, and thank you, Madam Chair Larson, and the distinguished members of the Senate Judiciary Committee. I'm the Executive Director of the Women's Liberation Front, a radical feminist organization with members and supporters across the country, including North Dakota. I'm testifying in favor of House Bill 1298, and respectfully request that you render a "DO PASS" on the bill.

Since the passage of Title IX, the ability to participate in competitive athletics has had a huge positive impact on women and girls in the United States. In addition to the benefits of an active lifestyle, participation in sports among girls has been shown to increase academic success, boost self-esteem and confidence, and lead to lower rates of teen pregnancy. Roughly 9 in 10 female corporate executives are former [athletes](#), and about half of them competed at the college level.

Women's athletics are the legacy of every American woman now. Preserving girls' and women's sports is just common sense.

But the fashion of allowing male students to compete in female athletics based on "gender identity" claims puts this progress at risk by costing hard-working women and girls the opportunity to compete in fair and safe sporting competitions. National [polling](#) of 3500 likely voters that we conducted before the 2020 election indicated that 66% of the public shares this view.

The differences in physical strength between the sexes starts before puberty, and is so great that, every year, teen boys break the women's world record times in track. The [best](#) 9-year-old boys can [outrun](#) the best 17-year-old girls. In 2017, a team of boys under-15 beat the US Women's National Team in a soccer scrimmage. The reverse is almost unimaginable.

Everyone knew what a girl was when she was the child who wasn't allowed to run, play, or compete for titles and scholarships, like the boys at her school. Likewise, human beings cannot change sex nor can we change over 6,500 sex differences in [gene expression](#) at the cellular level.

These sex differences are facts, but we don't arm wrestle or hold sprints, to determine who sits in elected office, or who gets to manage the accounting department. Sex differences are facts that need imply no judgement of women's intellectual or ethical fitness for public life. Still, when they matter, they matter a lot.

We all know who a girl is. When a teen girl is dangerously depressed, perhaps because she has been grievously abused, or bullied, or has body dysphoria, she is the sex of person that we do not stop the world to grieve for. The deadliest type of body dysphoric disorder is anorexia nervosa. It almost exclusively affects girls.

It would be inappropriate to threaten teen boys with the guilt of these girls' lives to ask them to give up their own rights and futures, as opponents of girls' sports often do.

I, and many other domestic abuse survivors, have vivid memories of a male partner using suicide threats against me, to back up his inappropriate demands. Eventually I found it in me to say no, and I hope elected officials can find their own courage to resist such improper pleadings if opponents of this bill resort to them.

I ask the committee to think about the futures of the North Dakota girls and women who will continue to benefit from female-only sports.

For these reasons, I ask you to please vote a "DO PASS" out of committee on HB 1298.

Thank you for your time and I would be happy to answer any questions.

North Dakota Testimony – HB 1298

Fairness in Women's Sports Presentation

Idaho State Representative Barbara Ehardt & sponsor of Idaho's Fairness in Women's Sports Act, first of it's kind legislation, 2020

- Chairman and good committee, thank you for hearing me today. I come to you today with legislation designed to do one thing: protect opportunities for girls and women in sports.
- Every girl deserves the chance to pursue her dreams and excel in athletic opportunities. Forcing girls & women to compete against biological boys & men has too often made us spectators in our own sports.
- Women fought long and hard to earn equal athletic opportunities, and this bill protects those victories for another generation. I should know. My story is about the opportunities provided through sports.

- 1) Story of me growing up and what opportunities existed. These were very few for women... secretary, airline stewardess, teacher...
- 2) I just wanted to play sports but I was told, girls don't do that.
- 3) **Title IX happened June 23, 1972.**
- 4) Opportunities in sports began to occur for girls and women. But this has been a process.
- 5) I had the chance to play junior high basketball, like my counterparts. However, I walked to practice at 5:45am, through the cold, every day, while the boys practiced after school – every day.
- 6) Then I was able to play high school basketball and our games were well attended. We were making progress.
- 7) As fate would have it, I was able to play college ball, first at North Idaho College and then at Idaho State, on a scholarship.
- 8) This led to a 15-year collegiate coaching career at four fantastic institutions.
- 9) As that young 6-year old girl wanting so badly to pursue her dreams, this was an amazing journey.
- 10) Women in the 70's and earlier, paved the way for me to have opportunities that have taught me so much and helped to shape who I am.
- 11) They have helped me and I have worked hard to help those who followed me.
- 12) This bill is really about opportunities to preserve those dreams that like me, so many young girls and women have.
- 13) We have fought hard to get where we are with opportunities – and we still aren't where we need to be. But let's make sure that we don't go

backwards. We need to preserve these hard fought for opportunities in girls and women's sports. Which is the point of this legislation.

In sports, we have requirements and standards, not feelings, in order to participate and ensure fairness and the school handles this. These include **weight** requirements for wrestling (*115 doesn't go against 165*); **age** requirements for all of athletes; **physicals**; school **boundary** requirements; **GPA** eligibility; **concussion** questions; extra in-season sport participation and sex specific requirements. None of these are discriminatory. They are a standard used to create a fair playing field and the state has a **compelling interest to ensure fairness**. This also is true in girl's and women's sports.

This bill will protect the rights and opportunities of girls & women.

- Girls & women shouldn't be forced to be spectators in their own sports.
- Girls & women deserve the same opportunities as boys & men to compete and chase their dreams.
- Women fought long and hard to earn equal athletic opportunities.
- When boys compete in girls' sports, equal opportunity is destroyed.
- **Title IX was designed to eliminate discrimination against girls & women in education and athletics, while creating equal opportunities for girls & women.**
- Allowing boys & men to compete against girls & women shatters dreams and steals opportunities.
- **Allowing boys & men to compete in girls' & women sports reverses nearly 50 years of advances for women.**

Tennis star Martina Navatrolova, who herself is gay and very supportive of LGBT rights addressed fair play. "Needless to say, I have always and will always be a champion of democracy, equal rights, human rights and full protection under the law for everyone," she wrote. "When I talk about sports and rules that must be fair, I am not trying to exclude trans people

from living a full, healthy life. And I am certainly not advocating violence against trans people, as has been suggested. All I am trying to do is to make sure girls and women who were born female are competing on as level a playing field as possible within their sport. (March 5, 2019)

Physical Differences Between Men & Women

Boys & men will always have physical advantages over girls & women —that's the reason we have women's sports.

- Men are stronger than women. Boys are faster than girls. An influx of hormones doesn't undo these realities.

What are the physical advantages of males?

- They have a bigger body size; longer limbs; and a stronger base that is designed for more mass power! They have denser, stronger bones, tendons and ligaments; they have larger & stronger heart, larger lungs with a greater lung volume per body mass; a higher red blood cell count and higher hemoglobin. Men also have natural levels of testosterone which affects 28 traits such as hemoglobin levels, body fat content, the storage and use of 29 carbohydrates, and the development of type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity... and the list goes on.
- No amount of hormone therapy can eliminate all those advantages.
- Forcing female athletes to compete against biological males isn't fair and destroys their athletic opportunities.
- Even an average male athlete can crush an elite female athlete. That's why the world's No. 203-ranked man soundly beat both Williams sisters back-to-back in their prime in 1998; it's why an under-15 boys' soccer team beat the U.S. Women's National Team in 2017. It's why in Connecticut, two boys have won 15 women's track championship titles since 2017—titles held by nine different girls in 2016. Science and common sense tell us that males are physically stronger than females.

As Duke Law professor and All-American track athlete Doriane Cole-Man, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing/ shooting, and riding / there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science."

Doriane Coleman, Martina Navratilova/ et al. / Pass the Equality Act/ But Don't Abandon Title IX, Washington Post (Apr. 29, 34 2019);

The benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of

such treatments found that even "after 12 months of hormonal therapy, " a man who identifies as a woman and is taking cross-sex hormones "had an absolute advantage" over female athletes...

Consider this, while at all four fantastic institutions while I was coaching, we had a practice squad of guys. Every Division I University Women's basketball program does this. These guys aren't special. They weren't even cut from the men's team. Often, they hadn't played high school ball. But they'd be there to push our gals and they could beat them every time.

We have always acknowledged that there are differences between males & females. Our counterparts have enjoyed the many benefits that come from participating in sports, everything from leadership, confidence, cooperation, conflict resolution... sports teach this and so much more.

NIKE 1995 ad: If You Let Me Play Sports – was ground-breaking

If you let me play, if you let me play sports.
I will like myself more;
I will have more self-confidence.
If you let me play sports. If you let me play,
I will be 60 percent less likely to get breast cancer;
I will suffer less depression.
If you let me play sports,
I will be more likely to leave a man who beats me.
If you let me play;
I will be less likely to get pregnant before I want to.
I will learn what it means to be strong,
if you let me play...

We have been celebrating women & how far we have come. Have we really come that far?

The ad was based on a compilation of research assembled by the **Women's Sports Foundation** (*updated July 20, 1995*). It also found that girls who participate in sports are less likely to get involved with drugs, less likely to get pregnant and more likely to graduate from high school than those who do not play sports. They would feel greater confidence, self-esteem and pride in their physical and social selves than those who were sedentary as kids.

CONCERNED
WOMEN *for* **AMERICA**
LEGISLATIVE ACTION COMMITTEE

March 16, 2021

Senate Judiciary Committee

Testimony in Support of HB 1298

Madam Chair Diane Larson and Members of the Senate Judiciary Committee, my name is Linda Thorson, State Director of Concerned Women for America (CWA) of North Dakota. I am a former educator of 26 years and am testifying for Concerned Women for America Legislative Action Committee on behalf of our North Dakota members in support of HB 1298.

As the largest public policy women's organization in the nation and our state, CWA of North Dakota heartily supports HB 1298. Fair competition and equality in women's sports in North Dakota are under threat, and this legislation is the remedy. As the director of the largest public policy woman's organization in our state, my remarks will address this issue's impact on girls' and women's sports.

Female athletics are a pathway to development, opportunity, and success for girls and women in America. So, when male-born athletes are permitted in women's sports as transwomen, female-born athletes will lose hard-fought opportunities, which came about through the feminist movement in the implementation of Title IX.

Allowing individuals who are assigned the opposite sex (male) at birth to participate on an athletic team directly violates Title IX and is discriminatory against girls. Title IX states in part: *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ..."*

Nearly 50 years ago, the first female race was held at the Boston Marathon. Women had to fight for their right to compete in contrast with men whose opportunities were much greater in the arena of sports. Leaders in the women's movement saw the need to provide a woman's only race to determine the fastest female marathon runner in Boston that year.

Physiological distinctions between the sexes also matter in protecting equal opportunity and a fair playing field. For example, puberty, testosterone, and innate biological differences give physical advantages to males that cannot be erased. Inherent male and female distinctions

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range from chromosomal and hormonal differences to physiological differences. Men generally have greater density and strength in bones, tendons, and ligaments, larger hearts, greater lung capacity, and higher red blood cell count.

Exercise physiology expert Dr. Gregory A. Brown of the University of Nebraska, published an exhaustive review of existing research, concluding that men and adolescent boys perform better in almost all sports than women and adolescent girls because of their inherent physiological advantages that develop during male puberty.

I urge you to support the victories of the women's movement, which opened the doors for women to compete on a level playing field, acknowledge biological science, and preserve women's sports, and vote "do pass" on HB 1298.

CONCERNED
WOMEN *for* **AMERICA**
 LEGISLATIVE ACTION COMMITTEE

Protecting Women's Sports for Female Athletes

The Issue:

Female athletics are a pathway to development, opportunity and success for girls and women in America. The passage of Title IX in 1972, the federal law that prohibits discrimination in education programs or activities on the basis of sex, resulted in huge increases in female sports' participation. It gave women the right and opportunity to compete in their own sports. Only one in 27 girls participated in school sports before Title IX. Since its enactment, two in five girls now participate in school sports.¹

Today, fair competition and equality in women's sports are under threat. Many U.S. states, interscholastic athletic conferences, and the Olympics currently allow biological males who claim transgender status as women or girls to compete in female sports. The Supreme Court's decision in an employment case, *Bostock v. Clayton County*, and Congress' so-called "Equality Act" redefine sex in civil rights law to include "gender identity," a self-defined perception, not biological reality. This intensifies the need for action to consider the impact and clarify the law.

Science, biology, and common sense expose the unfair advantage biological male athletes possess when pitted against female athletes in competition. Title IX must stand on the side of equality and protection for female athletes based on inherent and distinct biological differences. We must insist on fairness and equity in women's sports at every level.

The Facts:

Physiological distinctions between the sexes matter in protecting equal opportunity and a fair playing field.

- Puberty, testosterone, and innate biological differences give physical advantages to males that cannot be erased. Inherent male and female distinctions range from chromosomal and hormonal differences to physiological differences. Men generally have greater density and strength in bones, tendons, and ligaments, larger hearts, greater lung capacity, and higher red blood cell count.
- Exercise physiology expert Dr. Gregory A. Brown of the University of Nebraska published an exhaustive review of existing research, concluding that men and adolescent boys perform better in almost all sports than women and adolescent girls because of their inherent physiological advantages that develop during male puberty."²
- Researchers at the Karolinska Institute and University of Manchester concluded that after one year of treatment "the physical advantage enjoyed by biological males over females is only minimally reduced when testosterone is suppressed...Furthermore, the reductions observed in muscle mass, size, and strength are very small compared to the baseline differences between males and females in these variables."³

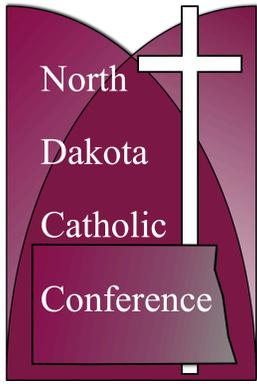
- Team USA sprinter Allyson Felix holds the most World Championship medals in history. Yet in 2018 alone, 275 high school boys ran faster times in the 400-meter on 783 occasions, exemplifying how allowing biological males to compete in female sports would be a detriment to females everywhere.⁴

The impact of transgender policies in female athletics is occurring at all levels of sport, including at the high school, college, and international levels.

- In Connecticut, high school female athletes were forced to compete in track against males identifying as girls, losing medals, state titles, and numerous other would-be-earned victories. The Connecticut Interscholastic Athletic Conference has been found in violation of Title IX for their transgender participation policy in a federal complaint.⁵
- Two Boise State female track athletes faced losses in the Big Sky Conference because a college runner previously on the University of Montana men's team claimed transgender status and competed on the women's team. They have joined as victims of the injustice in female athletics in defense of Idaho's Fairness in Women's Sports Act.⁶
- The NCAA is forcing female athletes to compete on an unfair playing field and lose their place on the podium. In 2019, the Division II NCAA national title in the women's 400-meter hurdles went to a male transathlete from Franklin Pierce University who had competed for three years on the men's team.
- The International Olympic Committee allows biological males identifying as women after one year of hormone treatment to compete in female Olympic sports after one year of male hormone suppression. Even the world's best female Olympic athletes would lose to thousands of male athletes—including those who would be second tier in the men's category—on any given day.⁷

Lawmakers and citizens are recognizing the unfairness of allowing biological males to compete in women's sports. They also face intense activist opposition in trying to act.

- Idaho's "Fairness in Women's Sports Act" is the first to be signed into law and is being challenged in federal court by the American Civil Liberties Union (ACLU).
- In 2020, lawmakers in 14 other states proposed similar legislation to ensure participation in women's sports is based on female biology, not gender identity.
- In a recent poll, 70-80 percent of Americans in ten battleground states responded NO to the question: "Should boys and men who say they identify as transgender be allowed to compete in girls' and women's athletics?"⁸
- In 2020, federal legislation to reclaim the purpose of Title IX and protect sports for women and girls based on biological sex was introduced in the U.S. House and Senate.
- In retaliation for Idaho's actions to protect fair competition for women and girls, trans activist groups are pressuring the NCAA to boycott the state of Idaho from hosting national tournaments.⁹



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To: Senate Judiciary Committee
From: Christopher Dodson, Executive Director
Subject: House Bill 1298 - Fairness in Sports
Date: March 16, 2021

True education aims at the formation of the human person as a unity of body, soul, and spirit, while pursuing the common good. It includes the social and physical aspects of athletics. As Pope Francis has said, "The Church is interested in sport because the person is at her heart, the whole person, and she recognizes that sports activity affects the formation, relations, and spirituality of a person."¹ In education and in sports, we must seek to avoid unequal treatment between men and women, and anything that debases human dignity, including rejection of a person's body. With these principles in mind, the North Dakota Catholic Conference supports HB 1298 for several reasons.

First, it assures fundamental fairness. We have made great strides not only in respecting the unique dignity of women and girls, but also in fostering a fair and equal environment that provides them opportunities to grow and succeed according to their created uniqueness. That environment is being threatened and HB 1298 protects it.

Second, youth have a right to safely participate in student athletics. Male competition in activities designated for females can be both unfair and, especially in high-contact sports, unsafe. Neither of these concerns is remediated by cross-sex hormone procedures, as they do not fully address disparities in average muscle mass, bone characteristics, and lung capacity once puberty is underway.²

Third, HB 1298 conforms to human dignity and proper pedagogy. We often hear, in support of allowing biological boys to compete against girls, that gender is a construct. In truth, gender ideology is a construct, untethered from biological and ontological reality. Allowing biological males to compete against biological females cooperates with and advances this false ideology, contrary to the proper purpose of both sports and education.

Fourth, HB 1298 prevents potential conflicts. Some schools, parents, or students might have philosophical or religious reasons preventing girls from competing against biological males, especially in contact sports. HB 1298 would prevent penalizing those schools and students.

Finally, HB 1298 recognizes that the legislature is the proper place to address this issue. As it stands now, an association consisting of non-elected individuals made a decision that imposed a certain ideology on our students. HB 1298 rectifies that mistake.

Every person, including students experiencing gender identity discordance, should be able to participate in student activities. The activities, however, should be in accord with fairness, safety, and the dignity of the human person. For these reasons we support HB 1298 and ask for a **Do Pass** recommendation.

¹ Pope Francis, Address to the Italian Tennis Federation, Rome, May 8, 2015.

² Tommy Lundberg and Emma Hilton, "Transgender women in the female category of sport: is the male performance advantage removed by testosterone suppression?" (May 13, 2020) (available at [https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20\(1\).pdf](https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf)), as pre-printed update of Lundberg 2019 study, *infra*); Expert Declaration of Gregory A. Brown, Ph.D., Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. (Jan. 7, 2020) (available at <https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20Report%20Executed.pdf?ver=1580495895886>); T. Lundberg, Ph.D. et.al., "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen," Karolinska Institutet, Department of Laboratory Medicine/ANA Futura, Division of Clinical Physiology. Huddinge, Sweden (Sep. 26, 2019) (available via bioRxiv, Cold Spring Harbor Laboratory, at <https://www.biorxiv.org/content/10.1101/782557v1>).

Furthermore, the safety of the students who undergo hormone treatments themselves is at risk when such procedures have unproven long-term results in developing bodies. See D. Getahun et al., "Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study," *Ann Intern Med* 169, no. 4 (2018); M.S. Irwig, "Cardiovascular Health in Transgender People," *Rev Endocr Metab Disord* 19, no. 3 (2018); P.W. Hruz, L.S. Mayer, and P.R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," *The New Atlantis*, 52 (2017); S. Maraka et al., "Sex Steroids and Cardiovascular Outcomes in Transgender Individuals: A Systematic Review and Meta-Analysis," *J Clin Endocrinol Metab* 102, no. 11 (2017); J. Feldman, G.R. Brown, M.B. Deutsch, et al., "Priorities for Transgender Medical and Healthcare Research," *Curr Opin Endocrinol Diabetes Obes* 23 (2016):180-87; D. Macut, I.B. Antić, and J. Bjekić-Macut, "Cardiovascular Risk Factors and Events in Women with Androgen Excess," *Journal of Endocrinological Investigation* 38, no. 3 (2015); E. Moore, A. Wisniewski, A. Dobs, "Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects," *J Clin Endocrinol Metab* 88 (2003): 3467-73.

Under federal law, equal rights and opportunities for women and girls should not be denied on the basis of biological sex. The Executive Branch has made this clear.

- The U.S. Department of Justice provided clear legal analysis defending the biological basis for female athletics under Title IX and the constitutionality of Idaho's Fairness in Women's Sports Act.
"Allowing biological males to compete in all-female sports is fundamentally unfair to female athletes. Under the Constitution, the Equal Protection Clause allows Idaho to recognize the physiological differences between the biological sexes in athletics."¹⁰
- The U.S. Department of Education asserted that the Supreme Court decision in *Bostock* does not overrule biological sex under Title IX.
"The Supreme Court's opinion in *Bostock* does not affect the Department's position that its Title IX regulations authorize single-sex teams based only on biological sex at birth – male or female – as opposed to a person's gender identity."¹¹

¹ Women's Sports Foundation. (September 2, 2016). *Title IX and the Rise of Female Athletes in America*. Retrieved from: <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>

² Expert Declaration of Gregory A. Brown, Ph.D. (January 7, 2020). Filed in support of the U.S. Department of Education Complaint Nos. 01-19-4025 & 01-19-1252. Retrieved from: <https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/2020.01.07%20G%20Brown%20Report%20Executed.pdf?ver=1580495895886>

³ Emma Hilton, Ph.D. and Tommy Lundberg, Ph.D. (13 May 2020). University of Manchester, UK. and Karolinska Institute. Department of Laboratory Medicine/ANA Futura. Division of Clinical Physiology. Huddinge, Sweden. Retrieved from: [https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20\(1\).pdf](https://img1.wsimg.com/blobby/go/a69528e3-c613-4bcc-9931-258260a4e77f/downloads/preprints202005.0226.v1%20(1).pdf)

⁴ Doriane Lambelet Coleman, Martina Navratilova, et al. Pass the Equality Act, But Don't Abandon Title IX, Washington Post (April 29, 2019). https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html.

⁵ Denny, D. (March 13, 2020). *The NCAA's black eye in women's sports*. Townhall. Retrieved from <https://townhall.com/columnists/doreendenny/2020/03/13/draft-n2564836>

⁶ Ridler, K. (May 28, 2020). *Idaho republican joins transgender sports lawsuit fight*. AP News. Retrieved from <https://apnews.com/93016b958a704517c897b16feef26dda>

⁷ Doriane Lambelet Coleman Oral Testimony on H.R. 5 before the U.S. House of Representatives Committee on the Judiciary April 2, 2019, available at <https://docs.house.gov/meetings/JU/JU00/20190402/109200/HHRG-116-JU00-Wstate-LambeletColemanP-20190402.pdf>.

⁸ APP and SPRY Strategies Release Polling Results from Ten Battleground States (July 22, 2020). Retrieved from: <https://americanprinciplesproject.org/elections/app-spry-strategies-release-polling-results-ten-battleground-states/>

⁹ ACLU letter to the NCAA Board of Governors (June 10, 2020). Retrieved from: https://images.saymedia-content.com/.image/cs_srgb/MTczMTcxNjc0MjM2MDY5NjY4/final-ncaa-idaho-letter.pdf

¹⁰ U.S. Department of Justice. (June 19, 2020). *The Department of Justice Files Statement of Interest Defending the Constitutionality of Idaho's Fairness in Women's Sports Act*. Retrieved from: <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-defending-constitutionality-idaho-s-fairness>

¹¹ U.S. Department of Education Letter to Concerned Women for America. (September 1, 2020) Retrieved from: https://concernedwomen.org/wp-content/uploads/2020/09/CWA_9.1.2020-1.pdf

TALKING POINTS FOR STATE LEGISLATURE TESTIMONY

INTRODUCTION

- My name is Ray Hacke, and I'm an attorney with the Pacific Justice Institute's Center for Public Policy
- I stand before the committee today in my capacity as a constitutional law attorney to explain why House Bill 1298, if enacted, would survive a legal challenge

EQUAL PROTECTION CLAUSE

- The U.S. Constitution's Equal Protection Clause applies whenever a state, or one of its agencies, treats distinct classes of similarly situated persons differently
 - Such agencies include high school athletic associations
- Actual girls, and boys who say they're girls, are **NOT** similarly situated
 - Males who self-identify as female have a different biological makeup than actual females – in that regard, they are the same as males who don't identify as female
 - Those males thus have distinct physiological advantages over actual females – and one need only look at the sport of track and field to see this:
 - In Connecticut, two male sprinters have rewritten the state high school record books: 17 of the fastest times in girls' track history now belong to boys
 - Here in North Dakota, a look at the state records for boys and girls shows that:
 - The top boys' times in the 100- and 200-meter dashes are nearly two to three full seconds faster than the top girls' times – and these are races where victory is decided by tenths of a second
 - The boys' high jump record is 6 feet, 10¼ inches – no girl has ever cleared 5-9¼. That's a difference of more than a full foot.
 - The boys' shot put record is nearly 16 feet longer than the girls' – and that's with girls throwing a lighter shot (8 pounds, compared to 12 for boys)
 - The boys' discus record is more than 20 feet longer than the girls' – again, with the girls throwing a lighter discus (roughly 4 pounds for boys, 2 for girls)
 - On a national level:
 - The NCAA crowned its first biologically male women's hurdles champion in 2019; in 2017, when competing against fellow males, this runner barely cracked the top 400 in NCAA Division II
 - The University of Montana's Jonathan Eastwood – who now goes by June – earned a Big Sky Conference Athlete of the Week award after beating all but one of his female competitors at a cross country meet in 2019
 - This is a guy whose best finish at the Big Sky championships, when competing against other males, was 24th
 - In tennis, Serena and Venus Williams – arguably the two top female players of all time – once bragged they could beat any male player not ranked in the top 200
 - The player ranked No. 203 took them up on the challenge – and beat them handily

- Neither Venus nor Serena won more than two sets against him
- Furthermore, *The Journal of Medical Ethics* published a study in 2019 demonstrating that even males who undergo hormone treatments to “transition” do not lose much in the way of muscle mass or power and can easily rebuild those things through training
- It is called the “Equal Protection Clause,” not the “Special Protection Clause” – states need not treat that which is different in fact as though it is the same in law
 - It is an undeniable scientific fact that a boy who says he’s a girl is quite different from an actual girl
 - Gender-based classifications are permissible under the Equal Protection Clause when they serve important governmental objectives, are substantially related to those objectives, and reflect reasoned judgments rather than prejudice
 - Remedying past discrimination against women in educational settings, including interscholastic sports, is an important governmental objective
 - Given the biological advantages males have over women, House Bill 112 is substantially related to the objective of giving girls and women a meaningful opportunity to not only participate, but be competitive – if not victorious – in interscholastic athletics
- The state would thus do no wrong in protecting girls’ sports via House Bill 112

TITLE IX

- Title IX – which will celebrate its 50th birthday next year – was enacted specifically to advance opportunities for biological women
 - To an overwhelming degree, it has accomplished this
 - Before Title IX, approximately 3 percent of girls in the United States participated in sports; since its enactment, that number has increased to 40 percent – two in five girls
 - The number of girls competing in college has increased 600%
 - At the high school level, the number is 900%
- I’d like to call this committee’s attention to two court cases involving Title IX:
 - *Mansourian v. Regents of the Univ. of Calif., Univ. of Calif. at Davis*
 - In that case, there were four female wrestlers at the University of California at Davis – an NCAA Division I school near Sacramento – who were cut from the school’s wrestling team
 - The women were then given the opportunity to win back their spots, assuming that they could defeat men in their respective weight classes using men’s collegiate rules
 - The U.S. Court of Appeals for the Ninth Circuit held that by requiring female wrestlers to compete against and prevail against men, UC Davis changed the conditions under which they could participate in college wrestling; this violated Title IX
 - Allowing transgender males to compete as females fundamentally changes the circumstances under which women can compete – it relegates the overwhelming majority of women to second-class status as runners-up, cheerleaders, benchwarmers, and spectators in their own sports

- *O'Connor v. Bd. of Educ. of Sch. Dist. 23*
 - The U.S. Supreme Court held that “without a gender-based classification in competitive contact sports, there would be a **substantial risk** that boys participating in the girls’ programs would dominate those programs and deny girls an equal opportunity to participate in interscholastic events”
 - “Substantial risk” – This means letting boys compete in girls’ sports will all but certainly relegate girls to second-class status in their own sports
 - The overwhelming majority of girls will have to settle for runner-up status at best or being benchwarmers, spectators, or cheerleaders at worst
- Allowing biological males to compete against girls and women would thus completely undermine the advancement of opportunity that Congress enacted Title IX to create

CONCLUSION

- One final note: Transgender athletes are NOT being denied the opportunity to compete
 - They are demanding to be able **dictate the terms** on which they can compete
 - Essentially, they’re asking the legislature to ignore biological realities in order to placate their feelings
- A male who says he’s female is not, in fact, female – he might not want to face that fact, but that doesn’t make it any less true
 - A heavyweight wrestler who self-identifies as being 100 pounds lighter doesn’t get to move down several weight classes because there is scientific evidence that he doesn’t belong in that classification
 - The same applies to transgender athletes: The state should not overlook biological realities to placate their feelings – as harsh as that might sound
- If it’s privacy you’re concerned about, athletes already forfeit a measure of privacy by choosing to compete
 - They have to take physical exams as a condition of competing
 - They have to shower and change alongside teammates in locker rooms
 - Occasionally, they may have to take drug tests
 - No privacy interest is thus invaded
- Transgender advocates would have you believe psychology matters more than biology. Nothing could be further from the truth. The line has already been drawn in the right place: Segregating sports by sex protects the right of girls and women to meaningfully compete in interscholastic athletics. This body should make sure that line isn’t redrawn by enacting House Bill 1298. Thank you.



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ARTICLE: Girls Will Be Boys, and Boys Will Be Girls: The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their Playing Fields Level - for Athletes of Both Genders

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* © 2018 **Ray Hacke**. J.D., University of the Pacific McGeorge School of Law 2010; B.A. Magazine/History 1997, Syracuse University. Sports and constitutional law are two of my greatest passions, and the opportunity to write about a subject that encompasses both was thrilling and rewarding. I would like to thank my wife Pauline, my daughter Ava, and my parents, Carl and Wendy Hacke, for their support as I dedicated time and energy to this project. I would also like to thank my friends and mentors at the Pacific Justice Institute - specifically Brad Dacus, Kevin Snider, and Matt McReynold - for helping improve my legal research and writing skills and The Sports Lawyers Journal for giving me a platform to discuss a controversial subject that many other journals shied away from. To avoid confusion, this Article uses the terms "man," "woman," "boy," "girl," "male," and "female" according to their traditional definitions. The author recognizes that transgender males define themselves as female and transgender females define themselves as male, and individuals who consider themselves "allies" of transgender persons honor those self-definitions. The author intends no disrespect to transgender persons by his use of traditional definitions.

Text

[*58]

I. Introduction

In the 1990 film Kindergarten Cop, an impish little boy delights in greeting unsuspecting adults by proudly broadcasting the extent of his carnal knowledge: "Boys have a penis; girls have a vagina." ¹ In one scene, a police detective visits the boy's kindergarten classroom, where the title character - the detective's fellow police officer - has been posing as a teacher while working undercover. ² When the boy incites his classmates' laughter by blindsiding

¹ Kindergarten Cop (Universal Pictures 1990).

² Id.

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the detective with his oft-repeated tidbit about human anatomy, the detective, smirking wryly, tells her fellow officer, "You taught them the basics. That's important." ³

For high school sports programs across the United States, distinguishing boys from girls is no longer so basic. ⁴ This is due to the emergence of the "transgender" athlete, whose "gender identity" - the perception and/or expression of whatever gender the athlete asserts himself or herself to be - may or may not match the athlete's anatomy; this depends on whether the athlete has undergone sex reassignment surgery and/or which gender is listed on the athlete's birth certificate and other legal records. ⁵ As of this writing, sixteen states, either by law or through their high school athletic associations' bylaws, currently require high schools - at least public ones, if not all participating schools - to let **[*59]** students compete on athletic teams or in athletic contests based on their gender identity. ⁶ The transgender community deems these states to be "inclusive": athletes in these states need not undergo gender reassignment surgery, hormone therapy, or any other medical intervention to compete against athletes of the gender with which they identify. ⁷ In these states, to quote The Kinks' hit song Lola, "Girls will be boys, and boys will be girls, it's a mixed-up, muddled-up, shook-up world." ⁸

Among the other thirty-four states, twenty deal with transgender athletes on a case-by-case basis and seven have no policy concerning transgender athletes at all. ⁹ Those states that deal with transgender athletes on a case-by-case basis vary in their approaches:

* Alaska, Connecticut, Georgia, Kansas, Pennsylvania, and Wisconsin let individual schools and school districts decide whether to let transgender athletes compete on teams that match the athletes' gender identity, rather than their biological gender. ¹⁰ In Alaska, if a school or school district has no written policy in place concerning transgender athletes, the gender on the athlete's birth certificate is the determining factor. ¹¹ Schools in Kansas and Wisconsin must notify their respective state athletic associations of their decisions, and Kansas' association may overrule a school's decision if a dispute arises concerning an eligibility determination. ¹² Georgia does not let boys compete on girls' teams and also does not let schools challenge other schools' determinations of an athlete's gender. ¹³

³ Id.

⁴ Although this Article specifically concerns high school sports programs, most of the statutes and legal principles discussed here are also applicable to elementary school, junior high, and college sports.

⁵ Pat Griffin & Helen J. Carroll, On the Team: Equal Opportunity for Transgender Student Athletes 1, 47 (Oct. 4, 2010), <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf> (defining gender identity as "(o)ne's inner concept of self as male or female or both or neither" and noting that some individuals assigned one gender at birth "choose to live socially as the other gender").

⁶ K-12 Policies for Transgender Student Athletes, TransAthlete, <http://www.transathlete.com/#k-12/c4w2> (last visited Mar. 8, 2018) [hereinafter K-12 Policies].

⁷ Id.

⁸ The Kinks, Lola (Morgan Studios 1970).

⁹ K-12 Policies, supra note 6.

¹⁰ Id.

¹¹ Id.

¹² Id.; see also KSASAA Policy for Transgender Student Participation, KSASAA, <http://www.kshsaa.org/Public/PDF/TransgenderPolicyRecommendations.pdf> (last visited Feb. 17, 2018); Transgender Participation Policy, Verona Area Sch. District, [http://www.verona.k12.wi.us/UserFiles/Servers/Server_139685/File/Kloopping, Kelly/Transgender Page/TGPC - Transgender Participation Policy.pdf](http://www.verona.k12.wi.us/UserFiles/Servers/Server_139685/File/Kloopping,Kelly/Transgender%20Page/TGPC-Transgender%20Participation%20Policy.pdf) (last visited Feb. 17, 2018).

¹³ K-12 Policies, supra note 6.

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* Illinois has a more complicated approach. ¹⁴ When an athlete's proclaimed gender identity does not match the gender listed on the athlete's birth certificate or school registration card, the athlete's school must present to the Illinois High School Association (IHSA) information concerning (1) the athlete's birth certificate and/or school records; (2) any medical documentation concerning **["*60"]** hormonal treatments, sex-reassignment surgery, counseling, or other treatment that the athlete has undergone; and (3) any physical advantages the athlete might have if permitted to play for a team associated with the opposite gender. ¹⁵ The IHSA then rules based on the advice of an established group of medical personnel. ¹⁶

* Iowa has separate associations governing girls' and boys' sports. ¹⁷ The boys' association lets girls who identify as male compete on boys' teams "as long as he consistently identifies as a male at school, home and socially." ¹⁸ The girls' association has a virtually identical rule concerning males who identify as female but provides an exception that allows schools to exclude males from participating on girls' teams consistent with state law. ¹⁹

* Maine gives student athletes the freedom to choose which teams they want to play for, subject to an approval process that considers competitive balance and safety for other student athletes. ²⁰ Maine's governing body has a Gender Identity Equity Committee that must approve a transgender athlete's request to compete on a team associated with the athlete's gender identity,

unless it is convinced that the student's claim to be transgender is not bona fide or that allowing the student to compete on a single sex team consistent with his or her gender identity would likely give the student athlete an unfair athletic advantage or pose an unacceptable risk of physical injury to other student athletes. ²¹

* Missouri requires athletes to undergo hormone treatments before participating on teams that do not match their biological gender. ²² Girls seeking to play on boys' teams must obtain treatment to increase their testosterone levels, while boys who wish to play on girls' teams must receive treatments to suppress their testosterone levels. ²³ Oklahoma and Nebraska also have rules and/or guidelines centering around medical therapy or gender reassignment surgery. ²⁴

["*61"] * New Jersey and New Mexico both require that student athletes either provide an official record demonstrating legal recognition of their gender identity or proof that they have transitioned, or are transitioning, to their reassigned sex. ²⁵

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. (quoting Sherry Tegtmeier, Iowa Girls High School Athletic Union Transgender Statement, Iowa Girls High Sch. Athletic Union (Aug. 22, 2014), <http://ighsau.org/2014/08/22/transgender-statement/>).

¹⁹ Tegtmeier, supra note 18.

²⁰ K-12 Policies, supra note 6; see also Me. Principals' Ass'n, 2017-2018 Handbook 1, 21, <https://www.mpa.cc/images/pdfs/handbook1718.pdf> (last visited Mar. 8, 2018) [hereinafter MPA Handbook].

²¹ MPA Handbook, supra note 20.

²² K-12 Policies, supra note 6.

²³ Id.

²⁴ Id.

²⁵ Id.

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* Oregon lets girls who identify as male participate on boys' teams regardless of whether they are taking hormone treatments, but once they decide to do so, they are precluded from competing on girls' teams for the remainder of their high school careers. ²⁶ Girls who are receiving testosterone treatments may only compete on boys' teams. ²⁷ Boys, meanwhile, are ineligible to compete on girls' teams unless they have completed at least one year of hormone treatments. ²⁸ Idaho has rules that are similar, but not identical, to Oregon's. ²⁹

* Ohio gives boys who wish to play on girls' teams two options: complete at least one year of hormone treatment related to gender transition or demonstrate, via sound medical evidence, that they do not possess physical advantages over biological females in the same age group. ³⁰ Such advantages include, but are not limited to, bone structure, muscle mass, and high testosterone levels. ³¹ Girls can compete on boys' teams without undergoing medically prescribed testosterone treatments. ³² Girls who have begun such treatments may compete on boys' teams but must submit to regular testing of their hormone levels. ³³

Surprisingly, only four states - Alabama, Kentucky, North Carolina, and **Texas** - still restrict participation in sports based on the gender listed on athletes' birth certificates. ³⁴ The transgender community considers these states "discriminatory." ³⁵

Foremost among the sixteen "inclusive" states is California, which enacted Assembly Bill 1266 into law in July 2013. ³⁶ Assembly Bill 1266 amended § 221.5 of California's Education Code to include paragraph (f), which states: "A pupil shall be permitted to participate in sex-segregated [***62**] school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." ³⁷

Under [California Education Code § 221.5\(f\)](#), a male claiming to identify as female has "the right to try out for the girls' basketball team, potentially taking away an opportunity from a girl who might otherwise make the team." ³⁸ So far, at least two transgender athletes, both biological males who consider themselves female, have taken advantage of § 221.5(f). ³⁹ Pat (nee Patrick) Cordova-Goff hit .588 with five home runs and twelve runs batted in

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Assemb. B. 1266, 2013 Reg. Sess. (Ca. 2013).

³⁷ Id. (emphasis added).

³⁸ New Bill Would Allow Boys to Play on Girls Teams, Share "Facilities," Pac. Just. Inst. (Jan. 9, 2012), <http://www.pacificjustice.org/press-releases/new-bill-would-allow-boys-to-play-on-girls-teams-share-facilities> (written concerning AB 266, the California Assembly's first attempt to amend Education Code § 221.5).

³⁹ Fred Robledo, Melissa Masatani & Zen Vuong, Transgender Student to Play on Azusa High School Softball Team, San Gabriel Valley Trib. (Feb. 13, 2014), <http://www.sqvtribune.com/sports/20140213/transgender-student-to-play-on-azusa-high-school-softball-team>.

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(RBI), all team highs, in eleven games for Azusa High's softball team in 2014,⁴⁰ according to the high school sports website MaxPreps.com (MaxPreps).⁴¹ Anry (nee Henry) Fuentes played soccer for Denair High during the 2015-2016 season,⁴² scoring at least one goal and assisting on at least one more in three games, according to MaxPreps.⁴³

Cordova-Goff and Fuentes are not the only biologically male transgender high school athletes to have found success competing against biological girls. In 2017, Andraya Yearwood, a sprinter for Connecticut's Cromwell High, placed first in the 100 meters and the 200 meters at Connecticut's state meet for mid-sized schools.⁴⁴ In 2016, Nattaphon Wangyot, a sprinter for Alaska's Haines High, earned all-state honors in girls' track and field by placing third in the 200 meters and fifth in the 100 meters at Alaska's state meet.⁴⁵ Wangyot stated that she took female [*63] hormones and other drugs to suppress her body's testosterone levels.⁴⁶ Yearwood, however, did not undergo any sort of hormonal treatment.⁴⁷ It is worth noting that had Yearwood and Wangyot competed as boys, neither would have placed as high as they did at their respective state meets.⁴⁸

Then there is the unique case of Mack Beggs, a wrestler for Trinity High in Euleus, Texas.⁴⁹ Biologically female, Beggs took testosterone⁵⁰ for two years to become more like the male she identified as.⁵¹ Beggs wanted to

⁴⁰ Id. Hereinafter, unless noted, all sports teams and athletes competed at the high school varsity level.

⁴¹ Azusa 2014 Softball Stats by Player, Max Preps (Aug. 25, 2017, 5:46 PM), [http://www.maxpreps.com/high-schools/azusa-aztecs-\(azusa,ca\)/softball-spring-14/stats.htm](http://www.maxpreps.com/high-schools/azusa-aztecs-(azusa,ca)/softball-spring-14/stats.htm).

⁴² No League of Their Own: Transgender Athletes, Fusion (Aug. 7, 2016), <https://www.youtube.com/watch?v=qZ8axU8POs4> [hereinafter No League].

⁴³ Anry Fuentes' Girls Soccer Stats, Max Preps, <http://www.maxpreps.com/athlete/anry-fuentes/Rc0S8-lvEeW-8KA2nzwbTA/gendersport/girls-soccer-stats.htm#year=15-16> (last visited Mar. 8, 2018). Cordova-Goff and Fuentes' statistical totals on MaxPreps appeared to be incomplete as of this writing, so their statistical totals could be even higher.

⁴⁴ Jeff Jacobs, As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain, Hartford Courant (June 1, 2017, 6:00 AM), <http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html>.

⁴⁵ Rivals Cry Foul After Losing Out to Transgender Athlete, Yahoo! Sports (June 6, 2016), <https://au.sports.yahoo.com/a/31775203/nattaphon-wangyot-rivals-cry-foul-after-losing-out-to-transgender-athlete/#page1> [hereinafter Rivals Cry Foul].

⁴⁶ Ben Rohrbach, Transgender Track Athlete Makes History as Controversy Swirls Around Her, USA Today High Sch. Sports (June 2, 2016), <http://usatodayhss.com/2016/transgender-track-athlete-makes-history-as-controversy-stirs-around-her/>.

⁴⁷ Jacobs, supra note 44.

⁴⁸ Id.; Rivals Cry Foul, supra note 45.

⁴⁹ Kent Babb, Transgender Wrestler Mack Beggs Identifies as Male. He Just Won the Texas State Girls Title, Wash. Post (Feb. 25, 2017), https://www.washingtonpost.com/sports/highschools/meet-the-texas-wrestler-who-won-a-girls-state-title-his-name-is-mack/2017/02/25/982bd61c-fb6f-11e6-be05-1a3817ac21a5_story.html?utm_term=.35e4697d6b49.

⁵⁰ Testosterone is widely known as a performance-enhancing drug, which is why it is on the World Anti-Doping Association's list of prohibited substances. World Anti-Doping Agency, The World Anti-Doping Code International Standard Prohibited List § 1 (Jan. 2017), https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29_-_wada_prohibited_list_2017_eng_final.pdf.

⁵¹ Babb, supra note 49.

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compete as a boy.⁵² However, because Texas classifies athletes strictly according to the gender listed on their birth certificates,⁵³ Beggs was forced to compete as a girl.⁵⁴ Beggs went 56-0 against female competition en route to winning Texas' Class 6A state 110-pound title in 2017 and went undefeated again to win another state title in 2018.⁵⁵ While Beggs did not take testosterone to gain an advantage over her female competitors and provided testing results showing that her testosterone levels were in the range required for her to compete as a girl,⁵⁶ Beggs undeniably had a strength advantage that she might not otherwise have had but for her taking testosterone.⁵⁷

[*64] If transgender advocates succeed in enacting policy change in relation to education, laws requiring states to permit athletes to compete as members of their chosen gender will become the norm nationwide. On May 9, 2016, the U.S. Department of Education's Office of Civil Rights (OCR) issued a controversial national directive (the Obama Directive) ordering every public school in the nation to allow transgender students to use bathrooms, locker rooms, and shower facilities and play on sports teams that are consistent with the students' proclaimed gender identity.⁵⁸ President Obama asserted that Title IX provided the basis for the order.⁵⁹ Title IX is the federal law that, among other things, requires schools that receive federal funding to provide women with the same opportunity to compete in scholastic sports that their male counterparts have.⁶⁰ President Trump rescinded the Obama Directive soon after taking office,⁶¹ and a federal district court in Texas has held that the OCR based the Obama Directive on a complete misreading of Title IX.⁶² The court held that "Title IX 'is not ambiguous' about sex being defined as 'the biological and anatomical differences between male and female students as determined at their

⁵² Mack Beggs: "Change the Laws and Then Watch Me Wrestle the Boys," ESPN.com (Mar. 6, 2017), http://www.espn.com/espn/otl/story/_/id/18802987/mack-beggs-transgender-wrestler-change-laws-watch-wrestle-boys [hereinafter Change the Laws].

⁵³ K-12 Policies, supra note 6.

⁵⁴ See Change the Laws, supra note 52.

⁵⁵ Associated Press, Texas Bill Could Sideline Transgender Wrestler Mack Beggs, USA Today High Sch. Sports (May 12, 2017), <http://usatodayhss.com/2017/mack-beggs-transgender-wrestler-texas-bill-title-defense>; Associated Press, Transgender Boy Wins Girls' State Wrestling Title for Second Time, N.Y. Post (Feb. 25, 2018), <https://nypost.com/2018/02/25/transgender-boy-wins-girls-state-wrestling-title-for-second-time/>.

⁵⁶ Cam Smith, Joe Rogan Lashes Out at Transgender Texas Wrestling Champ Mack Beggs, Foes Offer Support, USA Today High Sch. Sports (Feb. 27, 2017), <http://usatodayhss.com/2017/joe-rogan-lashes-out-at-transgender-texas-wrestling-champ-mack-beggs-while-foes-offer-support>.

⁵⁷ Babb, supra note 49 (noting that "coaches noticed an unmistakable strength advantage that hadn't been there even a year earlier").

⁵⁸ Todd Starnes, Starnes: We Must Defy Obama's Transgender Decree - No Matter the Cost, Fox News (May 13, 2016), <http://www.foxnews.com/opinion/2016/05/13/starnes-must-defy-obamas-transgender-decree-no-matter-cost.html>; see also Letter from Catherine E. Chamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, and Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, to Colleagues on Transgender Students 1, 3 (May 13, 2016) [hereinafter Letter from Chamon & Gupta], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁵⁹ Letter from Chamon & Gupta, supra note 58.

⁶⁰ Id. at 2.

⁶¹ Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, Trump Rescinds Rules on Bathrooms for Transgender Students, N.Y. Times (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

⁶² Paul J. Weber, Judge in Texas Temporarily Blocks Obama's Transgender Rules, Associated Press (Aug. 22, 2016), <https://apnews.com/1c9cb3fd45f462957813bdb5f5f1821/texas-judge-temporarily-blocks-obamas-transgender-directive>.

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birth."⁶³ Indeed, the intent of a statute is determined at the time of its enactment,⁶⁴ and when Title IX was enacted in 1972, "virtually every dictionary definition of "sex" referred to the physiological distinctions between males and females."⁶⁵ The Supreme Court itself recognized just one year later that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."⁶⁶

All of the above begs the question: Does the law really require that schools eliminate sex-segregated sports programs - or at least bend the [*65] time-honored, traditionally accepted definitions of terms like "boy" and "girl" - to accommodate transgender athletes, even in inclusive states? To answer this question, this Article will examine whether the United States Constitution's Equal Protection Clause (EPC), Title IX, and state law require that schools permit transgender athletes to use bathrooms and locker rooms and play on sports teams of their choosing - even when including such athletes denies opportunities to, or endangers, biological females. The purpose of exploring these issues is to provide high schools that wish to maintain separate athletic programs for girls and boys with a legally defensive game plan that lets them do so.

II. The Equal Protection Clause

Section 1 of the Constitution's Fourteenth Amendment, which contains the EPC, prohibits states from denying to anyone within their jurisdiction equal protection of the law.⁶⁷ The EPC applies whenever a state, or one of its agencies, takes any action that treats distinct classes of similarly situated persons differently.⁶⁸ State actors include high school athletic associations - which, while not officially agencies of state governments, are usually so "overborne by the pervasive entwinement of public institutions and public officials in [their] composition and workings [that] there is no substantial reason to claim unfairness in applying constitutional standards to [them]."⁶⁹

The Supreme Court has held that gender-based classifications are permissible under the EPC so long as they (1) serve important governmental objectives, (2) are substantially related to achievement of those objectives,⁷⁰ and (3) reflect reasoned judgments rather than prejudice.⁷¹ Courts generally view gender-based classifications as inherently suspect to some degree due to their potential to "relegate the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."⁷² However, these laws pass muster under the EPC if they are aimed at (1) remedying invidious discrimination, (2) enabling women to receive opportunities that have previously been denied to them, and (3) empowering them to overcome [*66] obstacles

⁶³ *Id.*

⁶⁴ [*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 \(1994\).](#)

⁶⁵ [*G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 \(4th Cir. 2016\)](#) (Niemayer, J., dissenting).

⁶⁶ [*Frontiero v. Richardson*, 411 U.S. 677, 686 \(1973\).](#)

⁶⁷ U.S. Const. amend. XIV, § 1.

⁶⁸ [*Ross v. Moffitt*, 417 U.S. 600, 609 \(1974\).](#)

⁶⁹ [*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 \(2001\)](#); see also [*Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1128 \(9th Cir. 1982\)](#) (citing cases from multiple jurisdictions asserting that high school athletic associations "are so intertwined with the state that their actions are considered state action").

⁷⁰ [*Craig v. Boren*, 429 U.S. 190, 197 \(1976\).](#)

⁷¹ [*Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 737 \(R.I. 1992\).](#)

⁷² [*Frontiero v. Richardson*, 411 U.S. 677, 686-87 \(1973\).](#)

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they face with regard to advancing their status.⁷³ This is especially true in the context of high school sports, where maintaining separate teams for boys and girls clearly addresses "the goal of redressing past discrimination and providing equal opportunities for women."⁷⁴

A. Physiological and Psychological Differences Between Cisgender and Transgender Athletes Do Exist and Should Be Accounted for in Equal Protection Analyses

The EPC does not require "things which are different in fact ... to be treated in law as though they were the same."⁷⁵ This is especially true where a law was enacted to protect women and girls from harms that they suffer uniquely or disproportionately.⁷⁶ Indeed, the Supreme Court has consistently held that a statute does not violate the EPC when it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."⁷⁷

If one thing is clear about transgender athletes, it is that they are different in fact from their "cisgender" counterparts - i.e., those whose gender identity matches their biological sex.⁷⁸ From a physiological standpoint, a boy who considers himself a girl and wishes to be treated as such is differently situated from an actual girl, and vice versa. In fact, there is a medical term for the cognitive dissonance that occurs when a transgender person's biological sex does not match the person's perception of himself or herself as a member of the opposite sex: "gender dysphoria," formerly known as "gender identity disorder."⁷⁹ Although some medical professionals deny that gender dysphoria is a mental [*67] illness,⁸⁰ at least one prominent psychiatrist, Dr. Paul McHugh of the Johns Hopkins University School of Medicine, has argued that it is.⁸¹ Dr. McHugh, who has studied transgenderism and sex-reassignment

⁷³ [Kahn v. Shevin, 416 U.S. 351, 353-55 \(1974\)](#) (upholding a Florida tax law that was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," due to the fact that while widowed men can typically continue working after the death of a spouse, widowed women often find themselves "suddenly forced into a job market with which [they are] unfamiliar, and in which, because of [their] former economic dependency, [they] will have fewer skills to offer."); see also [Michael M. v. Super. Ct., 450 U.S. 464, 469 \(1981\)](#); [Weinberger v. Wiesenfeld, 420 U.S. 636, 653 \(1975\)](#) (stating that statutes that "provide for the special problems of women" are valid under the EPC).

⁷⁴ [Clark, 695 F.2d at 1131.](#)

⁷⁵ [Michael M., 450 U.S. at 469](#) (quoting [Rinaldi v. Yeager, 384 U.S. 305, 309 \(1966\)](#)).

⁷⁶ *Id.* at 469-70 (holding that a statute making it a crime for males to engage in illicit sexual intercourse with underaged females passed constitutional muster, even though it did not protect underaged males and females equally, because the statute's purpose to protect underage females from illegitimate teenage pregnancies).

⁷⁷ *Id.* at 469 (emphasis in the original); see [Parham v. Hughes, 441 U.S. 347, 354 \(1979\)](#).

⁷⁸ Sunnie Brydum, The True Meaning of the Word "Cisgender," Advocate.com (July 31, 2015, 6:00 AM), <http://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender>.

⁷⁹ When You Don't Feel at Home with Your Gender, WebMD, <http://www.webmd.com/mental-health/gender-dysphoria> (last visited Mar. 8, 2018) [hereinafter Gender Dysphoria].

⁸⁰ *Id.*

⁸¹ Michael W. Chapman, Johns Hopkins Psychiatrist: Transgender Is "Mental Disorder;" Sex Change "Biologically Impossible," CNSNews.com (June 2, 2015, 1:34 PM), <http://www.cnsnews.com/news/article/michael-w-chapman/johns-hopkins-psychiatrist-transgender-mental-disorder-sex-change> [hereinafter Transgender Is Mental Disorder].

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surgery for forty years,⁸² and Dr. Lawrence Mayer, a scholar-in-residence in Johns Hopkins' psychiatry department, have published a report analyzing more than 200 peer-reviewed studies indicating that "the belief that gender identity is an innate, fixed human property independent of biological sex - so that a person might be a "man trapped in a woman's body" or "a woman trapped in a man's body" - is not supported by scientific evidence."⁸³

Dr. McHugh is not alone in his assessment. The American College of Pediatrics (ACP) has stated as follows:

A person's belief that he or she is something they are not is, at best, a sign of confused thinking. When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind [and] not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association⁸⁴

Transgender advocates have accused Dr. McHugh of cherry-picking portions of the studies he has reviewed to support an agenda of hatred toward transgenders.⁸⁵ It should also be noted that some medical professionals believe that the stress, anxiety, and depression associated with gender dysphoria, not the dysphoria itself, are what really need to be treated; bringing the person's body in line with his or her self-perception through hormone therapy, gender reassignment surgery, and/or other [*68] forms of treatment, according to these professionals, will accomplish that.⁸⁶ Still, given that gender dysphoria is a recognized medical disorder,⁸⁷ the now-rescinded Obama Directive required that public schools nationwide acknowledge transgender persons' perceptions, albeit at the possible expense of denying biological girls and boys their rightful places on their respective sports teams.

B. Physiological Differences Between Biological Boys and Girls Place Girls at a Competitive Disadvantage and Put Them in Harm's Way

Courts should remain mindful that physiological differences between the sexes do exist. In fact, several courts have ruled that due to those physiological differences, the EPC does not require that schools let boys compete on

⁸² Michael W. Chapman, Johns Hopkins Psychiatrist: Support of Transgenderism and Sex-Change Surgery Is 'Collaborating with Madness,' CNSNews.com (June 2, 2016, 3:45 PM), <http://cnsnews.com/blog/michael-w-chapman/johns-hopkins-psychiatrist-support-transgenderism-and-sex-change-surgery>.

⁸³ Louis DeBroux, "Born This Way"? New Study Debunks LGBT Claims, Patriot Post (Aug. 25, 2016), <https://patriotpost.us/articles/44470>.

⁸⁴ Gender Ideology Harms Children, Am. C. Pediatricians, <https://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children> (last updated May 2017).

⁸⁵ Mari Brighe, Clinging to a Dangerous Past: Dr. Paul McHugh's Selective Reading of Transgender Medical Literature, TransAdvocate, http://transadvocate.com/clinging-to-a-dangerous-past-dr-paul-mchughs-selective-reading-of-transgender-medical-literature_n_13842.htm (last visited Oct. 12, 2017).

⁸⁶ Id. (stating that "the opinions of Dr. McHugh fly in the face of currently accepted medical practice" and that "(t)he American Medical Association, the American Psychological Association, the American College of Obstetrics and Gynecology, the American Psychiatric Society, the American Public Health Association, and the World Professional Association for Transgender Health have all adopted positions supporting the medical necessity of transition-related care, including hormonal and surgical interventions"); see also Gender Dysphoria, *supra* note 79 (stating that "the mismatch between body and internal sense of gender is not a mental illness. Instead, what needs to be addressed are the stress, anxiety, and depression that go along with it.").

⁸⁷ Gender Dysphoria, *supra* note 79.

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girls' sports teams even though (1) the boys' schools do not offer comparable teams, and (2) girls have been allowed to compete on boys' teams.⁸⁸

The biggest reason why courts have allowed girls to compete on boys' teams, but not vice versa, is that gender-based classifications "are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls."⁸⁹ Boys generally tend to be bigger, taller, stronger, and faster than girls. Boys can jump higher and strike balls with greater force - giving boys an advantage over girls in sports that schools have traditionally reserved exclusively for girls, such as field hockey and volleyball.⁹⁰

[*69] From a safety standpoint, the only conceivable way to compensate for the strength differential between girls and boys is to create classes of teams where boys' advantages of size and strength would be eliminated.⁹¹ Football, a typically all-male sport, provides the best example of how such classes could work: some colleges - Princeton University, for instance - have had teams for players who weigh 172 pounds or less,⁹² and many high school, elementary school, and youth football programs place players onto teams based on their age or weight.⁹³ However, fielding varsity, junior varsity, and/or freshman teams in multiple classes would be impractical for schools for several reasons, not the least of which is budget concerns.⁹⁴ It would be difficult to devise a system of measurement that would place girls in classes where they are on a physical par with boys, because "any rating of players could only be done on a very subjective basis and would not be practical."⁹⁵ To illustrate, female track and field athletes might be considered elite when compared to other females, but their running times or jumping or throwing marks often pale in comparison to those of their male counterparts.⁹⁶ In sports like basketball or soccer,

⁸⁸ See, e.g., [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 \(9th Cir. 1982\)](#); see also [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#) ("The classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes.").

⁸⁹ [Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 739 \(R.I. 1992\)](#).

⁹⁰ [Petrie, 394 N.E.2d at 862](#); see also [Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 662 \(D.R.I. 1979\)](#) (noting an expert's testimony that "(b)ecause of men's greater muscle bulk, longer limbs and greater height, males generally could propel a volleyball with more force and better control"); Rick Reilly, Not Your Average Skirt Chaser, Sports Illustrated (Nov. 26, 2001), <http://www.si.com/vault/2001/11/26/314458/not-your-average-skirt-chaser> (noting that a six-foot-five, 205-pound male field hockey player "has a slap shot that nearly separated a few girls from their sports bras").

⁹¹ [Petrie, 394 N.E.2d at 862](#).

⁹² Phil Taylor, Losing Isn't Everything, Sports Illustrated (Oct. 1, 2012), <http://www.si.com/vault/2012/10/01/106238749/losing-isnt-everything> (concerning Princeton's "sprint" football team).

⁹³ [Petrie, 394 N.E.2d at 861](#); see also Ages & Weights, Pop Warner Football, <http://www.popwarner.com/default.aspx?tabid=1476162> (last visited Feb. 12, 2018) (concerning ages and weight classes in Pop Warner football).

⁹⁴ [Petrie, 394 N.E.2d at 862](#) ("Public institutions have a limited amount of funds and it is common knowledge that many school districts are extremely pressed to maintain their present programs. The extra expense of having this number of squads is obvious.").

⁹⁵ *Id.*

⁹⁶ [Id. at 861](#) (stating that "in the high school track season previous to the trial, none of the girls' state record holders in track and field "would have qualified in any event for the boys' state track and field meet").

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a tall, strong, fast, athletic girl who dominates against other girls would likely be seriously outclassed when competing against boys.⁹⁷

A class system that groups boys and girls together would also require state athletic associations to revamp their rules to account for variables between boys' and girls' sports that may have impacted individual athletes' success when sports were segregated by sex. For instance, female discus throwers use a smaller discus than boys.⁹⁸ In girls' volleyball, the net is several inches lower than in boys' volleyball,⁹⁹ and dimensions for diamonds in girls' softball are smaller than those in boys' [*70] baseball.¹⁰⁰ Girls' basketball teams use a smaller ball than their male counterparts,¹⁰¹ and although the nets they shoot at are equally high off the ground, at least one prominent college women's coach has suggested that nets should be lower in the girls' game to make the girls' game as high-scoring as the boys'.¹⁰² Boys' and girls' lacrosse are played with slightly different equipment under radically different rules - the chief difference being that the boys' game allows checking (i.e., body-to-body hits), while the girls' game does not.¹⁰³ Any creation of a class system of co-ed sports that would accommodate transgender athletes thus stands to negate any benefits to female athletes that the current system of sex-segregated sports has engendered.¹⁰⁴

From a competitive standpoint, if males were permitted to compete with females for positions on a girls' sports team, "due to average physiological differences, males would displace females to a substantial extent ... Thus, athletic opportunities for women would be diminished."¹⁰⁵ Put another way, "at the high school level, the average male is objectively more physically capable than the average female. Open competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators."¹⁰⁶ It thus stands to reason that letting boys - even ones who identify as girls - compete on girls' teams would violate the EPC because biological girls would be denied athletic opportunities that were created just for them. This is especially true given

⁹⁷ [Hoover v. Meiklejohn, 430 F. Supp. 164, 166 \(D. Colo. 1977\)](#) ("Applying the formula of force equals mass times acceleration, a collision between a male and a female of equal weights, running at full speed, would tend to be to the disadvantage of the female.").

⁹⁸ [Petrie, 394 N.E.2d at 863.](#)

⁹⁹ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 661 \(D.R.I. 1979\).](#)

¹⁰⁰ Zach Schonbrun, Idea to Lower Rim for Women's Basketball Stirs Talk, N.Y. Times (Oct. 25, 2012), <http://www.nytimes.com/2012/10/26/sports/ncaabasketball/geno-auriemma-of-uconn-proposes-lower-rim-for-womens-basketball.html>.

¹⁰¹ See Steve Silverman, Difference Between Men's & Women's Basketball, Livestrong.com, <http://www.livestrong.com/article/122406-difference-between-mens-womens/> (last updated Sept. 11, 2017).

¹⁰² Schonbrun, supra note 100 (describing University of Connecticut women's basketball coach Geno Auriemma's assertion that fans are less interested in women's basketball than men's because women's teams "were not scoring with the ease and regularity that they should").

¹⁰³ Preston Williams, Varsity Letter: For Boys and Girls, Lacrosse Is Two Games with One Ball, Wash. Post (May 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052603359.html>.

¹⁰⁴ [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#) (stating that a class system would be "inconsistent with a system of full competition which boys have had for years and which girls are seeking to achieve").

¹⁰⁵ [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 \(9th Cir. 1982\).](#)

¹⁰⁶ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 654, 662 \(D.R.I. 1979\).](#)

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that such boys would be competing with biological girls, who already have fewer opportunities than boys to compete in sports beyond high school, for prized college athletic scholarships. ¹⁰⁷

[*71] Not every state recognizes physiological differences between boys and girls as a valid reason to keep boys from participating in girls' sports, or vice versa. ¹⁰⁸ In Massachusetts, for instance, preventing boys from joining girls' sports teams violates the state's Equal Rights Amendment. ¹⁰⁹ Furthermore, many transgender athletes would argue that physiological differences are not an issue anyway because athletes, regardless of gender, come in all shapes and sizes, and have various abilities that give one athlete a competitive advantage over the other. ¹¹⁰ Anry Fuentes, the biological boy who played for California's Denair High School's girls' soccer team in 2015, said that "if a girl on an opposing team felt like I [was] stronger because I'm physically a male, I would ... tell them that, "It's not even your gender - it's just body type." ¹¹¹ At least one court, in a case involving a girl seeking to play soccer on a boys' team, has stated that "the range of [physical] differences among individuals in both sexes is greater than the average differences between the sexes." ¹¹² That court also held that "the failure to establish any physical criteria to protect small or weak males ... destroys the credibility of the reasoning urged in support of the sex classification." ¹¹³

Transgender athletes who have undergone hormone therapy treatments - which seek to decrease testosterone levels and increase estrogen levels in males who wish to become female and vice versa in females who wish to become male - argue that such treatments adversely impact their bodies, thereby negating any perceived physical advantages they might have. ¹¹⁴ Dr. Joshua Safer, a Boston-based endocrinologist, asserts that when a male undergoes hormone treatments to become female, his muscle mass shrinks to female proportions. ¹¹⁵ Chloe Anderson, a college volleyball player who transitioned from male to female, says that after she began receiving hormone treatments, her arms became weaker, she hit and served the ball with less power, she could not run as fast, and "[she] struggled a lot to recalibrate [her] body." ¹¹⁶ Joanna Harper, a transgender male-turned-female and former distance runner who is now a gender and sport consultant with the International Olympic **[*72]** Committee (IOC), compares her post-transition body to "a large car with a small engine ... competing against small cars with small engines." ¹¹⁷

Taking Safer, Anderson, and Harper's respective words into account, it remains apparent that even though some states disregard the physiological differences between boys and girls - or at least treat them as trivial - the reality is

¹⁰⁷ Betsey Stevenson, Title IX and the Evolution of High School Sports, 25 Contemp. Econ. Pol'y No. 4 486, 487 (Oct. 2007) (noting that more than 7 million students compete in high school athletics each year, compared to approximately 400,000 at the collegiate level; of that approximately 400,000, less than half (170,526) were female).

¹⁰⁸ K-12 Policies, supra note 6.

¹⁰⁹ Christopher Marquis, An Equal Playing Field: The Potential Conflict Between Title IX and the Massachusetts Equal Rights Amendment, 34 Bos. C. J.L. & Soc. Just. 77, 78 n.6 (2014) (citing Mass. Const. pt. 1, art. I; [Atty. Gen. v. Mass. Interscholastic Athletic Ass'n., 393 N.E.2d 284, 290 \(Mass. 1979\)](#)); see also Reilly, supra note 90.

¹¹⁰ No League, supra note 42.

¹¹¹ Id.

¹¹² [Hoover v. Meiklejohn, 430 F. Supp. 164, 169 \(D. Colo. 1977\)](#).

¹¹³ Id.

¹¹⁴ No League, supra note 42.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

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that such differences can, and often do, disadvantage and endanger girls on the athletic field. ¹¹⁸ Boys cannot reasonably be expected to restrain themselves, or give less than full effort, when facing girls in athletic competition, any more than they can when facing other boys. ¹¹⁹ This may understandably render girls fearful of facing boys who are significantly taller, heavier, and stronger than they are, strike balls with more force than they do, and in some cases, have played more violent contact sports with other boys. ¹²⁰ While such fears are not entirely unfounded, ¹²¹ they would not tip the EPC's scales in favor of schools that wish to maintain separate athletic programs for boys and girls: transgender athletes would argue that such fears constitute prejudice, and though "private biases may be outside the reach of the law[;] ... the law cannot, directly or indirectly, give them effect." ¹²² What would tip the scales in schools' favor is that sex-segregated athletic programs do not violate the EPC because they account for and eliminate the very real dangers that biological female athletes would face if required to compete against biological males. ¹²³

Having boys on a girls' team can rob girls of the satisfaction that comes with victory: "When you win, people think it's only because of the boys on your team," a female field hockey player told sportswriter Rick [*73] Reilly in 2001. ¹²⁴ "It's so defeating." ¹²⁵ It is worth noting that some female athletes can defeat, and have defeated, biological males in certain sports. ¹²⁶ Still, this does not mean that female athletes should have to compete against males, especially when the presence of biological males in girls' high school sports undermines the "legitimate and substantial state interest" in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes." ¹²⁷ This is especially true given that "mixed-sex teams would probably be dominated by males." ¹²⁸

¹¹⁸ Id.

¹¹⁹ See [Knight v. Jewett, 3 Cal. 4th 296, 318 \(Cal. 1992\)](#) (a case involving a female touch football player who was injured in a collision with a male opponent while battling to catch a pass; specifically: "In the heat of an active sporting event ... a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct.").

¹²⁰ Reilly, *supra* note 90.

¹²¹ Id. (concerning a female field hockey player who doubled over after being struck in the pelvic region by a male player's slap shot); see also Marquis, *supra* note 109, at 77-78 (concerning a female goalkeeper who suffered a concussion after colliding with a male forward in a 2010 Massachusetts field hockey match).

¹²² [Palmore v. Sidoti, 466 U.S. 429, 433 \(1981\)](#) (holding that no matter how prevalent racial prejudice may be in mainstream U.S. society, it could not serve as justification for a court prohibiting an African-American man from adopting his white stepdaughter).

¹²³ [Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1130 \(9th Cir. 1982\)](#) (citing [Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 862 \(Ill. App. Ct. 1979\)](#)); [Schlesinger v. Ballard, 419 U.S. 498, 505 \(1975\)](#); [Frontiero v. Richardson, 411 U.S. 677, 683-84 \(1973\)](#) (supporting the proposition that segregating sports programs based on innate differences between the sexes did not violate the EPC as long as such classifications are not based on archaic generalizations or paternalistic attitudes).

¹²⁴ Reilly, *supra* note 90.

¹²⁵ Id.

¹²⁶ Rivals Cry Foul, *supra* note 45 (noting that although Nattaphon Wangyot did place in his events at the Alaska state girls' track and field championships, he did not place first).

¹²⁷ [Clark, 695 F.2d at 1131](#); [Petrie, 394 N.E.2d at 862](#).

¹²⁸ [Hoover v. Meiklejohn, 430 F. Supp. 164, 170 \(D. Colo. 1977\)](#).

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Based on the foregoing, when deciding EPC cases concerning transgender athletes, courts should continue to factor physiological differences between the sexes into their analyses.

C. Allowing Transgender Athletes to Use Opposite-Sex Locker Rooms Might Protect Transgender Athletes, but Not Their Cisgender Counterparts

As important as on-field issues are to EPC analyses, off-field issues are equally important - particularly those involving locker rooms and other places where athletes undress and shower before and after games. Place even the most effeminate boy in a girls' locker room, and girls will be keenly aware that a boy is in their midst - if not because they are unwillingly exposed to his genitals, then because they are uncomfortable being in a state of undress in the boy's presence, especially when they have not consented to undress in front of him.¹²⁹ High school girls are insecure enough about other girls seeing them fully or partially naked.¹³⁰ Forcing girls to be naked in front of a boy, even one who claims to be and acts like a girl, could expose them to serious psychological harm - especially in a world where boys are increasingly objectifying girls' bodies and subjecting girls to sexual bullying and harassment at an alarming rate.¹³¹ Allowing an "intact" biological boy - one who has not undergone gender reassignment surgery, and thus still has a penis - to **[*74]** undress in a girls' locker room actually undermines the concept of equal protection: The boy may be protected, but the girls are not.¹³²

The same is true of allowing even the most masculine-looking biologically female athlete to dress and shower in a boys' locker room. Never mind that the girl will be in a room full of hormonal teenage boys who will find it nearly impossible to ignore her distinctively female anatomy. Even boys who accept her presence among them and try to respect her privacy would find it difficult to think of her as "just one of the guys."¹³³ Like their female counterparts, teenage boys going through puberty can struggle to feel comfortable with their changing bodies, and changing in front of girls can heighten their insecurities.¹³⁴ Furthermore, a boy may not wish to pull down his pants in front of a girl for fear she may accuse him of rape, sexual assault, or sexual harassment.¹³⁵ "Males' privacy rights in single-sex spaces should be upheld just as the same rights for women should be upheld in situations where women have complained of male transgendered exhibitionists."¹³⁶

"Superficially, the maintenance of separate sports teams suggests the possibility of a denial of equal protection of the laws, but sound reason dictates that "separate but equal" in the realm of sports competition, unlike that of racial

¹²⁹ Kelsey Harkness, Why These High School Girls Don't Want Transgender "Student A' in Their Locker Room, Stream (Dec. 21, 2015), <https://stream.org/high-school-girls-dont-want-transgender-student-locker-room/>.

¹³⁰ Id.

¹³¹ Melinda Tankard Reist, Sex Before Kissing: How 15-Year-Old Girls Are Dealing with Porn-Addicted Boys, Fight New Drug (April 1, 2016), <http://fightthenewdrug.org/sex-before-kissing-15-year-old-girls-dealing-with-boys/>.

¹³² Michael E. Miller, A Transgender Teen Used the Girls' Locker Room. Now Her Community Is Up in Arms, Wash. Post (Sept. 2, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/a-transgender-teen-used-the-girls-locker-room-now-her-community-is-up-in-arms/>.

¹³³ See generally *Just One of the Guys* (Columbia Pictures 1985) (telling the story of a high school girl who poses as a boy at a rival school to win a journalism competition; the girl gains access to boys' restrooms and locker rooms and has to keep her anatomy concealed in order to not blow her cover).

¹³⁴ Keith Ablow, All Wrong - in California, Girls Can Use Urinals in the Boys' Restroom, FoxNews.com (Jan. 14, 2014), <http://www.foxnews.com/opinion/2014/01/14/all-wrong-in-california-girls-can-use-urinals-in-boys-restroom.html>.

¹³⁵ Chris Ricketts, The Transgender Threat to Boys and Men, Am. Thinker (Apr. 29, 2016), http://www.americanthinker.com/articles/2016/04/the_transgender_threat_to_boys_and_men_.html.

¹³⁶ Id.

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discrimination, is justifiable and should be allowed to stand" ¹³⁷ Ultimately, if the dangers and competitive disadvantages that biological girls typically face when they must compete against biological boys are not enough to convince courts that public high schools should continue to maintain separate teams for boys and girls, the lack of equal opportunities for biological girls should. ¹³⁸

[*75]

III. Title IX

"The statute known as Title IX, [20 U.S.C. § 1681](#), is widely recognized as a source of a vast expansion of athletic opportunities for women in the nation's schools and universities" ¹³⁹ Although Title IX does not mention interscholastic sports specifically, the statute does state that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." ¹⁴⁰ "Regulations promulgated under the statute assure that Title IX covers such educational activities as high school athletics." ¹⁴¹

When a statute does not define a term, courts typically "construe [the] term in accordance with its ordinary and natural meaning." ¹⁴² Title IX provides no definition of the term "women" - in fact, the statute does not even mention the word "women." ¹⁴³ The statute merely states that no educational institution receiving federal funding shall discriminate against any "person in the United States on ... the basis of sex." ¹⁴⁴ Title IX provides no definition of the word "sex," either. ¹⁴⁵ This was especially problematic in *G.G. v. Gloucester County School Board*, in which the Fourth Circuit ruled that a Virginia school district's exclusion of a biologically female transgender student from a boys' locker room violated Title IX. ¹⁴⁶ *G.G.*, it should be noted, is no longer valid law in the Fourth Circuit, as the appellate court vacated the preliminary injunction entered for the plaintiff after the Supreme Court

¹³⁷ [Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930, 932 \(W.D. Pa. 1973\)](#).

¹³⁸ See [Gomes v. R.I. Interscholastic, 469 F. Supp. 654, 664 \(D.R.I. 1979\)](#) ("Providing women with separate and exclusive [athletic] teams in sports previously dominated by men appears a legitimate and narrowly drawn attempt to rectify past discrimination."); see also Carly Holtzman, Mother of Girl Who Lost Race to Transgender Athlete Speaks Out - and She's Furious, TheBlaze (June 7, 2016, 12:46 PM), <http://www.theblaze.com/stories/2016/06/07/mother-of-girl-who-lost-race-to-transgender-athlete-speaks-out-and-shes-furious/> ("Today it's one transgender athlete. Tomorrow it could be half the field." (quoting Jennifer VanPelt, the mother of a runner who lost to Nattaphon Wangyot at Alaska's state track and field meet)).

¹³⁹ [Mansourian v. Regents of the Univ. of Cal., 594 F.3d 1095, 1099 \(9th Cir. 2010\)](#), overruled by ***Mansorian v. Regents of Univ. of Cal., 602 F.3d 957, 974 (9th Cir. 2010)***.

¹⁴⁰ *Id.* at 1101 (emphasis added) (quoting [20 U.S.C. § 1681\(a\)](#) (2012)).

¹⁴¹ [Gomes, 469 F. Supp. at 660](#) (citing [45 C.F.R. § 86.41 \(1979\)](#)).

¹⁴² [FDIC v. Meyer, 510 U.S. 471, 476 \(1994\)](#).

¹⁴³ See generally [20 U.S.C. § 1681](#).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also Jae Alexis Lee, How Does Title IX Define Gender?, Quora.com (May 13, 2016), <https://www.quora.com/How-does-title-IX-define-gender>.

¹⁴⁶ Frances Hubbard, Gloucester School Board to Seek Supreme Court Review in Transgender Lawsuit, Daily press (June 7, 2016, 3:30 PM), <http://www.dailypress.com/news/gloucester-county/dp-nws-mid-grimm-supreme-court-20160607-story.html>; see also [822 F.3d 709, 714-27 \(4th Cir. 2016\)](#), vacated, **137 S. Ct. 1239**.

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denied certiorari in 2017 in light of the Trump Administration's rescission of the Obama Directive. ¹⁴⁷ While transgenders and other individuals "do currently [*76] discuss sex and gender as decoupled concepts relatively frequently ... it's fairly obvious that" in 1972, when Congress enacted Title IX, "the lawmakers of the time were not thinking of sex and gender as decoupled concepts in need of explicit definitions." ¹⁴⁸

Courts thus interpret Title IX's provisions "through relevant law interpreting parallel language in Title VII ... [which] prohibits discrimination by an employer" based on sex, among other factors. ¹⁴⁹ "Courts have interpreted the word 'sex' [in Title VII] narrowly to typically mean biological sex." ¹⁵⁰ "Based on this interpretation of Title VII, courts also interpret the meaning of 'sex' within Title IX to mean biological sex, not sexual orientation or gender identity." ¹⁵¹

A. Title IX Was Created to Advance Opportunities for Women, Not Biological Men Who Claim to Be Women

To ascertain Congress's intent with regard to the construction of Title IX, courts must look to Title IX's legislative history. ¹⁵² Title IX's legislative history indicates that Congress enacted the statute as a "response to significant concerns about discrimination against women in education." ¹⁵³ Title IX's primary sponsor, Senator Birch Bayh of Indiana, stated:

Title IX was enacted to "provide for the women of America something that [was] rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." ¹⁵⁴

"Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction" ¹⁵⁵ Furthermore, while words, and combinations thereof, may reasonably be interpreted multiple ways, "particularly in [*77] matters as complex as legislative enactments," ¹⁵⁶ "multiple accepted meanings do not exist merely because a statute's "authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." ¹⁵⁷ In other words,

¹⁴⁷ [G.G., 822 F.3d at 729-30](#); see also Amy Howe, Justices Send Transgender Bathroom Case Back to Lower Courts, No Action on Same-Sex Marriage Cake Case, SCOTUSblog (Mar. 6, 2017, 12:03 PM), <http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/>.

¹⁴⁸ Lee, supra note 145.

¹⁴⁹ Leena D. Phadke, When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX, [54 Kan. L. Rev. 837, 839 \(Apr. 2006\)](#) (quoting [42 U.S.C. § 2000e-2\(a\)](#) (2012)).

¹⁵⁰ Id. (citing [Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 \(9th Cir. 1977\)](#), overruled by [Schwank v. Hartford, 204 F.3d 1187 \(9th Cir. 2000\)](#)); Patricia A. Cain, Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law, [75 Denv. U. L. Rev. 1321, 1355 \(1998\)](#) (stating that "the court[']s holding in Holloway] declared, without serious question, that there can only be two sexes - male and female").

¹⁵¹ Phadke, supra note 149, at 840.

¹⁵² [North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 n. 26 \(1982\)](#).

¹⁵³ [Neal v. Bd. of Trustees, 198 F.3d 763, 766 \(9th Cir. 1999\)](#).

¹⁵⁴ Id. (quoting 118 Cong. Rec. 5808 (1972)).

¹⁵⁵ Id. (emphasis added) (quoting [Bell, 456 U.S. at 526-27](#)).

¹⁵⁶ [United States v. Sherbondy, 865 F.2d 996, 1000 \(9th Cir. 1988\)](#).

¹⁵⁷ [Calix v. Lynch, 784 F.3d 1000, 1005 \(5th Cir. 2015\)](#) (emphasis added) (quoting [Moore v. Hannon Food Servs., Inc., 317 F.3d 489, 497 \(5th Cir. 2003\)](#)).

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courts should not interpret Title IX in a way that would undermine its purpose of advancing educational opportunities for women and girls - or, to be more accurate, biological women and girls - including athletic opportunities.¹⁵⁸

1. For Title IX's Purposes, "Sex" Means "Biological Sex"

How should schools classify transgender athletes for purposes of Title IX then? Should they treat males who claim to be female as female, and vice versa, regardless of whether they have undergone hormone treatments or sex reassignment surgery? Transgender advocates would argue that they should.¹⁵⁹ The best known case specifically involving a transgender athlete suing for the right to compete as a member of the athlete's chosen gender, *Richards v. United States Tennis Association*, was not brought under Title IX, but under New York's State Human Rights Law.¹⁶⁰ In *Richards*, a tennis player who was born male but had undergone sex reassignment surgery to become female sued for, and won, the right to compete in the U.S. Open's thirty-five-and-over women's singles bracket.¹⁶¹ In granting an injunction allowing the player to compete as a woman, the court found the U.S. Tennis Association's demand that the player take a sex determination test to be "grossly unfair, discriminatory and inequitable."¹⁶² The court also held that "the only justification for using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing against women."¹⁶³

While some courts might find *Richards* instructive, justice for high school athletes would be better served by analyzing the transgender issue through the lens of Title VII, which, as stated above, serves as a guideline **[*78]** for Title IX cases.¹⁶⁴ "The dominant interpretation of Title VII examines its legislative history, which suggests that Congress did not intend for its prohibition of sex discrimination to include a prohibition of transgender sex discrimination."¹⁶⁵ In a seminal case concerning Title VII's applicability to individuals who have undergone sex reassignment surgery, the Ninth Circuit held that "a transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."¹⁶⁶ This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate."¹⁶⁷ Another federal appellate court held as follows:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male

¹⁵⁸ [Neal, 198 F.3d at 767-68](#) (noting that Title IX's drafters understood that "male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field").

¹⁵⁹ See K-12 Policies, *supra* note 6 (defining "inclusive" to mean "no medical hormones or surgery required" and "discriminatory" to mean "requires birth certificate or surgery" and a hormone wait period).

¹⁶⁰ [Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 268 \(N.Y. Sup. Ct. 1977\)](#).

¹⁶¹ [Id. at 273](#).

¹⁶² [Id. at 272](#).

¹⁶³ *Id.*

¹⁶⁴ Phadke, *supra* note 149, at 842.

¹⁶⁵ *Id.* at 842-43.

¹⁶⁶ *Id.*

¹⁶⁷ [Holloway v. Arthur Anderson & Co., 566 F.2d 659, 664 \(9th Cir. 1977\)](#), overruled by [Schwank v. Hartford, 204 F.3d 1187 \(9th Cir. 2000\)](#).

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body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.
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At least one court has held "that discrimination based on a claimant's failure to meet sex stereotypes violates Title VII even when it involves transgender individuals."¹⁶⁹ Under this lone court's view, if an employer discriminates against an individual because he or she refuses to dress, talk, or otherwise behave in a manner that conforms to expectations of the individual's biological gender, the individual may sue the employer under Title VII for sex stereotyping and gender discrimination.¹⁷⁰ However, as stated above, "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."¹⁷¹ "Courts have [thus] interpreted the word 'sex' narrowly to typically mean biological sex."¹⁷² Under this construction of the word "sex," "any discrimination based on an [*79] individual's sexual orientation or gender identity would not violate Title VII because as such, it would not constitute discrimination based on a person's biological sex, but rather because of a quality related to sex."¹⁷³ Applying this principle to Title IX, a school does not unlawfully discriminate against a boy who claims to be a girl by treating him as a boy, and vice versa.

2. Forcing Girls to Compete Against Boys for Athletic Opportunities Violates Title IX

The Ninth Circuit has held that forcing women to compete against men for spots on the same athletic team undermines Title IX's purpose.¹⁷⁴ In *Mansourian v. Regents of the University of California*, four female wrestlers sued the University of California at Davis (UCD) for kicking them off the university wrestling team, then giving them a chance to rejoin if they defeated male counterparts in their respective weight classes using men's collegiate wrestling rules.¹⁷⁵ Before their dismissal, the female wrestlers had only wrestled against other women using international freestyle rules.¹⁷⁶ Whether they proved unable to physically compete with the men or simply refused to out of discomfort, lack of knowledge and/or practice of men's collegiate rules, etc., the female wrestlers lost scholarships and academic credit due to their inability to participate.¹⁷⁷ In holding that UCD's exclusion of the female wrestlers violated Title IX, the Ninth Circuit stated that "by requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future participation."¹⁷⁸

¹⁶⁸ [Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 \(7th Cir. 1984\).](#)

¹⁶⁹ Phadke, supra note 149 (citing [Smith v. City of Salem, 378 F.3d 566, 578 \(6th Cir. 2004\)](#)).

¹⁷⁰ [Smith, 378 F.3d at 571-72](#) (citing [Price Waterhouse v. Hopkins, 490 U.S. 228, 235 \(1989\)](#)), superseded by statute, Civil Rights Act of 1991, 42 U.S.C.A. § 2000 (2012).

¹⁷¹ [Ulane, 742 F.2d at 1085.](#)

¹⁷² Phadke, supra note 149, at 839.

¹⁷³ Id. at 840.

¹⁷⁴ [Mansourian v. Regents of the Univ. of Cal., 594 F.3d 1095, 1102 \(9th Cir. 2010\)](#), overruled by ***Mansorian v. Regents of Univ. of Cal., 602 F.3d 957, 974 (9th Cir. 2010)***.

¹⁷⁵ Id. at 1099.

¹⁷⁶ Id. at 1099-1100.

¹⁷⁷ Id.

¹⁷⁸ Id. at 1111 n.16.

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B. Denying Transgender Athletes the Chance to Compete on Teams that Match Their Gender Identity Would Not Deny Them an Equal Opportunity to Compete

In *O'Connor v. Board of Education*, the Supreme Court held that "without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny [girls] an equal opportunity to [participate] in [*80] interscholastic events."¹⁷⁹ "Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact."¹⁸⁰ *O'Connor* involved a female junior high basketball player whose basketball skills greatly exceeded those of other girls her age or older and were at least equal to those of many boys her age or older.¹⁸¹ Because of this, the player sought and won an injunction from her local federal district court permitting her to try out for one of her school's boys' teams and to compete against boys in interscholastic competition if she made the team.¹⁸² The player's school district successfully appealed the lower court's ruling and was granted a stay of the injunction.¹⁸³

In denying the player's motion to vacate the stay, the Supreme Court held that only where (1) a school "operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex," and (2) "athletic opportunities for members of [the excluded] sex have previously been limited," must the school permit members of the excluded sex to try out for the team offered.¹⁸⁴ Because the school district had offered the female basketball player an equal opportunity to participate in interscholastic athletic competition not only by fielding girls' basketball teams, but also by devoting equal time, money, personnel, and facilities to the girls' teams at the player's school, the district had complied with Title IX.¹⁸⁵ *O'Connor* thus illustrates that schools do not deny equal opportunities to athletes of either gender - and thus do not violate Title IX - by requiring them to compete on teams set apart based on biological gender.¹⁸⁶

[*81]

C. Courts Should Not Interpret Title IX in a Way That Undermines Its Purpose

It should be noted here that the OCR was created to regulate federally funded schools with respect to athletic opportunities under Title IX.¹⁸⁷ It was the OCR that issued the now-rescinded Obama Directive.¹⁸⁸ "It is well-

¹⁷⁹ [449 U.S. 1301, 1307 \(1980\)](#) (emphasis added).

¹⁸⁰ [Id. at 1302](#) (quoting [45 C.F.R. § 86.41\(b\) \(1979\)](#)).

¹⁸¹ [Id. at 1302-03](#).

¹⁸² *Id.*

¹⁸³ [Id. at 1303-04](#).

¹⁸⁴ [Id. at 1308 n.5](#) (quoting [45 C.F.R. § 86.41\(b\)](#)).

¹⁸⁵ [Id. at 1306](#) (stating that if a gender-based "classification is reasonable in substantially all of its applications ... the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case"); see also [Hoover v. Meiklejohn, 430 F. Supp. 164, 170 \(D. Colo. 1977\)](#) ("The standard should be one of comparability, not absolute equality.").

¹⁸⁶ [O'Connor, 449 U.S. at 1306](#) ("The question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer (the player) opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the (school district) to structure (its) athletic programs by using sex as one criterion for eligibility.").

¹⁸⁷ [Neal v. Bd. of Trustees, 198 F.3d 765, 770 \(9th Cir. 1999\)](#) (citing [Cohen v. Brown Univ., 991 F.2d 888, 895 \(1st Cir. 1993\)](#)).

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established that the federal courts are to defer substantially to an agency's interpretation of its own regulations." ¹⁸⁹ However, a court has no obligation to show substantial deference to an agency's interpretation of a statute or regulation when it conflicts with a prior, consistently held interpretation. ¹⁹⁰ Courts should thus treat as invalid any agency's interpretation of Title IX that disadvantages biological girls and undermines the statute's remedial purposes. ¹⁹¹ OCR's interpretation of Title IX, as set forth in the Obama Directive, did just that: whereas the term "sex" in Title IX is to be construed consistently with the meaning prescribed in Title VII, and courts have consistently determined that term to mean "biological sex," ¹⁹² the Obama Directive asserted that the term also includes "gender identity." ¹⁹³ If a male athlete's mere claim that he is female, or vice versa, is to take precedent over - or at least be given equal weight with - biology, then there are no such things as males or females for Title IX's purposes, and the term "sex" is rendered meaningless. ¹⁹⁴

Taken together, Mansourian and O'Connor show that interpreting Title IX to require that high schools permit transgender athletes to compete on whichever athletic teams match their self-proclaimed gender identity would, in fact, disadvantage biological women and undermine Title IX's remedial purposes. As Mansourian illustrates, high schools may violate Title IX by requiring biological girls to compete with biological boys for spots on an athletic team that were once reserved exclusively for girls: "By requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future [*82] participation." ¹⁹⁵ As long as a school provides athletic teams for persons of both genders that are roughly equal in terms of the time, money, personnel, and facilities devoted to each team, the equal opportunity requirement is met. ¹⁹⁶

Requiring sex-segregated teams to include persons whose self-proclaimed "gender identity" does not match their biological gender "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." ¹⁹⁷ Courts should thus uphold Title IX's purpose of expanding athletic opportunities for women by not letting men who identify as women deny them such opportunities. ¹⁹⁸

IV. State Laws Concerning Transgender Athletes

¹⁸⁸ See Letter from Chamon & Gupta, supra note 58.

¹⁸⁹ [Neal, 198 F.3d at 770.](#)

¹⁹⁰ [Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 \(1994\).](#)

¹⁹¹ [Neal, 198 F.3d at 768](#) (quoting [Cohen v. Brown, 101 F.3d 155, 174 \(1st Cir. 1996\)](#)).

¹⁹² Phadke, supra note 149, at 842-43.

¹⁹³ Emma Margolin, Transgender Students Protected Under Title IX, DOE Says, MSNBC.com, <http://www.msnbc.com/msnbc/transgender-students-protected-under-title-ix> (last updated Apr. 30, 2014, 4:15 PM) ("Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity" (quoting the Obama Directive's statement)).

¹⁹⁴ Letter from Chamon & Gupta, supra note 58, at 1-2.

¹⁹⁵ [Mansourian v. Regents of Univ. of Cal., 594 F.3d 1095, 1111 \(9th Cir. 2010\)](#), overruled by [Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 974 \(9th Cir. 2010\)](#).

¹⁹⁶ Id. at 1102; see also [Hoover v. Meiklejohn, 430 F. Supp. 164, 172 \(D. Colo. 1977\)](#).

¹⁹⁷ [Neal v. Bd. of Trustees, 198 F.3d 765, 769 \(9th Cir. 1999\)](#).

¹⁹⁸ [Id. at 766.](#)

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Since the Supreme Court issued its landmark decision in *McCulloch v. Maryland* in 1819, "it has been settled that state law that conflicts with federal law is "without effect."¹⁹⁹ Under the U.S. Constitution's Supremacy Clause, "Congress has the power to preempt state law."²⁰⁰ "Even without an express provision for preemption, ... state law must yield to a congressional Act in at least two circumstances."²⁰¹ "When Congress intends federal law to 'occupy the field,' state law in that area is preempted."²⁰² "And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."²⁰³

California actually has two laws requiring public high schools to let transgender athletes compete on teams or in events based on their self-proclaimed gender identity.²⁰⁴ Besides Education Code § 221.5(f), cited supra, there is the Unruh Civil Rights Act (the Unruh Act), which prohibits business establishments from discriminating based on "gender identity and ... gender related appearance and behavior whether or not **[*83]** stereotypically associated with the person's assigned sex at birth."²⁰⁵ The term "business establishment" is to be construed broadly:

The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization"²⁰⁶

Public schools qualify as business establishments under the Unruh Act.²⁰⁷ The California Interscholastic Federation and the regional sections that oversee high school sports on its behalf (collectively the CIF) also qualify.²⁰⁸ Though no court has declared the CIF to be a business establishment, the CIF organizes and conducts high school sporting events throughout the state on an annual basis and generates revenue from the sale of tickets, event programs, T-shirts, and concessions, all of which would almost certainly qualify the CIF as a "business establishment."²⁰⁹ The CIF's status as a nonprofit organization would not exempt it from the Unruh Act's

¹⁹⁹ [Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 \(1992\)](#) (quoting [Maryland v. Louisiana, 451 U.S. 725, 746 \(1981\)](#)) (citing [McCulloch v. Maryland, 17 U.S. 316, 427 \(1819\)](#)).

²⁰⁰ [Crosby v. Nat'l. Foreign Trade Council, 530 U.S. 363, 372 \(2000\)](#) (citing [U.S. Const. art. VI, cl. 2](#)).

²⁰¹ Id.

²⁰² Id.

²⁰³ Id. (emphasis added).

²⁰⁴ Although this portion of the Article specifically discusses laws in California, the legal principles discussed apply in all other U.S. states, districts, and territories that have similar laws, rules, and regulations concerning transgender student-athletes. See, e.g., K-12 Policies, supra note 6.

²⁰⁵ See Unruh Civil Rights Act, Cal. [Civ. Code § 51\(e\)\(5\)](#) (1872) (incorporating by reference Cal. Gov't Code § 12926(o) (1943) and, by extension, [Cal. Pen. Code § 422.56\(c\)](#) (1987), which is incorporated by reference into Cal. Gov't Code § 12926(p) (2017) and whose language is quoted in the sentence preceding this note); see also Cal. Gov't Code § 11135(a) (2017); [Cal. Educ. Code §§200, 201](#) (1982), § 220 (1998).

²⁰⁶ [Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 709 \(Cal. Ct. App. 2nd Dist. 1982\)](#) (emphasis added) (quoting [Burks v. Poppy Constr. Co., 20 Cal. Rptr. 609, 612 \(Cal. 1962\)](#)).

²⁰⁷ [Sullivan v. Vallejo City Sch. Dist., 731 F. Supp. 947, 952 \(E.D. Cal. 1990\)](#).

²⁰⁸ Id.

²⁰⁹ Id. (quoting [Isbister v. Boys Club, Inc., 707 P.2d 212, 216 \(Cal. 1985\)](#)) (stating that in enacting the Unruh Act, the California Legislature intended for the statute to apply to "all private and public organizations ... that may reasonably be found to constitute business establishments of every type (sic) whatsoever" (emphasis in the original; internal quotations omitted)); see also Doe v. Cal. Lutheran High Sch. Ass'n, [88 Cal. Rptr. 3d 475, 478 \(Cal. Ct. App. 2009\)](#).

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provisions.²¹⁰ Private religious schools, however, are not subject to the Unruh Act,²¹¹ which is inapplicable where it conflicts with the First Amendment.²¹² In other words, private schools that wish to adhere to the biblical teaching "that at [*84] the beginning the Creator "made them male and female"²¹³ are free to do so.

The state laws discussed supra have put California's public high schools in a legal bind.²¹⁴ If they do not let transgender athletes compete for spots on teams that match their gender identity, they could be sued for violating Education Code § 221.5(f), the Unruh Act, the Equal Protection Clause, and Title IX.²¹⁵ If they do let transgender athletes compete on teams that match their gender identity, and thus displace biological boys or girls who would otherwise have earned spots on those teams, they could be subject to lawsuits on the same grounds.

V. High Schools' Defensive Game Plan

Other than lobbying their federal and state legislators for changes in existing law, there does not seem to be much that high schools can do to wriggle out of the proverbial "rock and a hard place" that they now find themselves between. However, schools need not sit back and wait to be sued to assert their right to maintain a level playing field for all of their athletes by maintaining separate athletic programs for boys and girls.

For starters, high schools can maintain the status quo. As stated supra, Title IX was enacted to advance educational opportunities for girls.²¹⁶ By ensuring that spots on athletic teams established for girls actually go to girls, schools can do just that. A boy who wants to play on a girls' team, or vice versa, is not "excluded from participation in [or] denied the benefits of ... [an] education program or activity receiving Federal financial assistance" if the school has teams available for persons of his biological gender,²¹⁷ especially given Title IX's purpose of remedying discrimination toward girls.²¹⁸

High schools with the resources to do so can also bring suit against an appropriate state official on behalf of their athletic teams. An organization "has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' [*85] participation in the lawsuit."²¹⁹ A girl who loses a spot on a school athletic team to a biological male would certainly have standing to bring suit against

²¹⁰ [Sullivan, 731 F. Supp. at 952](#) (citing [Isbister, 707 P.2d at 216-17](#); [O'Connor v. Vill. Green Owners Ass'n, 662 P.2d 427, 429 \(1983\)](#)).

²¹¹ Doe, [88 Cal. Rptr. 3d at 483-84](#) ("[A] private nonprofit religious school has as its 'overall purpose and function' the education of children in keeping with its religious beliefs. The 'inculcation of a specific set of values,' with programs 'designed to teach the moral principles to which the [school] subscribes,' prevents such a school from being considered a 'business establishment' whose ... practices would be subject to the [Unruh] Act." (quoting [81 Ops. Cal. Atty. Gen. 189 \(1998\)](#))).

²¹² [Hart v. Cult Awareness Network, 16 Cal. Rptr. 2d 705, 713 \(Cal. Ct. App. 2nd Dist. 1982\)](#)

²¹³ Matthew 19:4; see also Genesis 1:27, 5:2.

²¹⁴ [Cal. Educ. Code § 200](#) (2012).

²¹⁵ Id.

²¹⁶ [Neal v. Bd. of Trustees, 198 F.3d 765, 766 \(9th Cir. 1999\)](#).

²¹⁷ [20 U.S.C. § 1681](#) (2012).

²¹⁸ [Neal, 198 F.3d at 766](#).

²¹⁹ [Ala. Legislature Black Caucus v. Alabama, 135 S. Ct. 1257, 1268 \(2015\)](#) (emphasis in the original) (quoting [Friends of the Earth, Inc. v. Laidlaw Env. Serv. \(TOC\), Inc., 528 U.S. 167, 181 \(2000\)](#)).

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her school and/or its district for discriminating against her under Title IX, and a school that has been put in a position whereby it is forced to violate Title IX should be able to bring such a suit on the girl's behalf. ²²⁰ In such a circumstance, the best defense might be a good offense.

Should a high school be sued by a transgender athlete, however, a school seeking to preserve its sex-segregated sports programs can and should assert the following defenses:

Equal Protection Clause: As stated above, the EPC does not require "things which are different in fact ... to be treated in law as though they are the same." ²²¹ Psychologically and biologically, transgender athletes are distinguishable from their cisgender counterparts. ²²² Cisgenderers are what they claim to be and come by their body parts naturally, ²²³ whereas transgenders claim to be the opposite of what they are and must medically alter their bodies if they wish, at least externally, to look like the gender to which they identify. ²²⁴ Scientifically, males who claim to be female are still male, and vice versa. ²²⁵ Accordingly, schools, as state actors subject to the EPC, are free to treat transgender males - i.e., girls who claim to be boys - as female and vice versa for purposes of team placement and determining which locker rooms they should use.

Given that "distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls," ²²⁶ schools can assert the government interest in achieving those goals. For one thing, the presence of transgender athletes on sports teams that do not match their biological gender poses physical and/or **[*86]** psychological dangers to their cisgender teammates, both in the locker room and on the field; schools should not be forced to harm one group to accommodate the other. Remember, the EPC entitles both boys and girls to "equal protection," not "special protection." ²²⁷ Furthermore, it is theoretically possible for a girls' team to be populated largely with boys who claim to be transgender, ²²⁸ which would deny equal athletic opportunities to biological girls and thus undermine the goal of "redressing past discrimination and providing equal opportunities for women." ²²⁹ Even if maintaining sex-segregated sports programs is not the only way to achieve that goal, it is almost certainly the best way:

²²⁰ [20 U.S.C. § 1681; Ala. Legislature, 135 S. Ct. at 1268.](#)

²²¹ [Michael M. v. Superior Ct., 450 U.S. 464, 469 \(1981\)](#) (emphasis in the original).

²²² [Frontiero v. Richardson, 411 U.S. 677, 686 \(1973\).](#)

²²³ Id.

²²⁴ Transgender Is Mental Disorder, supra note 81 ("'Sex change' is biologically impossible... . People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather, they become feminized men or masculinized women." (quoting Dr. McHugh)).

²²⁵ Id.; see also Matt Walsh, You Are Born a Man or a Woman. You Don't Get to Choose, TheMattWalshBlog.com (Sept. 24, 2014), <http://themattwalshblog.com/2014/09/24/man-or-woman/> (describing transgender mixed martial arts fighter Fallon Fox - who was born male but fights against women - as "a grown adult male who ... beat a woman to a bloody pulp in front of a cheering crowd").

²²⁶ [Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734, 739 \(R.I. 1992\).](#)

²²⁷ See supra Part II.

²²⁸ [O'Connor v. Bd. of Educ., 449 U.S. 1301, 1307 \(1980\).](#)

²²⁹ [Clark v. Ariz. Interscholastic Ass'n, 449 U.S. 1126, 1131 \(9th Cir. 1982\), 695 F.2d at 1131](#) (citing [Petrie v. Ill. High Sch. Athletic Ass'n, 394 N.E. 2nd 855 862 \(Ill. App. Ct. 1979\)](#)).

ARTICLE: Girls Will Be Boys, and Boys Will Be Girls: The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools That Want to Keep Their....

We deem the preservation, fostering and promotion of interscholastic athletic competition for both boys and girls to be a matter of compelling governmental interest. Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors. Although classification of teams based on gender is not an absolute necessity in attempting to achieve those governmental interests, we are persuaded that the combination of problems which we believe to be likely to arise from attempts to do so through other classifications, creates a substantial element of necessity.²³⁰

Schools that wish to accommodate athletes who claim to be transgender are also within their rights to require proof of the athletes' transgender bona fides so as to prevent fraud - i.e., athletes, males in particular, claiming to be transgender in order to gain a competitive advantage.²³¹ Most, if not all, transgender athletes deny that anyone would claim to be transgender to obtain an easier path to athletic glory due to the bullying, harassment, and other persecution the person would face for doing so.²³² However, an athlete who is desperate enough could be willing to pay that price, especially if it means potentially being hailed as a groundbreaker and the possibility of being offered a coveted college [*87] scholarship for doing so.²³³ Schools are thus permitted under the EPC to condition participation on an opposite-gender team by requiring that a transgender athlete (1) provide legal and/or medical evidence of his or her transgender status, (2) undergo hormone treatments or sex reassignment surgery before permitting them to compete on an opposite-gender team, and/or (3) compete as a member of his or her approved gender for the remainder of his or her high school career - all of which are approaches taken in various states.²³⁴

Transgender athletes may argue that conditioning participation on opposite-gender teams is discriminatory²³⁵ and furthermore, that requesting proof of their transgender bona fides violates privacy interests protected by their federal and state constitutions.²³⁶ However,

unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.²³⁷

²³⁰ [Petrie, 394 N.E.2d at 863](#); see also [O'Connor, 449 U.S. at 1307](#) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in scholastic events.").

²³¹ [Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 272 \(NY. App. Div. 1977\)](#).

²³² No League, supra note 42 (featuring Caitlyn Jenner - who, as Bruce Jenner, won the men's decathlon at the 1976 Olympic Games in Montreal and is the most prominent current or former athlete who identifies as transgender - and transgender duathlete Chris Mosier, a biological female, who denies that men would seek to compete as women in order to gain a competitive advantage).

²³³ Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships, CBS N.Y. (June 8, 2016, 3:40 PM), <http://newyork.cbslocal.com/2016/06/08/transgender-nattaphon-wangyot-alaska-track/>; see also Walsh, supra note 225 (stating that as Fallon Fox "gloated about his physical dominance over (his) outmatched female" opponent in a mixed martial arts bout, "media outlets and advocacy groups hailed him as a pioneer").

²³⁴ K-12 Policies, supra note 6.

²³⁵ Id.

²³⁶ See, e.g., [Nguon v. Wolf, 517 F. Supp. 2d 1177, 1190-91 \(C.D. Cal. 2007\)](#) (noting that minor students in California have privacy rights concerning their sexual orientation that are protected under both the federal and state constitutions; the same would likely be equally applicable to one's gender identity).

²³⁷ [Hill v. Nat'l Collegiate Athletic Ass'n., 865 P.2d 633, 637 \(Cal. 1994\)](#).

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In other words, transgender athletes give up their reasonable expectation of privacy by voluntarily participating in interscholastic athletics.²³⁸ This is especially true since disclosure of their transgender status is necessary from a practical standpoint in order to gain approval to compete for an opposite-sex team. Other legitimate legal objectives, such as ensuring equality of opportunity for both boys and girls and ensuring the physical and psychological safety of other athletes, also outweigh the transgender athlete's already diminished expectation of privacy.²³⁹

The bottom line: All the EPC requires is that whatever opportunities schools provide for their students to compete in interscholastic athletics must "be open to all on equal terms."²⁴⁰ Maintaining sex-segregated [*88] sports programs, and limiting participation in those programs to persons of a specific biological gender, accomplishes that goal.²⁴¹

Title IX: By ensuring that as many biological girls and boys as possible have the chance to compete in interscholastic athletic competition, schools comply with the letter, spirit, and intent of Title IX.²⁴² Neither boys nor girls are denied equal athletic opportunities under Title IX by being required to try out for, and participate on, teams set apart exclusively for persons of their gender.²⁴³ However, by permitting transgender males to compete on teams set apart for biological girls, schools change the conditions under which girls may participate in a manner that effectively denies biological girls the opportunity to participate in interscholastic athletics.²⁴⁴ In other words, a girl who loses a spot on a girls' team to a transgender male loses out on the very type of educational opportunity that Title IX was enacted to provide to her.²⁴⁵ This would not only undermine Title IX's purpose, it "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment."²⁴⁶ To ensure true equality of athletic opportunities under Title IX, then, a school should continue to maintain separate athletic programs for boys and girls and limit participation in those programs to persons of the gender specified.

State Law: Where state law forces schools to violate federal law, state law must yield.²⁴⁷ Title IX is a federal law enacted for the purpose of "eliminating discrimination on the basis of sex in education programs and activities receiving federal financial assistance."²⁴⁸ If a school has to violate Title IX, a federal law, to accommodate a

²³⁸ *Id.*

²³⁹ [*Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 739 \(R.I. 1992\).](#)

²⁴⁰ [*Hoover v. Meiklejohn*, 430 F. Supp. 164, 171 \(D. Colo. 1977\).](#)

²⁴¹ [*Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 \(9th Cir. 1982\).](#)

²⁴² [*O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1306 \(1980\); *Neal v. Bd. of Trustees*, 198 F.3d 765, 767 \(9th Cir. 1999\).](#)

²⁴³ [*O'Connor*, 449 U.S. at 1306.](#)

²⁴⁴ [*Mansourian v. Regents of Univ. of Cal.*, 594 F.3d 1095, 1108 n.16 \(9th Cir. 2010\)](#), overruled by ***Mansourian v. Regents of Univ. of Cal.*, 602 F.3d. 957, 974 (9th Cir. 2010).**

²⁴⁵ [*Neal*, 198 F.3d at 767.](#)

²⁴⁶ [*Id.* at 769.](#)

²⁴⁷ [*Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 \(2002\)](#) ("State law is naturally preempted to the extent of any conflict with a federal statute.").

²⁴⁸ [*O'Connor*, 449 U.S. at 1307 n.5.](#)

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transgender athlete under state law, then Title IX's very language and purpose would be rendered meaningless. Schools are thus free to disregard state law in such circumstances. ²⁴⁹

[*89]

VI. Conclusion

Public high schools do not deny transgender athletes the opportunity to compete in interscholastic athletics - and thereby do not violate the law - by requiring transgender athletes to compete on teams associated with their biological gender or placing conditions on their participation on an opposite-gender team, such as obtaining hormone treatments or sex reassignment surgery. ²⁵⁰ There are valid, legally recognized reasons to classify transgender athletes according to their anatomy, rather than the gender they identify as, for purposes of their placement on teams. Ultimately, schools can take comfort in the knowledge that the world of high school athletics is not as "mixed-up, muddled-up, [or] shook-up" as transgender advocates make it out to be. ²⁵¹ "The basics" of human anatomy have not changed, and schools can thus treat transgender athletes accordingly. ²⁵²

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²⁴⁹ See, e.g., Cal. [Civ. Code § 51\(c\)](#) (2016) (stating that the Unruh Act "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation ... or to persons regardless of their genetic information" (emphasis added)).

²⁵⁰ [Gomes v. R.I. Interscholastic League, 469 F. Supp. 2d 659, 665 \(D.R.I. 1979\)](#) (stating that just because a public high school denied a boy the opportunity to play volleyball for the school's girls' volleyball team, and did not have a boys' team for him to compete on, did not mean that the school had denied him the opportunity to compete in interscholastic athletics).

²⁵¹ The Kinks, *supra* note 8.

²⁵² Kindergarten Cop, *supra* note 1.

Brandi Hardy
Legislative Coordinator
North Dakota Human Rights Coalition
Testimony on HB 1298
March 16th, 2021

RE: Opposition to HB 1298

Good Morning Chairwoman Larson and Members of the Committee,

I am Brandi Hardy and I am the Legislative Coordinator for North Dakota Human Rights Coalition (NDHRC).

Today, I am here to share that NDHRC is opposed to HB 1298. A bill that targets our transgender youth and their ability to participate in sports.

This bill does not represent North Dakota values.

HB 1298 is harmful, discriminatory, and unnecessary

Let's take a moment to think about who this bill targets. Children. It targets children. Children who are trying to navigate friendships, interests, and acceptance from their peers. This bill is adding unwarranted pressures to our children.

Why do kids play sports?

First and foremost, sports are fun. They are challenging and rewarding. There are many important life lessons learned in sports; such as leadership, confidence, self-respect, and what it means to be part of a team.

By passing HB 1298, you would be singling out and making a group of kids more vulnerable to bullying, rejection, and violence. This will lead to higher rates of self-harm and suicide, which are already significantly higher with our LGBTQ students. In fact, roughly 22.7% of non-LGBTQ+ students have attempted suicide, 7% being successful. LGBTQ+ youth are five times more likely to attempt suicide and are 4-6 times more likely have a serious injury, poisoning, or overdose from these attempts.

HB 1298 violates already existing policies, federally and statewide.

North Dakota High Schools Activities Associations (NDHSAA) has already established a regulation to ensure ALL students have access to any school activity they wish to participate in, including sports. These regulations were set into place on November 20, 2015. That was six years ago.

Similar bills to HB 1298 have been introduced in over 20 states and only passed in one, Idaho. After Governor Brad Little signed the bill into law, it was immediately challenged in federal court;

Brandi Hardy
Legislative Coordinator
North Dakota Human Rights Coalition
Testimony on HB 1298
March 16th, 2021



Hecox v. Little, which is now on appeal at the Ninth Circuit Court of Appeals. This legal fight has had **significant** costs for Idaho due to litigation fees.

If HB 1298 should become law, it will be likely to be extremely expensive for North Dakota and a waste of our taxpayer dollars. Dollars that could be far more useful to support the economic development of our state and retain young adults looking for a state to call their home.

Discrimination is NOT a North Dakota value, yet we have HB 1298 telling the nation and the world that our state leaders are trying to make it one.

NDHRC urges the committee to vote DO NOT PASS on HB 1298. If there are further questions regarding my testimony, my contact information is listed below.

Brandi Hardy
Legislative Coordinator
NDHRC
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Brandi Hardy
Legislative Coordinator
North Dakota Human Rights Coalition
Testimony on HB 1298
March 16th, 2021



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Engrossed HB 1298

House Human Services

March 16, 2021

Katie Fitzsimmons, NDUS Director of Student Affairs

701-328-4109 | katie.fitzsimmons@ndus.edu

Chair Larson and Committee Members: My name is Katie Fitzsimmons and I serve as the Director of Student Affairs at the North Dakota University System. I am representing the North Dakota University System in opposition to Engrossed HB 1298. The bill could possibly require our campuses to contradict Title VII and Title IX federal regulations, align incongruently with NCAA, NAIA, and NJCAA guidelines, create an unenforceable step of vetting for all intramural and club sports on our campuses, and possibly lose significant revenues earned through summer camps and conferences.

Title IX was enacted as a follow-up to the Civil Rights Act of 1964 and its original text, as written and signed into law by President Nixon in 1972 stated: “No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Title IX regulations have evolved over the last 49 years and sustained a major shift in May 2020. However, the most recent change occurred in January.

On January 20, 2021, President Joe Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹ The Order cites the 2020 Supreme Court case of *Bostock v. Clayton County*, which held that Title VII’s prohibition on discrimination “because of sex” covers discrimination on the basis of gender identity and sexual orientation. Under this case’s reasoning, all laws that prohibit sex discrimination, including Title IX, prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. The NDUS and its institutions are bound by this Executive Order, as it will guide federal regulators in their interpretation of Title IX.

In short, if a campus were to require an athlete to participate on an athletic team that corresponds with the athlete’s sex assigned at birth if that differed from the gender with which they identify, the athlete would have solid footing for a complaint with the Office of Civil Rights (OCR) and further litigation – a proposition that has been backed up by a number

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

of court decisions from the last year. The possible costs of time and money, in the forms of OCR fines and litigation fees and settlements, could span years and could amount to a substantial cost to the University System and North Dakota’s taxpayers. As an example, in 2020, Idaho passed HB 500, also known as the Fairness in Women’s Sports Act, which has a similar goal as Engrossed HB 1298. The law has since been halted by a federal court, and the parties have estimated that the total cost to litigate the constitutionality of the law could reach as high as \$10 million.

The NDUS appreciates that the bill sponsor attempted to address its concerns through an amendment. However, the amendment does not come close to resolving the legal and logistical hurdles the NDUS faces if the engrossed bill becomes law. Though the current version of the bill limits its applications to athletes who are “under eighteen years of age or who is enrolled in high school,” that does not exempt all NDUS students. On any given year, there are roughly 4,000 NDUS students who are not yet eighteen years old, which is no exemption at all. It is our understanding that the amendment intended to carve out higher education, but it fell short. The North Dakota University System respectfully requests clarification on this amended language.

In case the committee is unsure if it would like these rules to apply to college and university athletes, I would like to refer you to the guidelines and policies that direct their current practices. Bismarck State College, Dakota College at Bottineau, Lake Region State College, and Williston State College are members of the National Junior College Athletic Association (NJCAA). Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA). Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). Each of these three athletic associations have guidelines in place regarding participation of transgender student athletes. The NJCAA outlines their policies in Section 5 of their constitution and by-laws, which all member schools endorse. The NAIA and NCAA outline guidelines for their member schools to consider adopting. Each group requires transgender student athletes to obtain a medical exception from the corresponding association. The policies and guidelines established by these three athletic associations are currently working well and provide clear guidance to our athletic programs.

These large athletic associations use their influence in other ways. In 2016, the NCAA pulled seven planned championship events from the state of North Carolina, after that state passed HB 2, a law limiting civil rights protections for LGBTQ individuals (also known as the “Bathroom Bill”). The press release stated, “NCAA championships and events must promote an inclusive atmosphere for all college athletes, coaches, administrators, and fans. Current North Carolina state laws make it challenging to guarantee that host communities can help

deliver on that commitment if NCAA events remained in the state.” In 2017, North Carolina repealed the law to a certain degree and the NCAA resumed tournament play in the state. Similarly, the NCAA moved its 2021 March Madness tournament games from Boise, likely based on some combination of its version of this legislation and COVID-19 concerns. The NDUS faces similar potential consequences for UND Hockey or NDSU Football. If those teams suffered the loss of hosting a tournament due to this state law, that would be a truly unfortunate circumstance for all of the athletes, coaches, communities, and fans.

Additionally, the language in the bill does not specify the extent of the activities that would need to have monitored participation, but it does specify that any use of “an athletic facility, stadium, field, structure, or other property owned by or under the control of the state, political subdivision, or entity” would apply to this bill. Therefore, it stands to reason that all intramural sporting activities, or any wide range of athletic activities that are divided by sex, would apply to the intentions of this bill. For any campus to make these determinations would be a legal and logistical nightmare – one which the engrossed bill does not explain how to resolve. Again, a full carve-out of higher education institutions would help us avoid this unenforceable portion of the bill.

Finally, the language in the bill places the campuses in an unusual predicament. All of our campuses host camps and athletic groups during the summer months. Some of these camps are sponsored by the NDUS institution and for others, the outside groups rent the space from the campuses. Would NDUS campuses have to verify the sex assigned at birth for all participants of all camps, conferences, and workshops that use NDUS facilities in the summer months? What about camps that are not institution-sponsored? Placing this herculean task onto our limited summer conference staff would make managing a camp schedule with thousands of participants nearly impossible.

As stated earlier, the North Dakota State Board of Higher Education has not yet reviewed this bill and does not have a position at this time. That standing, the North Dakota University System Office respectfully requests a Do Not Pass on Engrossed HB 1298, or for the committee to consider amendments to fully exempt the campuses in order to remain in compliance with current federal regulations, avoid unnecessary financial risk, meet the requirements of athletic association guidelines, and avoid creating barriers to athletic competition participation for all student athletes. I thank you for your consideration and I stand for your questions.

HB 1298**Senate Judiciary Committee
Testimony of Mary Jo Dunne, Opposed
3/16/21**

Ms. Chairman and Members of the Committee,

I am here today to offer testimony in opposition to HB #1298, which would mandate participation in athletic events to be exclusively for males or females. I am testifying as a student in social work, concerned about how the policies made today will impact my future clients tomorrow. I also testify as a member of the LGBTQ+ community, worried about how HB #1298 would effectively ban non-cisgender students from participating in sports. There are many scientific studies that show that sports has invaluable benefits for young people. It helps them to maintain a healthy body and mind, build self-confidence, and gain social skills and leadership that come from being part of a team. Students who are active in sports are also more likely to graduate from high school, achieve high grades, and attend college. They are significantly less likely to become parents before age 18, drop out of school, or struggle with mental health.

According to a report from the Williams Institute, about 0.3% of people in North Dakota identify as transgender. This number does not include the people who would come out if they had the resources and support to do so, or who fall under other non-binary identities. However, if we go by this statistic anyway, it would mean that 0.3% of the 100,000 youth in North Dakota's public schools are transgender- which is around 300 students. These young people deserve our protection, as people who are transgender are at risk in many ways. 27% of transgender students report feeling unsafe at school, and 35% report being bullied. Transgender youth are alarmingly at risk for homelessness, drug use, and depression. Over half have engaged in self-harm. Over one third have attempted suicide. Since participation in sports can be a protective factor against

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so many of these risks, it is important that we encourage transgender students to get involved- not discourage them. Allowing them to play on a team that matches their gender identity sends the message that they belong; that they are supported. It helps them to build positive social connections, gain leadership skills, and succeed in school as a whole.

Some may worry that allowing non-cisgender students to play on their preferred teams could compromise safety and fairness for other student athletes. These are valid concerns. There can be significant biological differences between males and females, and I agree that these may be relevant when it comes to professional sports. However, professional sports and school sports are very different. Most biological differences do not emerge until puberty. And even so, North Dakota's High School Sports Association already mandates that transgender students complete a significant amount of hormone therapy before being allowed to play on a team that does not match their sex assigned at birth. This minimizes biological differences, creating an even playing field for all. In addition to this, many sports are already divided by weight class or skill level- both of which are far more relevant factors than gender when it comes to fairness and safety. The most important thing I would like to emphasize, though, is that youth sports should not be just about the competition. The focus should be less about who wins, and more about giving students the skills to succeed in life. Transgender students, just like anyone else, deserve the chance for teamwork, health, friendship, and leadership that comes from being on a sports team. I want to see my future clients who are transgender have this opportunity. I want to see them succeed.

I thank you for your time this morning and urge a "do not pass" recommendation on HB #1298. I now stand for questions.



Great Public Schools

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**Testimony on HB 1298
Senate Judiciary Committee
March 16, 2021**

Chairwoman Larson and members of the Senate Judiciary Committee, for the record my name is Nick Archuleta, and I am the president of North Dakota United. I am appearing before you today to urge a Do Not Pass recommendation for HB 1298.

Madam Chairwoman, I am the first to admit that I am not an expert on the physiology and science as they pertain to transgender youth or anyone else for that matter. I am thankful that there are many people here today that do have that expertise to share with you and all North Dakotans. As a teacher, however, I have gotten to know something about young people in general. I know that they are stressed, particularly as they are working through the current pandemic. I know, too, that they do not like to be singled out for attention, particularly if it is negative attention. And I know that they like to have a voice in matters that affect them.

HB 1298, as I read it, increases the stress that transgender young people feel, casts a negative but bright light on them, and to the best of my knowledge, was written without any input from the transgender community or any consideration of its impact on the emotional and mental health of transgender youth.

Members of the Committee, this bill, like the 20+ bills like it being considered in statehouses across the country, are misguided. This legislation appears to be part of yet another larger cultural fight between conservatives and progressives. The problem is that some of the most vulnerable young people in the country are getting caught up in the crossfire. Please consider the following:

- The Trevor Project, which advocates for LGBT+ youth, maintains that young trans people are less likely to consider suicide if they are supported in their identities. HB 1298 does not support young trans people and makes them less secure in their identities.
- As in the Idaho case, if HB 1298 becomes law, ND will likely end up in years long and expensive litigation.
- HB 1298 is a solution to a problem that does not exist. Our ND High School Activities Association has already adopted a nationally recognized and scientifically informed policy on the issue of transgender athletes. Further, there is not a single case in ND that claims that anyone was disadvantaged in competition due to the participation of a transgender athlete.



Great Public Schools

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Chairwoman Larson, teachers and education support professionals have an obligation to educate every child that walks, rolls, is carried through our schoolhouse doors, or is learning remotely. They embrace that obligation whole heartedly and work tirelessly every day to ensure that all students feel safe, valued, welcome, and loved throughout their educational career. We want them to participate in school sponsored activities, including sports, because all students want to belong to something bigger than themselves. It is where they build community, friendships, and confidence in their abilities as human beings. It is where they grow.

HB 1298 turns all that on its head by singling out transgender kids and depriving them of their opportunity to compete in athletics and be treated with the same dignity and respect as their cisgender peers.

Chairwoman Larson and members of the Committee, the beauty of school sports and other school sponsored activities is that they have historically provided lessons that kids carry with them throughout their lives. Let us not let bigotry be among them.

Please give a DO Not Pass recommendation to HB 1298.



March 16, 2021

The Honorable Diane Larson, Chair
North Dakota Senate Judiciary Committee

Good afternoon Senator Larson and Members of the Committee and thank you for this opportunity. I'm here to oppose passage of Engrossed House Bill 1298. I speak on behalf of the Fargo-Moorhead-West Fargo CVB, as well as the Travel Alliance Partnership. I do not come here lightly to do this and am—frankly—a little bit out of my comfort zone wading into a debate that is so fraught with emotion. I would much rather be here in my usual role of advocating for increased support for travel and tourism, the state's third largest industry behind oil and agriculture. But, in the end, this is directly related to that. I'm here to share my belief that passage of this bill will have a negative—perhaps devastatingly negative—effect on the economy of cities in the state that work hard to fill hotels, restaurants and retail stores with teams and their families.

Let me be clear about this—I claim no expertise and offer no opinion as to when, where or against whom transitioning athletes should compete, and I respectfully submit that the same is true of most members of the House and Senate. On the other hand, the governing and sanctioning bodies of virtually every sport in the world have studied this issue for decades, consulted with experts, and come up with nuanced policies based on what they've learned. That fact alone makes this bill completely unnecessary. Please, please, leave this issue to the groups who have been dealing with it for so long.

But here's the real crux of my opposition: *This bill is anti-business*, and by that, I mean anti-Main Street business. The travel, tourism and hospitality industry in North Dakota lost about \$1.2 Billion dollars in 2020. \$94 Million of that was lost state and local tax revenue. In Fargo, West Fargo, and Moorhead, where I work, 2020 hotel room revenue was down 40%, or \$40 Million. That's just room revenue, in one market. The modest recovery we've experienced between last summer and this spring is largely due to the return of youth sports. This is big business for our state. In the pre-pandemic year of 2019 the Sports Team at our CVB assisted with events that led to direct visitor spending of more than \$10 Million, and that's a conservative estimate. USA Wrestling has been bringing a 10-day tournament to the Fargo Dome for more than 25 years. That group's transgender policy closely mirrors that of the International Olympic Committee. If passage of this measure caused us to lose *only that event*, that direct spending figure would shrink by almost \$2 Million. By the way, I've heard supporters of this measure refer to the IOC's transgender policy as "willy-nilly". It's not. It's very detailed. The North Dakota High School Activities Association policy closely mirrors that of the NCAA. Also very detailed.

So, in a year when a pandemic devastated the hospitality industry, the last thing we need is a new law that throws fresh roadblocks in the way of attracting sports tourism to our communities. I know this was not the intention of the Bill's sponsors, and I have seen proposed amendments that aim to address some of our concerns, including allowing Destination Marketing Organizations like ours to sponsor events without restriction. But passage of this measure would put most of our local youth sports groups out of step with their sanctioning bodies and discourage *if not prohibit* out-of-state sports organizations from sponsoring tournaments in North Dakota, or even letting their sanctioned teams play here. It would likely also mean that those young North Dakota athletes wouldn't be able compete in any sanctioned competitions, anywhere, as well. Please say no to this bill.

Thank you for your time. I would be happy to answer any questions, either in person now or via email or a phone call.

Sincerely,



Charley Johnson
President & CEO
701-365-4567 (O)
701-371-9911 (M)
charley@fargomoorhead.org

Truman L. Hamburger
Student Advocates of North Dakota (SAND)
Testimony on HB 1298
Senate Judiciary Committee
Tuesday March 16th

RE: Testimony in Opposition of HB 1298

Dear Honorable Senators of the Senate Judiciary Committee:

I urge a DO NOT PASS recommendation on HB1298.

My name is Truman Hamburger, I am representing the High School Democrats of America as the North Dakota Director of Development, the Student Advocates of North Dakota as the Vice President, but most importantly, I am writing as a North Dakotan, Urging you to keep North Dakota the kind state we are by placing a do not pass recommendation on this bill.

This bill hurts students, and this stance is reinforced by the three areas of analysis I present before you today. Firstly this bill hurts the mental health of transgender students, invites gender policing for cisgender students, and finally, this bill is transphobic and sexist.

This bill will hurt the mental health of transgender students in North Dakota. Trans students' gender is different from that at birth, and they often experience gender dysphoria, which the mayo clinic defines as a "feeling of discomfort or distress that might occur in people whose gender identity differs from sex-related physical characteristics." This bill reinforces the idea that the trans students of ND are not their actual gender, giving these students dysphoria degrading their mental health. HB1298 could promote bullying by demonstrating to students that our Legislature does not care about respecting trans students, so why should they? Trans students are among the most vulnerable groups of people; we should be protecting them, not targeting them. This bill affects all students as well.

In addition to the effects on trans students, HB1298 will open the doors to gender policing for all students. Once we start doing any form of gender policing, we allow disgruntled competitors or athletes with atypical physiques to be subjected to invasive regulations. We cannot allow accusations of competitors being "too masculine" or "too good to be female" in our sports, as it would just be a devolution into sexism and transphobia, which brings me to my last point. This bill is sexist and transphobic.

Bigotry, in general, is comorbid (you will never meet a racist who has progressive views of the LGBTQ+ community), but two that are inseparably linked are Transphobia and Sexism.

And when we look at HB 1298, many of the representatives who support the bill say they are acting in a feminist interest, stopping trans athletes from competing because it protects women's sports, but when you pull that argument apart, you see the dichotomy of sexism and transphobia first; it implies that trans women aren't real women, which is transphobia. However, it also plays out an old sexist trope that women require protecting from a threat that trans women pose. The two reinforce each other and cannot be separated no matter what.

In Conclusion, this bill hurts North Dakota's students, and it is sexist and transphobic. North Dakota is a kind place full of kind people, and a DO NOT PASS recommendation is one step we can take to keep it that way.

Thank You For Your Time;

Truman L. Hamburger

SAND Student

District #36

Dickinson, ND

Dear Chairwoman Larson, Vice Chairman Dwyer and Members of the Senate Judiciary Committee:

My name is Dr. Kathy Anderson, and I am a General Pediatrician and the President of North Dakota American Academy of Pediatrics (NDAAP). I am speaking on behalf of NDAAP and the National Organization that we fall under, The American Academy of Pediatrics, recognized to be the national and global experts on child and adolescent health. We oppose House Bill 1298, which seeks to block transgender youth from participating in athletics. House Bill 1298 is discriminatory, contrary to federal law and athletic policies, in opposition to positive social development, and inconsistent with science.

House Bill 1298 puts North Dakota at odds with federal law. On January 20, 2021, President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. This Order states, “Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or **school sports.**”

House Bill 1298 further ignores established policies created by the National Collegiate Athletic Association (NCAA) in 2011 and the North Dakota High School Athletic Association in 2015, which specifically addresses and supports the participation of transgender athletes. The NCAA has removed postseason and championship events in states with laws that violate their policy. I understand that there have been amendments made to this bill since I spoke against it in the house, that have now isolated all of the policies of exclusion discussed within it to solely effect children 18yo and under (or at least, not have an effect on college sports).

The ability to participate in sports has been well documented to have a positive effect on mental health in kids of all ages. Involvement in sports, particularly as a member of a sports team, is an important way for youth to develop psychosocially and help form their social identity. Sports participation helps athletes develop self-esteem, correlates positively with overall mental health, and appears to have a protective effect against suicide. This is of particular importance due to the fact that risk factors for suicide are already dramatically higher in transgendered children with studies showing 56% of youth who identified as transgender reporting previous suicidal ideation, and 31% reporting a previous suicide attempt. Keeping transgender students connected with fellow peers and participating in activities is vital for their development and mental health.

In 2017, a systemic review of medical literature found, “There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery).” Any disingenuous attempts to defend this law by suggesting otherwise is flatly contradicted by research.

We need to consider how supporting the passing of this law or any law like it, means that we, as adults, are comfortable with creating an environment that excludes for our children, and this is very dangerous. There are many things that make our children different from each other, and it is troubling to think of the

behaviors that we are modeling, by policing these differences, rather than teaching acceptance with a goal of understanding. Think about your child that is made fun of because of their size, or the way they talk, or because they have a physical or mental disability. Or the color of their skin, religion, country of origin, or their gender. Is this OK? NO. We cannot discriminate against and penalize CHILDREN for the things listed above that they have no control over. We need to join together to create an environment that nurtures the development of all our children, not the fears of some of the adults.

There is simply no place in North Dakota for the discriminatory policies proposed in Bill 1298 and we urge you to vote no.

Kathy Anderson, MD, FAAP
President, North Dakota American Academy of Pediatrics (NDAAP)
k_anderson2001@hotmail.com

Katrina Josephine-Andrea Koesterman
Testimony on HB 1298
3/16/2021

RE: Testimony in Opposition of HB 1298

Good afternoon Chairwoman Larson and Members of the Committee.

My name is Katrina Koesterman, and I am president of Tristate Transgender, an organization based in Fargo, ND which serves the transgender populations of North Dakota, South Dakota, and Minnesota. I also happen to be transgender myself. Today, I am here to urge the committee to vote NO on HB 1298.

From my role as president of the Tristate Transgender, I wish to express the views of many of the North Dakota residents who have come to me with their concerns.

Almost every North Dakota resident I've spoken to regarding this bill thinks that it is harmful and discriminatory towards our student athletes. Rather than protect our young cisgender women, which the bill aims to do, it alienates and discriminates against our young transgender students. Many transgender and non-binary individuals seek integration with their peers rather than wanting to be singled out. Barring a young transgender woman from competing with her other women classmates makes her the other, the different, and as a result, the target of harassment and abuse.

Many important life lessons are learned in sports; such as leadership, confidence, self-respect, and what it means to be part of a team. By passing HB 1298, transgender students would be singled out and more vulnerable to bullying, rejection, and violence. This will lead to higher rates of self-harm and suicide, which are already significantly higher with transgender students. However, according to the Trevor Project, the world's largest suicide and crisis prevention organization for LGBTQ young people. LGBTQ youth who participate in sports reported nearly 20% lower rates of depression. Even better, transgender youth who participated in sports reported grades as mostly A's.

In the North Dakota High school Activities Associations already existing sporting regulations, it already require transgender athletes to meet hormonal standards before being allowed to compete in the division corresponding to their gender identity.

At the age of 18 or younger, one year of hormone replacement and/or puberty blocking drugs will have very profound effects on muscle mass, bone density, and other performance-related attributes of a student athlete. This means that a transgender woman meeting the already existing requirements will have similar physical characteristics to a cisgender woman, and a transgender man will have similar physical characteristics to a cisgender man.

Lastly, if this bill passes, it will force a transgender man, assigned female at birth, to compete with cisgender women his own age. This will cause the very unfair conditions this bill claims to be trying to protect against: making someone with male characteristics compete with someone with female characteristics.

Katrina Josephine-Andrea Koesterman
Testimony on HB 1298
3/16/2021

Now, as I am 35 years old, I am no longer a high school student, and as you can guess from my size, I am not nor have I ever been an athlete. I am, however, a member of a community to which a growing number of student athletes belong. It is for them I hope to speak. Our ND transgender youth should receive the same opportunities as their peers. To participate in school activities that build life-long skills and relationships that help them become successful adults.

I therefore urge you to vote against HB 1298. Discrimination is not now nor ever should be a North Dakota value. I hope you will agree.

Representative Kim Koppelman, Chair
Representative Karen Karls, Vice Chair
Senate Judiciary Committee
Zander R. L. Mueller
HERO
zanderm301@gmail.com

Tuesday March 16th 2021
I am writing against HB 1298

To the Senators of the Senate Judiciary Committee;

I strongly advise you to not pass House Bill 1298.

My name is Zander Mueller, I am writing as a student, a member of the club HERO, and as a member of the LGBTQ community myself. I have lived in North Dakota all my life. I want to be able to say that I am from North Dakota with pride, and not embarrassment. If this bill is to be passed it will force me to say that I am from North Dakota with such embarrassment because I will have to say that I am from a state that can not even allow transgender people to live here without them feeling like their existence is a burden.

This bill is harmful and extremely painful to the transgender community in North Dakota, and even more so for the trans youth in this state. For some transgender youth, sports and athletics are the only way for them to express themselves. If we force those people to play on the team that aligns with their birth sex other than their gender identity then they will only continue to struggle with their mental health. It is simply not fair to them that because they're something they can not control that they have to be punished for it. By forcing a transgender person on the team that identifies with their birth sex it will be nothing but a punishment for simply existing.

House Bill 1298 is nothing but an ignorant, sexist and bigotted opinion that has little to no evidence backing it up. The theory that transgender women or transgender athletes in general have an unfair advantage was debunked or proven as a myth. This bill is not trying to make sports more fair, it's just trying to legalize transphobia. There is already so much transphobia and homophobia in this state, and passing this bill it will just make this state even more dangerous for the trans community. Why does the trans community have to fight so hard, simply just to exist? Transgender people shouldn't have to worry about legislation invalidating their existence. Passing this bill will only make them more scared.

This bill has so much hate behind it. The outcome of HB 1298 is more harmful than you could imagine. It has been proven that transgender youth has a much higher rate of suicide than cisgender youth. If this bill goes any further that rate is just going to increase. The transgender community has lost and suffered so much already, it's not fair or humane to pass this bill knowing repercussions of

implementation. Why should the transgender community have to suffer because of the unwillingness of this state to simply educate itself? Transgender people are not a threat. Transgender people playing on the sports team that identifies with their gender identity is not a threat, and this state needs to stop treating them as one.

Transgender people are not going away, no matter how much you fight against them. They have every right to live in this state and to be who they are without fear. So again, I strongly advise you to not let this bill pass. Transgender people have already fought enough, it's time to give them a break and allow them to be who they are.

Thank you for listening; I am now open for questioning.

Zander R. L. Mueller

02/25/2021

To:
Senate Judiciary Committee
North Dakota

From:
Naomi Tabassum, LPCC
Fargo, ND

To Whom It May Concern:

My name is Naomi Tabassum. I live and work in Fargo, ND. I am a Licensed Professional Clinical Counselor and specialize in the mental health care of gender expansive clients. I am writing testimony to oppose HB 1298, and I strongly urge the Senate Judiciary Committee not to pass this bill. In short, this bill is clearly intended to attack and disenfranchise all minors who are not exclusively male or female regarding reproductive biology and genetics as identified at birth. This bill does not truly benefit anyone. As a mental health professional working with the gender expansive population, this bill passing will cause harm to individuals who may be biologically intersex and/or do not fit into the exclusionary definitions of sex as defined by the bill. It is not the responsibility of politicians to define "sex", but instead the job of medical professionals. This bill irresponsibly neglects the topic of gender, which contributes significantly to the expression of sex and social alignment individuals take within sex or gender categories, including peer bonding in school and as associated sports activities. According to the CDC, suicide is the second leading cause of death for minors under the age of eighteen. We also know that gender expansive youth have a significantly higher rate of suicide attempts than their cisgender counterparts. This should be a bigger concern to our state legislators that censoring genitalia on the soccer field. In the past five years, I have been made aware of multiple deaths by suicide of North Dakota minors who were transgender and/or gender expansive. Their deaths and as related mental health struggles were influenced by living in communities and attending schools where their gender was not honored or recognized. As a mental health professional, I urge the Senate Judiciary Committee to prioritize the mental wellbeing of its minor population over the flawed, misinformed, and divisive HB 1298.

Signed,



Naomi Tabassum, LPCC

**RE: House Bill 1298**

Chairman and members of Committee, thank you for the opportunity to provide written testimony on HB 1298. For the record, I am Tamara Uselman, Ed.D., and I am presenting this testimony in opposition of House Bill 1298 based on five simple reasons.

First, HB 1298 is an example of poor sportsmanship toward a student group in North Dakota who is often already alienated. The Bill sends a harsh message of exclusion to transgender students, a group already more likely to consider, attempt, and succeed at suicide. The 2019 North Dakota Youth Risk Survey data for queer youth showed of this group: 61.6% seriously considered suicide; 48.5% had made a plan; and 33.3% attempted suicide. These are North Dakota's children. The ND Legislature is called to support an at-risk student group rather than subject them to further alienation.

Next, any issues regarding transgender participation have been and shall continue to be best solved at the local level by the school's activity director and coaches. School staff know their students as individual human beings by face and name. Local leaders are situated to provide careful guidance in a way those at levels of public government further from the school cannot.

Third, medical science calls bunk on any fear of advantage for transgender students. North Dakota pediatricians find no advantage for trans students on the court or field because trans athletes must be in hormone therapy to participate.

Fourth, it is worth remembering students who are male, female, and transgender already participate in the same physical education classes in school with no catastrophic results reported.

Finally, trans athletes have been able to complete in the Olympics since 2004 and in National Collegiate Athletic Association (NCAA) activities since 2011. If ND's trans children are barred from high school activities, their access to athletics at college, as a career, and in community life is effectively denied unless trans students are expected to deny who they are.

In closing, the North Dakota Legislature and all North Dakotans can and should be proud of the investments made in young people, both in the classroom and in the co- and extra-curricular activity programs. Activity programs have always existed to build *even* better young people, providing youth opportunity to practice the democratic skills of cooperation and competition.

House Bill 1298 stands in contrast to ND's solid legacy of investment in young people. For these reasons, **I support a Do NOT Pass recommendation on House Bill 1298.**

Thank you for your time and attention as you deliberate how to best serve all North Dakota's school children.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tamara J. Uselman". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Tamara J. Uselman, Ed.D.
Director of Equity & Inclusion
Fargo Public Schools, Fargo ND

Dear chairman Larson and members of the Senate Judiciary Committee,

I am writing in favor of passage of HB 1298, this bill is essential to protect woman's sports. If we allow biological males to participate in woman's sports who will reap the benefits? Not women. Who will finish high school with Girls sports scholarships? I repeat, not women. Woman's sports will lose all meaning if men were allowed to participate in woman's sports.

Some opponents to this bill say there is a high suicide or attempted suicide rate of transgender youth, partly from lack of support of their communities, and that this bill will be even more devastating to transgender youth. The truth is that the transgenderism itself is what most strongly influences the suicide rate in transgender youth, and passage of this bill will encourage youth to stick with their assigned sex at birth.

The same opponents to this bill say it is not your job to define sex, but medical professionals, I disagree. God defined sex when He created them male and female in the beginning. It is already defined, and this bill supports God's definition.

I respectfully encourage you to give this bill a DO PASS.

Sincerely,

Felipe Vasquez de Velasco

Tuesday, March 16, 2021

Sixty-seventh Legislative Assembly
North Dakota Senate Judiciary Committee
North Dakota House Bill 1298 Hearing

“A BILL for an Act to create and enact a new section to chapter 14-02.4 of the North Dakota Century Code, relating to participation in athletic events exclusively for males or females.”

Senate Judiciary Chair Larson, Vice Chair Dwyer, Members Bakke, Fors, Heitkamp, Luick, and Myrdal, Greetings. My name is Kevin Tengesdal from District 35 here in Bismarck. I am writing in opposition to North Dakota House Bill 1298 (NDHB1298) before you today.

NDHB1298 is a bill to create and enact a new section to chapter 14-02.4 of the North Dakota Century Code, relating to participation in athletic events exclusively for males or females. Representative Ben Koppelman, District 16 West Fargo, Building Contractor, introduced the bill to the House Human Services Committee with “The trend is increasing nationwide, and as all trends do, they eventually come to North Dakota.” He views the bill as a proactive measure against “shifting national winds.”

Transgender residents of North Dakota are not a “shifting national wind” coming to North Dakota. They are our family, neighbor, and friends. Gender identities and expressions have been here well before colonists started occupying the state. North Dakota legislators should not pass policies discriminating against and banning youth from playing sports because they are transgender. This policy establishes roadblocks for students simply because people do not understand the scope of what it means to be gender diverse.

NDHB1298 intentionally excludes transgender and intersex youth from sports. Like every student, transgender kids thrive when treated with dignity and respect. Youth sports programs teach young people about leadership, confidence, self-respect, and belonging to a team. Medical experts, sports associations like the NCAA and the International Olympic Committee, and school administrators state that policies, as proposed by this bill, are harmful and profusely unnecessary. There is absolutely no viable or just reason to support this bill in any form. The only reason to support this policy is fear, bias, hatred, or bigotry.

Residents of North Dakota must be better than this. We support fairness, freedom, and understanding. We can celebrate youth sports, protect transgender kids from discrimination, and provide young people the opportunity to access the lessons and opportunities that sports offer. I urge you to give NDHB1298 a DO NOT pass recommendation. Targetting our young people for who they are is destructive and against our core values as North Dakotans. North Dakota’s gender-diverse kids, who are already struggling and dying while legislators play political games, deserve our respect and support.

Kevin R. Tengesdal, Graphic Designer
2025 North 16th #4, Bismarck, ND 58501
krten1966civics@gmail.com | 701-527-0737

March 14, 2021

Re: Opposition to HB1298

Chairman Larson and Committee Members:

As a lifetime resident of North Dakota, a mother, and a special education teacher, I have several reasons to oppose HB1298. I could speak to the damaging effects of exclusion on transgender youth. Or, I could point out misconceptions about transgender individuals having physical advantages. For now, I will focus on the erosion of the North Dakota values I was raised on.

As the daughter of a police officer, I was brought up valuing honesty, kindness, and compassion for our fellow citizens. I remember the “Love thy Neighbor” plaques that hung on the walls of friends’ and families’ homes. My family rarely hesitated to lend a helping hand. My father has always been known for his giving heart and willingness to assist someone in need. I model my life after his by helping people—especially children—in my work and in my personal time.

I was taught that values do not discriminate. HB1298 does not fit our “North Dakota nice” reputation. Caring North Dakotans have been goaded into believing they should fear transgender children. Rather than help our kids, this bill seeks to alienate them. This bill’s language was introduced by a group of people who are not from North Dakota and therefore do not share our values. The same people are attempting to pass similar legislation in 25 other states. We must make sure North Dakota isn’t one of them.

Sincerely,

Shannon Krueger

Dear members of the Legislative Assembly of North Dakota. I am writing to you in regards to HB 1298, which, in my opinion, would have a detrimental effect on hosting sporting events in my home state of North Dakota. Both of my boys, ages 13 and 15, are avid swimmers. They have been swimming since the age of 5 and is the only sport they both love. They both have been swimming for the West Fargo Flyers club swim team for the past 4 years and my 15 year old has been swimming for West Fargo High School swim team for the past 3. They have gained many friendships while competing on these teams. They have learned discipline, teamwork, the importance of hard work, and the gift of exercise. In my opinion, if HB 1298 is passed as currently written, it will have a detrimental effect to not only swimming but to ALL sports in the state of North Dakota. If this bill passes, it will show the lack of progressiveness that this state has in regards to transgender athletes. When it comes to hosting events such as the USA Wrestling National Tournament, Speedo Sectional Swimming Tournament, or any other national sporting events in our state, teams from more progressive states are NOT going to want to support a state that does not support transgender athletes. It will not only cost our state millions of dollars but it will also set a negative message to the children in North Dakota that we do not accept transgender athletes for who they are. I also do not think we need a bill for something that is not even an issue. I think the amount of transgender athletes in our state is very small so this bill is completely unnecessary. I am writing to ask you to please vote NO on HB 1298 so high school and club sports can continue for the children of North Dakota. Without the tax dollars of out-of-state teams, high school and club sports would cease to exist in our state.

Thank you

Cody Glaser

RE: Testimony in Opposition of HB 1298

Good afternoon, Chairwoman Larson and Members of the Committee.

My name is Olivia Data. I am a Junior at Century High School in Bismarck and I left school to be here today to tell you to vote NO on HB 1298.

I've lived in North Dakota my entire life, and growing up, I remember hearing all the jokes and sayings about how nice North Dakotans and midwesterners are, and it always made me so proud to live here. Recently, though, I've been learning more and more about the prejudice and discrimination that we struggle with, and I have been reflecting more on the challenges that I have faced in my life as a girl. The earliest example of this that I can remember is playing tag in elementary school, overhearing the boys in my class deliver this devastating insult to each other: *you run like a girl*. Growing up, I have noticed countless jokes, insults, stereotypes, and rules that enforce the sexist notion that girls are weak. That girls can't play sports, can't be assertive, can't be strong. HB 1298 is saying the same thing. I understand that there are often natural biological differences between cisgender boys and cisgender girls, but saying that transgender girls, even after hormone therapy, are automatically going to win any event in any sport because they were assigned male at birth portrays cis girls as inherently weak and feeble, and it depicts trans girls as inherently predatory. Both of those ideas are harmful, and neither of them are true.

If you are truly concerned about allowing boys to play on girl's sports teams, I am baffled as to why you consider supporting a bill that would force transgender boys to play on exclusively girl's teams. If a trans boy is taking testosterone and dressing and acting in a typically masculine

Olivia Data
Testimony on HB 1298
March 16, 2021

manner, I know that I would feel uncomfortable having him on an all-girls team.

Not only does this bill fail to protect girls like me, but it would actively harm us. Invalidating the gender of a trans girl because of something written on her birth certificate sets the stage for other forms of gender policing. If a girl is too masculine, if a girl performs too well in her sport, if a girl does not conform to traditional feminine expectations, the validity of her gender could be questioned as well. This isn't just a hypothetical, either. We've all heard the term "tom-boy." Just because a girl is strong, or has muscles, or is good at running, that does not make her a boy. Just because a girl has the word "male" written on her birth certificate, that does not make her a boy. It is 2021, surely we know by now that there is not one singular definition of femininity, that there is not one way to be a girl.

I am incredibly and increasingly concerned that this bill is not about protecting girls, but instead about hurting transgender students. Because the thing is, there *are* issues with girls being treated unfairly in sports. I have been taking ballet classes at Northern Plains Dance, here in Bismarck, since kindergarten, and I have been dancing en pointe since seventh grade. A few months ago, I was catcalled on my way into the studio. I brought up the incident to a few of the other dancers there, and it turned out that almost every single teenage girl there, even a girl as young as twelve, had been catcalled or harassed or even followed on their way to class.

Typically feminine athletics like cheerleading, gymnastics, and dance are looked down upon and discredited, and it hurts us. Multiple friends and classmates of mine have been injured in these athletics, and when we mention this to medical professionals, we are met with skepticism. As early as middle school, girl's sports uniforms are often sexualized. There are sexist coaches and

Olivia Data
Testimony on HB 1298
March 16, 2021

gym teachers known to make female students uncomfortable, and no one does anything! There is inequality between male and female sports in both media coverage and funding. The environment that our schools, and now, our legislation creates around sports for girls, whether it's the idea that strength and success are unfeminine or the idea that feminine sports are inherently different and lesser, has serious consequences. I realize that many of these issues may be difficult to tackle, but surely, there are many better ways to promote progress in gender equality than barring trans athletes from playing on the sports teams of their respective genders.

Furthermore, the idea that women are disadvantaged in every scenario and thus need protection has been used throughout history not as something to promote progression, but as something to harm minority groups. We've seen it used as an excuse to be homophobic, stereotyping lesbians as predatory, we've seen it used as an excuse to hurt black men and allow white women to be racist. We're seeing it now, with this bill. Myself and other girls like me have been trying to speak out to our schools and communities about the issues we face, and many times, we are met with condescension or even worse, silence. Our voices should be listened to, not misconstrued or spoken over.

HB 1298 ignores the real and prevalent struggles that female student athletes face in favor of pushing a harmful, discriminatory narrative. As a cisgender girl myself, I am sick and tired of the challenges that I face being used as a shield to deflect prejudice onto other vulnerable people. Transgender students, transgender *children* already face high levels of discrimination. We should be protecting them, not alienating them from our sports, our schools, our state.

Olivia Data
Testimony on HB 1298
March 16, 2021

As a student, as an athlete, and as a girl in North Dakota, this issue is very important to me. HB 1298 bill hurts transgender students. It hurts cisgender girls. And we, as North Dakotans, can do so much better in terms of creating a safe, healthy, and positive environment for *all* of our athletes.

For these reasons, I URGE the committee to vote NO on HB 1298.

Olivia Data
Vice Chairman of SAND
District 35
Bismarck, North Dakota

I am writing in opposition to HB 1298. I have been a general pediatrician in North Dakota for 13 years, and live in Fargo. I oppose this bill because as a licensed physician in the state providing care for LGBTQ+ youth I have seen the burden discrimination has on our youth. A large body of research shows that supporting an individual's gender identity drastically reduces suicide rates in youth. Rates of depression and anxiety also decrease.

There is no categorical advantage being male has over being female in athletics. Spontaneous genetic mutations which result in an individual possessing unique traits that place them at an athletic advantage are not routinely screened for in athletics, and are felt to occur in the same number of individuals who identify as a gender that is not congruent with their gender assigned at birth. As written, this piece of legislation is based on the personal views of its authors rather than evidence. I urge you sincerely to recommend a Do Not Pass on HB 1298.

Sincerely,

Stephanie Hanson, MD FAAP

Hello, Chairwoman Larson and Members of the Committee.

My name is Gracia Larsen-Schmidt. I am a high school senior from Grand Forks and I left school to attend this hearing today. I am urging you to vote “no” on H.B. 1298.

I have competed at the varsity level in both cross country and track all four years of high school. In fact, this past cross country season I placed All-Conference at the Eastern Dakota Conference. As an athlete, I know with distinct clarity the difference that gender makes in performance ability. I would go further to say that sports involving running are where that difference is most apparent. I do agree that I would feel disadvantaged if I were expected to compete against the boys my age. However, under the current North Dakota High School Activities Association guidelines, I have not, and would not ever be expected to compete against boys. I may be expected to compete against a trans female who has been treated with testosterone suppression medication, but only if that girl had been treated with medication for at least a full year. It is clear to me that under these guidelines, I do not have to worry that I am being discriminated against.

I am a competitive athlete, and I know how good it feels to race well and to be recognized for my accomplishments. I train year-round in order to be at the top of my game, and to be in the best physical shape possible. I understand the concern for fairness in high school sports, but I do not feel that my ability to compete on a fair playing field is endangered by trans girls who have completed a gender transition. If the claim is that this bill would protect female athletes, I believe the concern is unwarranted. Have any female high school athletes in North Dakota actually requested this so-called protection?

I would like to remind you that H.B. 1298 is not a question of whether or not you agree with the concept of gender changes. It is a question of whether or not trans teenagers deserve the opportunity to be involved in sports. I am sure you can sympathize with a teenager's desire to be involved in school activities. Some of you may have or have had teenagers. At the very least all of you were teenagers once. I ask you to put yourselves in the shoes of the teenagers whose lives we are discussing today.

High school is not easy for anyone. Personally, high school has been made a lot easier by the community of people I have found within my sports. I am in cross country and track because I love competing and pushing myself to be better every day, but I am also in the sports because of the incredible community of people I have found. I have never questioned that my teammates and coaches have my back, and I have found my best friends through my involvement in sports. I can't imagine what my high school experience would be like without that community encouraging me. To vote yes on H.B. 1298 is to steal that supportive community away from transgender teenagers.

Under the NDHSAA's current guidelines, transgender athletes are already held to a standard separate from that of cisgender athletes- in other words, it is clear that those who would chose to ban these athletes are not protecting what is fair. By voting yes on on H.B. 1298, you're sending the message that transgender teenagers do not deserve to represent their schools in sports.

Gracia Larsen-Schmidt
Testimony for HB 1298
Grand Forks, North Dakota
March 16th, 2021

We all have the right to our own personal beliefs about gender transition, but you, who have been elected to serve all North Dakotans, do not have the right to discriminate against transgender teens based on those beliefs, and you certainly don't have the right to claim that it is for my sake.

For that reason, I urge you to vote no on H.B. 1298.

March 12, 2021

The Honorable Diane Larson, Chair North Dakota Senate Judiciary Committee
and Committee Members,

My name is Tara Jensen and I am a mother of a talented and hardworking transgender youth. I strongly urge you to consider a DO NOT PASS on HB 1298.

We all know that school activities play a tremendous role in shaping a person's character. Being validated and supported by friends, family and school officials literally kept my child alive. Being included in high school activities has built the confidence for my child to thrive.

This bill, if passed, sends a very clear message to transgender, non-binary and intersex youth that to the State of North Dakota they are invisible, disposable, and not worthy of the opportunity to learn valuable character-building life lessons that come with being a part of team and competition.

This bill was deliberately introduced to exclude transgender youth and strip them of their dignity under the veil of preserving equal opportunity for women's athletics. The language was specifically amended to allow for the inclusion of cisgender girls only to play on cisgender boys teams. If this bill passes it may not end with sports. Soon there may be proposals for all activities to be exclusive to only cisgender youth. Why are we so willing to marginalize a group of individuals who are already widely mistreated and misunderstood? Why not teach a valuable lesson to all youth that including others and treating people with dignity and respect should be a core value of all activities.

The idea that transgender individuals are specifically going out for sports to steal playing time or scholarships from their peers is ridiculous. For the very small percentage of the world population that is transgender, what they most desire is being accepted, validated and included. As a mother, I can assure you that a transgender individual will be one of the most self-conscious and hard-working members on the team as there is a constant pressure to be validated and valued for who they truly are, not what the world around them might perceive them to be. The current guidelines set standards for maintaining a level playing field during transitional stages for transgender youth. These kids have abided by these requirements without issue, while their cisgender peers do not need to meet any guidelines even though science proves humans all grow and mature at different ages and levels.

What I find most troubling is that the mere introduction of this bill has made it seemingly acceptable for misinformed individuals to share hateful rhetoric about transgender athletes. Since this bill passed the House, I have witnessed groups of teens harassing transgender peers as if they are somehow entitled to treat others so poorly. Discrimination is learned. Kids are not born with hate or discrimination in their hearts. Through these experiences, transgender kids have learned to navigate their lives with courage, resilience, kindness, and integrity. They have learned through their hardships how to be natural leaders. These are skills that would be valuable to any team.

Please send the right message to the people of North Dakota and prove that our state is one of equity, inclusion and opportunity for all people and where discrimination is not tolerated. I urge the Committee to recommend Do Not Pass on House Bill 1298.

Respectfully submitted,

Tara Jensen, mother



District #44 - Fargo, North Dakota



Cardinal Red Bird
CARDINAL RED BIRD
National Chief Chaplain

CHAPLAINS ON CALL AND EMERGENCY RESPONSE

OFFICE OF THE CHIEF
INTERNATIONAL OPERATIONS

623 Main Avenue East Suite# 107
West Fargo, ND 58078

Phone: (218) 593-0525 Email: info.ccersa@gmail.com
Website: <https://ccerhq.wixsite.com/services>



Sarah Miller
SARAH MILLER
Chief of Chaplaincy

In reference to North Dakota HB1298

Rep. Robin Weisz, Chairman
Rep. Karen Rohr, Chairwoman
North Dakota House of Representative

Date: March 15th, 2021
Original: January 24th, 2021

Greetings Honorable Robin Weisz, Chairman, and the Honorable Karen Rohr,
Chairwoman of the North Dakota House of Representatives;

I am writing as a concerned chaplain who has been following the recent controversies surrounding the Anti-Transgender Athletes Bill, from across the nation but more specifically in North Dakota (ND HB1298) regarding student-athletes competing on sports teams that align with their gender identity. This policy is unjust, and I urge you not to proceed any further. As an adult in a position of "authority", I take my responsibility seriously to advocate for equality, justice, and the protection of all individuals especially the vulnerable and our youth.

In the Name of God, the Gracious, the Compassionate-4:135 "O you who acknowledge, stand with justice as witnesses of God, even if it is against yourselves, or the parents or the relatives, rich or poor, God is more worthy of them, so do not follow your desires from being just. If you twist or turn away, then God is Ever aware of what you do."

In a nationwide study, 68% of youth were found to play a school sport, but in 2018, the HRC Foundation and researchers from the University of Connecticut found that only 24% of LGBTQ-identified youth did so. Given what we know about the positive impact that sports has on self-esteem and mental health, particularly in young people, this disparity must be taken seriously. Indeed, "LGBTQ youth who participate in sports report lower levels of feelings of worthlessness and depression and feel safer in their classrooms than their non-sports-playing LGBTQ peers." To deny transgender high school/college students the opportunity to play on sports teams that align with their gender identity would effectively bar them from participating in school sports at all; they would then lose access to many tangible and intangible benefits that

sports make available to their cisgender peers. It disturbs me greatly that in the course of this debate, those who would see North Dakota adopt a discriminatory policy will further target transgender students.

Cases from other states have already experienced this. These students have been slandered, bullied, and harassed by other students and adults who ought to know better. This is despicable behavior, and it is wholly out of keeping with the Christian faith many of these people espouse. These students deserve what all young people deserve; the chance to grow up in a community that cares for them, advocates for them, and sets them on a course toward happy and meaningful adulthoods. Instead, they have been subjected to consistent attempts at character assassination over their supposed crime of competing in high school/college sports.

In *Bostock v. Clayton County, Georgia*, the Supreme Court has established an important precedent: one can not discriminate on the basis of LGBTQ identity with discriminating in part on the basis of sex. This means our students are entitled to protection under Title IX, the very law that is currently being weaponized against them. It goes without saying that the state of North Dakota has nothing to gain by adopting a policy that would almost certainly be found to be in violation of current federal laws against sex discrimination. That said, discrimination based on gender identity is not wrong only because it is inextricably linked to discrimination based on sex. It is wrong in and of itself.

In several different places, the Bible and the Qur'an speaks of God who shows no partiality, and in Proverbs of the Bible, we ourselves are cautioned not to show partiality in judging, and in Surah An-Nisa of the Qur'an, we learn to fight against oppression or seek asylum elsewhere. We can not allow a concerted hate policy to become law in the state of North Dakota as it would be unjust and un-American. As a chaplain residing in North Dakota, I value our state's longstanding commitment to justice and equal treatment for all under the law. I implore you to uphold those principles by not proceeding in favor of this policy against transgender high school/college student-athletes.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Miller".

Chpln. (Gen) Sarah Miller, MDiv, BCC | Badge# 16110
Chief of Chaplaincy - Office of the Chief
Chaplains on Call and Emergency Response
(218) 593-0525

#9132, 9145, 9146, 9147, 9161, 9177, 9179, 9224,
9240, 9259, 9271, 9285, 9367, 9371, 9533

Dear Committee Members,

I would like to voice my strong support for HB 1298. I ask that you protect the future of women's sports by prohibiting males from competing in women's-only sports. It is incredibly damaging to individuals and society to adopt the view that biological sex and gender are separate from each other because this leads to a society in which objective scientific facts are turned into mere cultural and social constructs. This leaves all of us vulnerable, but particularly women because we cannot protect women's rights without a concrete definition of what it means to be a woman. Trans women are not women. They are males who struggle with gender dysphoria and who should be treated with compassion, respect, and ethical psychological care. **No one is denying trans athletes the right to participate in sports. These individuals are free to compete with their peers who share the same physiological make-up.** This bill is not anti-trans. It is pro-woman, pro-fairness, pro-science, and pro-logic.

Please consider the ramifications of allowing males to compete against females. There is a mountain of evidence and data that show that, in general, male athletes are bigger, stronger, faster, possess better hand-eye coordination, and are more spatially aware than their female counterparts. Males are quite likely to injure women if they collide with them. Males even have the advantage after one year of gender-affirming hormone therapy. **A study by the British Journal of Medicine showed that trans-women (males) still had a 9% faster average run speed after the one year period of testosterone suppression that is recommended by World Athletics for inclusion in women's events.**

If gender is not informed by objective biological science, then it has to be based on subjective feelings and opinions which can and do change, especially in a culture that quickly and easily propagates postmodern philosophies like gender theory through the use of social media. The number of kids who identify as trans has skyrocketed in recent years. This is not a natural development, but due to peer contagion that is spurred on by activist parents, media, Hollywood, and certain public school systems all actively recruiting our youth to identify with the LGBT movement. Trans athletes are currently in the minority, but as transgenderism ideology becomes more mainstream, there will be more and more males who will want to compete in women's sports. If we do not pass legislation to protect women's sports from the cultural trend of transgenderism, the scholarships, awards, and opportunities that sports provide will once again be dominated by men and boys. Please do not be fooled into thinking that this is progress. It is not. Please do not allow transgenderism ideology to override established biology. Please do not choose political correctness over the safety and hard won rights of women and girls.

Please render a DO PASS out of committee on HB 1298.

Thank you for your leadership and service to the state of North Dakota.

RESOURCES:

The Selina Soule, Chelsea Mitchell, and Alanna Smith Stories

<https://www.adflegal.org/selina-soule-track-athlete-story#close>

Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators

<https://bjsm.bmj.com/content/early/2020/11/06/bjsports-2020-102329.full?ijkey=yjICzZVZFRDZzHz&keytype=ref>

Males Have Larger Skeletal Size and Bone Mass Than Females, Despite Comparable Body Size

<https://asbmr.onlinelibrary.wiley.com/doi/10.1359/JBMR.041005>

Comparison of injury during cadet basic training by gender

<https://pubmed.ncbi.nlm.nih.gov/9158436/>

LGBT Identification Rises to 5.6% in Latest U.S. Estimate

<https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>

The Bone-Muscle Relationship in Men and Women

<https://www.hindawi.com/journals/jos/2011/702735/>

A Comparative Study on Strength between American College Male and Female Students in Caucasian and Asian Populations

<http://archive.sciendo.com/SSR/ssr.2012.xxi.issue-3-4/v10237-012-0015-5/v10237-012-0015-5.pdf>

Skeletal muscle mass and distribution in 468 men and women aged 18–88 yr

<https://journals.physiology.org/doi/full/10.1152/jappl.2000.89.1.81>

Elite Strength Sports (IPF and IWF) a Comparison of Sex and Performance

<https://www.castironstrength.com/elite-strength-sports-ipf-and-iwf-a-comparision-of-sex-and-performance/>

Gender Differences in Spatial Ability

<https://core.ac.uk/download/pdf/143902789.pdf>

Comparing Athletic Differences Between Women and Men

<https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/>

The End of Gender by Dr. Debra Soh

<https://www.drdebrasoh.com>

Irreversible Damage: The Transgender Craze Seducing Our Daughters

https://www.amazon.com/Irreversible-Damage-Transgender-Seducing-Daughters/dp/B084YC53BR/ref=sr_1_1?crid=28P5DRYPZ9GZB&dchild=1&keywords=abigail+shrier&qid=1611855639&s=audible&sprefix=Abigail%2Caudible%2C244&sr=1-1

David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case

<https://embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case>

David Reimer, 38; After Botched Surgery, He Was Raised as a Girl in Gender Experiment

<https://www.latimes.com/archives/la-xpm-2004-may-13-me-reimer13-story.html>

March 15, 2021

The Honorable Diane Larson, Chair

North Dakota Senate Judiciary Committee

Testimony before Chair Larson and Committee Members, March 16, 2021

I'm writing to oppose passage of House Bill 1298. I am the proud parent of two children that participate in multiple youth sports in West Fargo, ND. This past weekend my 10 year old was in our state capital to compete in the ND State Swim Meet. Next weekend my 13 year old will participate in West Fargo at the 11 and older ND State Swim Meet. As West Fargo Flyers, their swim meets are governed by USA Swimming policies. USA Swimming largely adopts the International Olympic Committee policies on transgender athletes. These policies are well thought out by experts at the international level. House Bill 1298 would effectively end USA Swimming competitions in the state of North Dakota for my athletes and hundreds of athletes statewide.

In West Fargo we have one of the finest swimming facilities in the country in the Hulbert Aquatic Center. We host regional competitions that bring in swimmers from around the country and, with that, hundreds of thousands of dollars for our swim club and our local economy. Even with the proposed amendments to House Bill 1298, our swim club would not survive and our Olympic pool that was once used by Michael Phelps would be empty.

The collateral damage caused by the passage of House Bill 1298 on youth sports in North Dakota would mean the loss of millions of dollars annually to the local economies around our state from not only USA swimming, but USA hockey, USA wrestling, and any other national or international organization that is out of bounds of this unnecessary bill. It would also devastate our young athletes that just want to compete and alienate voters like me.

As a husband, a father of North Dakota athletes, and maybe someday a grandfather of a North Dakota athlete, I cannot sit back and let the North Dakota Legislature strip away opportunity from athletes in our state. Please VOTE NO to the House Bill 1298.

Sincerely,

Jeremy Engelstad

March 15, 2021

Member of the Senate Judiciary Committee,

As leaders, parents and/or community members in Grand Forks, we firmly stand AGAINST HB 1298. This bill targets the youth of North Dakota solely based on their gender identity. In Grand Forks we are working diligently on acceptance and understanding of equity, diversity and inclusivity. HB 1298 introduced by adults, departs from the culture of acceptance we are trying to promote in our schools and devalues members of our community.

HB 1298 will not make sports safer or fairer for any student. Instead, HB 1298 targets and excludes youth who already face high levels of discrimination. Transgender students already experience disturbingly higher rates of bullying, rejection, violence, and even suicide. In fact, one in three transgender youth report having attempted suicide.

HB 1298 is not needed in North Dakota. The North Dakota High School Activities Association already has a vetted transgender student eligibility policy in place that was created by coaches and officials who best understand their students and respective sports, and was approved by the NDHSAA Board of Directors in 2015. Why would legislators micromanage a governing body of athletics?

Members of our educational and broader community have pledged to create environments where students can learn and thrive all the while being accepted for who they are. HB 1298, which targets children who already face discrimination, directly contradicts these goals.

Therefore, we urge the Senate Judiciary Committee to give HB 1298 a Do Not Pass recommendation to protect our young students. Discrimination is not a North Dakota value.

Respectfully,

Jerry Brenner, Ed. D., Superintendent, Grand Forks Public Schools

Michelle Rydz, Executive Director, High Plains Fair Housing Center

Maura Ferguson, President of Lewis and Clark PTO and parent

Katie Dachtler, Grand Forks City Council Ward 2

Robin David, Bush Fellow and parent

To Whom It May Concern:

HB 1298 cannot pass. It will end youth sports in ND and force many people to move so their children can have a life with sports and activities. There are many proven studies showing that children in sports get better grades, show compassion and sportsmanship, lesser instances of depression, better physical health, and less obesity. This bill will potentially end all of that.

There are already governing bodies in place that have considered the issue so this bill is completely unneeded. These bodies require policies in writing for those organizations. If they take the inclusion policies out, then the national body will not recognize the club/team as a member, hurting our children. The kids will not be allowed to participate in sports at no fault of their own and be punished.

The amount of tourism dollars brought in by hosting large events equates to the MILLIONS. This bill will effectively put an end to that. Tourism is our third biggest industry in ND. We really do not have much to draw people in, let's be honest. This will effectively kill any tourism and would be a detriment to our economy. This bill would also allow organizations from providing financial assistance throughout the community, which puts those dollars back in our state.

North Carolina passed a bathroom bill (A BATHROOM BILL) and they LOST 3.56 BILLION. If you completely take out youth sports, the damage would be irreversible. The NCAA also banned NC from hosting any championships because of that bill. There are student athletes calling on the NCAA at this moment to ban any states with youth sports transgender bills such as this one from hosting events.

Since most facilities are publicly owned, this would leave large sports complexes sitting EMPTY. There would be no point in having them as they would be left to be completely useless.

If this bill passes, it would annihilate the tourism in ND, the mental and physical health of our youth, and handicap our economy beyond repair. Please think of this when voting.

Veronica Webb, Fargo, ND

Testimony by Ella M Gilkerson

To The Sentate Judiciary Committee

In Opposition of HB 1298

Tuesday March 16th

My name is Ella Gilkerson, and I am writing as a student and the President of Century Highschool's HERO club, which advocates for the rights of LGBTQ+ students in our school, in our community, and in our state. I strongly urge you vote AGAINST this bill. While the intention of this bill is to protect students who were assigned female at birth from being hurt in a sport by those who were assigned male at birth, it has consequences which fall back on an entirely innocent group of people. No matter your personal views on the matter of transgenderism, it is an undeniable fact that we have to put aside our differences and our biases to help make our state a safer place for all of its inhabitants, which is ultimately the purpose of the legislative system. Passing this bill would have incredibly negative effects on the mental health of our students. This is because it sets a precedent. It sets a precedent for how the State of North Dakota will treat it's students, and ultimately shows that the legislators of North Dakota don't care about the mental health of North Dakota Youth.

The unintended consequences of this bill go even farther than that. Because of the conditions of the bill, many sports organizations would no longer be able to come to North Dakota to compete. For example, the Olympic Trials would no longer be able to use North Dakota Facilities, because it would mean that highschool sports can no longer use the same facilities. It means that many sports organizations will have to choose between disallowing people to compete or closing down in order to make the facility available to other people. This is an incredibly underhanded measure to try and prevent even adults in North Dakota from

competing in sports. In the end, the decision of who can be on a team should be left up to individual coaches and sports organizations.

Another important issue with this bill is the sexist double standard it enforces. It implies that all people who are assigned female at birth are less physically fit than those who are assigned male at birth. It's a very harmful assumption. Many women are stronger than many men, and just because it also goes the other way, doesn't give anyone a basis to pass a bill like this which discriminates against an entirely innocent people. No matter how you look at it, it is in the best interest of the Youth of North Dakota to vote in opposition of this bill.

Testimony by Payton R. Bergman to the
Senate Judiciary Committee
Hearing on HB 1298
Tuesday, March 16th

Hello, Senators of the Senate Judiciary Committee.

I call for a DO NOT PASS recommendation on House Bill 1298.

My name is Payton Bergman and I write on behalf of the LGBTQ+ youth of ND. HB 1298 is not only damaging to transgender athletes but all people of ND, transgender or cisgender. The negative effects of this bill include: negative mental health effects for trans students, both trans and cis women being misconstrued, and effectively eliminating club sports.

Firstly, inclusion in team sports is proven to improve mental health, and not allowing trans students to participate would do the exact opposite. Transgender youth already have some of the poorest mental health of anyone in the United States, and taking away a fundamental piece in student life (sports) will only make that worse. Sure, there are other activities trans students will still be able to participate in, but a person passionate about sports simply cannot be fulfilled by theatre, for example, just as a person passionate about theatre will not find the same fulfillment in sports. Having a support system that can be provided to you by common activities like sports cannot be replaced, and there is no reason to exclude transgender students from finding a support system. These students are in high school, and missing a formative experience during their formative years will have negative impacts for the rest of their life.

Secondly, HB 1298 is heavily based on the protection of cisgender women in sports. This portion of the bill is not only transphobic but misogynistic as well. It portrays cis women as inherently weak and trans women as inherently dangerous. The narrative that cis women are fragile can encourage the toxic behavior of men, including sexual assault. Teaching young men that women are weak creates an internalized idea that endangering cis women is okay because they are weak. In addition, it encourages the dangerous and transphobic idea that transgender women are dangerous or “not real women”. This is another factor that can lead to poor mental health in transgender students. If you are being told for years by society that you are either dangerous or weak (trans women and trans men, respectively), you will internalize those ideas and let them impact how you treat others. Because this bill portrays both cis and trans people as stereotypes they are not, it is unacceptable and should not pass the Senate.

Finally, the implementation of this bill would effectively abolish club sports. At the national level, club sports protect transgender students through strict anti-discriminatory policies. Not allowing students to participate in sports that align with their gender identity would disqualify ND from any sort of club competition, particularly swimming and baseball. This would be unfair to all participants, as those in club sports tend to be the most competitive and invested in tier sport. Qualifying for nationals would be near impossible if ND violates the policies set forth by club sports nationally.

For the reasons I have listed as well as many others, HB 1298 is extremely dangerous and blatantly transphobic. Not allowing transgender students to participate in the sport that their gender aligns with will not only perpetuate misogynistic and transphobic ideas but will also harm the image that North Dakota strives to put forward: kindness. With all of this being said, I strongly urge a do not pass recommendation on HB 1298

Thank you for your time,
Payton R. Bergman
District 47

Testimony of Julie Rygg
Visit Greater Grand Forks Executive Director
House Bill 1298
March 8, 2021



Chairperson Larson and Senate Judiciary Committee:

Please accept this testimony, on behalf of Visit Greater Grand Forks (Visit GGF), as strong opposition to House Bill 1298, which we understand is now in your committee. We are requesting a “Do Not Pass” of the bill from the Judiciary Committee.

HB 1298 likely will prevent all youth sports activities from competing in public venues or receiving public funding (including support from destination marketing organizations such as Visit GGF). This is because most national sanctioning bodies for youth sports (USA Hockey, USA Volleyball, USA Swimming, etc.) have already approved inclusive participation policies with some restrictions.

For reference, I am also including some economic data, so you may be aware of the impact a bill such as this one may have on communities:

- In 2019 youth sports events, which received funding sponsorships from Visit Greater Grand Forks had a total of \$7,329,176 projected **direct spending impact**. This is a conservative estimate. Direct spending refers to actual dollars spent in a community such as lodging, meals, etc. This does not include the economic impact multiplier, which would make the projections much higher.
- Direct spend impact of some major Grand Forks sports events in 2019:
 - Jr. Grand Am Basketball - \$2,091,194
 - Greater Grand Forks Soccer Tournament - \$350,124
 - GF Youth Hockey Association tournaments (2019-2020 season) - \$7.3 million
- Additional impacts:
 - Many youth sports activities rely heavily on our financial and in-kind support, which could be lost if this bill passes.



- We may be in jeopardy of losing multi-year commitments such as FIRST LEGO Great Northern Regional Championship.
- Organizations such as Red River BMX are planning new facilities to attract more events, which could be in jeopardy.

While none of us at Visit Greater Grand Forks feel as though we are knowledgeable enough to make decisions related to if, when, where or how transgender athletes should be allowed to compete, which is why it is our stance these decisions should be left in the hands of the governing bodies. These organizations have been dealing with these issues for decades and have much more knowledge on how to be equitable.

Again, I ask you to send a “Do Not Pass” on HB 1298, as it could have devastating impact on the state’s travel and tourism industry. Thank you for your time and consideration.

January 25th, 2021

Greetings Chairman Weisz and Committee Members,

My name is Madison Jansky, I am a licensed social worker in North Dakota, a member of the LGBTQ+ community, and a life-long resident of North Dakota.

Originally from Mandan, I currently live in Fargo with my fiancé Grace. In solidarity with the Transgender community of North Dakota, I am testifying in opposition to House Bill 1298, which would ban Transgender students from participating on sports teams that align with their gender identity.

ALL of our students deserve to gain confidence, self-discipline, and the chance to be part of a team. Not just that, House Bill 1298 goes beyond basketball courts, football fields, and hockey rinks. Students also deserve to feel reassured by decision-makers to pass policies that support and protect who they are, not threaten their lives and well-being.

At the end of 2019, the LGBTQ+ advocacy organization called The Trevor Project, released the results of their National Survey on LGBTQ Youth Mental Health. Out of 34,000 youths who responded:

- Over 13,000 respondents seriously considered attempting suicide-7,160 of which were transgender or non-binary
- Over 24,000 of LGBTQ+ youth reported feeling sad or hopeless for at least two weeks
- 2 out of 3 LGBTQ youth reported that someone tried to force or coerce them to change their sexual orientation or gender identity, with youth who have undergone conversion therapy more than twice as likely to attempt suicide as those who did not.
- 25,840 respondents felt that the recent political climate impacted their mental health or sense of self.

This discriminatory bill cannot be separated from these statistics. And supporters of House Bill 1298 do not get to separate these statistics from the bill. Those sitting silent as our kids, teens, and young adults suffer, do not get to separate themselves from these statistics. Someone's personal beliefs rooted in fear, hate, and misinformation do not represent the best interest of North Dakotans and should not be used to propose legislation.

I have the lived experience of being a queer student and resident in the state of North Dakota. I ask you to stop this bill from becoming law in our state. I have the personal and professional experience to know that this bill will cause nothing but harm to our community.

The country is watching, and our community is watching.

I encourage the committee to vote DO NOT PASS on HB 1298.

-Madison Jansky, LBSW

**TNT Kid's Fitness & Gymnastics**

2800 Main Avenue – Fargo, ND 58013

Kim Pladson, Executive Director 701-551-5001 – kim@tntkidsfitness.org

March 15, 2021

Dear Honorable(s):

As a non-profit leader, member of a USA National Governed program in Fargo, I am writing to voice my strong opposition to the House HB 1298. The HB 1298 established to which relates to transgender athlete participation in sporting events has a greater and larger residual impact on our local businesses, venues, and youth sports.

As a member of a National USA program, our organization relies on hosting sporting events as part of the revenue needed to sustain our USA gymnastics program, the ability to allow athletes an opportunity to participate in a national program, and recruit professional coaching talent to our state. In the way the HB 1298 is currently written, any National affiliated sport that has a transgender policy could potentially dissolve in our state leaving 1000's of athletes no opportunity to participate in a sport they have spent years developing their skill and passion for.

USA Gymnastics, like many national governing bodies, have a transgender participation policy that as a member, we inherently have to adopt. We cannot 'opt' out.

- a) If HB 1298 is passed, clubs would not be able to 'rent' a public (school) or a park district facility.
- b) If HB 1298 is passed, ND law prohibits our organizations the ability to submit a bid to host local meet, state, regional, or national competitions in our state. We would not even have the ability to host a meet in our own facility.
- c) If HB 1298 is passed, each athlete is required to compete in their state to qualify to a Regional level, then qualify to a National level. That could not happen due to the fact our sport's governing body has a transgender participation policy and we cannot host a meet.
- d) If HB 1298 is passed, an ND athlete associated with any national association with a transgender policy, would not have the ability to compete in a Regional or National competition. This presence and status opens the doors for ND club athletes to be recruited for collegiate level scholarships.

I strongly oppose the current HB 1298 as written, and any proposed amendments to the HB 1298.

Any amendment to the HB 1298, would continue to have a detrimental effect on our local economy and athletes.

- a) Our ability to rent or 'afford' public venues. We would no longer be able to receive a non-profit rate as it would be considered a sponsorship.
- b) With a state law prohibiting transgender participation, it may be difficult to attract sporting events to North Dakota as a whole not just our sport.

- Many donations we request for our events come from hotel, restaurants, shopping, businesses that are profiting from events. This could cease.
 - Also note: These particular business entities do not receive public dollars so they wouldn't necessarily be directly prohibited from sponsoring/donating to local events; however, if their revenues are down because sporting events are much smaller or not happening at all, they may not have the extra dollars to support as they have done in the past.
- c) Renting a venue at a 'full market' rate put non-profits at risk by not having the ability to earn a profit to host the event itself.
- d) TNT has hosted (1) Regional tournament in Fargo. The economic impact to our community has been approximately \$295,000 hosting over 650 athletes. Our annual local tournaments hosted by TNT approximately \$60,000-\$80,000 for over 400 athletes locally and within a 200-mile radius.
- Our organization rely on hosting annual meets to support the USA program and its athletes. The HB 1298 does not allow us the ability to submit bids to bring large tournaments or local meets to our community.

National governed bodies impact 1,000's of ND athletes and organizations. Through sports we can influence our understanding of socio-economic issues, teach, develop, and express moral virtues and vices to demonstrate the importance of such values to overcome differences and encourages discussion, and thereby helps to break down prejudice, stereotypes, cultural differences, ignorance, intolerance and discrimination.

Once again I encourage you to oppose the HB 1298 due to its unforeseen larger economic impact. Please do not hesitate to contact me if you have any questions or if I may be of assistance in any way.

Sincerely,
Kim Pladson
TNT Kid's Fitness Executive Director

Dear All North Dakota State Senate Members,

My name is Jessica Domitrovich and I am writing to you today as a parent to two girls (11 and 8) in various sports in West Fargo. I implore you to strike down House Bill 1298 as it will have detrimental effects on not only our youth, our sports clubs and teams, but also our communities and state financially. I was a 3-sport athlete through high school and played college softball so I understand trying to protect female athletes but this bill is NOT needed. The impact that sports had on my life as a child but also now as a mother have stayed with me. Not only the health benefits of being in shape, knowing how to properly fuel my body to perform how I wanted it to, and keeping me active to prevent childhood obesity. Sports also had many other benefits from being a part of a team and working together towards one goal, to overcoming hardships and pushing through to meet your goals, to teaching me to work hard in school to maintain high grades to be able to participate and be able to attend college. As a small business owner, I use many of the skills I learned from playing youth sports still today and encourage my two girls to also find a sport or sports they love for the same benefits. As a spouse of a North Dakota Guardsman, my husband and I both use our time in youth sports every day to do our jobs, to lead our organizations, to run the various non-profit Boards we are on and so much more.

With all of that said, this bill is NOT needed. The governing bodies of every single sport in the world have already considered this issue and they ALL already have policies in place. This HB will have detrimental effects on all of our youth, not just female athletes, not just one single sport, not just one age. If this bill passes, our youth will not be able to participate in any youth sports because there will be no facilities for practice, competition, or hosting events for fundraisers that also drive additional millions of dollars into our communities each year. Many youth organizations, will risk their sanctioning from the national governing bodies (again, that already have policies in place pertaining to transgender athletes) which means we can no longer host events, can no longer compete in any event sanctioned by these governing bodies (which is every swim meet the West Fargo Flyers currently have or attend). To narrow it down, our youth in North Dakota will lose their opportunity to participate in sports.

I have not even hit on the financial impact to not only the communities in North Dakota but to the clubs or teams of each sport. The hospitality and tourism industry is North Dakota's third largest industry. Without the various sports bringing in big tournaments like the Fargo Youth Hockey Association tournaments bringing in \$2.4 million every hockey season, or USA Wrestling no longer hosting their tournament in North Dakota and that loss of \$2 million into the local economy, or USA Swimming events that are now being held on a more frequent basis after we have worked so hard to put on quality national events at the Hulbert Aquatic Center that bring in \$150,000-\$200,000 for EACH event. The financial impact could be devastating to not only the sports that host these large events to keep the teams/clubs afloat but also to every single tax payer that would now have to make up the income shortfall for the facilities not being used.

I have heard there are potential amendments to HB 1298 that are being considered. These also have serious impacts to each sports finances and the communities. If clubs/teams that are

currently receiving a discount for renting park district facilities, will no longer be allowed under the wording in lines 13-16 of the amendment.

Overall, not only will youth sports cease to exist due to all the issue identified above, the state of North Dakota will be negatively impacted because more progressive states will refuse to send their teams to our state due to this law. I implore you on behalf of my children and all children in the State of North Dakota to not amend this awful law but to completely vote against it and remove it – strike it down.

Sincerely,
Jessica Domitrovich

3634 Hidden Circle
West Fargo, ND 58078

March 15, 2021

The Honorable Diane Larson, Chair

North Dakota Senate Judiciary Committee

Testimony before Chair Larson and Committee Members, March 16, 2021

I'm writing in opposition of House Bill 1298.

I am the proud parent of two children that participate in multiple youth sports in West Fargo, ND. My 10-year-old recently competed in the 10 & Under ND Short Course Championship Swim Meet. This weekend, my 13-year-old will participate in 11 & Over ND Short Course Championship Swim Meet at the Hulbert Aquatic Center in West Fargo. As members of the West Fargo Flyers swim club, their swim meets are governed by the USA Swimming policies. USA Swimming largely adopts the International Olympic Committees policies on transgender athletes; these policies are thoroughly researched and well thought out by experts at the international level. House Bill 1298 would effectively end USA Swimming competitions in the state of North Dakota for my athletes, as well as hundreds of other athletes, statewide.

The Hulbert Aquatic Center in West Fargo is one of the finest swimming facilities in the country. The facility and community brings in regional and national competitions, which attract swimmers from around the country. Those swimmers, their families, and their fans help bring hundreds of thousands of dollars for not only our swim club, but also our local economy. Passing House Bill 1298 would put a stop to the Hulbert Aquatic Center hosting those events, along with the businesses in our community that profit from those events taking place. Even with the proposed amendments to House Bill 1298, our swim club would not survive and our Olympic pool, which was once used by Michael Phelps, would sit empty.

The collateral damage of passing House Bill 1298 on youth sports in North Dakota would mean the loss of millions of dollars annually to the local economies around our state from not only USA swimming, but also USA hockey, USA wrestling, and any other national organization that would not follow the bill's rules. The bill is unnecessary. If passed, it will devastate our young athletes that just want to compete.

I played multiple sports at West Fargo High School and played volleyball at the University of North Dakota. I understand the notion of wanting females to compete against females, but this bill is unnecessary and if passed, would be devastating to athletes across North Dakota. As a proud female North Dakota athlete myself, wife, mother of North Dakota athletes, and maybe someday a grandmother of North Dakota athletes, I cannot sit back and let the North Dakota Legislature strip away opportunity from the youth athletes in our state. Please **VOTE NO** to the House Bill 1298.

Sincerely,

Kristi Engelstad

Dear Members of the North Dakota Legislature,

I oppose HB 1298 the anti-transgender bill before you. I have a transgender granddaughter and many transgender friends. This measure will do little to enhance high school athletics and, unfortunately, a great deal of psychological harm to our transgender young people in North Dakota. They are already suffering the psychological trauma of the conflict between the bodies of the gender which they were assigned at birth and their brains and spirits which call them to their true, other gender. They do not need yet another burden of discrimination thrust into their faces by this measure. Please let North Dakota be a state that welcomes people who are different, that is an inclusive home for all people.

March 16, 2021

Dear Chairwoman Larson and Members of the Senate Judiciary Committee:

I write today on behalf of the ACLU of North Dakota to express our strong opposition to HB 1298, legislation that is deeply harmful to transgender youth in our state and violates both the Constitution and federal law. If passed, HB 1298 will likely entrench North Dakota in a drawn out, costly legal battle.

We urge you to vote **do not pass** on this legislation for the following reasons:

1. HB 1298 Will Harm Transgender Youth

Trans youth, just like all youth, simply want to participate in the activities they love, including athletics. Trans students participate in sports for the same reasons other young people do: to challenge themselves, improve fitness, and be part of a team. This bill would deprive a subset of students and young people of the opportunities available to their peers and, if passed, would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities.

2. HB 1298 Violates the Constitution and Title IX of the Civil Rights Act

By singling out transgender young people under the age of 18 and enacting a sweeping ban on participation in athletics, HB 1298 violates both the United States Constitution and Title IX of the Civil Rights Act.

Where a law singles out people based on the fact that they have a gender identity that does not match the sex assigned to them at birth, it necessarily discriminates on the basis of sex and trans status, thus triggering heightened equal protection scrutiny under the Constitution. “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”¹ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”² There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.³ The bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

Last summer, an Idaho court enjoined a similar ban on transgender women and girls participating in women’s athletics and reached the “inescapable conclusion that the Act discriminates on the basis of transgender status” and thus triggered heightened scrutiny.⁴ The court reasoned, “the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity.”⁵ The federal court’s order granting the motion for preliminary injunction (which is still in effect today) is attached to this document in full for your review.

¹ *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

² *United States v. Virginia*, 518 U.S. 515, 555 (1996).

³ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁴ *Hecox*, 2021 WL 4760138 at *27.

⁵ *Id.*



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Parties who seek to defend gender-based and trans-status based government action must demonstrate an “exceedingly persuasive justification’ for that action.” Under this standard, “the burden of justification is demanding and it rests entirely on the State.”⁶ The North Dakota legislature has so far has offered no justification for HB 1298 except for hypothetical future problems that have not arisen. But under heightened scrutiny, justifications “must be genuine, not hypothesized or invented post hoc in response to litigation.”⁷ This demanding standard leaves no room for a state to hypothesize harm and impose a categorical exclusion far exceeding anything utilized even at the most elite levels of competition. Applying this standard, the *Hecox* court enjoined Idaho’s ban on women and girls participating in women’s sports solely because they are transgender, finding the state’s proffered justifications wholly insufficient.⁸ Idaho, like North Dakota, already had regulations in place governing the participation of transgender athletes in student athletics and could not justify the additional ban.

Likewise, if passed, HB 1298 would violate Title IX of the Civil Rights Act of 1964. Title IX protects all students—including students who are transgender—from discrimination based on sex. Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁹ The overwhelming majority of courts to consider the issue have held that discrimination against transgender students in schools is prohibited sex discrimination under Title IX.¹⁰ Since the Supreme Court’s decision in *Bostock*, two federal appeals courts have affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹¹

3. HB 1298 Risks the Loss of Significant Amounts of Education Funding and Will Result in High Litigation Costs

The current presidential administration has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.¹² This means that should North Dakota pass HB 1298 or bills like it that target transgender students for discrimination, it will not only likely face litigation by private parties but also by the federal government. And such a violation of Title IX will not only cost the state substantially in litigation costs but will also put

⁶ *Virginia*, 518 U.S. at 531.

⁷ *Id.* at 533.

⁸ *Hecox*, 2020 WL 4760138, at *31-*35.

⁹ 20 U.S.C. § 1681(a).

¹⁰ See, e.g., *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719-722(D. Md. 2018).

¹¹ See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020)(applying *Bostock* and holding that school policy of excluding boy from restroom solely because he was transgender violated Title IX); accord *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 968 F.3d 1286 (11th Cir. Aug. 7, 2020).

¹² Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

the state's federal education funding at risk. For North Dakota in FY 2021, the estimated federal funding for primary and secondary education was over \$132 million and total funding for education, over \$407 million.¹³

Additionally, litigation costs that would arise out of the passage of HB 1298 are likely to be extremely high. As a chapter of ACLU National, the ACLU of North Dakota has consulted with litigators on the Idaho case to get a sense of the costs North Dakota can anticipate should HB 1298 pass and end up in court. Thus far, the case in Idaho – which centers on a bill very similar to HB 1298 – is becoming one of the most expensive transgender rights cases litigated to date.

As of February 2021, the Idaho case has required 10 expert declarations total (including both plaintiffs and defendants) and includes a number of ACLU National attorneys, partners at prominent private law firms, and several associates at prominent private law firms. The Idaho law has been enjoined on Equal Protection Clause grounds and is currently pending in front of the Court of Appeals. The Title IX claim and privacy claims are yet to be resolved. Should the case go to the Supreme Court and back to the district court for resolution of the pending claims it is estimated that the litigation costs will reach \$10 million dollars. This is astronomically expensive and is so in part due to the necessity of expert declarations and witnesses. By comparison, same sex marriage cases resulted in approximately \$1.5 million dollars in fees for states in which marriage bans were litigated. It is without question that bills like HB 1298 will result in substantially higher costs that will be carried by North Dakota taxpayers.

In conclusion, extreme policies such as HB 1298 are out-of-step with prevailing international and national norms of athletic competition, violate the United States Constitution and federal civil rights law, and put North Dakota at risk of losing hundreds of millions of dollars in federal funding. This bill will harm transgender youth and do so in an attempt to solve a problem that plainly does not exist.

Transgender students already live and go to school in North Dakota, they play sports and enjoy time with their friends, and they deserve the chance to succeed and thrive like any other student.

For these reasons, we strongly urge your do not pass vote on HB 1298.

Sincerely,



Libby Skarin
Campaigns Director
ACLU of North Dakota
eskarin@aclu.org

¹³ United States Dep't of Education, Fiscal Years 2019-2021 State Tables for the U.S. Department of Education, <https://www2.ed.gov/about/overview/budget/statetables/index.html>.



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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, *et al.*,

Plaintiffs,

v.

BRADLEY LITTLE, *et al.*;

Defendants.

Case No. 1:20-cv-00184-DCN

**MEMORANDUM DECISION AND
ORDER**

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction, proposed intervenors' Motion to Intervene, and Defendants' Motion to Dismiss. The Court held oral argument on July 22, 2020 and took the matters under advisement.

Upon review, and for the reasons stated below, the Court GRANTS the Motion for Preliminary Injunction (Dkt. 22); GRANTS the Motion to Intervene (Dkt. 30); and GRANTS in PART and DENIES in PART the Motion to Dismiss (Dkt. 40).

I. OVERVIEW

Plaintiffs in this case challenge the constitutionality of a new Idaho law which excludes transgender women from participating on women's sports teams. Defendants assert Plaintiffs lack standing, that their claims are not ripe for review, that certain of their claims fail as a matter of law, and that they are not entitled to injunctive relief. The proposed intervenors seek to intervene to advocate for their interests as female athletes and

to defend the law Plaintiffs challenge. The United States has also filed a Statement of Interest in support of Idaho's law. Dkt. 53.

The primary question before the Court—whether the Court should enjoin the State of Idaho from enforcing a newly enacted law which precludes transgender female athletes from participating on women's sports—involves complex issues relating to the rights of student athletes, physiological differences between the sexes, an individual's ability to challenge the gender of other student athletes, female athlete's rights to medical privacy and to be free from potentially invasive sex identification procedures, and the rights of all students to have complete access to educational opportunities, programs, and activities available at school. The debate regarding transgender females' access to competing on women's sports teams has received nationwide attention and is currently being litigated in both traditional courts and the court of public opinion.

Despite the national focus on the issue, Idaho is the first and only state to categorically bar the participation of transgender women in women's student athletics. This categorical bar to girls and women who are transgender stands in stark contrast to the policies of elite athletic bodies that regulate sports both nationally and globally—including the National Collegiate Athletic Association (“NCAA”) and the International Olympic Committee (“IOC”)—which allow transgender women to participate on female sports teams once certain specific criteria are met.

In addition to precluding women and girls who are transgender and many who are intersex from participating in women's sports, Idaho's law establishes a “dispute” process that allows a currently undefined class of individuals to challenge a student's sex. Idaho

Code § 33-6203(3). If the sex of any female student athlete—whether transgender or not—is disputed, the student must undergo a potentially invasive sex verification process. This provision burdens all female athletes with the risk and embarrassment of having to “verify” their “biological sex” in order to play women’s sports. *Id.* Similarly situated men and boys—whether transgender or not—are not subject to the dispute process because Idaho’s law does not restrict individuals who wish to participate on men’s teams.

Finally, as an enforcement mechanism, Idaho’s law creates a private cause of action against a “school or institution of higher education” for any student “who is deprived of an athletic opportunity” or suffers any harm, whether direct or indirect, due to the participation of a woman who is transgender on a women’s team. *Id.* § 33-6205(1). Idaho schools are also precluded from taking any “retaliation or other adverse action” against those who report an alleged violation of the law, regardless of whether the report was made in good faith or simply to harass a competitor. *Id.* at § 33-6205(2).

Plaintiffs seek a preliminary injunction which would enjoin enforcement of Idaho’s law pending trial on the merits. The Court will ultimately be required to decide whether Idaho’s law violates Title IX and/or is unconstitutional, but that is not the question before the Court today. The question currently before the Court is whether Plaintiffs have met the criteria for enjoining enforcement of Idaho’s law *for the present time* until a trial on the merits can be held. To issue an injunction preserving the status quo by enjoining the law’s enforcement, the Court must primarily decide whether Plaintiffs have constitutional and prudential standing to challenge the law, whether they state facial or only as-applied constitutional challenges, and whether they are likely to succeed on their claim, based upon

the current record, that the law violates the Equal Protection Clause of the Fourteenth Amendment.

II. BACKGROUND

On March 30, 2020, Idaho Governor Bradley Little (“Governor Little”) signed the Fairness in Women’s Sports Act (the “Act”) into law. Idaho Code Ann. § 33-6201–6206.¹ Plaintiffs’ Complaint challenges the constitutionality of the Act. Among other things, Plaintiffs contend that the Act violates their constitutional rights to equal protection, due process, and the right to be free from unconstitutional searches and seizures. Plaintiffs seek preliminary relief solely on their equal protection claim, arguing the Act discriminates on the basis of transgender status by categorically barring transgender women from participating in women’s sports, and also discriminates on the basis of sex by subjecting all women student-athletes to the risk of having to undergo invasive, unnecessary tests to “verify” their sex, while permitting all men student-athletes to participate in men’s sports without such risk. Plaintiffs seek a preliminary injunction to enjoin enforcement of the Act pending trial on the merits.

A. Definitions

As the Third Circuit recently explained, in the context of issues such as those raised in the instant case, “such seemingly familiar terms as ‘sex’ and ‘gender’ can be misleading.” *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018). The Court accordingly begins by defining relevant terms utilized in this decision.

¹ The Act went into effect on July 1, 2020. Idaho Code § 33-6201.

“Sex” is defined as the “anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia.” *Id.*

A person’s “gender identity” is his or her “deep-core sense of self as being a particular gender.” *Id.* “Although the detailed mechanisms are unknown, there is a medical consensus that there is a significant biologic component underlying gender identity.” Dkt. 22-9, ¶ 18.²

The term “cisgender” refers to a person who identifies with the sex that person was determined to have at birth. *Boyertown*, 897 F.3d at 522.

“Transgender” refers to “a person whose gender identity does not align with the sex that person was determined to have at birth.” *Id.* A transgender woman “is therefore a person who has a lasting, persistent female gender identity, though the person’s sex was determined to be male at birth.” *Id.*

Transgender individuals may experience “gender dysphoria,” which is “characterized by significant and substantial distress as result of their birth-determined sex being different from their gender identity.” *Id.* “In order to be diagnosed with gender

² The Court relies on various declarations filed in support of the Motion for Preliminary Injunction and Motion to Intervene for medical definitions of the terms used herein, and to identify the proposed intervenors and their arguments. The Court also considers extra-pleading materials when assessing Plaintiffs’ Motion for Preliminary Injunction. The Court does not, however, rely on extra-pleading materials (other than those of which it takes judicial notice) in its assessment of Defendants’ Motion to Dismiss, and accordingly does not treat the Motion to Dismiss as a Motion for Summary Judgment. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 921–22 (9th Cir. 2004) (finding a represented party’s submission of extra-pleading materials justified treating the motion to dismiss as a motion for summary judgment). Pursuant to Federal Rule of Evidence 201(c), the Court has discretionary authority to take judicial notice, regardless of whether it is requested to do so by a party, and does in fact do so in this case as it relates to certain materials identified below. Fed. R. Evid. 201.

dysphoria, the incongruence must have persisted for at least six months and be accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning.” Dkt. 22-2, ¶ 19. If left untreated, symptoms of gender dysphoria can include severe anxiety and depression, suicidality, and other serious mental health issues. *Id.* at ¶ 20. Attempted suicide rates in the transgender community are over 40%. Dkt. 1, at ¶ 103.

The term “intersex” is an umbrella term for a person “born with unique variations in certain physiological characteristics associated with sex, “such as chromosomes, genitals, internal organs like testes or ovaries, secondary sex characteristics, or hormone production or response.” Dkt. 22-1, at 2 (citing Dkt. 22-2, ¶ 41). Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life, if ever. *See generally* Dkt. 22-2, at 11–16.

B. The Parties

1. Plaintiffs

Plaintiffs in this action include Lindsay Hecox, and Jean and John Doe on behalf of their minor daughter, Jane Doe (collectively “Plaintiffs”).³ Lindsay is a transgender woman athlete who lives in Idaho and attends Boise State University (“BSU”). As part of her treatment for gender dysphoria, Lindsay has undergone hormone therapy by being treated with testosterone suppression and estrogen, which lower her circulating testosterone levels and affect her bodily systems and secondary sex characteristics. Dkt. 1, ¶ 29. Lindsay is a

³ Plaintiffs Jean, John, and Jane Doe have been granted permission to proceed under pseudonyms. Dkt. 48.

life-long runner who intends to try out for the BSU women’s cross-country team in fall 2020, and for the women’s track team in spring 2021. *Id.* at ¶ 33. Under current NCAA rules, Lindsay could compete at NCAA events in September—when she has completed one year of hormone treatment.⁴ *Id.* at ¶ 32.

Jane is a 17-year old girl and athlete who is cisgender. Dkt. 1, ¶¶ 39, 42. Jane has played sports since she was four and competes on the soccer and track teams at Boise High School, where she is a rising senior. *Id.* at ¶¶ 40, 45. After tryouts in August, Jane intends to play on Boise High’s soccer team again in fall 2020.⁵ *Id.* Because most of her closest friends are boys, she has an athletic build, rarely wears skirts or dresses, and has at times been thought of as “masculine,” Jane worries that one of her competitors may dispute her sex pursuant to section 33-6203(3) of the Act. *Id.* at ¶ 47.

2. *Defendants*

The defendants named in this action (collectively “Defendants”) include Governor Little; Idaho Superintendent of Public Instruction Sherri Ybarra; the individual members of the Idaho State Board of Education (Debbie Critchfield, David Hill, Emma Atchley, Linda Clark, Shawn Keough, Kurt Liebich, and Andrew Scoggin); Idaho state educational institutions BSU and Independent School District of Boise City #1 (“Boise School

⁴ Due to the COVID-19 pandemic, the Mountain West conference in which BSU participates recently postponed sports competitions for fall sports. However, as of the date of this decision, BSU has not announced whether it will alter the training programs or tryouts for the cross-country team, and the Court has been advised by Plaintiffs’ counsel that Lindsay is continuing her individual training program in preparation for tryouts.

⁵ Although try-outs for the Boise High soccer team have recently been postponed, the Court has been advised that small group training for the girls’ soccer team may begin as early as August 17, 2020.

District”); BSU’s President, Dr. Marlene Tromp; Superintendent of the Boise School District, Coby Dennis; the individual members of the Boise School District’s Board of Trustees (Nancy Gregory, Maria Greeley, Dennis Doan, Alicia Estey, Dave Wagers, Troy Rohn, and Beth Oppenheimer); and the individual members of the Idaho Code Commission (Daniel Bowen, Andrew Doman, and Jill Holinka).

3. Proposed Intervenors

Proposed intervenors Madison (“Madi”) Kenyon and Mary (“MK”) Marshall (collectively “Madi and MK” or the “Proposed Intervenors”) are Idaho cisgender female athletes. Like Lindsay and Jane, Madi and MK are “female athletes for whom sports is a passion and life-defining pursuit.” Dkt. 30-1, at 2. Madi and MK both run track and cross-country on scholarship at Idaho State University (“ISU”) in Pocatello, Idaho. *Id.* Both competed against a transgender woman athlete last year at the University of Montana and had “deflating experiences” of running against and losing to that athlete. *Id.*, at 3; Dkt. 30-2, ¶¶ 12, 14–15; Dkt. 30-3, ¶ 11. The Proposed Intervenors support the Act and wish to have their personal concerns fully set forth and represented in this case.

C. The Act

1. Overview

Idaho passed House Bill 500 (“H.B. 500”), the genesis for the Act, on March 16, 2020. Dkt. 1, ¶ 90. In the United States, high school interscholastic athletics are generally governed by state interscholastic athletic associations, such as the Idaho High School Activities Association (“IHSAA”). *Id.* at ¶ 66. The NCAA sets policies for member colleges and universities, including BSU. *Id.* at ¶ 67. Prior to the passage of H.B. 500, the

IHSAA policy allowed transgender girls in K-12 athletics in Idaho to compete on girls' teams after completing one year of hormone therapy suppressing testosterone under the care of a physician for purposes of gender transition. *Id.* at ¶ 71. Similarly, the NCAA policy allows transgender women attending member colleges and universities in Idaho to compete on women's teams after one year of hormone therapy suppressing testosterone. *Id.* at ¶ 75.

2. *Legislative History*

On February 13, 2020, H.B. 500 was introduced in the Idaho House by Representative Barbara Ehardt ("Rep. Ehardt"). On February 19, 2020, the House State Affairs Committee heard testimony on H.B. 500. *Id.* at ¶ 80. Ty Jones, Executive Director of the IHSAA, answered questions at that hearing and noted that no Idaho student had ever complained of participation by transgender athletes, and no transgender athlete had ever competed under the IHSAA policy regulating inclusion of transgender athletes. *Id.* at ¶ 81. In addition, millions of student-athletes have competed in the NCAA since it adopted its policy in 2011 of allowing transgender women to compete on women's teams after one year of hormone therapy suppressing testosterone, with no reported examples of any disturbance to women's sports as a result of transgender inclusion. *Id.* at ¶ 76. Rep. Ehardt admitted during the hearing that she had no evidence any person in Idaho had ever challenged an athlete's eligibility based on gender. *Id.* at ¶ 80.

On February 21, 2020, H.B. 500 was passed out of the House committee. *Id.* at ¶ 82. On February 25, 2020, Idaho Attorney General Lawrence Wasden ("Attorney General Wasden") warned in a written opinion letter that H.B. 500 raised serious constitutional and

other legal concerns due to the disparate treatment and impact it would have on both transgender and intersex athletes, as well as its potential privacy intrusion on all female student athletes. *Id.* at ¶ 83. On February 26, 2020, the House debated the bill. Rep. Ehardt referred to two high school athletes in Connecticut and one woman in college who are transgender and who participated on teams for women and girls. *Id.* at ¶ 84. Rep. Ehardt argued that the mere fact of these athletes' participation exemplified the "threat" the bill sought to address. *Id.* The bill passed the House floor after the debate. *Id.*

After passage in the House, H.B. 500 was heard in the Senate State Affairs Committee and was passed out of Committee on March 9, 2020. *Id.* at ¶ 85. The next day, the bill was sent to the Committee of the Whole Senate for amendment, and minor amendments were made. *Id.* at ¶ 86. One day later, on March 11, 2020, the World Health Organization declared COVID-19 a pandemic and many states adjourned state legislative sessions indefinitely. *Id.* at ¶ 89. By contrast, the Idaho Senate remained in session and passed H.B. 500 as amended on March 16, 2020. *Id.* at ¶ 90. After the House concurred in the Senate amendments, the bill was delivered to Governor Little on March 19, 2020. *Id.*

Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail." *Id.* at ¶ 91. Professor Coleman endorsed the existing NCAA rule, which mirrors the IHSAA policy, and stated: "No other state has enacted such a flat prohibition against transgender athletes, and Idaho shouldn't either." *Id.*

Five former Idaho Attorneys General likewise urged Governor Little to veto the bill “to keep a legally infirm statute off the books.” *Id.* at ¶ 92. They urged Governor Little to “heed the sound advice” of Attorney General Wasden, who had “raised serious concerns about the legal viability and timing of this legislation.” *Id.* Nevertheless, based on legislative findings that, *inter alia*, “inherent, physiological differences between males and females result in different athletic capabilities,” Governor Little signed H.B. 500 into law on March 30, 2020.⁶ Idaho Code § 33-6202(8); Dkt. 1, ¶ 93.

For purpose of the instant motions, the Act contains three key provisions. First, the Act provides that “interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education” shall be “expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed.” Idaho Code § 33-6203(1). The Act mandates, “[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.” *Id.* at § 33-6203(2). The Act does not contain comparable limitation for any individuals—whether transgender or cisgender—who wish to participate on a team designated for males.

⁶ On the same day, Governor Little also signed another bill into law, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. *Id.* at ¶ 93–94. Enforcement of H.B. 509 is currently being litigated in *F.V. and Dani Martin v. Jeppesen et al.*, 1:17-cv-00170-CWD, because another judge of this Court previously permanently enjoined Idaho from enforcing a prior law that restricted transgender individuals from altering the sex designation on their birth certificates. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1146 (D. Idaho 2018).

Second, the Act creates a dispute process for an undefined class of individuals who may wish to “dispute” any transgender or cisgender female athlete’s sex. This provision provides:

A dispute regarding a student’s sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student’s personal health care provider that shall verify the student’s biological sex. The health care provider may verify the student’s biological sex as part of a routine sports physical examination relying only on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. The state board of education shall promulgate rules for schools and institutions to follow regarding the receipt and timely resolution of such disputes consistent with this subsection.

Id. at § 33-6203(3).

Third, the Act creates an enforcement mechanism to ensure compliance with its provisions. Specifically, the Act creates a private cause of action for any student negatively impacted by violation of the Act, stating:

- (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or institution of higher education.
- (2) Any student who is subject to retaliation or other adverse action by a school, institution of higher education, or athletic association or organization as a result of reporting a violation of this chapter to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or institutions of higher education in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.
- (3) Any school or institution of higher education that suffers any direct or

indirect harm as a result of a violation of this chapter shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the government entity, licensing or accrediting organization, or athletic association or organization.

- (4) All civil actions must be initiated within two (2) years after the harm occurred. Persons or organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

Id. at § 33-6205.

D. Procedural Background

Plaintiffs filed the instant suit on April 15, 2020. The lawsuit primarily seeks: (1) a judgment declaring that the Act violates the United States Constitution and Title IX, and also violates such rights as applied to Plaintiffs; (2) preliminary and permanent injunctive relief enjoining the Act's enforcement; and (3) an award of costs, expenses, and reasonable attorneys' fees. *Id.* at 53–54. On April 30, 2020, Plaintiffs filed the instant Motion for Preliminary Injunction, seeking preliminary relief on their Equal Protection Claim. Dkt. 22. The Proposed Intervenors filed a Motion to Intervene on May 26, 2020 (Dkt. 30), and Defendants filed a Motion to Dismiss on June 1, 2020. Dkt. 40. After each was fully briefed, the Court held oral argument on all three motions on July 22, 2020.

III. ANALYSIS

Since there are three pending motions with different applicable legal standards, the Court will set forth the appropriate legal standard when addressing each motion. Because the Court's decision on the Motion to Intervene will determine the parties in this action, and its decision on the Motion to Dismiss will determine whether Plaintiffs may bring their

Motion for a Preliminary Injunction, the Court begins with the Motion to Intervene, follows with Defendants' Motion to Dismiss, and, since the Court finds the Motion to Dismiss is appropriately denied in part and granted in part, concludes with consideration of the Motion for Preliminary Injunction.

A. Motion to Intervene (Dkt. 30)

The Proposed Intervenors seek to intervene to advocate for their interests and to defend the Act, arguing they “face losses to male athletes” and “stand opposed to any legally sanctioned interference with the opportunities that they have enjoyed as female competitors, and that would deprive them and other young women of viable avenues of competitive enjoyment and success within a context that acknowledges and honors them as females.” Dkt. 30-1, at 4. The Proposed Intervenors request intervention as a matter of right, or, alternatively, permissive intervention, under Federal Rule of Civil Procedure 24. Plaintiffs oppose the Motion to Intervene. Dkt. 45; Dkt. 51-1. Defendants are in favor of intervention and suggest the Proposed Intervenors' perspectives “can help inform the Court when it balances hardships and determines the public consequences of the relief Plaintiffs seek.” Dkt. 44, at 2.

1. Legal Standard

Where, as here, an unconditional right to intervene is not conferred by federal statute,⁷ Federal Rule of Civil Procedure 24 authorizes intervention as of right or permissive intervention.

⁷ While a federal statute does not authorize intervention by the Proposed Intervenors, the United States is statutorily authorized to intervene in cases of general public importance involving alleged denials of equal

Rule 24(a) contains the standards for intervention as of right, and provides that a court must permit anyone to intervene who, on timely motion: “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2).

The Ninth Circuit has distilled the aforementioned provision into a four-part test for intervention as of right: (1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by existing parties in the lawsuit. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001) (“*Berg*”) (citation omitted).

The Court must construe Rule 24(a)(2) liberally in favor of intervention. *Id.* at 818. In assessing interventions, courts are “guided primarily by practical and equitable considerations.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). However, it is the movant’s burden to show that it satisfies each of the four criteria for intervention as of right. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)

protection on the basis of sex. 28 U.S.C. § 517; *see also United States v. Virginia*, 518 U.S. 515, 523 (1996). The United States filed its Statement of Interest in support of the Act pursuant to 28 U.S.C. § 517. Dkt. 53.

In general, Rule 24(b) also gives the court discretion to allow permissive intervention to anyone who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). In addition, in exercising its discretion under Rule 24(b), the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3).

2. Analysis

a. Intervention as of Right

Plaintiffs argue intervention as of right should be denied because the Proposed Intervenors claim interests that are neither cognizable under the law nor potentially impaired by the disposition of the present lawsuit. Plaintiffs also argue intervention as of right is unavailable because Defendants adequately represent the Proposed Intervenors' interests.

i. Timeliness of Application

In support of their arguments against permissive intervention, Plaintiffs suggest the Proposed Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims. Dkt. 45, at 17. Plaintiffs do not, however, contest the timeliness of the application to intervene with respect to intervention as of right. To the extent necessary, the Court will accordingly address the timeliness of the application when assessing permissive intervention.

ii. Protectable Interest

To warrant intervention as of right, a movant must show both "an interest that is

protected under some law” and “a ‘relationship’ between its legally protected interest and the plaintiff’s claims.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (“*Lockyer*”) (quoting *Donnelly*, 159 F.3d at 409). “Whether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.” *Berg*, 268 F.3d at 818 (citing *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)).

The Proposed Intervenors claim a significant and protected interest in having and maintaining “female-only competitions and a competitive environment shielded from physiologically advantaged male participants to whom they stand to lose.” Dkt. 30-1, at 7; *see also* Dkt. 52, at 4 n. 1. Plaintiffs characterize this interest as a mere desire to exclude transgender students from single-sex sports, which is not significantly protectable. Dkt. 45, at 10–11. As Plaintiffs note, the Ninth Circuit has held cisgender students do not have a legally protectable interest in excluding transgender students from single-sex spaces. *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single sex restrooms and locker facilities with transgender students).

However, the Ninth Circuit has also held that redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is unquestionably a legitimate and important interest, which is served by precluding males from playing on teams devoted to female athletes. *Clark, ex rel. Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (“*Clark*”). Regardless of how the Proposed Intervenors’ interest is characterized—either as a right to a level playing field

or as a more invidious desire to exclude transgender athletes—they do claim a protectable interest in ensuring equality of athletic opportunity. The importance of this interest is the basic premise of almost fifty years of Title IX law as it applies to athletics, and, as recognized by the Ninth Circuit, is unquestionably a legitimate and important interest. *Clark*, 695 F.2d at 1131. The Proposed Intervenors argue the only way to protect equality in sports is through sex segregation without regard to gender identity. Whether this argument is accurate or constitutional is not dispositive of the issue of whether the Proposed Intervenors have an interest in this suit.

Just as Plaintiffs have an interest in seeking equal opportunity for transgender female student athletes, the Proposed Intervenors have an interest in seeking equal opportunity for cisgender female student athletes. As such, to find the Proposed Intervenors are without a protectable interest in the subject matter of this litigation would be to hold that no party has an interest in this litigation. *See, e.g., Johnson v. San Francisco Unified Sch. Dist.*, 500 F.2d 349, 353 (9th Cir. 1974) (explaining all students and parents have an interest in a sound educational system, and that interest is surely no less significant where it is entangled with the constitutional claims of a racially defined class).

Further, Defendants acknowledged at oral argument what seems beyond dispute—Idaho passed the Act to protect cisgender female student athletes like Madi and MK. Because the Proposed Intervenors are the “intended beneficiaries” of the Act, their interest is neither “undifferentiated” nor “generalized.” *Lockyer*, 450 F.3d at 441 (citation omitted); *see also Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (finding small farmers had a protectable interest in action seeking to enjoin a federal statute passed regarding lands

receiving federally subsidized water where the small farmers were “precisely those Congress intended to protect” with the statute). If the Act is declared unconstitutional or substantially narrowed as result of this litigation, Madi and MK may be more likely to have to choose between competing against transgender athletes or not competing at all. Such an interest is sufficiently “direct, non-contingent, [and] substantial” to constitute a significant protectible interest in this action. *Lockyer*, 450 F.3d at 441 (alteration in original) (quoting *Dilks v. Aloha Airlines*, 642 F.2d 1155, 1157 (9th Cir. 1981)).⁸

iii. Impairment of Interest

The “significantly protectable interest” requirement is closely linked with the requirement that the outcome of the litigation may impair the proposed intervenors’ interests. *Lockyer*, 450 F.3d at 442 (“Having found that [intervenors] have a significant protectable interest, we have little difficulty concluding that disposition of this case, may, as a practical matter, affect [them].”). If a proposed intervenor ““would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.”” *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee note to 1966 amendment).

The relief requested by Plaintiffs may affect the Proposed Intervenors’ interests. Should Plaintiffs prevail in this lawsuit, the Proposed Intervenors will not have the

⁸ Plaintiffs also argue the outcome of this lawsuit will not advance the Proposed Intervenors’ claimed interests because Madi and MK, as collegiate athletes, will still be required to compete against non-Idaho teams and athletes who are subject to the rules of the NCAA, which allow participation of women who are transgender after one year of testosterone suppression. Yet, the fact that a challenged law may only partially protect an intervenor from harm does not mean that the intervenor does not have an interest in preserving that partial protection, and Plaintiffs do not cite any authority to the contrary.

protection of the law they claim is vital to ensure their right to equality in athletics. Further, they “will have no legal means to challenge [any] injunction” that may be granted by this Court. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (abrogated by further broadening of intervention as of right for claims brought under the National Environmental Policy Act in *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)); *see also Lockyer*, 450 F.3d at 443 (finding impairment where proposed intervenors would have no alternative forum to contest the interpretation of a law that was “struck down” or had its “sweep substantially narrowed”). Under such circumstances, the Proposed Intervenors satisfy the impairment requirement for intervention as of right.

iv. Adequacy of Representation

The “most important factor” to determine whether a proposed intervenor is adequately represented by an existing party to the action is “how the [proposed intervenor’s] interest compares with the interests of existing parties.” *Arakaki*, 324 F.3d at 1086 (citations omitted). When an existing party and a proposed intervenor share the same ultimate objective, a presumption of adequacy of representation applies. *Id.* There is also an assumption of adequacy where, as here, the government is acting on behalf of a constituency that it represents. *United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002). In the absence of a “very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.” *Arakaki*, 324 F.3d at 1086 (internal quotation marks and citation omitted).

Despite their individual interests in the instant litigation, even “interpret[ing] the requirements broadly in favor of intervention,” it is clear that the ultimate objective of both the Proposed Intervenor and Defendants is to defend the constitutionality of the Act. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009) (alteration in original) (quoting *Donnelly*, 159 F.3d at 409); see also *Prete*, 438 F.3d at 958–959 (holding that a public interest organization seeking intervention to defend a state constitutional ballot initiative failed to defeat the presumption of adequate representation when the ultimate objective of both the organization and the defendant government was to uphold the measure’s validity).⁹ Given this shared objective, the presumption of adequacy of representation applies, and the Proposed Intervenor must make “a very compelling showing” to defeat this presumption. *Arakaki*, 324 F.3d at 1086.

The Ninth Circuit has identified three factors for evaluating the adequacy of representation: (1) whether the interest of an existing party is such that it will undoubtedly make all of a proposed intervenor’s arguments; (2) whether the existing party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that existing parties would neglect. *Id.* “The prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). However, this burden is satisfied if a proposed intervenor shows that

⁹ In *Prete*, the Court explained that while “it is unclear whether this ‘assumption’ rises to the level of a second presumption, or rather is a circumstance that strengthens the first presumption, it is clear that ‘in the absence of a very compelling showing to the contrary,’ it will be presumed that the Oregon government adequately represents the interests of the intervenor-defendants.” *Id.* at 957 (quoting *Arakaki*, 324 F.3d at 1086).

representation “may be” inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

The Proposed Intervenors argue that their participation in this lawsuit is necessary because Defendants include “multiple agencies and voices of the Idaho government that represent multiple constituencies including constituencies with views and interests more aligned with Plaintiffs than proposed intervenors.” Dkt. 30-1, at 10. The Proposed Intervenors also suggest they bring a unique perspective the government cannot adequately represent because the “personal distress and other negative effects suffered by female athletes from the inequity of authorized male competition against females is not felt by institutional administrators.” *Id.* Neither of these arguments is convincing.

First, regardless of the “multiple constituencies” represented, or beliefs of individual constituents voiced before H.B. 500 was passed,¹⁰ there is no reason to believe that Defendants cannot be “counted on to argue vehemently in favor of the constitutionality of [the Act].” *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997). Defendants’ retention of an expert witness, “proactive filing of a motion to dismiss and the arguments they have advanced in support of that motion,” and fervent opposition

¹⁰ As Plaintiffs note, although Attorney General Wasden issued an opinion letter explaining that H.B. 500 was likely unconstitutional at the request of a legislator, Attorney General Wasden is statutorily required to represent the State in all courts, Idaho Code section 67-1401(1), and his Deputy Attorney General vigorously defended the Act in both briefing on the pending motions and during oral argument. As such, there is no evidence to suggest that Attorney General Wasden will not fulfill his statutory duties. In addition, the Proposed Intervenors contend BSU will not adequately represent their interests because BSU has a Gender Equality Center that advances the interests of transgender students. Dkt. 30-1, at 11–13. However, as Plaintiffs highlighted during oral argument, BSU could have realigned itself as a party if it felt it could not support the Act, but instead gave over representation to the State and has accordingly adopted the positions of the State. Dkt. 62, at 28: 10–15. The Proposed Intervenors’ arguments regarding Attorney General Wasden and BSU are not a compelling showing of inadequate representation.

to Plaintiffs’ Motion for a Preliminary Injunction, “suggest precisely the opposite conclusion.” *Animal Legal Defense Fund v. Otter*, 300 F.R.D. 461, 465 (D. Idaho 2014). As even the Proposed Intervenors observe in their proposed opposition to Plaintiffs’ Motion for Preliminary Injunction, the “legal authorities, standards, and arguments” in opposing Plaintiffs’ motion for a preliminary injunction are “well covered” by Defendants. Dkt. 46, at 5.

Likewise, the Proposed Intervenors’ “particular expertise in the subject of the dispute” as cisgender female athletes who have competed against a transgender woman athlete does not amount to a compelling showing of inadequate representation by Defendants. *Prete*, 438 F.3d at 958–959. To the extent they lack personal experience, Defendants can “acquire additional specialized knowledge through discovery (*e.g.*, by calling upon intervenor-defendants to supply evidence) or through the use of experts.” *Id.* at 958. Defendants have also already referred to the experiences of both Madi and MK in opposing Plaintiffs’ Motion for a Preliminary Injunction. Dkt. 41, at 19–20. Thus, the Proposed Intervenors’ personal experience is insufficient to provide the showing necessary to overcome the presumption of adequate representation. *Prete*, 438 F.3d at 959.

However, the Court cannot find Defendants “will undoubtedly make” all of the Proposed’ Intervenors’ arguments. *Arakaki*, 324 F.3d at 1086. Specifically, there are two limiting constructions that Defendants could, and in fact have, advocated to support dismissal of Plaintiffs’ suit and/or assuage constitutional doubts clouding the Act: (1) the Act is not self-executing and requires another individual to invoke the “dispute process” before any transgender athlete will be precluded from playing on a women’s team; and (2)

to verify her sex, a transgender female athlete need only submit a form from her health care provider verifying that she is female. Defendants invoked such limiting constructions in their briefing on the Motion to Dismiss and reaffirmed them during oral argument. *See, e.g.*, Dkt. 40-1, at 3, 6–7; Dkt. 59, at 5–6; Dkt. 62, at 44:13–25, 66:21–25. Thus, that the “the government will offer . . . a limiting construction of [the Act] is not just a theoretical possibility; it has already done so.” *Lockyer*, 450 F.3d at 444.

In contrast to Defendants’ attempt to narrow the Act, the Proposed Intervenors suggest the Act must be read broadly to categorically preclude transgender women from ever playing on female sports teams, regardless of whether they become the target of a dispute or whether they can obtain a sex verification letter from a health care provider. These are far more than differences in litigation strategy between Defendants and the Proposed Intervenors. *City of Los Angeles*, 288 F.3d at 402–403 (“[M]ere differences in strategy . . . are not enough to justify intervention as of right.”). This conflicting construction goes to the heart of interpretation and enforcement of the Act.

The Court therefore concludes that the Proposed Intervenors have “more narrow, parochial interests” than the Defendants. *Lockyer*, 450 F.3d at 445 (finding proposed intervenors overcame the presumption of adequacy of representation where the government suggested a limiting construction of a law in its motion for summary judgment); *Citizens for Balanced Use v. Montana Wilderness Ass’n*, 647 F.3d 893, 899 (9th Cir. 2011) (holding proposed intervenors overcame presumption of adequate representation where they sought to secure the broadest possible interpretation of the Forest Service’s Interim Order, while the Forest Service argued that a much narrower

interpretation would suffice to comply with the Interim Order). Through the presentation of direct evidence that Defendants “will take a position that actually compromises (and potentially eviscerates) the protections of [the Act],” the Proposed Intervenors have overcome the presumption that Defendants will act in their interests. *Lockyer*, 450 F.3d at 445.

Liberally construing Rule 24(a), the Court finds that the Proposed Intervenors have met the test for intervention as a matter of right. Alternatively, however, the Court finds permissive intervention is also appropriate.

b. Permissive Intervention

The Court’s discretion to grant or deny permissive intervention is broad. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (citation omitted). The Ninth Circuit has “often stated that permissive intervention requires: (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant’s claim or defense and the main action.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (citations omitted). “In exercising its discretion,” the Court must also “consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). When a proposed intervenor has otherwise met the requirements, “[t]he court may also consider other factors in the exercise of its discretion, including the nature and extent of the intervenors’ interest and whether the intervenors’ interests are adequately represented by other parties.” *Perry*, 587 F.3d at 955 (quoting *Spangler*, 552 F.2d at 1329).

Plaintiffs do not dispute that the Proposed Intervenors have an independent ground for jurisdiction and share a common question of law and fact with the defense of the main action. Plaintiffs instead argue that permissive intervention should be denied because existing parties adequately represent the Proposed Intervenors' interests, and because intervention would unduly delay or prejudice the adjudication of the rights of the original parties. Dkt. 45, at 16–19. As explained above, the Proposed Intervenors have shown Defendants may not adequately represent their interests because Defendants have advanced a limiting construction of the Act and thus *undoubtedly will not* make all of the arguments Madi and MK will make. *Arakaki*, 324 F.3d at 1086. The Court accordingly rejects Plaintiffs' contention that permissive intervention should be denied because Defendants adequately represent the Proposed Intervenors' interests.

Plaintiffs also argue the Proposed Intervenors' participation will likely delay and prejudice the adjudication of Plaintiffs' claims because Madi and MK waited six weeks after Plaintiffs filed their Complaint to seek intervention. This argument fails because the Ninth Circuit has held an application to intervene is timely where, as here, it is filed less than three months after the complaint. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding motion to intervene filed four months after initiation of a lawsuit to be timely); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (deeming motion to intervene timely when it was filed "less than three months after the complaint was filed and less than two weeks after [Defendant] filed its answer to the complaint.").

Plaintiffs next contend they will be prejudiced if they are unable to obtain a ruling from this Court before the fall sports season begins, and that the any disruption of the briefing schedule to accommodate the Motion to Intervene could delay resolution of Plaintiffs' request for emergency relief. This concern is moot because the Motion to Intervene was fully briefed prior to oral argument on July 22, 2020, and the Court is issuing the instant decision on all three pending motions before the fall sports season begins.

Finally, Plaintiffs argue intervention could prejudice the adjudication of their claims because counsel for the Proposed Intervenors have a history of utilizing misgendering tactics that will delay and impair efficient resolution of litigation. For instance, the Motion to Intervene is replete with references to Lindsay using masculine pronouns and refers to other transgender women by their former male names. The Court is concerned by this conduct, as other courts have denounced such misgendering as degrading, mean, and potentially mentally devastating to transgender individuals. *T.B., Jr. ex rel. T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 577 (4th Cir. 2018) (describing student's harassment of transgender female teacher by referring to her with male gender pronouns as "pure meanness."); *Hampton v. Baldwin*, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018) (referencing expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating.").

Counsel for the Proposed Intervenors responds that they have used such terms not to be discourteous, but to differentiate between "immutable" categories of sex versus "experiential" categories of gender identity, and that the terms they use simply reflect "necessary accuracy." Dkt. 52, at 8 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686

(1973)). Such “accuracy,” however, is not compromised by simply referring to Lindsay and other transgender females as “transgender women,” or by adopting Lindsay’s preferred gender pronouns.¹¹ *See, e.g., Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019) (consistently referring to transgender female prisoner using her chosen name and female gender pronouns); *Canada v. Hall*, 2019 WL 1294660, at *1 n. 1 (N.D. Ill. March 21, 2019) (“Although immaterial to this ruling, the Court would be derelict if it failed to note the defendants’ careless disrespect for the plaintiff’s transgender identity, as reflected through . . . the consistent use of male pronouns to identify the plaintiff. The Court cautions counsel against maintaining a similar tone in future filings.”); *Lynch v. Lewis*, 2014 WL 1813725, at *2 n. 2 (M.D. Ga. May 7, 2014) (“The Court and Defendants will use feminine pronouns to refer to the Plaintiff in filings with the Court. Such use is not to be taken as a factual or legal finding. The Court will grant Plaintiff’s request as a matter of courtesy, and because it is the Court’s practice to refer to litigants in the manner they prefer to be addressed when possible.”).¹²

Ultimately, however, that the Proposed Intervenors’ counsel used gratuitous language in their briefs is not a reason to deny Madi and MK the opportunity to intervene to support a law of which they are the intended beneficiaries. Moreover, during oral

¹¹ The Court does not take issue with identifying Lindsay (or any other transgender women) as a transgender woman or transgender female, a male-to-female transgender athlete or individual, or as a person whose sex assigned at birth (male) differs from her gender identity (female). *Edmo*, 935 F.3d at 772. Each of these descriptions makes counsel’s point without doing so in an inflammatory and potentially harmful manner.

¹² Personal preferences or beliefs and organizational perceptions or positions notwithstanding, the Court expects courtesy between all parties in this litigation. In an ever contentious social and political world, the Courts will remain a haven for fairness, civility, and respect—even in disagreement.

argument, counsel for the Proposed Intervenors was respectful in advocating for Madi and MK without needlessly attempting to shame Lindsay or other transgender women. That counsel did so illustrates there is no need to misgender Lindsay or others in order to “speak coherently about the goals, justifications, and validity of the Fairness in Women’s Sports Act.” Dkt. 52, at 8. Counsel should continue this practice in future filings and arguments before the Court.

In sum, the Court will allow Madi and MK to intervene as of right, and, alternatively, finds permissive intervention is also appropriate. The Court will accordingly collectively refer to Madi and MK hereinafter as the “Intervenors.”

B. Motion to Dismiss (Dkt. 40)

Defendants filed a Motion to Dismiss Plaintiffs’ action, contending Plaintiffs lack standing, that their claims are not ripe for review, and that their facial challenges fail as a matter of law.

1. Legal Standard

A motion to dismiss based on a lack of Article III standing arises under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362–63 (1st Cir. 2001) (applying Rule 12(b)(1) to a motion to dismiss on grounds of ripeness or mootness). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may challenge jurisdiction either on the face of the pleadings or by presenting extrinsic evidence for the court’s consideration. *Safer Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding a jurisdictional attack may be facial or factual). “In a facial attack, the challenger asserts that the allegations

contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* Where, as here, an attack is facial, the court confines its inquiry to allegations in the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

When ruling on a facial jurisdictional attack, courts must “accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.” *De La Cruz v. Tormey*, 582 F.2d 45, 62 (9th Cir. 1978) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). However, the plaintiff bears the burden of alleging facts that are legally sufficient to invoke the court’s jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

Rule 12(b)(6) permits a court to dismiss a case if the plaintiff has “fail[ed] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). In deciding whether to grant a motion to dismiss, the court must accept as true all well-pled factual allegations made in the pleading under attack. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court is not, however, “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). However, a “complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in

support of the claim that would entitle the plaintiff to relief.” *Id.* (citing *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999)).

Dismissal without leave to amend is inappropriate unless it is beyond doubt that the complaint could not be saved by amendment. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (citations omitted). The Ninth Circuit has held that “in dismissals for failure to state a claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv., Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

2. *Analysis*

a. Standing

The “irreducible constitutional minimum” of Article III standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant and not the result of the independent action of some third party not before the court; and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To survive a Rule 12(b)(1) motion at the pleading stage (a facial challenge to subject-matter jurisdiction), the complaint must clearly allege facts demonstrating each element of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Defendants suggest Plaintiffs lack standing because they have failed to allege that they have suffered an injury in fact.¹³ Dkt. 40-1, at 6. “To establish injury in fact, a plaintiff must show that he or she has suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). “A plaintiff threatened with future injury has standing to sue if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). A plaintiff cannot establish standing by alleging a threat of future harm based on a chain of speculative contingencies. *Nelsen v. King Cty.*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Defendants argue Plaintiffs have not alleged an injury in fact because all alleged harms are conjectural, hypothetical, or based on a chain of speculative contingencies. Specifically, Defendants suggest that Lindsay’s alleged harm of being subject to exclusion from participation on a women’s sport teams, and Jane’s alleged harm of being required to verify her sex, cannot occur unless each Plaintiff first makes a women’s athletic team, and a third party then disputes either Plaintiffs’ sex according to regulations that the State Board of Education has not yet promulgated.¹⁴ Dkt. 40-1, at 6. This argument fails with respect to both Plaintiffs.

¹³ Defendants do not challenge the causation and redressability elements of standing.

¹⁴ Defendants also maintain that “because HB 500 has not yet come into effect, all alleged harm is future harm—and Plaintiffs have not shown that the alleged injuries are certainly impending, or that there is

i. Lindsay

The Act categorically bars Lindsay from participating on BSU's women's cross-country and track teams. Idaho Code § 33-6203(2) ("Athletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex.") (emphasis added). Although Defendants contend Lindsay will not be harmed unless she first makes the BSU team and someone then seeks to exclude her through a sex verification challenge, the Act prevents BSU from allowing Lindsay to try out for the women's team at all.

The Act also subjects BSU to a risk of civil suit by any student "who is deprived of an athletic opportunity or suffers any direct or indirect harm," if BSU allows a transgender woman to participate on its athletic teams. Idaho Code § 33-6205(1). A student who prevails on a claim brought pursuant to this section "shall be entitled to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief." *Id.* at 6205(4). Defendants' claim that the Act's categorical bar against Lindsay's participation on BSU's women's teams is not "self-executing" because it "has no independent enforcement mechanism," is meritless in light of the risk of significant civil liability the Act imposes on any school that allows a transgender woman to participate in women's sports. Dkt. 59, at 5.

The harm Lindsay alleges—the inability to participate on women's teams—arose when the Act went into effect on July 1, 2020. That Lindsay has not yet tried out for BSU athletics or been subject to a dispute process is irrelevant because the Act bars her from

substantial risk of harm occurring." Dkt. 40-1, at 6. Since the Act went into effect July 1, 2020, this argument is moot.

trying out in the first place. The Supreme Court has long held that the “injury in fact” required for standing in equal protection cases is denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing”); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (finding political officers had standing to challenge provision of Texas Constitution requiring automatic resignation for some officeholders upon their announcement of candidacy for another office because injury was the “obstacle to [their] candidacy” for a new office, not the fact that they would have been elected to a new office but for the law’s prohibition); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 281 n. 14 (1978) (holding twice-rejected white male applicant had standing to challenge medical school’s admissions program which reserved 16 of 100 places in the entering class for minority applicants, because the requisite “injury” was plaintiff’s inability to *compete* for all 100 places in the class, simply because of his race, not that he would have been *admitted* in the absence of the special program). Lindsay has adequately alleged an injury because she cannot compete for a position on BSU’s women’s cross-country and track teams in the first place, regardless of whether or not she would ultimately make such

teams.¹⁵

In addition, even if BSU risked civil liability and allowed Lindsay to try out for, or join, a women’s team, it is not speculative to suggest Lindsay’s sex would be disputed. Lindsay is a nineteen-year-old transgender woman who has bravely become the public face of this litigation, and, in doing so, has captured the attention of local and national news. *See, e.g.,* James Dawson, *Idaho Transgender Athlete Law To Be Challenged in Federal Court*, <https://www.boisestatepublicradio.org/post/idaho-transgender-athlete-law-be-challenged-federal-court#stream/0> (Apr. 15, 2020); Julie Kliegman, SPORTS ILLUSTRATED, *Idaho Banned Trans Athletes from Women’s Sports. She’s Fighting Back*, <https://www.si.com/sports-illustrated/2020/06/30/idaho-transgender-ban-fighting-back> (June 30, 2020); Roman Stubbs, THE WASHINGTON POST, *As transgender rights debate*

¹⁵ Citing *Braunstein v. Arizona Dep’t of Transp.*, 683 F.3d 1177, 1185 (9th Cir. 2012), Defendants argue that even where the government discriminates on the basis of a protected category, only those who are “personally denied equal treatment have a cognizable injury under Article III.” Dkt. 59, at 3. In *Braunstein*, the Ninth Circuit considered a white male engineer’s lawsuit alleging the Arizona Department of Transportation violated his right to equal protection by giving general contractors a financial incentive to hire minority-owned subcontractors. *Braunstein*, 683 F.3d at 1184. Braunstein alleged that these preferences prevented him, as a non-minority business owner, from competing for subcontracting work on an equal basis. *Id.* at 1185. However, Braunstein did not submit a quote or attempt to secure subcontract work from any of the prime contractors who bid on the government contract. *Id.* at 1185. The Ninth Circuit held that because Braunstein’s surviving claim was for damages, rather than for declaratory and injunctive relief, Braunstein had to show more than that he was “able and ready” to seek subcontracting work. *Id.* at 1186. The Court determined Braunstein had not established an injury for purposes of his claim for damages because Braunstein had “done essentially nothing to demonstrate that he [was] in a position to compete equally with the other contractors.” *Id.* By contrast, Lindsay seeks declaratory and injunctive relief, and has demonstrated she is “able and ready” to join the BSU cross-country and track teams. *Id.* at 1186 (citing *Gratz v. Bollinger*, 539 U.S. 244, 261–62 (2003) (holding plaintiff had standing to challenge university’s race-conscious transfer admissions policy, even though he never applied as a transfer student, because he demonstrated that he was “able and ready to do so.”) Lindsay has adequately alleged that she is ready and able to join BSU’s women’s cross-country and women’s track teams and also that she is in a position to compete with other students who try out for BSU’s women’s track and cross-country teams. Specifically, Lindsay alleges she has been training hard to qualify for such teams, that she is a life-long runner who competed on track and cross-country teams in high school, and that she will try out for the cross-country team in fall 2020 and track team in spring 2020 if BSU allows her to do so. Dkt. 1, at ¶¶ 6, 25, 33. Such allegations are sufficient to establish standing for Lindsay’s claims. *Braunstein*, 683 F.3d at 1185–86.

spills into sports, one runner finds herself at the center of a pivotal case

<https://www.washingtonpost.com/sports/2020/07/27/idaho-transgender-sports-lawsuit-hecox-v-little-hb-500/> (July 27, 2020).¹⁶

In addition to such headlines, prominent athletes, including Billie Jean King and Megan Rapinoe, have, due to the Act, called for the NCAA to move men’s basketball tournament games scheduled to be played in Idaho next March to another state. *Id.* On the other side of the coin, advocates in favor of the Act, including 300 high-profile female athletes, signed a letter asking the NCAA not to boycott Idaho over passing the Act. Ellie Reynolds, THE FEDERALIST, *More Than 300 Female Athletes, Olympians Urge NCAA to Protect Women’s Sports*, <https://thefederalist.com/2020/07/30/more-than-300-female-athletes-olympians-urge-ncaa-to-protect-womens-sports/> (July 30, 2020). In light of the extensive attention this case has already received, and widespread knowledge that Lindsay is transgender, it is untenable to suggest she would *not* be subject to a sex dispute if BSU allowed her the opportunity to try out for, or join, a women’s team.¹⁷

Defendants also argue Lindsay lacks standing because she has not alleged facts to

¹⁶ The Court takes judicial notice of such articles because they are matters in the public realm. “When a court takes judicial notice of publications like websites and newspaper article, the court merely notices what was in the public realm at the time, not whether the contents of those articles were in fact true.” *Prime Healthcare Services, Inc. v. Humana Ins. Co.*, 230 F. Supp. 3d 1194, 1201 (citing *Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir. 1999)). The Court references such articles solely to illustrate that this case has received local and national attention, and not for the truth of the contents of the articles. *Id.*

¹⁷ As mentioned, BSU cannot allow Lindsay this opportunity under section 33-6203(2) of the Act. Given BSU’s awareness that Lindsay is a transgender woman, the Act directs that BSU “shall not” permit her to join the women’s team, regardless of whether a third-party challenges Lindsay’s sex. Idaho Code § 33-6203(2).

show she could compete under the current NCAA rules, such as dates showing she has undergone hormone treatment for one calendar year prior to participation on women's sports teams. However, Lindsay alleged in the Complaint that she is being treated with both testosterone suppression and estrogen, and that she is eligible to compete in women's sports in fall 2020 under existing NCAA rules for inclusion of transgender athletes. Dkt. 1, at ¶¶ 29, 32. Because the Court must accept such allegations as true and construe them in Lindsay's favor, Lindsay has adequately alleged she is eligible to participate on women's teams under the NCAA's regulations despite the Complaint's omission of the exact dates of her treatment. *De la Cruz*, 582 F.2d at 62.

Nonetheless, Defendants claim Lindsay has not adequately alleged she is otherwise eligible to play on women's teams because the U.S. Department of Education Office of Civil Rights ("OCR") recently issued a Letter of Impending Enforcement Action ("OCR Letter") opining that allowing transgender high school athletes in Connecticut to participate in women's sports violated the rights of female athletes under Title IX.¹⁸ Dkt. 40-1, at 7 n. 1, 10 n. 2. However, the OCR Letter itself states that "it is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." Dkt. 41, at 68. Because it is expressly not the OCR's formal policy and may not be cited or construed as such, the

¹⁸ The OCR Letter was filed by the OCR in Connecticut court cases involving claims by three high school student-athletes and their parents due to the Connecticut Interscholastic Athletic Conference's policy of permitting transgender women to compete on women's teams. Dkt. 41, at 25. Although the parties do not raise the issue, the Court takes judicial notice of the OCR Letter, filed by Defendants in support of their Opposition to the Motion for Preliminary Injunction, and cited by Defendants in their Motion to Dismiss, because the Court may take judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

OCR Letter does not render Lindsay ineligible from participating on women's teams. In addition, the OCR Letter is also of questionable validity given the Supreme Court's recent holding in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (clarifying that the prohibition on discrimination because of sex in Title VII includes discrimination based on an individual's transgender status); *see also Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (interpreting Title IX provisions in accordance with Title VII). The Court accordingly rejects Defendants' claim that Lindsay may not otherwise be eligible to play women's sports due to the OCR Letter.

Defendants also imply Lindsay cannot establish an injury in fact because the State Board of Education has not yet promulgated regulations governing third-party sex verification disputes. Dkt. 40-1, at 3, 6. Regardless of how they are written, any future regulations cannot alter the Act's categorical bar against transgender women participating on women's teams. Under the Act, women's teams "shall not be open to students of the male sex." *Id.* at § 33-6203(2). Future regulations could not alter this mandate without eliminating a key component of the Act by overriding specific language of the statute.

In essence, Defendants' argument regarding Lindsay's standing is essentially a claim that Lindsay has not suffered any injury because there is no guarantee the Act will be enforced. Defendants have not identified any "principal of standing," or "any case that stands for the proposition that [the Court] should deny standing on the assumption that the regulated entity under the statute will simply violate the law and not do what the law says." Dkt. 62, at 52:5–9. In fact, the Supreme Court rejected a similar argument by the State of Georgia in *Turner v. Fouche*, 396 U.S. 346, 361 (1970). In *Turner*, the Supreme Court held

a non-property owner had standing to raise an, equal protection claim against a state law requiring members of the board of education to be property owners. The Court addressed Georgia's contention that the non-property owner lacked standing to challenge the law in the absence of evidence that the law had been enforced, noting: "Georgia also argues the question is not properly before us because the record is devoid of evidence that [the property ownership requirement] has operated to exclude any [non-property owners] from the Taliaferro County board of education." *Id.* at 361 n. 23. The *Turner* Court neatly rejected this contention, stating, "Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law." *Id.* Moreover, given the civil liability and significant damages any regulated entity in Idaho now faces if they allow a transgender woman to participate on woman's sport teams, the Act's enforcement is essentially guaranteed. Idaho Code § 33-6205.

In addition to the injury of being barred from playing women's sports, Lindsay also claims an injury of being forced to turn over private medical information to the government if her sex was challenged. Dkt. 1, at ¶¶ 157, 168. Defendants argue this injury is "not based in [the Act's] text, which requires a 'health examination and consent form or other statement signed by the student's personal health provider' when there is a dispute, and does not require that the health care provider expound further or disclose any underlying health information." Dkt. 40-1, at 8. However, if BSU violates the Act by allowing Lindsay to participate in women's sports and another student challenges Lindsay's sex, the Act also provides a health care provider can verify Lindsay's sex relying *only* on one or more of the following: her reproductive anatomy, genetic makeup, or normal endogenously produced

testosterone levels. Idaho Code § 33-6203(3). Evaluating any of these criteria would require invasive examination and/or testing and would also necessarily reveal extremely personal health information such as Lindsay’s precise genetic makeup. Moreover, it would be impossible for Lindsay to demonstrate a “biological sex” permitting participation on a women’s team based on any of these three criteria. Dkt. 55, at 7–8.

Defendants counter that Plaintiffs’ concerns are overblown and that the verification process is not as invasive as Plaintiffs make it out to be. They suggest a health care provider may verify a student’s “biological sex” based on something other than the three expressly listed criteria due to the “health examination and consent form or other statement provision” language outlined in the Act. Dkt. 40-1, at 3 (claiming that the Act does not require the health care provider “to use the three specified factors in providing an ‘other statement’ verifying ‘the students biological sex.’”) During oral argument, defense counsel confirmed that Lindsay can play on female sport’s teams if her health care provider simply signs an “other statement” stating that Lindsay is female. Dkt. 62, at 66:21-25; 67:4–9.

It is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citations omitted); *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute.” (internal quotation marks omitted)); *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (it is a “longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.”)

If the Court were to adopt Defendants' aforementioned construction of the statute, the entire legislative findings and purpose section of the Act would be rendered meaningless. Idaho Code § 33-6202 (explaining inherent physiological differences put males at an advantage in sports, requiring sex-specific women's teams to promote sex equality). So too would the Act's mandate that athletic teams or sports designated for females, women, or girls "shall not be open to students of the male sex." *Id.* at § 33-6203(2). Defendants' contention that Lindsay would not be subject to the invasive and potentially cost-prohibitive medical examination codified in Idaho Code section 33-6203(3) because her health care provider could simply verify that she is female is impossible to reconcile with the rest of the Act's provisions.¹⁹ As such, Lindsay has also alleged a non-speculative risk of suffering an invasion of privacy if BSU violated the law and allowed her to try out for the women's cross-country or track team.

ii. Jane

Jane has also alleged an injury in fact because, by virtue of the Act's passage, she is now subject to disparate, and less favorable, treatment based on sex. As a female student athlete, Jane risks being subject to the "dispute process," a potentially invasive and expensive medical exam, loss of privacy, and the embarrassment of having her sex challenged, while male student athletes who play on male teams do not face such risks. The Supreme Court has long recognized that unequal treatment because of gender like that

¹⁹ During oral argument, Plaintiffs' counsel stated that they would be happy to consider entering into a consent decree if Defendants were willing to agree that this interpretation of the statute was authoritative and binding in Idaho. Dkt. 62, at 70:16–21. Defendants did not respond to this suggestion, and the parties have not notified the Court of any subsequent talks regarding a potential consent decree.

codified by the Act “is an injury in fact” sufficient to convey standing. *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (finding plaintiff claimed a judicially cognizable injury where a statute subjected him to unequal treatment solely because of his gender); *Davis v. Guam*, 785 F.3d 1311, 1315 (9th Cir. 2015) (“[Plaintiff]’s allegation—that Guam law provides a benefit to a class of persons that it denies him—is ‘a type of personal injury [the Supreme Court] has long recognized as judicially cognizable.’”) (quoting *Heckler*, 465 U.S. at 738).

The male appellee in *Heckler* challenged a provision of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits. *Heckler*, 465 U.S. at 731–35. However, the statute also “prevent[ed] a court from redressing this inequality by increasing the benefits payable to” male workers. *Id.* at 739. Thus, the lawsuit couldn’t have resulted in any tangible benefit to plaintiff. The Supreme Court nevertheless held that appellee’s claimed injury of being subject to unequal treatment solely because of his gender was “a type of personal injury we have long recognized as judicially cognizable.” *Id.* at 738. The *Heckler* Court explained plaintiff had standing to challenge the provision because he sought to vindicate the “right to equal treatment,” which isn’t necessarily “coextensive with any substantive rights to the benefits denied the party discriminated against.” *Id.* at 739. In *Davis*, the Ninth Circuit read *Heckler* “as holding that equal treatment under law is a judicially cognizable inquiry that satisfies the case or controversy requirement of Article III, even if it brings no tangible benefit to the party asserting it.” *Davis*, 785 F.3d at 1315.

As a cisgender girl who plays on the Boise High soccer team and who will run track on the girl’s team in the spring, Jane is subject to worse and differential treatment than are

similarly situated male students who play for boy's teams in Idaho.²⁰ Jane has suffered an injury because she is subject to disparate rules for participation on girls' teams, while boys can play on boys' teams without such rules. *Id.* (holding Guam's alleged denial of equal treatment on the basis of race through voter registration law was a judicially cognizable injury); *see also Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012) (holding that Latino plaintiffs had standing to challenge policy targeting Latinos in connection with traffic stops based on their "[e]xposure to this policy while going about [their] daily li[ves]," even though "the likelihood of a future stop of a particular individual plaintiff may not be 'high'") (citation omitted).²¹ That Jane has not had her sex challenged does not change the fact that she is subject to different, and less favorable, rules for participation on girls' teams that similarly situated boys are not.

In addition to being subject to disparate treatment on the basis of her sex, Jane reasonably fears that her sex will be disputed and that she will suffer the further injury of having to undergo the sex verification process. Dkt. 1, ¶¶ 46–50. In *Krottner v. Starbucks*

²⁰ The Court uses the specific terms "girl" and "girl's teams" for Jane, and "transgender woman" and "woman's teams" for Lindsay, due to their respective ages and year in school. The terms are generally interchangeable, however, since the Act applies to nearly all girls and women student athletes in Idaho. Idaho Code § 33-6203(1).

²¹ Defendants suggest *Melendres* is inapposite because each of the plaintiffs in *Melendres* had been subjected to targeted traffic stops, and because plaintiffs presented evidence that the defendants had an ongoing policy of targeting Latinos. Dkt. 59, at 2–3 n. 1. Defendants argue this case is distinguishable because no one has challenged either Plaintiff's sex, and because Defendants have no policy or practice to mount such challenges in the future. *Id.* This argument ignores that regulated entities, such as BSU and Boise High, are statutorily required to ensure that transgender women or girls do not play on female sports' teams, are also responsible for resolving sex disputes, and risk significant civil liability if they fail to comply with the statute. Idaho Code §§ 33-6203(3), 6205. The requirements the statute itself places on regulated entities is evidence that the policy will be enforced.

Corp., 628 F.3d 1139 (9th Cir. 2010), the Ninth Circuit addressed the Article III standing of victims of data theft where a thief stole a laptop containing “the unencrypted names, addresses, and social security numbers of approximately 97,000 Starbucks employees.” *Id.* at 1140. Some employees sued, and the only harm that most alleged was an “increased risk of future identity theft.” *Id.* at 1142. There was no evidence that the thief had actually used plaintiffs’ specific identities. The Ninth Circuit determined this was sufficient for Article III standing, holding that the plaintiffs had “alleged a credible threat of real and immediate harm” because the laptop and their personal information had been stolen. *Id.* at 1143.

Jane also alleges a credible threat of being forced to undergo a sex verification process. Jane has identified why she is more likely than other female athletes to be subjected to the dispute process. Specifically, Jane “worries that one of her competitors may decide to ‘dispute’ her sex” because she “does not commonly wear skirts or dresses,” “most of her closest friends are boys,” she has “an athletic build,” and because “people sometimes think of her as masculine.” Dkt. 1, at ¶¶ 46–47. Further, even in the absence of Jane’s specific characteristics, her general fear of being subjected to the dispute is credible because the Act currently provides that essentially anyone can challenge another female athlete’s sex and protects any challenger from adverse action regardless of whether the dispute is brought in good faith or simply to bully or harass. Although, as Defendants note, the State Board of Education may promulgate regulations that narrow the Act’s dispute process, Jane risks being subject to the currently unlimited process as soon as she tries out for Boise High’s soccer team on or around August 17, 2020.

Under the Act's dispute process, Jane may have to verify that she is female in order to play girls' sports, and, given the clear meaning of the statute, such verification must be based on her reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels. Idaho Code § 33-6203(3). As discussed above, Defendants' claim that Jane can simply provide a health examination and consent form from her sports physical, or "other statement" from her personal health care provider, appears impossible to reconcile with the clear language of the Act. Dkt. 40-1, at 7. Jane's risk of being forced to undergo an invasion of privacy simply to play sports represents an "injury in fact" sufficient to confer standing. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief.") (internal quotation marks, alterations, and citations omitted).

Because it finds both Lindsay and Jane have alleged an injury in fact, the Court turns to Defendants' ripeness argument.

b. Ripeness²²

Defendants also seek dismissal because this case is purportedly unripe. Ripeness is a question of timing. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). It is a doctrine "designed to prevent the courts, through avoidance of

²² Standing and ripeness are closely related. *Colwell v. Dep't of Health and Human Services*, 558 F.3d 1112, 1123 (9th Cir. 2009). "But whereas standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* that litigation may occur." (emphasis in original) (internal quotation marks and citations omitted).

premature adjudication, from entangling themselves in abstract disagreements.” *Id.* (internal quotation marks and citation omitted).

The “ripeness inquiry contains both a constitutional and prudential component.” *Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). As Defendants acknowledge, the constitutional component of the ripeness inquiry is generally coextensive with the injury element of standing analysis. Dkt. 40-1, at 9; *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 n. 2 (9th Cir. 2003) (noting, “the constitutional component of ripeness is synonymous with the injury-in-fact prong of the standing inquiry”); *see also Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 81 (1978) (finding that an “injury in fact” satisfies the constitutional ripeness inquiry). Defendants’ constitutional ripeness arguments fail for the same reasons that their standing arguments fail.

The prudential component of ripeness “focuses on whether there is an adequate record upon which to base effective review.” *Portman*, 995 F.2d at 903. In evaluating prudential ripeness, the Court must consider “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Thomas*, 220 F.3d at 1141. Ultimately, prudential considerations of ripeness are discretionary. *Id.* at 1142.

i. Fitness for Judicial Review

The Supreme Court and Ninth Circuit have recognized the difficulty of deciding constitutional questions without the necessary factual context. *See, e.g., W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 313 (1967); *Thomas*, 220 F.3d at 1141. In *Thomas*, several landlords challenged an Alaska statute that banned discrimination on the basis of

marital status, arguing the statute violated their First Amendment rights. 220 F.3d at 1137. For instance, the landlords claimed, *inter alia*, that the City's prohibition on any advertising referencing a marital status preference violated their right to free speech. The Ninth Circuit found the free speech claim was not ripe because no "concrete factual scenario" demonstrated how the law, as applied, infringed the landlords' constitutional rights. *Id.* at 1141. Specifically, the landlords had never advertised or published a reference to marital status preference in the past in connection with their rental real estate activities, nor had expressed any intent of doing so in the future. *Id.* at 1140 n. 5. On this record, the Ninth Circuit held the alleged free speech violation did not rise to the level of a justiciable controversy. *Id.*

Here, unlike in *Thomas*, Plaintiffs' claims are concrete and Plaintiffs clearly delineate how the Act harms them in their specific circumstances. Specifically, Jane is a life-long student athlete who will try out for Boise High School's girls' soccer team in August 2020. Because of various identified traits that have led others to classify her as masculine, Jane reasonably fears she may be subject to a sex dispute challenge. That a specific individual has not threatened such challenge is immaterial because the Act has never been in effect during a school sport's season and the sex dispute challenge has thus never before been available, and, by virtue of being a female student athlete, Jane risks being subject to a sex dispute challenge as soon as she tries out for Boise High's girls' soccer team. Lindsay is also a life-long athlete who has alleged a desire and intent to try out for BSU's women's cross-country team this fall. If BSU permitted her to try out, Lindsay would meet the rules under the NCAA, and the rules in Idaho prior to the Act's

passage, to participate by the time BSU will have its first NCAA meet. However, Lindsay is now categorically barred from trying out for the cross-country team under the Act.

Defendants have not addressed such as-applied challenges and have not identified any factual questions that preclude consideration of such challenges at this juncture.²³

Further, legal questions that require little factual development are more likely to be ripe. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). The issues Lindsay and Jane raise are primarily legal: whether the Act violates the Constitution and Title IX in light of its categorical exclusion of transgender women and girls from school sports and its sex-verification scheme for all female student athletes. As such, the Act's legality involves a "pure question of law" and Plaintiffs claims are fit for judicial review now. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996) (finding claims were ripe and issue was purely legal where organization which arranged trips to Cuba challenged regulation restraining right to travel to Cuba, even though organization had not applied for, and had not been denied, the specific license required under regulation).

ii. Hardship to the Parties should the Court Withhold Consideration

When a plaintiff challenges a statute or regulation, hardship is more likely if the

²³ Although Defendants again highlight that the Department of Education has not yet established the rules and regulations applicable to the sex verification process, Defendants do not articulate how the forthcoming rules and regulations could possibly change the Act's core prohibitions and requirements; could allow transgender women athletes to participate on women's teams; could exempt a girl or woman whose sex is disputed from the verification process; or could add to the narrow list of criteria that can be used to verify a girl's or woman's biological sex. Defendants are simply mistaken that impending regulations could possibly alleviate Plaintiffs' concerns, or that such rules must be established before Lindsay can be excluded from women's sports and before Jane can be subjected to a sex verification challenge.

statute has a direct effect on the plaintiff's daily life. *Texas v. United States*, 523 U.S.296, 301 (1998). Hardship is less likely if the statute's effect is abstract. *Id.* at 302 (rejecting argument that ongoing "threat to federalism" could constitute hardship).

Here, the Court is satisfied that the Plaintiffs stand to suffer a hardship should the Court withhold its decision. If the Court declines jurisdiction over this dispute, Lindsay will be categorically barred from participating on BSU's women's teams this fall and will also lose at least a season of NCAA eligibility, which she can never get back. Dkt. 1, at ¶ 34. Similarly, as soon as she tries out for fall soccer, Jane is subject to disparate rules and risks facing a sex verification challenge. If the Court withholds its decision, both Plaintiffs risk being forced to endure a humiliating dispute process and/or invasive medical examination simply to play sports.²⁴ Given the reasonable threat that the Act will be enforced within days of this decision, as well as the hardship such enforcement will impose on Lindsay and Jane, the Court exercises its discretion to accept jurisdiction over this dispute.

c. Facial Challenge²⁵

²⁴ Lindsay will not have even this choice unless BSU violates the Act, exposing itself to civil suit, and allows her to join the women's team.

²⁵ "Facial and as-applied challenges do not enjoy a neat demarcation, but conventional wisdom defines facial challenges as 'ones seeking to have a statute declared unconstitutional in all possible applications,' while as-applied challenges are 'treated as the residual, although ostensibly preferred and larger, category.'" *Standing--Facial Versus As Applied Challenges--City of Los Angeles v. Patel*, 129 HARV. L. REV. 241, 246 (2015) ("*Facial Versus As Applied Challenges*") (quoting Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 923 (2011)). However, as many scholars note, the distinction, if any, between a facial and an as-applied challenge is difficult to explain because there is a disconnect between what the Supreme Court has outlined and what happens in actual practice. *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 247; see also Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 882 (2005).

Finally, Defendants argue Plaintiffs' facial challenges fail as a matter of law because the Act's provisions can be constitutionally applied. Facial challenges are "disfavored" because they: (1) "raise the risk of premature interpretation of statutes on factually barebone records;" (2) run contrary "to the fundamental principle of judicial restraint"; and (3) "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks and citations omitted). As such, the Supreme Court has held, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances* exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). As previously discussed, the Ninth Circuit has held that an Arizona policy of excluding boys from playing on girls' sports teams was constitutionally permissible. *Clark*, 659 F.2d at 1131. Thus, Defendants argue the Act can clearly be constitutionally applied to cisgender boys, and Plaintiffs' facial challenges fail.

Plaintiffs counter that the *Salerno* language does not represent the Supreme Court's standard for adjudicating facial challenges. Dkt. 55, at 17 (citing *City of Chicago v. Morales*, 527 U.S. 41, 51–52, 55 n. 22 (1999) (plurality) (finding an ordinance was facially invalid even though it also had constitutional applications and observing that, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.")). As Plaintiffs point out, *Salerno*'s "no set of circumstances" test

was called into question by the Supreme Court in *Morales* and has been the subject of considerable debate. *Morales*, 527 U.S. at 55 n. 22; *see also Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (stating that the “dicta in *Salerno* does not accurately characterize the standard for deciding facial challenges[.]”); *Washington State Grange*, 552 U.S. at 449 (noting that some Members of the Supreme Court have criticized the *Salerno* formulation); *Almerico v. Denney*, 378 F. Supp. 3d 920, 924–926 (D. Idaho 2019) (outlining debate regarding viability of *Salerno*’s “no set of circumstances” test); *Does 1-134 v. Wasden*, 2018 WL 2275220, at *4 (D. Idaho May 17, 2018) (noting the ongoing debate regarding *Salerno* and “what types of constitutional claims would warrant a facial challenge, when a facial challenge becomes ripe, and the level of scrutiny that should be applied to the challenged statute”).

Notwithstanding such controversy, the Ninth Circuit has consistently held that *Salerno* is the appropriate test for most facial challenges.²⁶ *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (explaining that the Ninth Circuit will not reject *Salerno* in contexts other than the First Amendment or abortion “until the majority of the Supreme Court clearly directs us to do so.”); *Almerico*, 378 F. Supp. 3d at 925 (“Time and again, plaintiffs have attempted to escape the effect of the *Salerno* standard, only to see their path foreclosed by the Ninth Circuit.”). The Supreme Court also continues to apply *Salerno* to most facial challenges, albeit with some limited exceptions.

²⁶ Exceptions to *Salerno*’s “no set of circumstances” test have been developed but are not applicable here. For instance, *Salerno* does not apply to certain facial challenges to statutes under the First Amendment. *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1026 (9th Cir. 1999). The Supreme Court also held *Salerno*’s “no set of circumstances” test does not apply to “undue burden” challenges to statutes regulating abortion in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992).

See, e.g., Washington State Grange, 552 U.S. at 449 (holding a plaintiff can succeed on a facial challenge only by establishing that no set of circumstances exists under which the law could be valid).

However, Plaintiffs suggest an exception to the *Salerno* test, recently applied by the Supreme Court in *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015), is applicable. In *Patel*, the Supreme Court cited *Salerno* with approval, but also explained that when assessing whether a statute meets the “no set of circumstances” standard, the Supreme Court “has considered only applications of the statute in which it actually authorizes or prohibits conduct.” *Id.* In addressing a facial challenge to a statute authorizing warrantless searches, the *Patel* Court held the “proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.” *Id.* (quoting *Casey*, 505 U.S. at 894). Plaintiffs argue a facial challenge is appropriate here because transgender and cisgender girls and women, are those for “whom the law is a restriction,” while the Act is “irrelevant” to cisgender boys. Dkt. 55, at 18 (quoting *Patel*, 576 U.S. at 418).

While the Court recognizes *Patel* implied that the “method for defining the relevant population” test may apply to all facial challenges, *Patel* unfortunately did not explain when such test is applicable, whether it is appropriate in contexts other than abortion or the Fourth Amendment, or how to distinguish those cases where the test is appropriately used for facial adjudication from others where it is not. Nothing in the *Patel* opinion “even explains why *Casey*’s method of defining the relevant population to which a statute applies should be transplanted to adjudicate Fourth Amendment unreasonableness claims,

especially when *Casey* was confined to the abortion context before *Patel*.” *Facial Versus As Applied Challenges*, 129 HARV. L. REV. at 250. Plaintiffs do not cite, and the Court has not located, any subsequent Ninth Circuit or Supreme Court case where *Patel*’s method for defining the relevant population has been used outside the abortion or Fourth Amendment context. Absent such guidance, the Court declines to extend *Patel* to create a new exception to *Salerno*’s “no set of circumstances test” here.

Plaintiffs also suggest that a motion to dismiss is not the proper vehicle for Defendants’ opposition to their facial challenge, as the distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010). However, *Citizens United* involved a facial challenge to a federal statute which purportedly violated plaintiffs’ First Amendment rights. As noted *supra*, note 26, *Salerno* does not apply to facial challenges under the First Amendment. *Lawall*, 180 F.3d at 1026. As such, *Citizens United* appears inapplicable to cases where, as here, Plaintiffs facial challenges do not involve the First Amendment.

Further, the District of Idaho has frequently dismissed facial challenges at the Motion to Dismiss stage under *Salerno*, including facial challenges brought under the Fourteenth Amendment. *See, e.g., Almerico*, 378 F. Supp. 3d at 926 (dismissing facial due process and equal protection challenge to Idaho statute requiring any healthcare directive executed by women in Idaho to contain provision rendering directive without force during pregnancy); *Williams v. McKay*, 2020 WL 1105087, at *5 (D. Idaho March 6, 2020) (dismissing prisoner’s facial First Amendment challenge to prison’s grievance policy);

Wasden, 2018 WL 2275220 at *18 (dismissing all facial constitutional challenges to Idaho’s Sexual Offender Registration and Community Right-to-Know Act).

In sum, the Court is not convinced an exception to *Salerno* applies to Plaintiffs’ facial Fourteenth Amendment challenges and will dismiss such claims. The Court will not dismiss Plaintiffs’ as-applied Fourteenth Amendment challenges to the Act.²⁷

C. Motion for Preliminary Injunction (Dkt. 22)

1. Legal Standard

Injunctive relief “is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurack v. Armstrong*, 520 U.S. 968, 972 (1997)). A party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *Id.* at 20. Where, as here, “the government is a party, these last two factors merge.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nkhen v. Holder*, 556 U.S. 418, 436 (2009)).

²⁷ Plaintiffs also bring facial challenges under the Fourth Amendment. Given the confusion created by *Patel* and uncertainty as to whether *Patel* applies here, the Court will deny dismissal of Plaintiffs’ facial Fourth Amendment challenges without prejudice. However, even if the Court later determines that all of Plaintiffs’ facial challenges fail, the Court rejects Defendants’ suggestion that if the Court dismisses all facial challenges, all of Plaintiffs’ other requests for relief, including all requests for injunctive relief, should be dismissed. Dkt. 59, at 8. Plaintiffs seek preliminary and permanent injunctive relief enjoining enforcement of the Act both facially and as applied. Dkt. 1, at 53 (Prayer for Relief, paragraph D, requesting injunctive relief “as discussed above” which includes reference to Plaintiffs’ as-applied challenges in paragraphs A and B). Dismissal of Plaintiffs’ facial challenges does not require dismissal of their requests for injunctive relief.

A preliminary injunction can take two forms. A prohibitory injunction prohibits a party from taking action and “preserve[s] the status quo pending a determination of the action on the merits.” *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988). A mandatory injunction “orders a responsible party to take action.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). A mandatory injunction ““goes well beyond simply maintaining the status quo,”” requires a heightened burden of proof, and is ““particularly disfavored.”” *Marlyn Nutraceuticals, Inc. v. MucosPharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quoting *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1980)). In general, mandatory injunctions ““are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.”” *Id.* (quoting *Anderson*, 612 F.2d at 111).

While the parties do not address the issue, the relevant “status quo” for purposes of an injunction “refers to the legally relevant relationship between the parties before the controversy arose.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (emphasis in original); *see also Regents of Univ. of California v. Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) (for purposes of injunctive relief, the status quo means “the last uncontested status which preceded the pending controversy”) (internal quotation marks and citation omitted). Here, Plaintiffs’ motion for preliminary injunction was filed to contest the enforceability of H.B. 500—Idaho’s new Act. The status quo, therefore, is the policy in Idaho prior to H.B.500’s enactment. Injunctions that prohibit enforcement of a new law or policy are prohibitory, not mandatory. *Arizona Dream Act*, 757 F.3d at 1061; *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179

F.3d 725, 732 n. 13 (9th Cir. 1999) (requested preliminary injunction against enforcement of new zoning ordinance was not subject to heightened burden of proof since relief sought was prohibitory injunction that preserved the status quo pending a decision on the merits). Thus, if the Court grants Plaintiffs' preliminary injunction, it will be issuing a prohibitory injunction to preserve the status quo pending trial on the merits, rather than forcing Defendants to take action.

2. *Analysis*

a. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated people be treated alike. *City of Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Equal protection requirements restrict state legislative action that is inconsistent with core constitutional guarantees, such as equality in treatment. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). However, the Fourteenth Amendment's "promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has attempted to reconcile this reality with the equal protection principle by developing tiers of judicial scrutiny. *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho) ("*Latta I*"), *aff'd*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) ("*Latta II*"). "The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the classification." *Latta I*, 19 F. Supp. 3d at 1073.

When a state restricts an individual's access to a fundamental right, the policy must withstand strict scrutiny, which requires that the government action serves a compelling purpose and that it is the least restrictive means of doing so. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). The Supreme Court has recognized that the Constitution protects a number of fundamental rights, including the right to privacy concerning consensual sexual activity, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the right to marriage, *Obergefell*, 135 S. Ct. at 2599, and the right to reproductive autonomy, *Eisenstadt v. Baird*, 405 U.S. 438, 455 (1972). Access to interscholastic sports is not, however, a constitutionally recognized fundamental right. *See, e.g., Walsh v. La. High Sch. Athletic Ass'n*, 616 F.2d 152, 159–60 (5th Cir. 1980) (explaining that a student's interest in playing sports "amounts to a mere expectation rather than a constitutionally protected claim of entitlement[.]").

When a fundamental right is not at stake, a court must analyze whether the government policy discriminates against a suspect class. *Cleburne*, 473 U.S. at 440 (identifying race, alienage, and national origin as suspect classifications vulnerable to pernicious discrimination). Because government policies that discriminate on the basis of race or national origin typically reflect prejudice, such policies will survive only if the law survives strict scrutiny. *Id.* Strict scrutiny review is so exacting that most laws subjected to this standard fail, leading one former Supreme Court Justice to quip that strict scrutiny review is "strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980).

Statutes that discriminate on the basis of sex, a "quasi-suspect" classification, need

to withstand the slightly less stringent standard of “heightened” scrutiny.²⁸ *Craig v. Boren*, 429 U.S. 190, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“*VMI*”). To withstand heightened scrutiny, classification by sex “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig*, 429 U.S. at 197. “The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment.” *Latta I*, 19 F. Supp. 3d at 1073 (citing *VMI*, 518 U.S. at 533).

The District of Idaho determined transgender individuals qualify as a quasi-suspect class in *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1143–1145 (2018) (“*Barron*”).²⁹ While not specifically stating that transgender individuals constitute a quasi-suspect class, the Ninth Circuit has also held that heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski v. Trump*, 926 F.3d 1180, 1201 (2019). Further, although in the context of Title VII, the Supreme Court has, as mentioned, recently stated, “it is impossible to discriminate against a person for being . . . transgender

²⁸ Heightened scrutiny is also referred to as “intermediate scrutiny.” See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court uses the term “heightened” scrutiny for consistency.

²⁹ As the *Barron* Court explained, the Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect: (1) when the class has been “historically subjected to discrimination;” (2) has a defining characteristic bearing no “relation to ability to perform or contribute to society;” (3) has “obvious, immutable, or distinguishing characteristics;” and (4) is “a minority or is politically powerless.” *Id.* at 1144 (quoting *United States v. Windsor*, 570 U.S. 744 (2003)). The *Barron* Court determined transgender individuals meet each of these criteria. *Id.* This test has also been employed by district courts in other states to find transgender people are a quasi-suspect class. For instance, in *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y.), the court determined: (1) transgender individuals have a history of persecution and discrimination and, moreover, “this history of persecution and discrimination is not yet history”; (2) transgender status bears no relation to ability to contribute to society; (3) transgender status is a sufficiently discernible characteristic to define a discrete minority class; and (4) transgender individuals are a politically powerless minority. *Id.* at 139.

without discriminating against that individual based on sex.” *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020).

Finally, the least stringent level of scrutiny is rational basis review. Rational basis review is applied to laws that impose a difference in treatment between groups but do not infringe upon a fundamental right or target a suspect or quasi-suspect class. *Heller v. Doe*, 509 U.S. 312, 319–321 (1993). “[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.” *Id.* at 319 (citations omitted). Rational-basis review in equal protection analysis “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Under rationale basis review, a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 320 (quoting *Beach*, 508 U.S. at 313).³⁰

b. Appropriate level of scrutiny

Plaintiffs argue heightened scrutiny is appropriate in this case because the Act discriminates on the basis of both transgender status and sex. Dkt. 22-1, at 12 (citing *VMI*, 518 U.S. at 55). Defendants acknowledge that the Act may be subject to heightened

³⁰ Yet, even under rational basis review, if a court finds that a classification is “born of animosity toward the class of persons affected,” a law that implicates neither a suspect classification nor a fundamental right may be ruled constitutionally invalid. *Romer*, 517 U.S. at 634; *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down provision of Food Stamp Act that denied food stamps to households of unrelated individuals where the legislative history suggested Congress passed the provision in an effort to prevent “hippie communes” from receiving food stamps). Thus, even under rational basis review, a policy that is primarily motivated by animus will not pass constitutional muster. *Id.* at 534.

scrutiny but suggest the Act does not discriminate on the basis of transgender status or sex because it simply “treats all biological males the same and prohibits them from participating in female sports to protect athletic opportunities for biological females.” Dkt. 41, at 13 n. 8. While contending, “[n]either the Supreme Court nor the Ninth Circuit has recognized ‘gender identity’ as a suspect class,”³¹ the Intervenors argue the Act nonetheless passes heightened scrutiny. Dkt. 46, at 13–18. Finally, the United States contends that even assuming, *arguendo*, that the Act triggers heightened scrutiny, it “readily withstand[s] this form of review.” Dkt. 53, at 5.

Because all parties focus their arguments on the Act’s ability to withstand heightened scrutiny, and because the Court finds heightened scrutiny is appropriate pursuant to *Craig*, 429 U.S. at 197, *VMI*, 518 U.S. at 533, *Barron*, 286 F. Supp. 3d at 1144, and *Karnoski*, 926 F.3d at 1201, the Court applies this level of review.³²

c. Likelihood of Success on the Merits-Lindsay

i. Discrimination based on transgender status

Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term “transgender” and because the Act does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females. Dkt. 41,

³¹ However, as noted *supra*, the Ninth Circuit has explicitly held heightened scrutiny applies if a law or policy treats transgender persons in a less favorable way than all others. *Karnoski*, 926 F.3d at 1201.

³² While maintaining heightened scrutiny is appropriate, Plaintiffs also argue the Act fails even rational basis review. Dkt. 22-1, at 12, 25–26. Because the Court finds provisions of the Act fail to withstand heightened scrutiny, it does not further address this argument.

at 13 n. 8; Dkt. 53, at 13. The Ninth Circuit rejected a similar argument in *Latta II*, 771 F.3d at 468. In *Latta II*, the Ninth Circuit considered defendants' claim that Idaho and Nevada's same-sex marriage bans did not discriminate on the basis of sexual orientation, but rather on the basis of procreative capacity. The Ninth Circuit rebuffed this contention, explaining:

Effectively if not explicitly, [defendants] assert that while these laws may disadvantage some same-sex couples and their children, heightened scrutiny is not appropriate because differential treatment by sexual orientation is an incidental effect of, but not the reason for, those laws. However, the laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized. Whether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination.' Hence, while the procreative capacity distinction that defendants seek to draw could represent a *justification* for the discrimination worked by the laws, it cannot overcome the inescapable conclusion that Idaho and Nevada do discriminate on the basis of sexual orientation.

Id. at 467–68 (emphasis in original) (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).

Similarly, the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity. Hence, while the physiological differences the Defendants suggest support the categorical bar on transgender women's participation in women's sports may justify the Act, they do not overcome the inescapable conclusion that the Act discriminates on the basis of transgender status. *Id.* at 468.

As mentioned, the Ninth Circuit has held that classifications based on transgender status are subject to heightened scrutiny. *Karnoski*, 926 F.3d at 1201. The Court accordingly applies heightened scrutiny to the Act. Under this level of scrutiny, four principles guide the Court’s equal protection analysis. The Court: (1) looks to the Defendants to justify the Act; (2) must consider the Act’s actual purposes; (3) need not accept hypothetical, *post hoc* justifications for the Act; and (4) must decide whether Defendants’ proffered justifications overcome the injury and indignity inflicted on Plaintiffs and others like them. *Latta I*, 19 F. Supp. 3d at 1077. When applying heightened scrutiny, the Court does not adopt the strong presumption in favor of constitutionality or heavy deference to legislative judgments characteristic of rational basis review. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014). Further, under heightened scrutiny review, the Court must examine the Act’s “actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.” *Latta II*, 771 F.3d at 468 (quoting *SmithKline*, 740 F.3d at 483).

ii. The Ninth Circuit’s holding in *Clark*

At the outset, the Court recognizes that sex-discriminatory policies withstand heightened scrutiny when sex classification is “not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 462, 469 (1981) (upholding law that held only males criminally liable for statutory rape because the consequences of teenage pregnancy essentially fall only on girls, so applying statutory rape law solely to men was justified

since men suffer fewer consequences of their conduct). The Equal Protection Clause does not require courts to disregard the physiological differences between men and women. *Michael M.*, 450 U.S. at 481; *Clark*, 695 F.2d at 1131.

As repeatedly highlighted by Defendants, the Intervenors, and the United States (collectively hereinafter the Act's "Proponents"), the Ninth Circuit in *Clark* held that there "is no question" that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" is "a legitimate and important governmental interest" justifying rules excluding males from participating on female teams. *Clark*, 695 F.2d at 1131. In *Clark*, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. *Id.* at 1131. The *Clark* Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing fair and equal opportunities for females to participate in athletics. *Id.* at 1132.

While the Court recognizes and accepts the principals outlined in *Clark*, *Clark's* holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average

physiological differences meant that “males would displace females to a substantial extent” if permitted to play on women’s volleyball teams. *Clark*, 695 F.2d at 1131. These principals do not appear to hold true for women and girls who are transgender.

First, like women generally, women who are transgender have historically been discriminated against, not favored. *See, e.g., Barron*, 286 F. Supp. 3d at 1143–1145. In a large national study, 86% of those perceived as transgender in a K–12 school experienced some form of harassment, and for 12%, the harassment was severe enough for them to leave school. National Center for Transgender Equality, 2015 U.S. Transgender Survey: Idaho State Report 1–2, <https://www.transequality.org/sites/default/files/docs/usts/USTSIDStateReport%281017%29.pdf> (October 2017). According to the same study, 48% of transgender people in Idaho have experienced homelessness in their lifetime, and 25% were living in poverty. *Id.* Rather than a general separation between a historically advantaged group (cisgender males) and a historically disadvantaged group (cisgender women), the Act excludes a historically disadvantaged group (transgender women) from participation in sports, and further discriminates against a historically disadvantaged group (cisgender women) by subjecting them to the sex dispute process. The first justification for the Arizona policy at issue in *Clark* is not present here.

Second, under the Act, women and girls who are transgender will not be able to participate in any school sports, unlike the boys in *Clark*, who generally had equal athletic opportunities. *Clark*, 695 F.2d at 1131; Dkt. 58-3, at ¶¶ 24–28 (explaining that forcing a transgender woman to participate on a men’s team would be forcing her to be cisgender,

which is “associated with adverse mental health outcomes.”); *see also* Dkt. 22-6, ¶¶ 35–37. Participating in sports on teams that contradict one’s gender identity “is equivalent to gender identity conversion efforts, which every major medical association has found to be dangerous and unethical.” Dkt. 58, at 11 (citing Dkt. 58-3, ¶¶ 24–28).³³ As such, the Act’s categorical exclusion of transgender women and girls entirely eliminates their opportunity to participate in school sports—and also subjects all cisgender women to unequal treatment simply to play sports—while the men in *Clark* had generally equal athletic opportunities.

Third, it appears transgender women have not and could not “displace” cisgender women in athletics “to a substantial extent.” *Clark*, 695 F.2d at 1131. Although the ratio of males to females is roughly one to one, less than one percent of the population is transgender. Dkt. 22-1, at 22. Presumably, this means approximately one half of one percent of the population is made up of transgender females. It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women. It appears untenable that allowing transgender women to compete on women’s teams would substantially

³³ The Intervenor’s rely on an expert opinion from Dr. Stephen Levine claiming gender-affirming policies (such as allowing transgender individuals to play on sports teams consistent with their gender identity) are instead harmful to transgender individuals. *See generally*, Dkt. 46-2. However, another judge of this Court previously determined that Dr. Levine is an outlier in the field of gender dysphoria and placed “virtually no weight” on his opinion in a case involving a transgender prisoner’s medical care. *Edmo v. Idaho Dep’t of Corr.*, 258 F. Supp. 3d 1103, 1125 (D. Idaho 2018) (*vacated in part on other grounds in Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019)); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188–89 (N.D. Cal. 2015) (noting Dr. Levine’s expert opinion overwhelmingly relied on generalizations about gender dysphoria, contained illogical inferences, and admittedly included references to a fabricated anecdote). At this stage of the proceedings, the Court accepts Plaintiffs’ evidence regarding the harm forcing transgender individuals to deny their gender identity can cause.

displace female athletes.³⁴

And fourth, it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women. The Court discusses the distinction between physical differences between men and women in general, and physical differences between transgender women who have suppressed their testosterone for one year and women below. However, the interests at issue in *Clark*—Defendants’ central authority—pertained to sex separation in sport generally and are not necessarily determinative here.³⁵

iii. The Act’s justifications

The legislative findings and purpose portion of the Act suggests it fulfills the interests of promoting sex equality, providing opportunities for female athletes to

³⁴ The United States suggests the Ninth Circuit held participation by just one cisgender boy on the girls’ volleyball team would “set back” the “goal of equal participation by females in interscholastic sports.” Dkt. 52, at 10 (citing *Clark by and through Clark v. Arizona Interscholastic Ass’n*, 886 F.2d 1191, 1193 (1989) (“*Clark II*”). The part of *Clark II* the United States references responded to plaintiff’s “mystifying” argument that the Arizona school association had been “wholly deficient in its efforts to overcome the effects of past discrimination against women in interscholastic athletics, and that this failure vitiate[d] its justification for a girls-only volleyball team.” *Id.* The Ninth Circuit noted that it was true that participation in Arizona interscholastic sports was still far from equal. *Id.* In light of this inequity, the *Clark II* Court could not see how plaintiff’s “remedy” of allowing him to play on the girl’s team would help. *Id.* Thus, the *Clark II* Court’s statement regarding participation by one male athlete was in the context of plaintiff’s argument that he should be permitted to play on the girl’s team because there was no justification for women’s teams. *Id.* The *Clark II* Court remained focused on the risk that a ruling in plaintiff’s favor would extend to all boys and would engender substantial displacement of girls in school sports. *Id.* (observing that the issue of “males . . . outnumber[ing] females in sports two to one” in school sports would “not be solved by opening the girls’ team to Clark and other boys.”) (emphasis added); *see also id.* (“Clark does not dispute our conclusion in *Clark I* that ‘due to physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team.’”) (quoting *Clark*, 695 F.2d at 1131) (emphasis added).

³⁵ As Attorney General Wasden advised the legislature before it passed the Act: “The issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in *Clark* and presents issues that courts have not yet resolved.” Letter from Attorney General Wasden to Rep. Rubel (Feb. 25, 2020), <https://www.idahostatesman.com/latest-news/article240619742.ece/BINARY/HB%20500%20Idaho%20AG%20response.pdf>.

demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades. Idaho Code § 33-6202(12). Plaintiffs do not dispute that these are important governmental objectives. They instead argue that the Act is not substantially related to such important governmental interests. At this stage of the litigation, and without further development of the record, the Court is inclined to agree.

(1) Promoting Sex Equality and Providing Opportunities for Female Athletes

As discussed, *supra*, section II.C, the legislative record reveals no history of transgender athletes ever competing in sports in Idaho, no evidence that Idaho female athletes have been displaced by Idaho transgender female athletes, and no evidence to suggest a categorical bar against transgender female athlete's participation in sports is required in order to promote "sex equality" or to "protect athletic opportunities for females" in Idaho. Idaho Code § 33-6202(12); *see* Dkt. 1, at ¶¶ 80–83. Rather than presenting empirical evidence that transgender inclusion will hinder sex equality in sports or athletic opportunities for women, both the Act itself and Proponents' rely exclusively on three transgender athletes who have competed successfully in women's sports.

Specifically, during the entire legislative debate over the Act, the only transgender women athletes referenced were two high school runners who compete in Connecticut, and who were, notably, also defeated by cisgender girls in recent races.³⁶ Dkt. 22-3, Ex. B, at 8; *see also* Associated Press, *Cisgender female who sued beats transgender athlete in high*

³⁶ Rep. Ehardt also vaguely referenced a college transgender athlete, but it is not clear from the record who this athlete is or where she competed. Dkt. 22-3, Ex. B, at 8.

school race, <https://www.fox61.com/article/news/local/transgender-athlete-loses-track-race-lawsuit-ci-ac-high-school-sports/520-df66c6f5-5ca9-496b-a6ba-61c828655bc6> (Feb. 15, 2020). Notably, unlike the IHSAA and NCAA rules in place in Idaho before the Act, Connecticut does not require a transgender woman athlete to suppress her testosterone for any time prior to competing on women’s teams. Dkt. 41, at 33; Dkt. 45, at 7.

The Intervenor identifies a third transgender athlete, June Eastwood, and argues that their athletic opportunities were limited by Eastwood’s participation in women’s sports. Dkt. 46, at 8. The State also highlights this example. Dkt. 41, at 18. However, Eastwood was not an Idaho athlete and the competition at issue took place at the University of Montana. Dkt. 45, at 10 n. 7. So, the Idaho statute would have no impact on Eastwood. More importantly, although the Intervenor lost to Eastwood, Eastwood was also ultimately defeated by her cisgender teammate. *Id.* And, losing to Eastwood at one race did not deprive the Intervenor from the opportunity to compete in Division I sports, as both continue to compete on the women’s cross-country and track teams with ISU. Dkt. 30-1, at 2.

The evidence cited during the House Debate on H.B. 500 and in the briefing by the Proponents regarding three transgender women athletes who have each lost to cisgender women athletes does not provide an “exceedingly persuasive” justification for the Act. *VMI*, 518 U.S. at 533 (“To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’”). Heightened scrutiny requires that a

law solves an actual problem and that the “justification must be genuine, not hypothesized.” *VMI*, 518 U.S. at 533. In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act’s categorical bar against transgender women athletes’ participation appears unrelated to the interests the Act purportedly advances.

Plaintiffs have also presented compelling evidence that equality in sports is *not* jeopardized by allowing transgender women who have suppressed their testosterone for one year to compete on women’s teams. Plaintiffs’ medical expert, Dr. Joshua Safer, suggests that physiological advantages are not present when a transgender woman undergoes hormone therapy and testosterone suppression. Before puberty, boys and girls have the same levels of circulating testosterone. Dkt. 22-9, at ¶ 23. After puberty, the typical range of circulating testosterone for cisgender women is similar to before puberty, and the circulating testosterone for cisgender men is substantially higher. *Id.*

Dr. Safer contends there “is a medical consensus that the difference in testosterone is generally the primary known driver of differences in athletic performance between elite male athletes and elite female athletes.” Dkt. 22-9, at ¶ 25. Dr. Safer highlights the only study examining the effects of gender-affirming hormone therapy on the athletic performance of transgender athletes. *Id.* at ¶ 51. The small study showed that after undergoing gender affirming intervention, which included lowering their testosterone levels, the athletes’ performance was reduced so that relative to cisgender women, their performance was proportionally the same as it had been relative to cisgender men prior to any medical treatment. *Id.* In other words, a transgender woman who performed 80% as

well as the best performer among men of that age before transition would also perform at about 80% as well as the best performer among women of that age after transition. *Id.*

Defendants' medical expert, Dr. Gregory Brown, also confirms that male's performance advantages "result, in large part (but not exclusively), from higher testosterone concentrations in men, and adolescent boys, after the onset of male puberty." Dkt. 41-1, at ¶ 17. While Dr. Brown maintains that hormone and testosterone suppression cannot fully eliminate physiological advantages once an individual has passed through male puberty, the Court notes some of the studies Dr. Brown relies upon actually held the opposite. *Compare* Dkt. 41-1, at ¶ 81 *with* Dkt. 58-2, at ¶ 7 (highlighting that the Handelsman study upon which Dr. Brown relies states that "evidence makes it highly likely that the sex difference in circulating testosterone of adults explains most, if not all, of the sex differences in sporting performance."). Further, the majority of the evidence Dr. Brown cites, and most of his declaration, involve the differences between male and female athletes in general, and contain no reference to, or information about, the difference between cisgender women athletes and transgender women athletes who have suppressed their testosterone. Dkt. 41-1, at ¶¶ 12–112, 114–125.

Yet, the legislative findings for the Act contend that even after receiving hormone and testosterone suppression therapy, transgender women and girls have "an absolute advantage" over non-transgender girls. Idaho Code § 33-6202(11). In addition to the evidence cited above, several factors undermine this conclusion. For instance, there is a population of transgender girls who, as a result of puberty blockers at the start of puberty and gender affirming hormone therapy afterward, never go through a typical male puberty

at all. Dkt. 22-9, ¶ 47. These transgender girls never experience the high levels of testosterone and accompanying physical changes associated with male puberty, and instead go through puberty with the same levels of hormones as other girls. *Id.* As such, they develop typically female physiological characteristics, including muscle and bone structure, and do not have an ascertainable advantage over cisgender female athletes. *Id.* Defendants do not address how transgender girls who never undergo male puberty can have “an absolute advantage” over cisgender girls. Nor do Defendants address why transgender athletes who have never undergone puberty should be categorically excluded from playing women’s sports in order to protect sexual equality and access to opportunities in women’s sports.

The Act’s legislative findings do claim the “benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones.” Idaho Code § 33-6202(11). However, the study cited in support of this proposition was later altered after peer review, and the conclusions the legislature relied upon were removed. Dkt. 58, at 17; Dkt. 58-2, at ¶ 19; Dkt. 62 at 80:10–25; 81:1–10; 95:24–25, 96. Defendants provide no explanation as to why the Legislators relied on the pre-peer review version of the article or why Defendants did not correct this fact in their briefing after the peer reviewed version was published. In fact, the study did not involve transgender athletes at all, but instead considered the differences between transgender men who increased strength and muscle mass with testosterone treatment, and transgender women who lost some strength and muscle mass with testosterone suppression. Dkt. 58, at 17. The study also explicitly stated it “is important to recognize that we only assessed

proxies for athletic performance . . . it is still uncertain how the findings would translate to transgender athletes.” Anna Wiik et. al, *Muscle Strength, Size, and Composition Following 12 months of Gender-affirming Treatment in Transgender Individual*, J. CLIN. METAB., 105(3):e805-e813 (2020).³⁷

In addition, several of the Act’s legislative findings which purportedly demonstrate the “absolute advantage” of transgender women are based on a study by Doriane Lambelet Coleman. Idaho Code § 33-6202(5), (10). Professor Coleman herself urged Governor Little to veto H.B. 500 because her work was misused, and she also endorsed the NCAA’s rule of allowing transgender women to participate after one year of hormone and testosterone suppression. Betsy Russell, *Professor whose work is cited in HB500a, the transgender athletes bill, says bill misuses her research and urges veto*, IDAHO PRESS https://www.idahopress.com/eyeonboise/professor-whose-work-is-cited-in-hb-a-the-transgenderarticle_0e800202-cacl-5721-a7690328665316a8.html (Mar. 19, 2020).

The policies of elite athletic regulatory bodies across the world, and athletic policies of most every other state in the country, also undermine Defendants’ claim that transgender women have an “absolute advantage” over other female athletes. Specifically, the International Olympic Committee and the NCAA require transgender women to suppress their testosterone levels in order to compete in women’s athletics. *Id.* at ¶ 45. The NCAA

³⁷ The legislative findings and the citations in the Proponents’ briefs cite this study as Tommy Lundberg et al., *Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for transwomen*, Karolinska Institute (Sept. 26, 2019). The correct reference for the published study is Anna Wiik et al., *Muscle Strength, Size, and Composition following 12 Months of Gender-affirming Treatment in Transgender Individuals*, J. CLIN. METAB., 105(3):e805-e813 (2020).

policy was implemented in 2011 after consultation with medical, legal, and sports experts, and has been in effect since that time. Dkt. 1, ¶ 76. Millions of student-athletes have competed in the NCAA since 2011, with no reported examples of any disturbance to women's sports as a result of transgender inclusion.³⁸ *Id.* Similarly, every other state in the nation permits women and girls who are transgender to participate under varying rules, including some which require hormone suppression prior to participation. The Proponents' failure to identify any evidence of transgender women causing purported sexual inequality other than four athletes (at least three of whom who have notably lost to cisgender women) is striking in light of the international and national policy of transgender inclusion.

Finally, while general sex separation on athletic teams for men and women may promote sex equality and provide athletic opportunities for females, that separation preexisted the Act and has long been the status quo in Idaho. Existing rules already prevented boys from playing on girls' teams before the Act. IHSAA Non-Discrimination Policy, <http://idhsaa.org/asset/RULE%2011.pdf> ("If a sport is offered for both boys and girls, girls must play on the girls team and boys must play on the boys team. . . If a school sponsors only a single team in a sport. . . Girls are eligible to participate on boys' teams. . . Boys are not eligible to participate on girls' teams."). However, the IHSAA policy also allows transgender girls to participate on girls' teams after one year of hormone

³⁸ In their Response to the Motion for Preliminary Injunction, Defendants highlight the circumstances of one transgender woman athlete who competed in women's sports after suppressing her hormones, Cece Telfer, to suggest testosterone suppression does not eliminate the physiological advantages of transgender women athletes. Dkt. 41, at 17–18. The Court finds, and Defendants concede, that such anecdotal evidence does not establish that hormone therapy is ineffective in reducing athletic performance advantages in transgender women athletes. *Id.* at 18.

suppression. Similarly, the existing NCAA rules also preclude men from playing on women's teams but allow transgender women to compete after one year of testosterone suppression. Because Proponents fail to show that participation by transgender women athletes threatened sexual equality in sports or opportunities for women under these pre-existing policies, the Act's proffered justifications do not appear to overcome the inequality it inflicts on transgender women athletes.

The Ninth Circuit in *Clark* ruled that sex classification can be upheld only if sex represents "a legitimate accurate proxy." *Clark*, 695 F.2d at 1129. The *Clark* Court further explained the Supreme Court has soundly disapproved of classifications that reflect "archaic and overbroad generalizations," and has struck down gender-based policies when the policy's proposed compensatory objective was without factual justification. *Id.* Given the evidence highlighted above, it appears the "absolute advantage" between transgender and cisgender women athletes is based on overbroad generalizations without factual justification.

Ultimately, the Court must hear testimony from the experts at trial and weigh both their credibility and the extent of the scientific evidence. However, the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho.

(2) Ensuring Access to Athletic Scholarships

The Act also identifies an interest in advancing access to athletic scholarships for women. Idaho Code § 33-6202(12). Yet, there is no evidence in the record to suggest that the Act will increase scholarship opportunities for girls. Just as the head of the IHSAA testified during the legislative debate on H.B. 500 that he was not aware of any transgender girl ever playing high school girls' sports in Idaho, there is also no evidence of a transgender person ever receiving any athletic scholarship in Idaho. Idaho Education News, *Lawmakers hear emotional testimony but take no action on transgender bill*, Idaho News 6, <https://www.kivity.com/news/education/making-the-grade/lawmakers-hear-emotional-testimony-but-take-no-action-on-transgender> (Feb. 20, 2020). Nor have the scholarships of the Intervenor—the only identified Idaho athletes who have purportedly been harmed by competing against a transgender woman athlete—been jeopardized. Both Intervenor continue to run track and cross-country on scholarship with ISU, despite their loss to a transgender woman athlete at the University of Montana. Dkt. 30-1, at 2.

The Act's incredibly broad sweep also belies any genuine concern with an impact on athletic scholarships. The Act broadly applies to interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public primary or secondary school, or a public institution of higher education, or any school or institution whose students or teams compete against a public school or institution of higher education. Idaho Code § 33-6203(1). Thus, any female athlete, from kindergarten through college, is generally subject to the Act's provisions. Clearly, the need for athletic scholarships is not implicated in primary school and intramural sports in the same way that it may be for high

school and college athletes. As such, “the breadth of the [law] is so far removed from [the] particular justifications” put forth in support of it, that it is “impossible to credit them.” *Romer*, 517 U.S. at 635.

Based on the dearth of evidence in the record to show excluding transgender women from women’s sports supports sex equality, provides opportunities for women, or increases access to college scholarships, Lindsay is likely to succeed in establishing the Act violates her right to equal protection. This likelihood is further enhanced by Defendants’ implausible argument that the Act does not actually ban transgender women, but instead only requires a health care provider’s verification stating that a transgender woman athlete is female. *See, e.g.*, Dkt. 40-1, at 3; Dkt. 41, at 4; Dkt. 62, at 66:21–25; 67:1–25; 68:1–17.

Defense counsel confirmed during oral argument that if Lindsay’s health care provider signs a health form stating that she is female, Lindsay can play women’s sports. Dkt. 62, at 66:21–25. In turn, Plaintiffs’ counsel affirmed that Lindsay’s health care provider will sign a form verifying Lindsay is female. *Id.* at 70:5–21. If this is indeed the case, then each of the Proponents’ arguments claiming that the Act ensures equality for female athletes by disallowing males on female teams falls away. Under this interpretation, the Act does not ensure sex-specific teams at all and is instead simply a means for the Idaho legislature to express its disapproval of transgender individuals. If “equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Moreno*, 413 U.S. at 534.

(3) The Act's Actual Purpose

The Act's legislative findings reinforce the idea that the law is directed at excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women. For instance, the Act's criteria for determining "biological sex" appear designed to exclude transgender women and girls and to reverse the prior IHSA and NCAA rules that implemented sex-separation in sports while permitting transgender women to compete. Idaho Code § 33-6203(3).

Specifically, an athlete subject to the Act's dispute process may "verify" their sex using three criteria: (1) reproductive anatomy, (2) genetic makeup, or (3) endogenous testosterone, i.e., the level of testosterone the body produces without medical intervention. *Id.* This excludes some girls with intersex traits because they cannot establish a "biological sex" of female based on these verification metrics. Dkt. 22-9, ¶ 41. It also completely excludes transgender girls.

Girls under eighteen generally cannot obtain gender-affirming genital surgery to treat gender dysphoria, and therefore will not have female reproductive anatomy. Dkt. 22-2, ¶ 13. Many transgender women over the age of eighteen also have not had genital surgery, either because it is not consistent with their individualized treatment plan for gender dysphoria or because they cannot afford it. *Id.* With respect to genetic makeup, the overwhelming majority of women who are transgender have XY chromosomes, so they cannot meet the second criteria. And, by focusing on "endogenous" testosterone levels, rather than actual testosterone levels after hormone suppression, the Act excludes transgender women whose circulating testosterone levels are within the range typical for

cisgender women.

Thus, the Act's definition of "biological sex" intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance. Dkt. 22-9, at ¶ 25. Significantly, the preexisting Idaho and current NCAA rules instead focus on that factor. That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.

In addition, it is difficult to ignore the circumstances under which the Act was passed. As COVID-19 was declared a pandemic and many states adjourned state legislative session indefinitely, the Idaho Legislature stayed in session to pass H.B. 500 and become the first and only state to bar all women and girls who are transgender from participating in school sports. *Id.* at ¶ 89. At the same time, the Legislature also passed another bill, H.B. 509, which essentially bans transgender individuals from changing their gender marker on their birth certificates to match their gender identity. Governor Little signed H.B. 500 and H.B. 509 into law on the same day. That the Idaho government stayed in session amidst an unprecedented national shut down to pass two laws which dramatically limit the rights of transgender individuals suggests the Act was motivated by a desire for transgender exclusion, rather than equality for women athletes, particularly when the national shutdown preempted school athletic events, making the rush to the pass the law unnecessary.

Finally, the Proponents turn the Act on its head by arguing that transgender people seek "special" treatment by challenging the Act. Dkt. 53, at 9–10; Dkt. 62, at 92:16–22.

This argument ignores that the Act excludes *only* transgender women and girls from participating in sports, and that Lindsay simply seeks the status quo prior to the Act's passage, rather than special treatment. Further, the Proponents' argument that Lindsay and other transgender women are not excluded from school sports because they can simply play on the men's team is analogous to claiming homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex. The Ninth Circuit rejected such arguments in *Latta*, 771 F.3d at 467, as did the Supreme Court in *Bostock*, 140 S. Ct. at 1741–42.

In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics. As such, Lindsay is likely to succeed on the merits of her equal protection claim. Again, at this stage, the Court only discusses the "likelihood" of success based on the information currently in the record. Actual success—or failure—on the merits will be determined at a later stage.

d. Likelihood of Success-Jane

The Act additionally triggers heightened scrutiny by singling out members of girls' and women's teams for sex verification. *VMI*, 518 U.S. at 555 ([“A]ll gender-based classifications today warrant heightened scrutiny”) (internal quotation marks and citation omitted). Defendants argue that the Act does not treat females differently because “it requires any athlete subject to dispute, whether male or female, to verify his or her sex.” Dkt. 41, at 13 n. 8. Defendants suggest males are equally subject to the sex verification

process because they may try to participate on a woman's team. *Id.* This claim ignores that all cisgender women are subject to the verification process in order to play on the team matching their gender identity, while only a limited few (if any) cisgender men will be subject to the verification process if they try to play on a team contrary to their gender identity.

Defendants' argument also contradicts the express language of the Act, which mandates, "[a]thletic teams or sports designated for females, women, or girls *shall* not be open to students of the male sex." *Id.* at § 33-6203(2) (emphasis added). Males are not subject to the dispute process because female teams are not open to them under the Act.³⁹ By arguing that people of any sex who seek to play women's sports would be subject to sex verification, Defendants ignore that the Act creates a different, more onerous set of rules for women's sports when compared to men's sports. Where spaces and activities for women are "different in kind . . . and unequal in tangible and intangible ways from those for men, they are tested under heightened scrutiny." *VMI*, 518 U.S. at 540.

It is also clear that a sex verification examination is unequal to the physical sports exam a male must have in order to play sports. Being subject to a sex dispute is itself humiliating. The Act's dispute process also creates a means that could be used to bully girls perceived as less feminine or unpopular and prevent them from participating in sports. And if, as the Act states, sex must be verified through a physical examination relying "only

³⁹ Moreover, males were already excluded from female sports teams under the long-standing rules in Idaho prior to the Act's passage. Defendants do not explain why women must risk being subject to the onerous sex verification process in the name of equality in sports when women already had single sex teams without the risk of a sex dispute prior to the Act's passage.

on one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels,” girls like Jane may also have to endure invasive medical tests that could constitute an invasion of privacy in order to “verify” their sex. Idaho Code § 33-6302(3).

As Plaintiffs’ expert, Dr. Sara Swoboda, a pediatrician in Boise with approximately 1,500 patients across Idaho, explains, none of the aforementioned physiological characteristics are tested for in any routine sports’ physical examination. Dkt. 22-10, ¶ 21. If a health care provider was to verify a patient’s sex related to their reproductive anatomy, genes or hormones, none of that testing is straightforward or ethical without medical indication. *Id.* at ¶ 22. Nor would it actually “verify biological sex,” “either alone or in any combination,” as this “would not be consistent with medical science.” *Id.* at ¶ 21.

For example, “‘reproductive anatomy’ is not a medical term. That could include internal reproductive organs, external genitalia, or other body systems.” *Id.* at ¶ 28. Further, “medically unnecessary pelvic examination would be incredibly intrusive and traumatic for a patient” and would not be conducted. *Id.* at ¶ 29. Pelvic examinations in “pediatric patients are limited to patients with specific concerns such as acute trauma or infection,” and are not conducted as a general practice. *Id.* at ¶ 27. “In young patients, such an exam would often be done with sedation and appropriate comfort measures to limit psychological trauma.” *Id.* “Pediatric consensus recognizes that genitalia exams are always invasive and carry the risk of traumatizing patients if not done with careful consideration of medical utility, discussion about the purpose and subsequent findings of any exam with the patient and their family, and explicit consent of the patient.” *Id.* In addition, determining

whether an individual has ovaries or a uterus may also require more intrusive testing including “transvaginal ultrasounds and may require referral to pediatric gynecologists, endocrinologists, and geneticists. None of this testing would be a necessary part of a sports physical or any standard medical examination absent medical concerns and indications of underlying health conditions necessitating treatment.” *Id.* at ¶ 30.

Similarly, determining a patient’s “genetic makeup” would require genetic testing. Such testing is complicated and personal and reveals a significant amount of information. *Id.* at ¶ 23. It is done by a specialist and would require a pediatric endocrinologist if performed on a minor like Jane. *Id.* at ¶ 24. Where a patient presents with a constellation of medical concerns that indicate a need for genetic testing, they are referred to a pediatric endocrinologist for a chromosomal microarray:

This type of testing reveals a significant amount of very sensitive and private medical information. A chromosomal microarray looks at all 23 pairs of chromosomes that an individual has and would reveal things beyond just whether a person has 46-XX, 46-XY, or some combination of sex chromosomes. In ordering genetic testing of this kind, a range of genetic conditions could be revealed to a patient and a patient’s family. [Dr. Swoboda does] not do genetic testing as a routine part of any medical evaluation and [is] not aware of any pediatric practice that would (absent specific medical indications). Even in cases where a patient presents with possible medical or genetic conditions based off of medical or family history that would warrant genetic testing, such testing is complex and often requires insurance preauthorization.

Id. at ¶ 25.

Nor would hormone testing be conducted as a part of a normal physical examination, or without clear medical indication. *Id.* at ¶¶ 21–22. Hormone testing would also require a referral to a pediatric endocrinologist and could reveal sensitive information.

Id. at ¶¶ 24, 31. “Specific testing of genetics, internal or external reproductive anatomy, and hormones could reveal information that an individual was not looking to find out about themselves and then could result in having to disclose information to a school and community that could be deeply upsetting to pediatric patients.” *Id.*

Given the significant burden the Act’s dispute process places on all women athletes, the Court must decide whether Defendants’ proffered justifications overcome the injury and indignity inflicted on Jane and all other female athletes through the dispute process. *SmithKline*, 740 F.3d at 481–83. Instead of ensuring “long-term benefits that flow from success in athletic endeavors for women and girls,” it appears that the Act hinders those benefits by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations. Idaho Code § 33-6202(12). Because, as discussed above, Defendants have not offered evidence that the Act is substantially related to its purported goals of promoting sex equality, providing opportunities for female athletes, or increasing female athlete’s access to scholarship, Jane is also likely to succeed on her equal protection claim. Idaho Code § 33-6202(12).

e. Irreparable Harm

Lindsay and Jane both face irreparable harm due to violations of their rights under the Equal Protection Clause. “It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.” *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (internal citations omitted); *Monterey Mech. Co. v. Wilson*, 125 F.3d

702, 715 (9th Cir. 1997) (holding that an equal protection violation constitutes irreparable harm).

Beyond this dispositive presumption, Lindsay and Jane will both suffer specific “harm for which there is no adequate legal remedy” in the absence of an injunction. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). If Lindsay is denied the opportunity to try out for and compete on BSU’s women’s teams, she will permanently lose a year of NCAA eligibility that she can never get back. Lindsay is also subject to an Act that communicates the State’s “moral disapproval” of her identity, which the Constitution prohibits. *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003). When Jane tries out for Boise High’s women’s soccer team, she will be subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex. Such violations are irreparable. *Obergefell*, 135 S. Ct. at 2606 (“Dignitary wounds cannot always be healed with the stroke of a pen.”). Lindsay and Jane both also face the injuries detailed *supra*, section III.B.2, if the Act is not enjoined.⁴⁰

The Court accordingly finds Plaintiffs will likely suffer irreparable harm if the Act is not enjoined. *Alliance for the Wild Rockies*, 632 F.3d at 1131 (noting plaintiffs must establish irreparable harm is likely, not certain, in order to obtain an injunction).

f. Balance of the Equities and Public Interest

Where, as here, the government is a party, the “balance of the equities” and “public

⁴⁰ The Intervenor outrageously contend that Lindsay has not shown she will suffer irreparable harm because she has not alleged that she will commit suicide if she is not permitted to participate on BSU’s women’s sports teams. Dkt. 46, at 2. Clearly, a risk of suicide is not required to establish irreparable harm. The Intervenor’s attempt to twist the tragically high suicide rate of transgender individuals into a requirement that Lindsay must be suicidal to establish irreparable harm is distasteful.

interest” prongs of the preliminary injunction test merge. *Drakes Bay Oyster Co.*, 747 F.3d at 1092. In evaluating the balance of the equities, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. As explained above, Plaintiffs’ harms weigh significantly in favor of injunctive relief.

In stark contrast to the deeply personal and irreparable harms Plaintiffs face, a preliminary injunction would not harm Defendants because it would merely maintain the status quo while Plaintiffs pursue their claims. If an injunction is issued, Defendants can continue to rely on the NCAA policy for college athletes and IHSAA policy for high school athletes, as they did for nearly a decade prior to the Act. In the absence of any evidence that transgender women threatened equality in sports, girls’ athletic opportunities, or girls’ access to scholarships in Idaho during the ten years such policies were in place, neither Defendants nor the Intervenors would be harmed by returning to this status quo.

Further, the Intervenors are themselves subject to disparate treatment under the Act. While the Intervenors have never competed against a transgender woman athlete from Idaho, or in Idaho, they risk being subject to the Act’s sex dispute process simply by playing sports. As Plaintiffs’ counsel noted during oral argument, the Act “isn’t a law that pits some group of women against another group of women. This is a law that harms all women in the state, all women who are subject to . . . the sex verification process, and, of course, particularly women and girls who are transgender and are now singled out for categorical exclusion.” Dkt. 62, at 89:23–25; 90:1–4.

Moreover, it is “always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at 1002. By establishing a likelihood that the Act violates the Constitution, Plaintiffs “have also established that both the public interest and the balance of the equities favor a preliminary injunction.” *Ariz. Dream Act*, 757 F.3d at 1069 (“[T]he public interest and the balance of the equities favor preven[ting] the violation of a party’s constitutional rights.”) (internal quotation marks and citation omitted).

g. Bond Requirement

Finally, Plaintiffs request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c). The Ninth Circuit has held that requiring a bond “to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate because . . . protection of those rights should not be contingent upon an ability to pay.” *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). In any event, Defendants do not contest Plaintiffs’ request that the Court waive the bond. The Court will accordingly grant Plaintiff’s request.

IV.CONCLUSION

The Court recognizes that this decision is likely to be controversial. While the citizens of Idaho are likely to either vehemently oppose, or fervently support, the Act, the Constitution must always prevail. It is the Court’s role—as part of the third branch of government—to interpret the law. At this juncture, that means looking at the Act, as enacted by the Idaho Legislature, and determining if it may violate the Constitution. In making this determination, it is not just the constitutional rights of transgender girls and

women athletes at issue but, as explained above, the constitutional rights of every girl and woman athlete in Idaho. Because the Court finds Plaintiffs are likely to succeed in establishing the Act is unconstitutional as currently written, it must issue a preliminary injunction at this time pending trial on the merits.

V.ORDER

Now, therefore IT IS HEREBY ORDERED:

1. The Motion to Intervene (Dkt. 30) is GRANTED;
2. The Motion to Dismiss (Dkt. 40) is GRANTED IN PART and DENIED IN PART. It is GRANTED with respect to Plaintiffs' facial Fourteenth Amendment constitutional challenges, it is DENIED with respect to Plaintiffs' as-applied constitutional claims and in all other respects;
3. The Motion for Preliminary Injunction (Dkt. 22) is GRANTED.



DATED: August 17, 2020



David C. Nye
Chief U.S. District Court Judge

I am providing testimony urging a DO NOT PASS recommendation on HB 1298 relating to participation in athletic events exclusively for males or females. If the legislators pass this bill it will affect the swim club, the West Fargo Flyers, which both of my daughters are active members. It would prevent the West Fargo Flyers from using almost all swimming facilities in the Fargo and West Fargo area with the current wording of the bill. This would mean our club would struggle to find facilities to host its swim practices and meets. This would lead to an increase cost because of the likely competition between clubs for practice times and meets. The inability to use facilities could lead to our club ending its existence as the difficulty and cost in finding facilities outweighs any potential benefits from keeping the club.

The current wording of the bill would also result in the loss of millions of dollars to the local community. This bill not only affects our swim club but other youth sports such as Fargo Youth Hockey Association. Like USA Swimming, USA Hockey has a policy of inclusivity which would pre-empt them and other youth hockey organizations from renting ice from public venues if the bill passes. It would also lead to the loss of other youth sports events and tournaments as these entities all ready have policies in place related to inclusivity or do not want to face a public backlash of not supporting inclusivity. The economic loss to the West Fargo-Fargo, region, and our state does not make sense.

Even with proposed amendments there are still issues. Events would not want to have meets hosted in our state for fear of suffering a backlash. Simply look to what happened to North Carolina after they passed its state's bathroom bill. The NCAA prevented North Carolina from hosting any championships because of that bill. It is estimated North Carolina lost 3.56 Billion dollars because of the bill. There is also likely to be litigation surrounding this bill which will only cost North Dakota additional money in defending such a bill.

In addition, this bill is not necessary. All the governing bodies in youth sports have already considered these issues and have policies in place. Moreover, there has not been any issue with transgendered athletes in North Dakota. This is a bill looking for a problem rather than trying to solve a problem.

Lastly, this last year has been especially hard on kids. The one outlet my two daughters had this year was their swim team. When they could not see relatives, go out to eat, or to movies, swimming was their fun. This bill is likely to take that away from them. A DO NOT PASS recommendation is the only solution.

DARREN S. ALMOND

3592 50th St S, Fargo, ND 58104 | 620-988-1019 | almonddarren@msn.com

15 March 2021

State of North Dakota Senate Judiciary Hearing

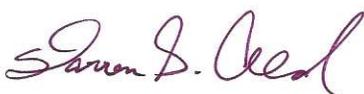
Esteemed members of the committee:

Our family recently has relocated to the Fargo area. When choosing between North Dakota and Minnesota for our residence in the area, the state leadership's conservative values were a determining factor. Thus, the underlying intent conveyed within Bill 1298 before this committee is not the heart of the issue. The overarching concern I would ask the Senate to consider is whether eliminating several youth sports that rely on national sanctioning bodies for their administration and execution is an appropriate outcome or consequence.

As a parent of a youth sports athlete who has dedicated years of training in the discipline of swimming, I have personally witnessed the value youth sports have in developing young men and women of character and discipline. It would be a shame to eliminate such valuable institutions as a consequence of trying to preserve their integrity via legislation such as currently presented in Bill 1298.

I humbly request this committee and the Senate to strongly reconsider the approach taken to address this issue in youth sports in a manner that will allow all forms of youth sports such as those sanctioned by the USA Hockey, USA Swimming, and USA wrestling to continue in our community. Disruption or elimination of these sporting disciplines for the reasons outlined in this Bill only increases the level of animosity and discord in our communities. I am hopeful a better way can be found to preserve youth sports while protecting their integrity.

Sincerely,



Darren S. Almond

March 15, 2021

Chairperson Larson and Committee Members,

As a local church pastor, I strongly urge a Do NOT Pass on HB1298. This bill is detrimental to the emotional health of transgender students, their families, friends, classmates, support systems, and the entire community as a whole. As a church pastor, I have witnessed the damage bills like this and other discriminatory acts have on youth and adults. The decisions you make regarding bills like HB1298 have a direct impact on depression and suicide rates among not only transgender students, but all LGBTQ+ individuals of all ages. When you pass discriminatory legislation or fail to pass protective measures for individuals, I see an increase in hopelessness and an increase in the desire for successful young adults to leave North Dakota. As both a pastor and employer, I have spoken with numerous individuals who refuse to accept a position in North Dakota because of bills and attitudes like those represented in HB1298. Community health and the health of our children is of upmost importance to me, as I am sure it is to you as well; therefore I ask for a DO NOT PASS on HB1298.

Thank you,
Rev. Gretchen Deeg
Local Church Pastor

917 N 5th St
Bismarck, ND 58501
gretchen@uccbismarck.org

Greetings Chairwoman Larson and Members of the Committee,

My name is Joe A. Larson, and I serve as pastor of St. Mark's Lutheran Church in Fargo, ND. I am also the first openly gay ELCA pastor called by a Lutheran congregation in the state of North Dakota. I serve a Lutheran congregation that voted to become welcoming towards LGBTQ individuals and their families 30 years ago.

I am writing to voice my opposition to HB 1298, which would effectively ban transgender youth from participating in sports teams that align with their gender identity in North Dakota.

My congregation currently has four families with transgender children. I know each of these parents supports their transgender child in every way they can. They love and care for their children just as much as parents of cisgender, or not transgender, children support theirs. Sports are an important part of a young person's school and social development. Transgender youth do not pose a risk to other children or adults.

Transgender youth simply want to sincerely, participate in sports activities that they enjoy and they should not be prohibited from participating on sports teams.

I believe that we as Christians are called by Christ to love one another and not pass judgment on one another. This bill continues to promote fear and bullying that many transgender youth already face. School bullying statistics are frightening: 78% of respondents to the National Transgender Discrimination Survey (NTDS) reported being harassed, 35% physically attacked, and 12% sexually assaulted.

If we want to retain young people to live and work in our state, we need to create communities that welcome and embrace people from diverse backgrounds and experiences.

It's time for those of us who call ourselves Christians to follow Christ's example by supporting policies that support the dignity, humanity, and needs of all people. As the prophet, Micah once said, "What does the LORD require of you, but to do justice, to love kindness, and to walk humbly with your God?" (Micah 6:8)

I pray that you will not support HB 1298 and seek to promote legislation that creates a welcoming and supportive environment for our young people.

Sincerely,

Rev. Joe A. Larson
St. Mark's Lutheran Church
417 Main Avenue, Suite 401, Fargo, ND 58103
pastorjoe@stmarkslutheranfargo.com
Cell: 612-750-5079

Dear NDCA Member,

#9246

What is happening in womens sports right now is a perfect example of why its important for conservatives to speak out on sociocultural issues. Too many have acquiesced to the immense social pressure to either affirm or stay silent on transgenderism because they dont want to be labeled as hateful and judgmental. At this point, the pressure is so great that many citizens fear losing their job if they dare express an opinion that doesnt align politically with the Left. Many people justify their silence by telling themselves its none of their business how other people live their lives. However, transgender ideology does, in fact, affect us all. There are real world implications for the redefinition of certain key words like man and woman, and one way we are seeing that play out is the misguided, dangerous, and unfair push to allow males in female sports. We can make ourselves heard on this issue by urging our legislators to support HB 1298 relating to the prohibition of males in female sports. We must not allow a counterfeit social justice for the minority to create an injustice for the majority. Emails from the opposing side are pouring into the Senate. We must make our voices for truth ring loud and clear. Spread the word to friends and family across the state!



Senate Judiciary Committee
600 E. Boulevard Ave
Bismarck, ND 58505

March 15, 2021

Re: Human Rights Campaign Opposition to H.B. 1298

Dear Chair Larson and Members of the Committee,

The Human Rights Campaign (HRC), on behalf of its three million members and supporters nationwide, thanks you for the opportunity to submit testimony to help inform your deliberation on H.B. 1298. We strongly oppose this legislation and it is our hope that the committee will not advance it.

Transgender students, like all students, can benefit from participating in sports, and allowing them to participate in athletic activities consistent with their gender identity in no way disadvantages their fellow students. Attempting to separate transgender youth from their peers is impractical, unfair, and unnecessary. Finally, similar legislation passed by Idaho last year has been enjoined by a federal court on the grounds that it is discriminatory and unconstitutional.

Many are rightly protective of the legacy of women's sports in this country. Importantly, advocates for women and girls in sports – such as the National Women's Law Center, the Women's Sports Foundation, Women Leaders in College Sports, and others – efforts to exclude transgender students from participating in sports. That's because while there are real issues facing women's sports, including a lack of resources devoted to supporting them, transgender participation in athletics is not one of them.

Rather, bills like these are a reincarnation of the narrative underpinning anti-transgender bathroom bills like North Carolina's infamous HB2 – they use fear-based arguments that suggest transgender girls identify as such only to take advantage of female students, despite overwhelming evidence to the contrary. A widely-cited situation in Connecticut involves two transgender athletes out of an estimated 150,000 transgender youth across the country.¹ Further,

¹ Herman, Jody L. et al. "Age of Individuals Who Identify As Transgender in the United States". Williams Institute, January 2017. <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/>

collegiate and professional athletics associations have adopted policies, informed by experts, to ensure fair competition by adults. This bill is simply a solution in search of a problem.

This bill will suffer the same fate as Idaho's H.B. 500, a similar bill that passed into law last year: immediate challenge in court. The preliminary injunction granted by the District Court is currently on appeal to 9th Circuit. The District Court decisively rejected the arguments by the state - which are emulated in the justifications for this bill - concluding that "the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho."

There is no reason for North Dakota to embark on a similarly futile path. It is simply not true that transgender girls and women pose any risk to women's sports. A small percentage of people identify as being transgender, many transgender youth are not interested in playing sports, and those who do play want to play for the same reasons other youth like sports: because sports are fun. Prior to puberty, transition is an entirely social process – transgender children do not receive any medical transition-related care. For transgender youth on the verge of puberty, medical treatment generally consists of puberty-blocking hormones which prevent the youth from going through puberty in a way that would provoke dysphoria. Further, it is clear from the experience of 20 states who already allow transgender kids to compete in sports consistent with their gender identity that the participation of transgender girls in high school athletics does not result in the consequences that proponents of this legislation allege.

Participation in sports is essential for young athletes to be able to stay fit, develop healthy habits, and learn the virtues of practice and teamwork. The history of sports in this country has been about opening up true, meaningful opportunities to participate in sports – and allowing transgender people to participate in sports furthers that goal, not threatens it. For these reasons, we request that you reject this harmful and discriminatory bill.

Sincerely,



Cathryn Oakley
State Legislative Director and Senior Counsel
Human Rights Campaign

TRANSATHLETE.COM

POWERED BY @THECHRISMOSIER

Statement by Chris Mosier
Professional Athlete & Founder of Transathlete.com,
before the Senate Judiciary Committee
in opposition of House Bill 1298

Members of the Senate Judiciary Committee:

Thank you for this opportunity to share my concerns with House Bill 1298 – I am contacting you today to ask you to oppose this bill, which targets one of the most vulnerable populations of youth and aims to exclude young people who are transgender from participation.

My name is Chris Mosier and I am a professional athlete and founder of Transathlete.com, the leading resource for policy on transgender people in sport. Transgender students participate in sports for the same reasons other young people do: to challenge themselves, improve their fitness, and be part of a team. Having the opportunity to participate in sports results in positive outcomes for all students - better grades, greater homework completion, higher educational and occupational aspirations, and improved self-esteem. Excluding trans students from participation deprives them of opportunities available to their peers and sends the message they are not worthy of a full and social life.

I know this first hand. I am a transgender man, but long before I understood and could tell others I am transgender, I grew up playing girls and women's sports. Sports was how I found my friends, my community, and my social life. Sport was an essential part of my upbringing and my life, teaching me about goal setting, communication, determination, perseverance, leadership, and supporting others. In high school, when I struggled with understanding my place in the world, sports quite literally saved my life. And my participation in sports as a high school student-athlete certainly shaped me into who I am today.

Policies for high school athletes should focus on inclusion and should keep the bigger picture in mind: while there are athletes who are very serious about their sports, high school athletics is not elite competition and it is not on the world stage. Therefore, the policies at the high school level should prioritize access and participation for all youth, regardless of how they identify, and should support their growth as students and people.

The best policies do this. In the eight years since I created transathlete.com, I have seen more state high school associations adopt policies that govern where transgender high school student-athletes can participate. North Dakota is among those states, where student athletes have been able to participate with their peers since at least 2015. When bills like HB 1298 pop up, as they have in the past year in a wave of anti-trans policymaking, we see that they are not linked to any clear problem in women's sports, or any real documented threat to women in sports; instead, they are linked to stereotypes and

myths about transgender people and driven by hate groups and lobbyists whose missions are to erase transgender people from public life.

The truth that no one supporting HB 1298 wants to face is this: no transgender high school student is transitioning for athletic dominance. Girls in sports are not losing scholarship opportunities. And despite the fear mongering and false narratives by politicians right now, transgender athletes are not a threat to women's sports. There are many very real threats to women's sports, like a lack of funding, lack of positive media coverage, a shortfall of opportunities for growth and development for women in sports, and on and on - but having transgender teammates is not an issue. That's why organizations like the Women's Sports Foundation, the National Women's Law Association, and Athlete Ally, as well as high-profile women in professional and Olympic and Paralympic sports are in support of having transgender women and girls as part of women's and girls' teams.

Let me clear about the damage this bill, and even this conversation will have: when government officials, lawyers and lobbyists publicly debate the validity and worth of our existence as transgender people, the worth of athletes – of people – like me, it sends a dangerous message to young people that there is no safe or supportive place for them in this world. It also sends a message to people who are not transgender that they can and should ignore the basic humanity of transgender North Dakotans.

Trans kids just want to play sports with their peers.

I urge you to send a clear message that hatred, transphobia, and targeted attacks on young people will not be tolerated in North Dakota. Please make your commitment to oppose House Bill 1298.

March 16, 2021

Submitted by:

A handwritten signature in black ink, appearing to read 'Chris Mosier', with a stylized flourish at the end.

Chris Mosier
Founder, Transathlete.com
chris@thechrismosier.com
312-487-1485

Dear Senator:

The bill as it stands will end youth sports in ND at the Club and High School level. This would be catastrophic to our athletes of all ages and at all levels of competition in ND.

Please do not pass this bill.

Sincerely,

Barb Fisher

West Fargo Flyers Lead Coach



Senate Judiciary Committee –

I am writing to express concern over HB1298 and the potential implications this will place on tourism associated with youth sports in the state of ND. While I personally believe that HB1298 is flawed for a variety of reasons, I hope that the economic implications this misguided bill creates warrant consideration by our lawmakers, since the personal and emotional implications of such a bill seem not to resonate.

The Fargo Moorhead Convention and Visitors Bureau and its legal team asserts that the current language of HB1298 would prevent the CVB, a publicly funded organization, from providing any sort of financial assistance to youth tournaments that allow persons of one sex to play on a team designated for persons of the opposite sex. Whether this is applicable to a transgendered youth, or simply a girl wanting to play on the boys' team, this bill is unnecessarily discriminatory, burdened by a tremendous amount of red tape that youth sports organizations will have to navigate, and quite frankly embarrassing for the citizens of North Dakota.

It should be noted that USA Wrestling likely cannot be held in North Dakota if this bill is passed, and USA Swimming will effectively cease to exist under this bill. Governing bodies such as these have policies in place to navigate the topic, and suggesting that the ND legislature knows more about what is appropriate for youth sports than their governing bodies is arrogant and disappointing. Furthermore, the North Dakota High School Athletic Association has policies in place addressing transgendered youth, and asserts that policy has not once been activated. Our elected officials are literally solving a problem that does not exist, and potentially creating a plethora of economic fallout in its wake.

During the COVID-19 pandemic, the importance of youth sports tournaments in our community has been made abundantly clear, and support from agencies such as CVBs and Parks Board are critical towards making sure these events happen throughout our state. COVID aside, hotels and restaurants simply cannot afford to lose such a significant piece of our revenues, and in 2021 and 2022 as other forms of tourism are slow to rebound, youth sports are more important now than ever.

I appreciate your consideration of these comments, and look forward to seeing our legislative bodies do what is ultimately right for North Dakota businesses and citizens.

Sincerely,

Dan Hurder
President and CEO
Great Plains Hospitality

To Whom It May Concern,

I am writing to you on behalf of HB1298. I am urging you to vote no on this important matter. I care about the youth in our state as I know you do. I am not asking you to make a statement on whether or not you agree with transgender identification. That is not the matter at hand. The truth is, we have students in our midst who identify as transgender and they are my concern.

I am asking you to please consider the message that this bill sends to students who are already vulnerable. There is much misinformation and fear surrounding transgender students. Studies have shown that transgender athletes pose no physical threat and they have no advantage over cis-gender athletes. A New Zealand study published on October 13, 2016 states:

The majority of transgender people have a negative experience when engaging in competitive sports and sport-related physical activity.

There is no direct and consistent research to suggest that transgender female individuals (and transgender male individuals) have an athletic advantage in sport and, therefore, the majority of competitive sport policies are discriminatory against this population.

There are several areas of future research required to significantly improve our knowledge of transgender people's experiences in sport, inform the development of more inclusive sport policies, and, most importantly, enhance the lives of transgender people, both physically and psychosocially."

Because studies have not proven that transgender athletes pose no harm, then why would we want a bill that does harm a portion of our students? The North Dakota High School Activities Association already has a policy in place for transgender athletes. If the organization that oversees athletics can have a policy in place and encourage participation, then why would we contradict them?

I am sure you have already researched much of this topic, but here is another document from the ACLU that addresses myths surrounding transgender athletes. <https://www.aclu.org/news/lgbt-rights/four-myths-about-trans-athletes-debunked/>

I understand that this is a complicated issue, one that I do not fully understand myself. However, in my role as a pastor, a mother, a mentor, and a human being, I long for opportunity for everyone. The world is changing. Transgender people have been in our midst since the beginning of time - they are just now trying to live openly. They are not predators. They are not 'different'. They are people trying to play sports that they love. They already face enough hate and discrimination from peers and adults. Why would we wish to legalize and empower that disdain?

I wish to thank you for the hard work that you do on our behalf. Thank you for taking the time to read my correspondence. Thank you for living into this part of your vocation that God has called you to. Whether or not you agree with me on this matter does not change the fact that we are siblings in Christ and I pray that we can continue to work to make North Dakota the best place it can be. I just happen to believe that HB1298 does not belong.

Grace and peace,

Ivy Schulz

Trans people belong everywhere in North Dakota - including sports. That's why I'm urging you to vote no on House Bill 1298, legislation that would ban transgender athletes under the age of 18 from competing on the sports teams that match their gender identity.

All students should have the opportunity to play sports and have their personal dignity respected. Transgender students are no different.

No one is harmed by allowing transgender students to compete consistent with who they are - and the North Dakota High School Activities Association already has a policy in place for transgender athletes.

House Bill 1298 is clearly fueled by fear and misunderstanding of transgender people in our state.

Instead of leveling the playing field, this legislation would place hurdles in front of students just because they're transgender. I'm urging you to vote no on House Bill 1298 and focus on issues that really matter to the people of our state.

March 16th, 2021

RE: Opposition to HB 1298

Good Morning Chairman Weisz and Committee Members;

I am Sarah Galbraith and I am opposed to HB 1298 as a community leader, an advocate, an ally and a caregiver.

Our youth in North Dakota has been exposed to higher amounts of intolerance and targeting as we have navigated the topics of gender and sexuality in our schools. I can say this because my inbox (as well as the inbox of my persona, B.J. Armani) is flooded with messages from parents and their children asking what can they do to avoid bullying by fellow students, coaches, and their teachers.

These students as young as five years old are having their clothes stolen, and their desks, backpacks, books and lockers defaced with derogatory comments and pictures. The schools do nothing about the words FAG, FREAK, SICKO, WEIRDO or TRANNY and ask the parents/students to pay for the cleanup or the replacement of items.

Students as young as eight years old have been told to wear a diaper to school so they don't have to worry about the bathroom. Students are also explaining to me that they have had bladder infections and have had to stop eating/drinking after 7am until they come home for school because they are scared of using the bathroom.

This environment has paved the way for HB 1298. It would also give grounds to coaches, teachers, and students that this environment of fear and bullying is okay. This correlates with the students' use of gyms and equipment for sports as they are told that the two genders recognized by their coaches and educational system is the locker room they have to abide by. The wording of this bill has reduced our children to genitalia and not given any thought to their need for compassion, belonging, and support. These student athletes have immense courage to express that the body they were born in doesn't match their identity. These students bravely explain themselves time and time again to adults and students as they go to therapy and utilize the medical field to process their identity in a safe and therapeutic manner. While they are given the support by professionals, family, and friends, they face the judgement of their school system and the defense of their bullies as a backdoor way for the school to remove these students to avoid actually making change.

By disguising HB 1298 as defending cisgender children this is, in effect, sexual harassment/assault that is being allowed by our public school system. These moments bring shame and isolation to these students, further making their environment unsafe and their parents unable to utilize the very educational system that is supposed to be public education.

The knowledge of what you have heard about the saving of lives of students cannot fall on deaf ears of our elected North Dakota officials. I strongly urge the committee to vote DO NOT PASS on HB 1298. If there are further questions regarding my testimony, my contact information is listed below.

Thank you,

Sarah Galbraith (aka B.J. Armani),
sarah.g27101@gmail.com

As a pediatric and adult endocrinologist (a physician that that deals with the medicine of hormones), I oppose House Bill 1298 which attempts to prevent transgender youth from participating in athletics.

As the only pediatric endocrinologist in the state of North Dakota, I have the unique responsibility and privilege of caring for transgender youth and young adults seeking treatment to alleviate their gender dysphoria. I also care for children and adolescent with other chronic and serious endocrine medical conditions, which increases their risk for depression, anxiety, self-harm and suicide. However, it has only been those trans youth patients who have actually succeeded in suicide attempts.

It is a fact that student participation in sports have positive mental health effects in addition to the obvious effects it has on overall health and wellbeing. Excluding trans youth from participating in school sports will have significant mental health consequences in a group that already has the highest risk for attempted suicide and levels of depression.

Your bill assumes that transgender youth, particular transgender girls will have an unfair advantage over cis-girls. The risk of excluding transgender girls or women in sports will hurt all women. The policy proposed could subject any girl or woman to accusations and invasive tests because of concerns of being “too masculine” or “too good” for their sport to really be a cis-woman or cis-girl. As a pediatric endocrinologist, I have evaluated healthy young girls who come to me because they are too tall and measure well over two standard deviations above the normal for age and ultimately become tall women (often measuring six feet or taller). One could argue that they too could be discriminated against because they exceed the expected body type that could in theory advantage them in female sports.

Dr. Joshua D. Safer who contributed to the policies and standards set by the NCAA states that “a person’s genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance” and “that there is no inherent reason why their physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-gender woman”. In a study published in Science in 2018, Joanna Harper’s research found that a nonelite group of eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.

Since 2011, trans athletes have been able to compete on teams at NCAA member collegiate and universities consistent with their gender identity like all other student-athletes with no disruption to their gender’s collegiate sports. It is also my understanding that since the 2015 North Dakota High School Athletic Association’s policy about transgender students in sports, that no issues have come up about a specific transgender athlete’s unfair advantage.

It is clear that excluding trans youth from sports or other activities is harmful and are more likely to experience detrimental effects to their physical and emotional wellbeing when they are pushed out of affirming places, activities and communities. Transgender youth face discrimination and violence that makes it difficult to even stay in school. A 2015 U.S. Transgender Survey report

found that 22% of trans women who were perceived as trans in school were harassed so badly they had to leave school because of it and another 10% were kicked out.

So, it is my professional opinion that the House Bill 1298 will unjustly discriminate against transgender youth in our state and subject them to further harm and risk of mental health exacerbation and self-harm.

The NCAA and the NDHSAA have already set guidelines that address the concerns of trans youth's participation in sports. These guidelines are backed up by scientific data and by experts in the field of medicine, genetics and psychology.

Luis Casas, MD

Pediatric and Adult Endocrinologist

RE: Opposition to HB 1298

Good Morning Chairman Weisz and Committee Members:

My name is Francis M. Galbraith and I am a resident of Grand Forks, North Dakota. I have lived here from 1994 to 1998, and from 2002 to the present time. I am writing to you in opposition of HB 1298.

I am not a native of North Dakota, but have made it my home. I am originally from New Jersey and moved here when I joined the US Air Force and decided to remain with my family after I retired from active service. In all of my years here, it always amazed me how the people of this state can rally together in times of adversity and are always ready to help a neighbor in need. This state had shown me the heart and character that I respected and drew me to remain here. That is why I am shocked at the level of discrimination I now see becoming more prevalent today.

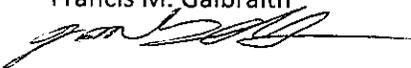
When I was growing up, I played many sports through high school and heard the same insults that were thrown around on every boys/men's athletic field: "You hit like a girl!", "you run like a girl!" , "Don't be a B*****!". Even in my time in the service, similar insults were thrown around and after 22 years of serving our country and through multiple tours overseas including Iraq, it always surprised me. I can tell you in high school I knew many cisgender girls/women who could out throw, hit, or run cisgender boys/men. Even our baseball team, trying to show off against the softball team, I saw many hitters struck out by the softball pitchers. I knew cisgender girls/women who could out kick our place kickers and punters on the football team.

In the military, I had the honor of serving with some of the bravest and toughest women there are. These women could take whatever was thrown at them and keep moving. I also knew many members who were LGBTQIA+ and there was never a doubt of their strength. Despite the image of the "tough" men of the military, there were many of us who it didn't matter what gender someone was. All that mattered was they were there doing the job and, when needed, bringing the fight to the enemy. That is what truly mattered.

This bill is doing nothing for the state and the athletes it involves, but pushing them down and making them see that in the eyes of the community, they are nothing. This cannot and should not be allowed! We need to show the future generations that we have advanced beyond old prejudices. What determines a person is not their genitalia or what society tells them they are. It is their strength of character and heart and this bill shows that there are some amongst you and this state, who are lacking in those areas. These athletes are not the issue but the underlying fear of change and that is what causes a society to fall.

I urge you to vote NO on this bill and show this country that North Dakota is a place that is inclusive and judges you on the strength of your drive, character and heart and NOT by gender!

Thank you,
Francis M. Galbraith



House Bill (HB) 1298 creates the potential to financially damage the State of North Dakota's hospitality industry. Implementing HB 1298 could disqualify the state's publicly-owned or managed venues (such as The FARGODOME or Alerus Center) from hosting regional and national athletic events. For example, USA Wrestling (which often hosts large regional tournaments) has a policy allowing individuals who have transitioned from female to male or from male to female (with conditions) to compete in their corresponding category. With the restrictions created by HB 1298, events hosted by the USA Wrestling organization with similar policies may not be hosted in those publicly-owned or managed venues.

Numerous other organizations are following the policies of a governing body which conflicts with the language of HB 1298, including but not limited to: USA Swimming, USA Hockey and USA Gymnastics. As this bill is written, individual sports programs would not be able to follow both the governing bodies' policies and North Dakota Law, making it impossible for events sanctioned by these organizations to be hosted in North Dakota.

The ramifications of losing such events would not only impact the venues, but also the hotels, restaurants and retailers who benefit tremendously from these large, multi-day events. A spending measurement study by the Fargo-Moorhead Convention and Visitors Bureau conservatively estimates each individual visiting Fargo for a sporting event spends \$225 per day. The potential of losing events with hundreds of participants (as well as spectators) could hurt restaurants, shops and hotels which are already feeling the effects of a down year due to COVID-19.

There is precedent for events being pulled from states with legislation regarding transgender people. For example, at the collegiate level, the National Collegiate Athletic Association (NCAA) rescinded seven athletic events which were meant to be hosted in North Carolina in 2016 and 2017. These rescissions were due to a North Carolina law regarding transgender individuals' usage of public bathrooms.

A state law passed in Idaho banning transgender women from playing on women's sports teams prompted the NCAA to state the law "conflicts with the NCAA's core values of inclusivity, respect and the equitable treatment of all individuals." Idaho ultimately ended up losing its rights to host two NCAA March Madness games as the tournament is slated to be hosted in one central geographic location. It is important to note, however, that the NCAA Board of Governors is currently reviewing its policies on transgender athletes and event venues.

Allow the NCAA, the North Dakota High School Athletic Association and other entities to create their own applicable policies. The touch of government does not belong in this issue.

I would urge the North Dakota Senate to consider the potential ramifications of the passage of HB 1298, including the financial impact it could have on some of the industries hit hardest by COVID-19 and the long-term wellbeing of the state's economy.





March 16, 2021

RE: HB 1298

Dear Senate Judiciary Committee,

The Trevor Project writes to express its strong opposition to HB 1298, a harmful bill which would effectively ban transgender youth from participating in school sports, denying them the health benefits and valuable life lessons of being part of a team and doing serious harm to their mental health. We humbly ask you to oppose HB 1298.

The Trevor Project is the world's largest suicide prevention and crisis intervention organization for LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning) young people. We work to save young lives by providing support through free and confidential suicide prevention and crisis intervention services and through our education, research, and advocacy programs.

At The Trevor Project, we constantly hear from transgender youth in crisis who want nothing more than to be recognized for who they are — and we know based on the work we do every day that respecting and affirming a young person's identity is essential to their mental health and well-being. Denying transgender youth the ability to participate in sports increases the kind of social isolation and stigma that contributes to self-harm and suicidality. Conversely, our research has shown that participating in sports has positive effects, as LGBTQ youth who participated in sports reported nearly 20% lower rates of depressive symptoms compared to those who did not, and more than a quarter of transgender and nonbinary youth (27%) who participated in sports reported their grades as being mostly A's compared to 19% who did not¹.

Additionally, research shows that denying equal access to school activities adds to the discrimination transgender and non-binary youth experience, exposing them to “an increased risk of experiencing depressed mood, seriously considering suicide, and attempting suicide².” In Trevor's 2020 National LGBTQ Youth Mental Health Survey, LGBTQ youth who reported having at least one LGBTQ-affirming space had 35% reduced odds of reporting a suicide attempt in the past year, with affirming schools being most strongly associated with reduced suicide attempts³.

Finally, we hope the legislature will keep in mind the effect of its actions on LGBTQ youth mental health directly; over 86% of LGBTQ youth said in our National Survey that recent politics had negatively influenced their well-being. Legislation like HB 1298



is neither necessary nor helpful⁴. We can celebrate girls' sports and protect transgender youth from discrimination, making sure that all young people can access the lessons and opportunities that sports afford.

For these reasons, The Trevor Projects asks that you please oppose HB 1298. Should you have any questions, or if we can be of assistance regarding this matter, please feel free to contact me at 202-768-4413 or Sam.Brinton@TheTrevorProject.org.

Sincerely,

A handwritten signature in cursive that reads "Samuel Brinton".

Sam Brinton
Vice President of Advocacy and Government Affairs
The Trevor Project

References

- 1) The Trevor Project (2020). Research Brief: The Well-Being of LGBTQ Youth Athletes. Available at: <https://www.thetrevorproject.org/2020/08/31/research-brief-the-well-being-of-lgbtq-youth-athletes/>. Accessed on January 20, 2021.
- 2) Price-Feeney, Green, and Dorison, "Understanding the Mental Health of Transgender and Nonbinary Youth." *Journal of Adolescent Health*, 2020.
- 3) The Trevor Project (2020). Research Brief: LGBTQ and Gender-Affirming Spaces. Available at: <https://www.thetrevorproject.org/2020/12/03/research-brief-lgbtq-gender-affirming-spaces/>
- 4) The Trevor Project. "National Survey on LGBTQ Youth Mental Health 2020," July 15, 2020. <https://www.thetrevorproject.org/survey-2020/>.

Greetings Chairperson Larson and committee members,

My name is Zayden Q Bartosh and I am a Bismarck Resident of District 47

I am **asking the committee to recommend do not pass on HB 1298** the anti-trans youth athlete bill.

Here is why...

The Olympics has already done massive research on this topic and have found that there is **no inherent advantage for trans athletes** and allows them to play on the team according to their gender. The NCAA has done the same research and allows trans athletes to play on the team according to their gender. We have our first transman athlete who is on a men's swimming team. **There are literally no occurrences of this being a problem, in this state, EVER!** To use the own logic of state legislators as to why they won't pass non-discrimination bills, show me the data! Show me the instances where this is a problem. Show me women who haven't gotten scholarships or unable to win because of one transwoman. By the way, even when we did show the data, you still voted no.

There were numerous testimonies as to why this bill should not be passed and it has been made very clear to me that North Dakota legislators do not want trans people and gay people to have equal rights and I plan on leaving this state because you are now attacking our youth. I am also the Vice President for Dakota Outright and we provide LGBTQ+ training for schools. In the training, we provide statistics of the struggle for ND youth. **This data comes from the Youth Risk Behavior Surveillance System (YRBSS) which is a statewide survey of 10,000 middle and high school students. This survey was last conducted in 2017 and showed that 9.4% of high school students in North Dakota identified as Gay, Lesbian, or Bisexual. It showed that 47% of these LGB students seriously considered attempting suicide and that 29.4% had attempted suicide. This survey did not ask if students were transgender, but we can imagine the transgender population suffers to the same degree or worse.** Overall, this survey painted a horrifying image of the reality of anti-LGBT bullying, daily struggles of our LGB youth, and the dire need for intervention on the state level.

As a facilitator for a LGBTQ+ youth support group, I get to see first-hand the pains our LGBTQ+ youth face. The pains are caused by living in a state and schools that aren't safe for our kids. They need protection. We aren't crying for acceptance; we are asking for protection. That any kind of bullying but not accepted. Our kids are literally dying over this issue. You can see spray painted downtown on the Proximal 50 building; his name is Chase. I do not condone vandalism but this was for the youth who committed suicide and, in his obituary, they still referred to him as a girl and had no mention of the issue being that he was bullied for being trans and that was why he committed suicide.

The ND school board already has policy for this issue and that is what should be followed.

Please be a part of the solution and not the problem. You don't have to be ok with someone being gay or trans. But you should not be ok with discrimination, bullying, and children losing their lives. The youth of this state need your help. Please help protect the kids that need it.

There has been another response floating around that is invalid for voting a yes on this bill. **Donna Lopiano was contacted** and she gave permission to direct quote her saying, "You are correct that any statement to the effect that I support banning trans girls/women from women's sports is not correct. I am a member of Women's Sports Policy Working Group that is trying to get federal legislation that does 3 things including mandating the inclusion of trans girl/women in women's sports."

The other arguments for this bill are invalid and here are the reasons why.

1. The false equivalency that cisgender males have an advantage over cisgender females and implying this research applies to transgender women. This research is invalid because you cannot apply that to transwomen because biological males experience androgenized puberty and continue to benefit from male range testosterone. This research does not take into account transgender women who take puberty blockers and estrogen hormone therapy and are indistinguishable.
2. Primary hormones are not the only thing that impact performance. Genetics has a widespread bilateral overlap, meaning that most people are about the same with extreme ends being rare. But saying that all men are better than women is 100% sexist and incorrect. Women do out perform men. Look at Crossfit for example. Experts agree, whatever advantage a trans woman had from an androgenized puberty is removed on hormone therapy after a year.
3. Sex itself is a spectrum of possible variations and there is more than just XX and XY. We have people who are intersex. Sex is not binary, science proves it.
4. The tones of the argument are similar to racist segregation arguments. Bone density arguments were brought up for why black people have an unfair advantage. Concerns for the safety of white women and girls were brought up. These arguments count on bias and fear to propagate bigotry.

Again, please recommend DO NOT PASS on HB 1298 as it will only cause more damage to an already at risk population.

Zayden Q Bartosh
Resident of Bismarck

Senator,

I am in support of no men competing in any women's or girls' sports.

It should also go the opposite way and no girls should be allowed to participate in men's or boys' sports due to the sexual problems that may come from this as well. **This bill needs to be amended to reflect this!**

We cannot have a double standard on this!

Thank you,

Mr. Mitchell S. Sanderson

March 16th, 2021

Dear Chairwoman Larson and Members of the Senate Judiciary Committee: I write today as a founder of a health clinic who treats transgender individuals, professional trainer on LGBTQ+ topics, and a researcher into education and healthcare policy. Since the inception of this bill, I have spent over a hundred hours reviewing all the material available and I'm going to summarize that here for your benefit, followed by some comprehensive breakdown.

- Fairness in Sports: A Comprehensive Breakdown for ND Policy Makers
- Queer Youth: Understanding Outcomes in North Dakota
- House Committee: Summary of Original Testimony
- The Court Cost: This Legislation has Been Tested

After we look at the actual science, which debunks the notion this is about fairness in sports, we will look at what else is at stake. If we're being honest this entire legislation is solely intended to be an attack on the trans community as cultural blowback for the affirming direction the Biden Administration is heading in. This is not about fairness in sports, it is about the systematic exclusion of transgender individuals as a cultural attack made by anti-lgbtq+ organizations nationally and locally.

This is evident from the quote of the Mississippi governor, who said their anti-trans sports law was necessary because the president "encourages transgenderism." Not because of fairness in sports, but because too many trans people are being accepted. While I know individuals may have honest concerns, the engine that is driving these anti-trans legislations across dozens of states do not.

Data provided by the report [Fair Play](#) indicates this strategy is a scorched earth strategy that harms all youth, lowers participation of all females in sports, and costs the state millions in lawsuits.

If you vote "Do Pass" on this it should be solely with the acknowledgement that you're willing to spend millions on a lawsuit that will fail, to intentionally hurt a marginalized community that is struggling, and not in any way help female sports. It is your right to do so, but let us not pretend this is about something else. The real litmus test is asking yourself if you've ever cared about female sports before the issue also happened to deny trans people?

While politics has become extremely partisan, I am not a democrat. I'm someone who looks at research to make non-partisan suggestions that improve outcomes. I would not be successful in a predominantly red state if I were to try to sell folks on democrat leaning partisan position. If the science pointed to there being an advantage or to legislation like this being beneficial or needed, I would advocate for it. What I learned is from looking at female sporting leaders and organizations across our nation for their concerns and their positions. While you can find an individual or single study that will say anything, it is important to look at the community

consensus and not just what fits your agenda. The primary concerns are lack of funding and predatory coaches. If we simply doubled the funding for female sports and scholarship opportunities, this would solve the proposed problems without harming anyone. That or create better transparency and opportunity to report coaches for sexual misconduct.

I believe Donna Lopiano presents excellent centrist positions that acknowledges the need for fairness for cisgender females, without the exclusion of transgender females. A wealth of information from her can be found here: <https://womenssportspolicy.org/>.

Indisputable Facts

Cisgender Males (Assigned male at birth and go through a testosterone dominate puberty) have an advantage over Cisgender Females (Assigned female at birth and go through an estrogen dominate puberty)

1. Nearly all of the research that we see established in favor of this bill is only in fact pointing out this known relationship.
2. Transgender females are individuals who are assigned male at birth, but may not have a testosterone dominate puberty or the associated advantages we see from it. They cannot be lumped in with biological males or cisgender males, because their development isn't necessarily going to be the same.
3. Transgender males are individuals who are assigned female at birth, but may have a testosterone dominate puberty and the associated advantages that go with it.
4. It is not the sex a person is assigned at birth that is responsible for performative advantage, it is the primary hormone they had during puberty. Ben Koppelman's study supports this.
5. Given that not all trans individuals may be advantaged or disadvantaged due to their sex assigned at birth, blanket bans provide undue discrimination, as trans girls may never have cis male levels of testosterone at any point in their life. Trans men conversely may have only had cis male typical levels of testosterone making their competing with cis girls unfair to the girls they play against. We see this with the trans male wrestler in Texas who won the girls championship twice. A reminder a trans male was assigned female at birth, but went through male typical puberty.

The Disputable

If someone had gone through a testosterone dominant puberty, how much reduction of T would be required to remove the advantages they have due to that puberty?

1. We almost entirely focus all discussion on this, when not all trans women ever had male puberty.

2. Olympics and many other supporting organizations suggests a one year hormone therapy regimen before competing with a required T value being at a specific amount.
3. Some studies indicate trans women may still hold an advantage even after a year, but no study conducted on this has included more than 50 participants. While this shows we need to do more research, it would be a mistake to apply the findings of such limited studies on expansive, far reaching bans. Even with this taken in mind, no study suggests a total ban, the biggest restrictive suggestion is a 2 year regiment. All of these studies caution against making broad assumptions.
4. Since our data on this is very limited, we can look towards real life examples. While individuals focus on the very very few times transgender athletes win (less than 20 in the entire united states), this ignores the thousands of times this doesn't happen. If transgender individuals played at roughly a fair playing field with their cisgender counterparts, you would expect to see approximately 1.8% of trans youth represented as winners within given sports due to population distribution. Instead we see a fraction of a fraction of that, we see an incredible underrepresentation of trans athletes, even though they've been able to compete in the NCAA sporting leagues for 10 years. The speculation they have an advantage is only speculative. The real world results speak largely in this advantage not being there or not being significant.

Fairness in Sports: A Comprehensive Breakdown for ND Policy Makers

Competitive Advantage and Fairness

The National Collegiate Athletic Association (NCAA) released a [38 page report](#) on their rationale behind including trans athletes. This policy was crafted with a number of leading experts in sports policy who took the medical, ethical, legal, and social considerations into play before making an equitable decision.(1)

“Transgender girls who medically transition at an early age do not go through a male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that arise when transgender women transition after puberty. Transgender women display a great deal of physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women and men. Many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true. A male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize. The assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.

It is also important to know that any strength and endurance advantages a transgender woman arguably may have as a result of her prior testosterone levels dissipate after about one year of estrogen or testosterone-suppression therapy. According to medical experts on this issue, the

assumption that a transgender woman competing on a women's team would have a competitive advantage outside the range of performance and competitive advantage or disadvantage that already exists among female athletes is not supported by evidence.

Educators in collegiate athletics programs must develop thoughtful and informed practices that provide opportunities for all students, including transgender students, to participate in sports. These practices must be based on sound medical science, which shows that male-to-female transgender athletes do not have any automatic advantage over other women. These practices must also be based on the educational values of sport and the reasons why sport is included as a vital component of the educational environment: promoting the physical and psychological well-being of all students, and teaching students the values of equal opportunity, participation, inclusion, teamwork, discipline, and respect for diversity.”(2)

A systemic review of medical literature in 2017 found that “Currently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery) and, therefore, competitive sport policies that place restrictions on transgender people need to be considered and potentially revised.” (3)

The **International Olympic Committee (IOC)** has allowed transgender women to compete since 2004, but we've yet to see a single trans athlete qualify to compete.(4)

The **North Dakota American Academy of Pediatrics** stated in testimony agreement with the systematic review in 2017 above and further stated, “Any disingenuous attempt to defend this law by suggesting otherwise [that science supports exclusion] is flatly contradicted by research.” (5)

Dozens of medical professionals within North Dakota stated, “there is no categorical advantage being male has over being female in athletics. Spontaneous genetic mutations which result in an individual possessing unique traits that place them at an athletic advantage are not routinely screened for in athletics, and are felt to occur in the same number of individuals who identify as a gender that is not congruent with their gender assigned at birth. As written, this piece of legislation is based on the personal views of its authors rather than evidence. If any of the legislators who currently support this bill would like to learn more about the anatomy and medical science behind gender identity, we welcome an open discussion.”(6)

Dr. Luis Casas shared that “In a study published in Science in 2018, Joanna Harper's research found that a nonelite group of eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.” (7)

One study from the Karolinska Institutet shows adult trans women only losing 5% of muscle mass during 12 months on hormone therapy. This study only looked at 11 trans women and

said “It is important to note that we only examined a few selected performance markers and the participants were untrained. The magnitude of physical changes in elite athletes who undergo treatment while training for their sport is very difficult to speculate on as there are no such studies.” (8)

Regardless, Matt Fetsch, executive director of **North Dakota High School Activity Association** describes it as a non-issue in our state. According to research there are “Currently, 16 states plus Washington, D.C., have transgender-inclusive statewide guidance and policies that allow students to participate and compete on teams in accordance with their gender identity without requiring the athlete to have undergone medical transition—meaning hormone therapy and/or gender confirmation surgery—or legal transition, such as by changing one’s birth certificate or other legal documents, prior to competing. In supporting access to athletics based on gender identity, almost 42 percent of transgender high school-age youth nationwide—representing approximately 62,550 transgender students among more than 6.8 million high school-enrolled youth living in these states—have the same opportunity to participate in and benefit from sports as their cisgender peers”.(9)

Despite tens of thousands of trans athletes competing in states that allow inclusion, we don’t see these athletes dominating. A highly cited example of trans youth winning are Terry Miller and Andraya Yearwood in Connecticut. ESPN did a comprehensive breakdown of this story, showcasing that while both of these girls did win some competition, they also lost a number of times as well. (10) Their top times weren’t even close to the world record held by non trans female youth athletes either. (11) It would stand to reason that if transgender youth had an advantage, we would see an overrepresentation of trans youth winning tournament. What we see is far from that, we rarely see trans youth win, and when we do it is faced with harassment and extreme public scrutiny. (12) Miller and Yearwood are unlikely to continue competing in track due to these experiences.

What complicates these discussions is an inconsistency in arguments that require some baseline considerations. Biological male is not a useful classification when attempting to apply it to both cisgender males and transgender women as there is a marked difference in physiology, development, and hormones between these two groups.

- Cisgender male: Someone who was assigned male at birth, had testosterone based puberty, and continues to have testosterone as a primary hormone their entire life
- Transgender female: Someone who was assigned male at birth, May or may not have a testosterone based puberty, may or may not have testosterone as a primary hormone, and may have only had testosterone as a primary hormone for months or years, rather than decades.

The important factor for athletic advantage is not “being born male”, but having an androgenized puberty and continual testosterone. (13)

Fact: Cisgender males as a group have a statistical advantage due to a testosterone based puberty and continuing to have testosterone as a primary hormone.

Fact: Transgender females who have a testosterone based puberty and are still on testosterone for primary hormone likely have a statistical advantage similar to cisgender males.

Fact: Transgender females who do not have a testosterone based puberty or testosterone as a primary hormone have no conceivable advantage in women's sports.

Debate: How long does it take to remove the advantage of a testosterone based puberty with hormone therapy and how low must testosterone be kept.

Before we continue it is worth noting the debate mentioned above is entirely focused around adults and for the highest level of competition for largely private organizations. Schools have and should consider a number of additional factors for why they host and encourage sports participation within their school districts that will be discussed in subsequent sections.

This debate does not contradict the policy suggestions put forward by the IOC or NCAA, as the systematic review of literature has concluded this is a non-issue. The recent studies making way that trans adult women may hold onto some competitive advantage if they've gone through testosterone based puberty and development are not conclusive and feature sample sizes of less than 30 trans women. (14) This is not statistically relevant and with numbers these low no conclusions can be made.

I agree that more research can and should be done in interest of fairness, but it would be a mistake to focus on these studies as conclusive hard proof, when even within the studies themselves they declare the data as only a suggestion to look at further. Also statistical advantage does not translate to individual advantage as NCAA warns to not over generalize. With all of this taken into account, the policy suggested in HB 1298 is not promoting fairness.

2. For purposes of this section, sex means an individual's biological sex and is based solely on an individual's reproductive biology and genetics at birth.

This is not how biological sex is understood by science or law. (15) (16) More importantly, neither reproductive biology or genetics at birth are necessarily nor guaranteed to convey a biological advantage. None of this takes into account intersex athletes or Hyperandrogenism in female athletes either. This bill is intended to be about fairness and this section does not relate to the intent or goal of this bill. In fact, this bill creates distinct undisputable disadvantage for cisgender female athletes.

- Cisgender female: Someone who was assigned female at birth, had estrogen based puberty, and continues to have estrogen as a primary hormone their entire life
- Transgender male: Someone who was assigned female at birth, may or may not have an estrogen based puberty, may or may not have estrogen as a primary hormone, and may have only had estrogen as a primary hormone for months or years, rather than decades.

A cisgender female and a transgender male are both assigned female at birth. According to Section 2 of HB 1298, a transgender male would be considered biologically female. This transgender male may have a testosterone based puberty and may be on testosterone as their primary hormone. A study with a small sample size does suggest “prior to gender affirming hormones, transmen performed 43% fewer push-ups and ran 1.5 miles 15% slower than their male counterparts. After 1 year of taking masculinising hormones, there was no longer a difference in push-ups or run times, and the number of sit-ups performed in 1 min by transmen exceeded the average performance of their male counterparts. (17)

There is no fairness to be found in HB 1298. The NDHSAA already has a fair policy for transgender inclusion. (18) This policy equitably deals with the reality of advantage being based on hormones. There is no debate on where advantage may come from. The notion it comes from your reproductive organs or genetics without regard to hormones is not consistent with any sports literature. I cannot stress this enough, there was no mention of reproductive organs or genetics being a factor in every single organization, policy, or research study on the topics of transgender people in sports. If one was truly concerned they could change the recommended policy to require two years of hormone therapy or an estrogen based puberty for trans girls. This is not remotely needed or supported by data or empirical evidence, but would represent the most extreme restrictions that still flirt with sound science.

1. https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf
2. On Transgendered Athletes, Fairness and Doping: An International Challenge,” Sport in Society: cultures, commerce, media, Politics, 1743-0445, Volume 9, Issue 2 (2006) Pages 227 – 251.
3. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259/>
4. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf
5. https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2497-A-SYVERSON_GRANT.pdf
 - a. Signed by Grant Syverson, MD Luis Casas, MD David Newman, MD Kathy Anderson, MD Brenda Thurlow, MD Tracie Newman, MD, MPH Sarah Paur, CPNP Jagila Minso, MD Chris Tiongson, MD Barbara Bentz, MD Maria Weller, MD Gabriela Balf, MD, MPH Bonnie Kvistad, MD Rebecca Preussler, PsyD Justin Horner, MD Alex Thompson, MD Brandon Meyer, MD Stephanie Antony, MD Vanessa Nelson, MD Jenifer Jones-Dees, MD Stephen Tinguely, MD Julie Erpelding-Kenien, MD Kurt Kooyer, MD Rebecca Schreier, MD Natalie Dvorak, MD Amy Oksa, MD Rebecca Bakke, MD
6. <https://www.grandforksherald.com/opinion/letters/6860158-Letter-HB-1298-is-an-archaic-piece-of-legislation-discriminates-against-North-Dakota-youth>
 - a. Signed by Heidi Selzler-Echola, WHNP-BC; Whitney Fear PMHNP-BC; Dr. Kayla Moorer, PhD, LP; Dr. Luis Casas, MD; Dr. David Newman, MD; Naomi Tabassum, LPCC; Jessica Deckert, LPCC; Megan Degenstein, LPCC; Jessica Danielson, PhD, LPCC-S, NCC; Farryn Helm, LPCC, RPT; Molly Secor-Turner, PhD, RN, FSAHM; Mykell Barnacle, DNP, FNP-BC; Danial S. Sturgill, Ph.D.;

Melissa L. Johnson, MSIV; Emily Coler Hanson, LMFT; Mary L. Rymanowski, MSW, LICSW; Mark C. Daniels, PhD; Shauna Erickson, MS LMFT; Rebecca Preussler, PsyD; Sara Vedvei, MS, LMFT; Barb Stanton, PhD, LPCC, LMFT; Will Pearson, LMFT ; Carrie Nostrant, MEd, NCC, Kathryn Tidd, LICSW; Denage Sauve, LPCC; Ashley Limesand, Mental Health Therapist Intern; Madison Schill, Clinical Counseling Master's Student; Tyrza Hoines, Clinical Counseling Master's Student; Courtney Quist, Clinical Counseling and School Counseling Master's Student; Amy Tichy, RDT, Clinical Counseling Master's Student; Holly DeVries, Clinical Counseling Master's Student; Marion Harris, graduate student, Clinical Mental Health; Katrina Stollenwerk, Mental Health Therapist Intern and Clinical counseling Master's Student; Anika Mundal, Clinical Counseling and School Counseling Master's Student; Amanda Jensen, Clinical Counseling Master's Student

7. https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2420-A-CASAS_LUIS.pdf
8. <https://academic.oup.com/jcem/article-abstract/105/3/e805/5651219?redirectedFrom=fulltext>
9. <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/#fn-495502-38>
10. https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate
11. <https://www.runnersworld.com/news/a28147914/briana-williams-national-high-school-record-100-meters/>
12. <https://www.theguardian.com/sport/2015/feb/16/fallon-fox-trans-mma-athlete-interview>
13. <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance/>
14. <https://www.bmj.com/company/newsroom/current-treatment-period-may-be-too-short-to-remove-competitive-advantage-of-transgender-athletes/>
15. <https://www.forbes.com/sites/kimelsesser/2020/06/15/the-myth-of-biological-sex/?sh=2cf1879e76b9>
16. <https://www.oyez.org/cases/2019/17-1618>
17. <https://bjsm.bmj.com/content/early/2020/11/06/bjsports-2020-102329>
18. https://ndhsaa.com/files/2015_16_Board_and_Committees/NDHSAA_Transgender_Student_Board_Regulation.pdf

Queer Youth: Outcomes in North Dakota

Queer youth are 4 times more likely to attempt suicide in North Dakota. 1 in 3 queer youth will attempt to kill themselves in North Dakota. We hear from some of the individuals who propose this legislation that even though there is a legislative risk of lawsuit that could cost the state money, maybe that cost is worth it for doing the moral thing. Even if trans youth had some innate advantage, which is either patently false for those who've medically transitioned during puberty or unlikely for those who have, this legislation will have negative repercussions for these youth that will increase anxiety, depression, and suicidality. I can't believe the moral thing involves actions that will lead to youth being so hopeless they kill themselves.

I can't stress enough that this isn't being an alarmist, we have a wealth of local data from the Youth Risk Behavior Survey that show the struggle already. GLSEN compiled a good deal of national data looking at impacts of sports for these youth and by extension the consequence for being unable to participate and gain the benefits sports gives youth beyond this hyperfocus on top performance or scholarships that relatively few students even have access to.

"For all students, having the opportunity to participate in sports results in positive outcomes, including physical development,¹ social skills,² and psychological well-being. The psychological benefits of sports specifically include improved emotional regulation,³ decreased hopelessness and suicidality,⁴ fewer depressive symptoms,⁵ and higher self-esteem.⁶ Research has also found that sports participation is related to greater feelings of school belonging and pro-school behaviors.⁷ GLSEN's research has shown that on a 4.0 scale, LGBTQ+ student athletes have a GPA that is 0.2 points higher than students who did not participate in athletics. LGBTQ+ team leaders have a GPA that is 0.4 points higher than their peers who did not participate in athletics. Further, 56% of LGBTQ+ team members and 66% of LGBTQ+ team leaders competing in high school sports report feeling a positive sense of belonging at school.⁸"

¹ Biddle, S. J. H., & Asare, M. (2011). Physical activity and mental health in children and adolescents: A review of reviews. *British Journal of Sports Medicine*, 45(11), 886-895; Snyder, A., Martinez, J., Bay, R., Parsons, J., Sauers, E., & McLeod, T. (2010). Health-related quality of life differs between adolescent athletes and adolescents nonathletes. *Journal of Sport Rehabilitation*, 19, 237-248.

² Bailey, R. (2006). Physical education and sport in schools: A Review of benefits and outcomes. *Journal of School Health*, 76(8), 397-401; Eime, R. M., Young, J. A., Harvey, J. T., Charity, M. J., & Payne, W. R. (2013). A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport. *International Journal of Behavioral Nutrition and Physical Activity*, 10(98).

³ Eime, R. M., et al (2013); Hansen, D. M., Larson, R. W., & Dworkin, J. B. (2003). What adolescents learn in organized youth activities: A survey of self-reported developmental experiences. *Journal of Research on Adolescence*, 13(1), 25-55.

⁴ Taliaferro, L. A., Rienzo, B. A., Pigg, R. M., Miller, M. D., & Dodd, V. J. (2009). Associations between physical activity and reduced rates of hopelessness, depression, and suicidal behavior among college students. *Journal of American College Health*, 57(4), 427-436; Taliaferro, L. A., Eisenberg, M. E., Johnson, K. E., Nelson, T. F., Neumark-Sztainer, D. (2011). Sport participation during adolescence and suicide ideation and attempts. *International Journal of Adolescent Medicine and Health*, 23 (1), 3-10.

⁵ Boone, E., & Leadbeater, B. (2006). Game on: Diminishing risks for depressive symptoms in early adolescence through positive involvement in team sports. *Journal of Research on Adolescence*, 16(1), 79-90; Eime, R. M., et al (2013).

⁶ Adachi, P. J. C., & Willoughby, T. (2014). It's not how much you play, but how much you enjoy the game: The longitudinal associations between adolescents' self-esteem and the frequency versus enjoyment of involvement in sports. *Journal of Youth and Adolescence*, 43(1), 137-145; Bailey, R.

(2006); Eime, R. M., et al (2013); Slutzky, C. B., & Simpkins, S. D. (2009). The link between children's sport participation and self-esteem: Exploring the mediating role of sport self-concept. *Psychology of Sport and Exercise*, 10(3), 381-389.

⁷ Bailey, R. (2006); Eime, R. M., et al (2013).

⁸ MAP, GLSEN, NCTE, and NEA (2017). *Transgender Youth in America's Schools*. Available at https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf

House Committee: Summary of Testimony

I compiled all of the testimony in opposition to this bill from the original house committee hearing. What we found is individuals involved in sports, education, and healthcare pretty much unanimously voted in opposite to this bill. Since then, we've learned many school districts oppose it, including the North Dakota High School Activity Association. Even Rob Port wrote that he wouldn't vote for this.

The folks in favor are largely from a very religious background, opposing the existence of transgender individuals on religious grounds. While they have the right to their opinion, faith, and practice, we should not be using the government to enforce an extreme religious position. North Dakota's values are very much about freedom. We're about local control. We shouldn't be imposing such strict government oversight over the local coaches, sporting experts, and schools to meet the ideology of special interest groups that diametrically oppose queer people. Especially considering the blowback, financial cost, and harm it will have.

When the Obama administration gave protections for queer students our state opposed on the grounds of not wanting government oversight and allowing each school the power to self determine the policy that makes sense. Why are we now bowing to national political pressure to put the same far reaching legislation we once fought so hard against?

The testimony as shared below has five key points

1. This is unconstitutional
2. Medical communities band together to say there is no advantage for trans youth
3. It harms cisgender girls
4. It harms transgender girls
5. It harms the state

North Dakota law and federal law prohibit discrimination based upon sex.

1-4 Testimony from Debra L. Hoffarth

1. The North Dakota Human Rights Act prohibits discrimination based upon sex
 - a. NDCC 14-02.4-01
2. Title VII of the Civil Rights Act prohibits discrimination based upon sex, this includes gender identity.
 - a. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

3. The State of Idaho passed the Fairness in Women's Sports Act. The United States District Court of Idaho stayed the implementation of the law, as the Act is likely unconstitutional.
 - a. Hecox v. Little, No. 1:20-CV-00184-DCN (D. Idaho Aug. 17, 2020)
 - b. <https://law.justia.com/cases/federal/district-courts/idaho/iddce/1:2020cv00184/45676/63/>
4. Executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."
 - a. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/execute-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>
5. Policies like this are no different from policies that excluded groups or treated groups differently based on race - they are rooted in discrimination, have no scientific basis, and will ultimately negatively effect the health, development, and safety of children within our state.
 - a. Testimony from Kathy Anderson, President of the North Dakota American Academy of Pediatrics
6. The bill, if enacted, could require NDUS colleges and universities violate federal Title VII and Title IX federal regulations and guidance, take a position that contradicts athletic conference guidelines, and add to the institutions' administrative burden by requiring the collection of birth certificates as part of the admission process for our 45,000 students. It may also be impossible to enforce.
 - a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
7. This bill will suffer the same fate as Idaho's H.B. 500: immediate challenge in court. The preliminary injunction granted by the District Court is currently on appeal to 9th Circuit. The District Court decisively rejected the arguments by the state - which are emulated in the justifications for this bill - concluding that "the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho."
 - a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign

Trans Youth Do Not have a Competitive Advantage for being Transgender

1. Dr. Joshua D. Safer who contributed to the policies and standards set by the NCAA states that "a person's genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance" and "that there is no inherent reason why their physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-gender woman". In a study published in Science in 2018, Joanna Harper's research found that a nonelite group of

eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.

a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist

2. I have devoted my life to women's athletics and have spent the past decade coaching at the Division I and III levels. While I have heard the concern that some may have for transgender participation in athletics, I can assure you that there is no real threat to athletics, specifically women's athletics. The NCAA has allowed transgender student-athletes to participate in college athletics since before I started coaching college sports without incident. Transgender student-athletes are not "stealing" scholarships, championships or opportunities from female student-athletes. I have never experienced any detriment to my program or women's athletics due to the NCAA's inclusive stance on transgender student-athletes. In my opinion, this bill is unnecessary and reckless. This bill would not make our athlete's safer because there is no impending risk.

a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia

3. Testosterone levels vary considerably amongst non transgender males and non transgender females, and we don't routinely screen for common medical conditions that increase testosterone amongst cisgender female athletes, such as polycystic ovarian syndrome.

a. Testimony from David Newman MD

4. In 2017, a systemic review of medical literature found, "There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery)." Any disingenuous attempts to defend this law by suggesting otherwise is flatly contradicted by research.

a. Testimony from ND American Academy of Pediatricians, Grant Syverson, MD Luis Casas, MD David Newman, MD Kathy Anderson, MD Brenda Thurlow, MD Tracie Newman, MD, MPH Sarah Paur, CPNP Jagila Minso, MD Chris Tiongson, MD, Barbara Bentz, MD Maria Weller, MD Gabriela Balf, MD, MPH Bonnie Kvistad, MD Rebecca Preussler, PsyD Justin Horner, MD Alex Thompson, MD Brandon Meyer, MD Stephanie Antony, MD, Vanessa Nelson, MD Jenifer Jones-Dees, MD Stephen Tinguely, MD Julie Erpelding-Kenien, MD Kurt Kooyer, MD Rebecca Schreier, MD Natalie Dvorak, MD Amy Oksa, MD Rebecca Bakke, MD

5. As a 13-year old I was a 6 ft. tall, 190 lb. forward on my JV team who could palm a boys' regulation basketball. Because I was bigger and stronger than the typical 7th-grade girl, should I have not been allowed to play? I am a cisgender female, and would those physical stats have mattered any differently had I been a transgender girl? People come in all shapes and sizes, especially during the school-age years. To blame size/strength discrepancies on transgender athletes is dishonest.

a. Testimony from Marla Fogderud

6. In fact, based on my research, I couldn't find a single case of transgender athletes gaining an unfair advantage over competitors in the state of North Dakota. What I could

find, though, are athletic organizations like the NCAA (National Collegiate Athletic Association), IOC (International Olympic Committee) and USA Gymnastics implementing inclusive trans athlete policies at the highest levels of competition.

- a. Testimony by Jacob Thomas
 - b. https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf
 - c. <https://www.outsports.com/2016/1/21/10812404/transgender-ioc-policy-new-olympics>
 - d. https://www.usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf
7. Many are rightly protective of the legacy of women's sports in this country. Importantly, advocates for women and girls in sports – such as the National Women's Law Center, the Women's Sports Foundation, Women Leaders in College Sports, and others – support transinclusive policies and oppose efforts to exclude transgender students from participating in sports. That's because while there are real issues facing women's sports, including a lack of resources devoted to supporting them, transgender participation in athletics is not one of them.
- a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign
8. The District Court also notes that "Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail."
- a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign

This Bill Creates Negative Outcomes for Transgender Youth

1. Current research shows that people who do not feel supported to express themselves as they identify are more likely to suffer from depression, substance use, and experience suicidal thoughts and engage in suicidal behavior. (Gabriela Balf Testimony)
 - a. Signed by these psychiatrists of North Dakota and ND Psychiatric Society:
Stephanie Jallen, MD Laura Schield, MD Andrew J. McLean, MD, MPH Lisa Schock, MD Ahmad Khan, MD Lori Esprit, MD
2. It is a fact that student participation in sports has positive mental health effects in addition to the obvious effects it has on overall health and wellbeing. Excluding trans youth from participating in school sports will have significant mental health consequences in a group that already has the highest risk for attempted suicide and levels of depression.
 - a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist

This Bill Creates Negative Outcomes for Cisgender Youth

1. The policy proposed could subject any girl or woman to accusations and invasive tests because of concerns of being "too masculine" or "too good" for their sport to really be a ciswoman or cis-girl. As a pediatric endocrinologist, I have evaluated healthy young girls

who come to me because they are too tall and measure well over two standard deviations above the normal for age and ultimately become tall women (often measuring six feet or taller). One could argue that they too could be discriminated against because they exceed the expected body type that could in theory advantage them in female sports.

- a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist
 - b. <https://www.nytimes.com/2019/05/01/sports/caster-semenya-loses.html>
2. Female-athletes that live in rural areas will be among those most affected. It is not uncommon for a female to compete on male athletic team if there is no female option available to them. While almost every high school may have a men's and women's basketball team, the same cannot be said for sports like soccer.
- a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia
3. HB 1298 does nothing to protect women and girls in sport and has the potential to violate Title IX. Leading national women's organizations including The Women's Sports Foundation and high profile female professional, Olympic, and Paralympic athletes have consistently expressed opposition to bills like HB 1298 for this reason . Female athletes and women's organizations want lawmakers to focus on the real issues facing women and girls in sports -- like lack of resources for girls' teams, a dearth of female leadership in sports coaching and administration, and sexual harassment and assault toward girls and women in sports -- having a transgender teammate is not among the well-documented threats facing female athletes. Further, Title IX makes allowances for women to play on men's team in circumstances where there is not a women's team established or there are significant hurdles to doing so. HB1298 would not allow this to happen, meaning any institution that makes allowances to rectify the issues for women in sports could lose federal funding for noncompliance with Title IX . In addition, HB 10 1298's additional emphasis on athletic venues would make North Dakota ineligible to host NCAA events, just as HB2 in North Carolina prompted the NCAA to move championships out of the state.
- a. Anne Lieberman Director of Policy & Programs, Athlete Ally
 - b. https://www.womenssportsfoundation.org/press_release/billie-jean-king-megan-rapinoe-and-candace-parker-join-nearly-200-athletes-supporting-trans-youth-participation-in-sports/
 - c. <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>

This Bill Creates Negative Outcomes for the State and State Institutes

1. A more recent case may be instructive. In 2020, Idaho passed HB 500, also known as the Fairness in Women's Sports Act, the first of its kind in the nation. It states: "athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Currently, the law has been blocked in federal court, and the NCAA has stated that it is considering moving 2021 March Madness tournament games out of Boise because of the legislation. If HB 1298 were to pass, we can expect that the NCAA may target the Frozen Four regionals currently scheduled to take place at Scheels Arena

in Fargo in March 2021, 2023, or 2025 – with UND as the host school – or a potential NDSU football playoff or championship game.

- a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
2. To administer this requirement, NDUS campuses would be required to maintain original birth certificate records of all 45,000+ students which could result in additional administrative burden or cost and impose barriers for access for students who are unable to provide the required original birth certificate. It would also require campuses to police the rules and participants of every outside school or league that uses. It could transform a simple flag football sign-up sheet into a legal and logistical nightmare.
 - a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
3. If passed, HB 1298 will face the same fate [as Idaho's Bill]: immediate and expensive litigation paid for by taxpayers, only to be struck down
 - a. Testimony from Dane DeKrey ACLU
4. In Indiana, a bill that discriminated against LGBTQ people cost the state millions of dollars in lost revenues after businesses boycotted the state. Similarly, in North Carolina a bill that targeted transgender people's ability to use the bathroom of their choosing cost the state over \$3.75 billion from boycotts. Finally, in South Dakota bills like HB 1298 have consistently been rejected out of fear of their effect on the state's financial services industry.
 - a. Testimony from Dane Dekrey ACLU
5. I would like to add that this bill and others like it affect the overall perception of North Dakota and its relationship to minorities. Personally, this bill as well as other anti-LGBT legislation has encouraged me to live in Minnesota despite cheaper taxes, lower house prices and better commerce in Fargo. I recently bought a house in Minnesota with my wife, Chelsea. I am sad to say that while we considered buying a home in North Dakota, ultimately we felt that our rights as an LGBT couple would be better protected in the state of Minnesota.
 - a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia
6. We're troubled by these anti-LGBTQ bills that could hurt our workforce and their families. We need our workers and their families – including any transgender members of their families – to feel welcome in the state where we operate. Discriminatory legislation like HB 1298 negatively impacts our ability to recruit and retain the best and brightest employees, and discourages local investment. We recognize the work North Dakota has done to help the technology sector grow and be competitive in a national and global economy, and we caution legislators from doing anything that would make it more challenging to compete for the talented and highly educated workers many of our companies are looking to hire.
 - a. Testimony from Samantha Kersul Executive Director, Washington and the Northwest TechNet

The Court Cost: This Legislation has Been Tested

I will keep this section brief as all of the information can be found here:

<https://www.aclu.org/cases/hecox-v-little>. A good deal of this was also shared within the ACLU's testimony against this legislation.

It has to be understood that this legislation, regardless of how it attempts to frame its issues, is discriminatory. If you want to attempt to discriminate against transgender individuals than it is in your best interest to vote "Do Pass". This may be a benefit to your voter base, it may be in your interest to harm marginalized community members, but this is the only reason to try to pass this legislation. If you care about sports, if you care about having actual conversations looking to find solutions to these issues, then vote no.

These are conversations we should have, I don't think anyone disagrees with that, but are we having conversations here or are we being told what to do? These issues are complicated and nuanced and have been studied and weighed by sports experts for decades. Do our legislators possess that same background? Are they able to look over all of this data impartially in just a few hours and make a reasonable determination weighing the issues at hand and the outcomes we're likely to see?

We should spend more time studying this, more time discussing it, and more time looking for equitable solutions for all North Dakodans. Until then, we should leave it up to the people who actually run sports in our state, whether that be coaches or schools. Let's give them discretion on a case by case basis. Let's give opportunity to all parents and children depending on their preference to find areas that will work for them. Namely, let's keep doing what we have been doing, because no problem has arisen yet from it and don't fix what isn't broken.

Final Thoughts

This document is far too large to ever be read, but I often feel I'm not heard when I speak to legislators in this state anyway. My previous piece was short, with big text, that just pointed to the very major issues. I didn't get into as much as I knew then, because of this loss of hope that my voice, experience, or work matter. If I even take on a position that is meant to help or understand trans folks I seem to get boxed as a radical leftist. My background is healthcare, my concern is from empathy and my approach from policy and data on outcomes.

I think it's fair to say that I'm the most aware of the struggles of queer youth in this state. I've extensively researched the outcomes through our Youth Risk Behavior Survey and even advocated for question changes to better understand this landscape. I always work with a non-partisan agenda, that invites people in, without forcing them or calling them out. I just want queer folks in this state to have hope, because right now they don't.

I'm completely sure this committee will vote 'Do Pass' and the senate will vote to put this into legislation regardless of what I or the many other organizations and individuals of this state say. There is no amount of evidence or appeal that exists that will change the mind of someone who's already made it up.

I've seen legislators sit there during testimony, never asking questions of the many policy experts who devote their time for education. I don't see many legislators trying to understand. I see them waiting until it's over to vote how they would've voted anyways. If I knew a way to

convince you, I would do it. If begging helped, I would do it. If you asked me to donate all my money to nonprofits to help queer youth, I would if it meant a statewide effort to improve these outcomes. I care about this. This isn't politics to me or football, where I walk away after the game is over saying "oh well". This is knowing this legislation will have severely negative outcomes on queer youth without comparable benefits to cis youth and I have to do so much more to try to help them survive.

I get that for many people being trans is new and sometimes scary, but we just need to have better conversations and grow as a culture to understand what this means. As I've said many times, blanket bans aren't the answer. We need to keep talking about this, while determining things on a case by case basis until we can all grasp these issues better. Ultimately, let's keep talking about this legislation, let's introduce it in our next legislative cycle, when we've had more time to sit with the information and discover what would be best for our state. If you still feel a ban would be necessary then, I wouldn't have room to complain.

I would rather stick to conversations around data without appeals to emotion, but here is my everything in hopes to get some traction. I've done my best, I really have. Regardless of what happens here, I will keep working towards improving outcome for queer youth. If you do believe this is solely about fairness in sports, after everything written here, please also do something to help these queer youth who are struggling.

Thank you for your time,
Faye



March 15, 2021

Via Electronic Mail

Diane Larson, Chair
Michael Dwyer, Vice-Chair
Members of the Senate Judiciary Committee
Peace Garden Room
North Dakota State Capitol
600 E. Boulevard Ave.
Bismark, ND 58505

Re: House Bill 1298 concerning student athletics – OPPOSE

Chair Larson, Vice-Chair Dwyer, and Members of the Committee:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) respectfully submits the following written comments in opposition to H.B. 1298, concerning student athletics. Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people and people living with HIV through impact litigation, education, and public policy work. In 1993, Lambda Legal opened its Midwest Regional Office in Chicago, which leads cases in the Midwest, including in North Dakota, concerning issues of anti-LGBTQ and HIV discrimination in all areas of law including health care, identity documents, employment discrimination, students’ rights, family law, and marriage equality.

We write to express our deep concern about H.B. 1298, which would ban transgender North Dakotan high school student athletes from participating in sports on teams that match their gender identity. We must advise you that this legislation is not only misguided as a policy matter, but it will likely result in expensive litigation for the State because, although the resolution against the State might arrive relatively quickly, awards of attorney fees for plaintiffs’ counsel are likely.

H.B. 1298 irrationally and unlawfully targets some of North Dakota’s most vulnerable young people—transgender students. If the bill is enacted, it would stigmatize and discriminate against transgender students, create serious privacy and harassment risk for all girls and young women interested in sports participation, and invite no-win litigation against school districts.

First, if H.B. 1298 were enacted, it would cause serious, irreparable harm for transgender students, who already experience well-documented stigma, bullying and discrimination.¹ Excluding transgender students from athletics denies them the “life-long benefits of equal

¹ See Movement Advancement Project et al, *Separation and Stigma, Transgender Youth & School Facilities, Spotlight Report*, available at <https://www.lgbtmap.org/file/transgender-youth-school.pdf>.

opportunity and participation” and “the value of inclusive and welcoming sports environments.”² School athletics provide students uniquely valuable opportunities to develop self-confidence, teamwork, sportsmanship, and leadership skills, as well as a personal work ethic, discipline, responsibility, and good habits of exercise and attention to physical health. Denying transgender students these opportunities would irreparably harm those students.

Second, harming transgender students by excluding them from participation in athletics, as H.B. 1298 intends, would constitute sex discrimination in violation of federal law and would place schools at great risk of liability. For example, H.B. 1298 would require schools to prohibit transgender girls from participating with other girls, which effectively bars them from participating and violates Title IX of the Education Amendments of 1972 (the federal law banning sex discrimination). The U.S. Supreme Court (in *Bostock v. Clayton County, Georgia*) confirmed that excluding people from employment because they are transgender is discrimination against them because of sex in violation of federal law. Even before *Bostock* was decided, courts were clear that transgender students are similarly protected under Title IX,³ as well as by the U.S. Constitution.⁴ And since *Bostock*, multiple federal circuit courts have further confirmed that it is unlawful discrimination to deny transgender students equal treatment,⁵ and no federal circuit court has agreed with this type of discriminatory policy. Also, in the one case addressing a law like this proposal, the federal court enjoined the law on constitutional grounds.⁶

Third, H.B. 1298, if enacted, would place schools at risk of legal liability by inviting litigation against them from both directions. On the one hand, it invites claims by cisgender⁷ students who object to participation by transgender students and those they believe might be

² See Brief of Amici Curiae 176 Athletes in Women’s Sports, the Women’s Sports Foundation, and Athlete Ally in Support of Plaintiffs-Appellees and Affirmance, *Hecox v. Little*, Ninth Circuit Case Nos. 20-35813, 20-35815, available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/athletes_in_womens_sports_amicus_brief_hecox_v._little.pdf.

³ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016).

⁴ See, e.g., *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 283 (W.D. Pa. Feb. 27, 2017) (policy restricting Lambda Legal clients’ access to restrooms consistent with their gender identity violated Equal Protection).

⁵ E.g., *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (affirming right of Lambda Legal client to access school restroom consistent with his gender identity). *Accord, Parents for Privacy v. Barr*, 949 F.3d 1210, 1228 (9th Cir. 2020) (rejecting Title IX and constitutional claims of cisgender students based on having to share single-sex restrooms and locker facilities with transgender students).

⁶ *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *28, 35 (D. Idaho Aug. 17, 2020) (holding Idaho law like H.B. 1298 violated federal law, and citing *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019), Lambda Legal case holding heightened constitutional scrutiny applies “if a law or policy treats transgender persons in a less favorable way than all others”). The *Hecox* court also noted that to suggest that transgender girls are free to play, but that they must play on boys’ teams, is akin to saying gay and lesbian people were free to marry when they were only permitted to marry a person of the other sex.

⁷ The term “cisgender” refers to a person who is not transgender.

transgender; meanwhile, as noted, schools that deny transgender students the ability to participate or that subject some students to privacy violations because others suspect them of possibly being transgender would violate the federal rights of the students excluded or so targeted. All litigation tends to be costly, especially when attorneys' fees are considered. Given the status of existing law, the likelihood of a successful legal challenge to H.B. 1298, if enacted into law, is obvious.

This bill also creates the risk of loss of federal funding. The U.S. Department of Education's Office for Civil Rights ("OCR") enforces Title IX's nondiscrimination requirements in education programs and activities that receive federal financial assistance. Importantly, President Biden's January 20, 2021 executive order—*Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*—directs all federal agencies to fully implement the principles of equal treatment under the law by applying the reasoning in *Bostock*, which prohibits sex discrimination based on gender identity or sexual orientation.⁸ Specifically affirming the rights of young people and citing Title IX, the Executive Order states, "Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."⁹ Accordingly, a recipient of federal financial assistance that refuses to comply with Title IX by excluding transgender students or otherwise engaging in gender identity discrimination risks termination of such funds and is also likely to incur significant attorney fees in responding to any OCR investigation and probable funding termination proceedings. These serious consequences are not to be taken lightly.

Finally, H.B. 1298's definition of sex is factually mistaken and legally indefensible. The bill's definition makes the same mistake that analogous policies and laws have made, which has rendered them invalid. By ignoring medical science and attempting to limit a complex human reality with a legislative "say so," such policies create and impose discrimination which cannot be defended when challenged in court. More specifically, the bill imposes a definition of "sex" that is inconsistent with how sex and gender are understood and explained in science and in the law. To begin with, courts have thoroughly rejected artificial, inaccurate, limiting conceptions of "biological sex."¹⁰ For example, the Seventh Circuit refused to adopt such a definition in a school policy excluding transgender students because such a definition does not exist in Title IX.¹¹

⁸ Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

⁹ *Id.*, Section 1 (emphasis added).

¹⁰ See, e.g., *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018), *aff'd*, 968 F.3d 1286, (11th Cir. 2020); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *3 (D. Idaho Aug. 17, 2020); *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019), *reh'g denied* (Apr. 2, 2019); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833 (S.D. Ind. 2019); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018).

¹¹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

Similarly, the Fourth Circuit and the Eleventh Circuit both have rejected similar attempts to narrow the definition of “sex” to exclude transgender youth.¹²

Medical experts also have rejected the narrow definition of “biological sex” contained in H.B. 1298. Human beings are complicated, and each person’s sex has multiple different elements, including chromosomes, hormones, anatomy, and gender identity. Chromosomal makeup is more complicated and varied than most people realize; for example, a significant number of people have more than two sex chromosomes. Moreover, some people appear female but have XY chromosomes, and some people who appear male have XX genetics.¹³ There also is much more variation of observable “reproductive biology” among infants than many people realize. Some have ambiguous genitalia; some have an uncommon combination of features. The term “intersex” covers a range of these variations that defy the simplistic assumption used in the definition in this bill. In sum, multiple elements combine to determine an individual’s sex or gender and it is now widely recognized among experts that the most important of these is gender identity.¹⁴

H.B. 1298 is a solution in search of a problem and would needlessly invite harm to girls and all LGBTQ young people, and the contentiousness and expense of litigation merely to inscribe discrimination into statute—at least temporarily—for no legitimate reason. It is important for elected leaders, including each of you in your role as Senate Judiciary Committee members, to uphold the statutory and constitutional guarantees that protect everyone in this State, especially including marginalized populations like those who would be disparately impacted by the proposed

¹² See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *reh’g en banc denied*, 976 F.2d 399 (4th Cir. 2020), *cert. petition filed*, Case No. 20-1163 (Feb. 19, 2021); *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020).

¹³ See *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 fn. 5 (D.D.C. 2006). As the court explained, “While the biological components of sex align together in the vast majority of cases, producing a harmony between outward appearance, internal sexual identity, and legal sex, variations of this pattern that lead to intersexed individuals are real, and cannot be ignored. For example, androgen insensitivity syndrome (AIS) appears in approximately 1 out of every 20,000 genetic males. Complete AIS can produce an individual with “male” (XY) chromosomes and testes, but whose body does not respond to the virilizing hormones the testes produce. As a result, these individuals typically have a female sexual identity, appear feminine, and have female external genitalia, but lack female reproductive organs. See “The Necessity of Change: A Struggle for Intersex and Transex Liberties,” 29 Harv. J.L. & Gender 51, n. 2 (2006) (citing James E. Griffin, Androgen Resistance: The Clinical and Molecular Spectrum, 326 New Eng. J. Med. 611 (1992)). Discrimination against such women (defined in terms of their sexual identity) because they have testes and XY chromosomes, or against any other person because of an intersexed condition, cannot be anything other than “literal[]” discrimination “because of ... sex.” *Ulane I*, 581 F. Supp. at 825. If, as some believe, sexual identity is produced in significant part by hormonal influences on the developing brain in utero, this would place transsexuals on a continuum with other intersex conditions such as AIS, in which the various components that produce sexual identity and anatomical sex do not align.”

¹⁴ See Expert Report of Walter Bockting Ph.D, paragraph 13, submitted in *Schroer v. Billington*, Case No. 05-1090 (JR), U.S. District Court for the District of Columbia (Sept. 14, 2006), *available at* https://www.aclu.org/sites/default/files/field_document/asset_upload_file236_30367.pdf.



legislation at issue. We appreciate your consideration of the above submission and hope that it informs your decision to vote against H.B. 1298.

Thank you for your kind attention to these matters. Please do not hesitate to contact us at (219) 669-1445 or via kingelhart@lambdalegal.org should you have questions or if additional information about these matters would be helpful.

Sincerely,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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**Kristie Wolff – Executive Director, North Dakota Women’s Network
Opposition HB 1298
North Dakota Senate Judiciary Committee**

March 16, 2021

Chair Larson and members of the Senate Judiciary Committee. My name is Kristie Wolff and I am the Executive Director of the North Dakota Women’s Network.

North Dakota Women’s Network is a statewide organization with members and advocates from every corner of the state. I am testifying today in opposition to HB 1298.

Within our mission to improve the lives of women, we have three areas of focus; leadership, opportunity, and equality. HB 1298 is a direct conflict to the positive outcomes we work to create through those areas of focus.

HB 1298 removes opportunities, including leadership opportunities from transgender youth in our state in relationship to sports participation.

HB 1298 uses the guise of women’s rights to create an environment of discrimination and exclusion in North Dakota high school sports.

NDHAA has had a policy in place since 2015 that outlines participation requirements for transgender athletes; therefore, this has been addressed in detail and this discriminatory bill is not needed.

Today I am asking the committee for a do not pass recommendation on HB 1298.

Thank you,

Kristie Wolff

kristie@ndwomen.org

March 15, 2021

Dear Senate Judiciary Committee,

Thank you for accepting public input on HB 1298. I am writing to urge that you vote against the passage of HB 1298. This bill is harmful to transgender and intersex youth. It also has the potential to harm girls who are not transgender but who are noticeably tall, athletic, etc.

School athletics in North Dakota are already well-regulated by policies regarding transgender athletes. For this reason, HB 1298 is a solution in search of a problem. Additionally, there is absolutely no evidence that transgender girls are overtaking girls' sports in North Dakota. Girls in North Dakota are **not** missing out on athletic opportunities due to the presence of transgender girl athletes. I say that we should allow coaches and school districts to continue navigating the inclusion of transgender athletes as they already do. A change is not warranted, especially a change to Century Code!

Transgender and intersex kids are like other children -- they have friends, they have interests, and so on. They want to participate in school life like anyone else, and sometimes that will include sports participation. Most of these children do not broadcast their transgender or intersex status for safety reasons (like avoiding bullying). By making such children play sports as the wrong gender (the one they were assigned at birth that turned out to be wrong), that would highlight their transgender or intersex status and would invite bullying. Most likely, if HB 1298 passes, transgender and intersex children will just opt to not engage in sports at all simply to avoid humiliation and ridicule from bigoted community members. I don't think any children should be nudged out and excluded from normal life like that. That's horrible and is not the kind of community norm that I will ever accept. Experts also tell me that HB 1298 is emotionally devastating and will cause trans youth to contemplate suicide. In some cases, trans youth may carry out a suicide. That absolutely breaks my heart, and it should break yours too. **Simply put, this bill has the potential to put blood on your hands.**

I also think that HB 1298 would inspire a culture of accusations. Girls who are not trans but who are very tall, strong, or competitive may be accused of being trans by their competitors or by bullies. That's not the kind of culture that I want my stepdaughters growing up in.

Ultimately, this bill is an embarrassment to North Dakota. It is clearly government overreach; thus, it actually violates conservative principles. It is repellent to people who know and love trans youth and serves to undermine our workforce development investments in retaining a capable workforce in North Dakota. A lot of really great workers want to live in a North Dakota where trans people are treated like the full humans that they are. "Brain drain" is a very real phenomenon in the United States. Why would we want to embarrass ourselves and drive away talent?

The social scientific evidence suggests that intersex and trans people have likely always existed and likely always will. A productive and pride-inspiring North Dakota – for the present and the future – will be a North Dakota where trans and intersex people are accepted and included. This kind of bigotry should have no place in our beautiful state. I urge you to do the right thing and defeat this cruel bill.

Ellie Shockley, Ph.D. ◻ Mandan, North Dakota
District 34 Resident ◻ EllieShockley.com
(701) 347-1148 ◻ Ellie.Shockley@Gmail.com

March 15, 2021

Senator Diane Larson, Chair
Senator Michael Dwyer, Vice Chair
North Dakota Senate Judiciary Committee
House Bill 1298 – Relating to participation in athletic events exclusively for males or females.

Hello Senator Larson and Members of the Committee,

My name is Alexandra Schulz, and I am a lifelong resident of North Dakota, social worker, graduate student, and LGBTQIA+ ally and am writing you to urge you to oppose the passage of Engrossed House Bill 1298.

This bill feels as though it was written with the intention of protecting the youth of North Dakota, which I do agree is an important priority. One of our primary responsibilities as adults, and especially as elected officials, should be to keep the younger generation safe from harm. Upon further inspection of the bill, however, it is my fear that this is just transphobia attempting to be disguised as concern. That is a common theme in anti-trans legislation, such as the bathroom bills that were a common feature of the news a few years ago. Please allow me to take a moment to discuss how this bill actually is more harmful than helpful to the youth of North Dakota, particularly our transgender and gender non-conforming students.

Research has determined that participation in athletic extracurricular activities has many beneficial outcomes for all students including physical development, social skills, psychological well-being, improved emotion regulation, decreased hopelessness and suicidality, fewer depressive symptoms, and higher self-esteem (GLSEN, 2020). These outcomes are beneficial for all students, but especially so for transgender or gender non-conforming students, who already experience much higher rates of stigma, prejudice, and discrimination than their cisgender peers do. These negative experiences contribute to higher levels of anxiety, depression, substance abuse, suicidal ideation and attempts, and self-harm (Cicero & Wesp, 2017). By not allowing trans/gender non-conforming students to participate on the sporting teams that align with their identified gender, they are experiencing discrimination that they should not have to face. North Dakota communities and schools should be safe for all students to learn and grow in, and by passing this bill, it guarantees that that will not be the case for students who do not identify as transgender. Those students deserve to be protected and safe just as much as their cisgender peers do.

In reviewing the testimony that was submitted in favor of this bill, a common theme that was brought up was the safety of youth athletes. Again, I am in complete agreement with keeping North Dakota's youth safe – but this bill actually is in direct opposition of that goal. This bill targets a group of individuals who are already marginalized and at an increased risk of harm. There is a common misconception that trans/gender non-conforming individuals are sexual predators – this is simply untrue. Here is some information presented by the Office for Victims of Crime (2014):

- One in two transgender individuals will be sexually abused or assaulted during their life.

- 12 percent of transgender youth surveyed in a 2011 study reported being sexually assaulted in K-12 settings by peers or staff.
- The majority of respondents to a 2005 survey stated that they were first assaulted when they were children or youth.

These are just a snapshot of the statistics available on sexual assault and abuse experienced by trans/gender non-conforming individuals. We can never know for sure how many trans/gender non-conforming individuals have been victimized for a multitude of reasons, but what we do know is that they experience increased rates of sexual assault and abuse and are significantly more likely to be victims than they are to be perpetrators. If we want to protect our youth from being victims, passing this bill is not the way to accomplish that.

In the testimony presented when this bill was heard in the house, many professional organizations were in direct opposition of this bill – the Human Rights Campaign, the North Dakota Chapter of the American Academy of Pediatrics, the North Dakota Chapter of the National Association of Social Workers, the Trevor Project, the American Civil Liberties Union of North Dakota, and the North Dakota Psychiatric Society. In addition to these organizations, several psychiatrists and a pediatric and adult endocrinologist were also in opposition to this bill. I do not claim to be an expert on this topic, but these groups and individuals are certainly qualified to be considered that. Their views on this bill should be heavily considered before you make your decision.

I urge you to choose facts over fear and vote “no” on this bill. If we want to protect the youth of North Dakota, this bill is not the way to do it. If you have any additional questions, I would be happy to answer them either during the hearing or via email or phone call. If you would like additional resources, I can certainly provide you with those as well.

Sincerely,



Alexandra Schulz, LBSW
701.426.7454
alexandra.l.schulz1@gmail.com

References:

- Cicero, E. C., and Wesp, L. M. (2017). Supporting the health and well-being of transgender students. *The Journal of School Nursing*, 33(2), 95-108. doi: 10.1177/1059840516689705
- GLSEN. (2020, September). *Gender affirming and inclusive athletics participation*. <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation#:~:text=A%20student%20has%20the%20right,registration%20records%20or%20birth%20certificate>.
- Office for Victims of Crime. (2014, June). *Responding to transgender victims of sexual assault*. <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/printerFriendlyPDF/sexual-assault.pdf>

Senate Judiciary Committee

HB 1298

Chairman Larson and Committee

I urge a strong DO PASS on HB 1298 as a grandparent of a young female athlete.

Trangender athletes deserve compassion, but not the right to transform women's sports.

Millions of girls, women have athletic opportunities because of the legal meaning of the word 'sex.' Redefining the law for trans people is not fair.

Males and females are different. This shouldn't surprise us. On average, men have 36% more skeletal muscle mass, according to one study. In general, males are taller, have thicker bones and have greater lung capacity, than their female counterparts. Cross-hormone treatment (with all the risks and side effects such treatments entail) cannot fully suppress all these biological competitive advantages. Indeed, the entire premise behind sex-specific competition in sports is the simple scientific reality that, in general, males are stronger, faster, and more physically powerful than females. As a result, if males and females are required to compete together, women will almost always lose.

I strongly urge a DO PASS on HB 1298

Thank You

Gordon Greenstein

US Navy (Veteran)

US Army (Retired)



Greetings Chairman Larson and Senate Judiciary Committee Members:

House Bill 1298 is an extremely broad and poorly defined bill aiming to prevent the participation of transgender athletes in public sports. Not only does the bill attempt to ban transgender athletes from participating in any municipal or state run sports such as high school or college competitions, it also bans them from participating in any competition held on public property, whether or not the competition is state sponsored. This sweeping language is imprecise and irresponsibly broad.

Last year, the U.S. Supreme Court ruled that protections from discrimination 'on the basis of sex' includes protections for transgender individuals from discrimination based on their gender identity. While the Supreme Court case specifically involved Title VII of the 1964 Civil Rights Act, the 11th circuit Federal Appeals court decided shortly after that this interpretation also extends to Title IX, disallowing any federally funded schools or universities from discriminating against transgender students. The North Dakota Human Rights Act also disallows discrimination on the basis of sex regarding participation in public services.

HB 1298 directly conflicts with North Dakota High School Activity Association (NDHSAA) policy, which specifically allows transgender athletes who are undergoing hormone replacement therapy to participate in High School athletic competitions with their chosen gender. Additionally, the language contained in the bill invites FERPA violations on the part of schools, and may result in lawsuits and loss of federal grants.

HB 1298 sets a dangerous precedent by disallowing certain members of our community from using public property and services, and conflicts directly with federal and state policy. HB 1298 also flagrantly impedes upon local control by disallowing city or county run organizations from including transgender athletes, and oversteps the bounds of state control by banning transgender athletes from participating in any competition taking place on city, county, or state property, regardless of municipal policy. We urge the committee to vote no in the interest of individual liberty and municipal sovereignty.

Dakota OutRight Board of Directors
Bismarck and Mandan, North Dakota

Erin Pringle
Zayden Bartosch
Jonathan Frye
Naima Fatimi
Kathryn Doll
Sara Durbin

March 15, 2021

Chairperson Larson and Committee Members,

I am writing in opposition to HB 1298. I don't see any reason for this bill, even with any amendments. This bill is too broad reaching, and it destroys a number of youth sports in the state.

In the case with my family (3 children) who are all competitive swimmers, this bill would prevent all of them from ever competing in any organized swimming meets in the entire state.

I understand that the author has a proposed amendment. And while I believe the amendment makes some positive adjustments to the bill so that youth sports MIGHT not be in jeopardy, the fact remains that this bill isn't necessary.

I ask for a DO NOT PASS on HB1298.

Thank you,

Dan Heckaman – Club and High School Swimming Parent
USA Swimming – North Dakota Swimming
Swimming Official

Testimony in Favor of HB 1298

I am writing in support of 1298. Please vote yes on this. As a female athlete myself, I know the importance that sports have played in my life. It taught me camaraderie, leadership, self-control, and strong work ethic. I was also very competitive. I would play against boys all the time. Boys my age. No matter what, there is always a difference when I would play against a boy or a girl. It doesn't matter what an individual identifies as. They are biologically either a boy or a girl, and their body's will perform as such. To put a boy or boys on a court against girls would completely be unfair to women.

I urge you, please protect women's rights and women's sports.

Vote yes on HB 1298

Thank you

Chairperson Larson and Members of the Judiciary Committee,

My name is Kristin Rubbelke and I am the Executive Director of the National Association of Social Workers, North Dakota Chapter (NASW-ND). On behalf of NASW-ND, thank you for reading and considering our position on HB 1298.

NASW-ND opposes HB 1298 due to its intent to discriminate against North Dakota citizens.

NASW Ethical Standards state “[s]ocial workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability.”

Sports and athletic events are very important to the people of North Dakota, and HB 1298 discriminates against transgender adults, youth, and children by preventing them from participating in and enjoying the benefits of their chosen sports activities. The bill also serves to further isolate and ostracize transgender individuals and sends the message that they are not welcome or tolerated in North Dakota – a message that is far from the truth.

The NASW Code of Ethics asserts the inherent dignity and worth of every person and requires social workers to promote self-determination and support an individual’s capacity and opportunity to change and address his or her own needs. HB 1298 denies individual self-determination and opportunity.

Therefore, NASW-ND strongly opposes HB 1298 in its entirety and requests that it be withdrawn from consideration.

Sincerely,



Kristin Rubbelke
Executive Director
NASW-ND

#9409

March 15, 2021

To the ND Senators (and Representatives) considering limiting transgender athletic participation:

As a North Dakotan I stand FIRMLY AGAINST HB 1298. This bill targets the youth of North Dakota with hatred and exclusion. Why??

Passing such hateful legislation will NOT change the gender identities of these youth, it will simply tell them that some of you in the legislature think of them as freaks to be contained and controlled. Is THAT the message YOU want to send throughout the State, the Country, the world from North Dakota? Hasn't the ND legislature embarrassed us enough already?

You know that this bill won't make sports safer or fairer for any student. But it does target and exclude a group of students who already face high levels of discrimination. Transgender students experience disturbingly higher rates of bullying, rejection, and violence, and you seek to add to that? How shameful.

HB 1298 is opposed by local organizations including: Fargo-Moorhead Convention and Visitors Bureau, Fargo Public Schools, Grand Forks Public Schools, North Dakota American Academy of Pediatrics, North Dakota Psychiatric Association, and parents and athletes of West Fargo Flyers. These are people who have dedicated their lives to families and children. I respect these organizations, don't you?

Many businesses are opposed to bills like HB 1298 that target transgender youth including: Amazon, AT&T, Microsoft, TechNet, T-Mobile, Lyft, Uber, and Verizon. Surely, each and every business organization that all of you work for would oppose such blatant discrimination. Take a stand for progress, not repression.

Most North Dakotans are better than this. Most of us support fairness and freedom. To target our transgender youth is harmful and quite frankly, ridiculous. Vote NO on HB 1298.

Thank you,

Jane Pettinger
District 46

3633 River Drive
Fargo, ND 58104

March 15, 2021

To whom it may concern:

I do not claim to understand this and its full ramifications, but I have been notified by North Dakota Swimming LSC that if this bill (HB 1298) as it stands will end youth sports in ND at the Club and HS level. This would be devastating. Please carefully review the following that was put out by our Dakota Swimming LSC and make sure that we know what we are actually passing.

Sincerely,
Angela Wescott
Bismarck, ND

With the current wording of the bill:

- Lines 16-20 would not allow any publicly funded or owned facility to host any event designated as exclusively for boys or girls in which a transgender athlete of the opposite birth gender under the age of 18 may be allowed to participate. Almost all of the sports facilities in Fargo and West Fargo are publicly owned.
- Since the CVB receives public funding in the form of lodging tax dollars, lines 13-15 of this bill would effectively eliminate their ability to support (financially or otherwise) any of those events, even if the event is held at a privately owned facility. We rely on CVB for our events!
- These sanctions would apply simply if a sport's governing body has a policy in place that would allow for a transgender athlete to participate. It would not matter whether one actually is participating or not. The policy alone is enough to enact the above restrictions. USA Swimming lawyers have been notified of this bill.

SUMMARY/IMPACTS of POTENTIAL AMENDMENTS TO WORDING OF BILL:

We have received the attached amendment document (second attachment) that we believe will be proposed at the committee meeting on Tuesday. The committee will then consider those amendments during their work after the hearing and one of the committee members would need to make a motion to advance the amendments. The committee will then determine to either amend the bill as proposed, make additional amendments or move the bill forward in its original form. IF the language of the amendments is accepted "as is" in the attachment, the following items would be addressed:

- The proposed language in lines 13-16 would allow for the CVB to support events in the same manner we have done in the past. However, park districts still would be affected. According to our lawyer's interpretation of it, any discounts or package pricing on rent fees from a park district to a youth sports organization/event could be considered a sponsorship. Therefore, if this bill passes, if your organization receives ANY sort of discount/lower rent pricing or package deals from the park district, that would no longer be allowed for you.
- The proposed language in lines 17 through line 2 on the second page, would allow

for organizations to now rent publicly owned facilities, i.e. park district facilities, for practices, games, events, etc. Again, though, while organizations would now have the ability to rent these facilities, it would be at their full rent prices as they cannot offer any discounts. The language also would still prevent the park districts from using their own facilities for events they themselves host/operate if they are for, or in partnership with, any entity or sanctioning body whose transgender athlete policies would provide for transgender athletes to participate.

Some key talking points/impacts are below for the potential amendments of the bill (second attachment):

- Section 1 above

- o Despite these potential amendments (if they pass), the CVB still maintains item #1 above to hold true in that this bill is not needed.

- Section 2

- o Item 2.a (facilities being able to host events) would be addressed

- o Items 2.b (events we work with), 2.c (FYHA) and 2.d (hospitality industry) would be helped but our perspective is the problem still remains that the size and number of those events would be negatively impacted as team leaders from more progressive states refuse to send their teams to North Dakota due to this law. Any decreases in the number and size of these events would not only negatively impact the revenue streams for organizations running events but also the revenue generated for our community as a whole would also decrease

- o While local organizations would now potentially be eligible to bid on the events described in item 2.e (non-local events), we believe there will still be a strong likelihood their bids would be stricken from the list of candidates to host the event due to their sanctioning body's reaction to our community having such a law in place. Although these amendments would allow us to now support sporting events, we still have the task of convincing those events to come here which will become significantly more difficult if we have

any sort of transgender law in place. We can't offer any assistance to a tournament that chooses not to come here.

- o The CVB maintains items 2.f (USA Wrestling), 2.g (USA Swimming) and 2.h (reactions from the nation) to be true.

- Section 3

- o Items 3.a (organizations using facilities), 3.b (sanctioning) and 3.c (our ability to support events) would be addressed with the exception of park district operated events.

- o Item 3.d (high school sports using their own facilities) would still apply until/if the NDHSAA changes their policy.

- Section 4
 - o Again, item #4 (reverse effect) would still hold true in light of these potential amendments

I am writing you to ask that you, the members of the Senate Judiciary Committee, vote DO NOT PASS relative to HB1298. This Bill cruelly targets transgender students under the age of 18, particularly transgender girls. The negative impacts that this bill will have on the health and well-being of transgender students in our state are immeasurable. These are students who have difficulty in almost every aspect of their lives, please do not add targeting in the area of sports to those difficulties. As the mother of two children, including one playing high school sports, I can assure you that it is just plain wrong for you to consider discriminatory actions such as those this bill would make law. My daughter has taught me a lot about the willingness of children to be accepting of transgender students, and she and her friends could teach those people who drafted this Bill much more. My daughter doesn't give a second thought relative to how transgender children in her school might impact her, instead, she expresses concerns regarding any transgender student who is treated poorly because they are transgender. This is a mindset she developed on her own. A mindset of accepting differences, seeking to understand them, and supporting those who have a harder time in life than she does.

I read something today that was written relative to the experiences of the past year of living through a pandemic, but it honestly applies here too. Someone asked the question, "what has the past year taught you that will stick with you for the rest of your life?" The response that seems applicable here was, "I have learned that there are two types of people: those who believe in doing what is best for everyone even if it means personal sacrifice and those who see their own inconvenience as unacceptable no matter what." Please vote DO NOT PASS on HB 1298, and show yourselves to be the former rather than the latter.

March 15, 2021

North Dakota Senate Judiciary Committee

Dear Committee Members:

I am writing to urge you to vote "DO NOT PASS" on House Bill 1298, because I believe it will have the unintended consequence of limiting the sporting opportunities of the athletes this bill purports to support and protect. The national organizations that sanction many sports in North Dakota have already created policies concerning participation by transgender athletes. If this House Bill passes as currently written, it is likely that these national organizations will withhold sanctions for events in North Dakota.

If national sporting organizations effectively leave the state, that departure will eliminate sporting opportunities for many athletes. There are many athletes that participate in recreational club sports that are organized on a national level. In my opinion, the likely deconstruction of organized athletics in North Dakota would appear to defeat the purpose of the bill.

In closing, I request that you consider the likely unintended consequences that will affect generations of athletes to come, and that you ask yourselves if this bill will possibly do more harm than good. I believe that it will harm athletics in North Dakota and again urge you to vote "DO NOT PASS" on House Bill 1298.

Thank you for your thoughtful consideration.

Sincerely,

Michael and Schaff



March 16th, 2021

From: ND Psychiatric Society

Re: In Opposition to HB 1298

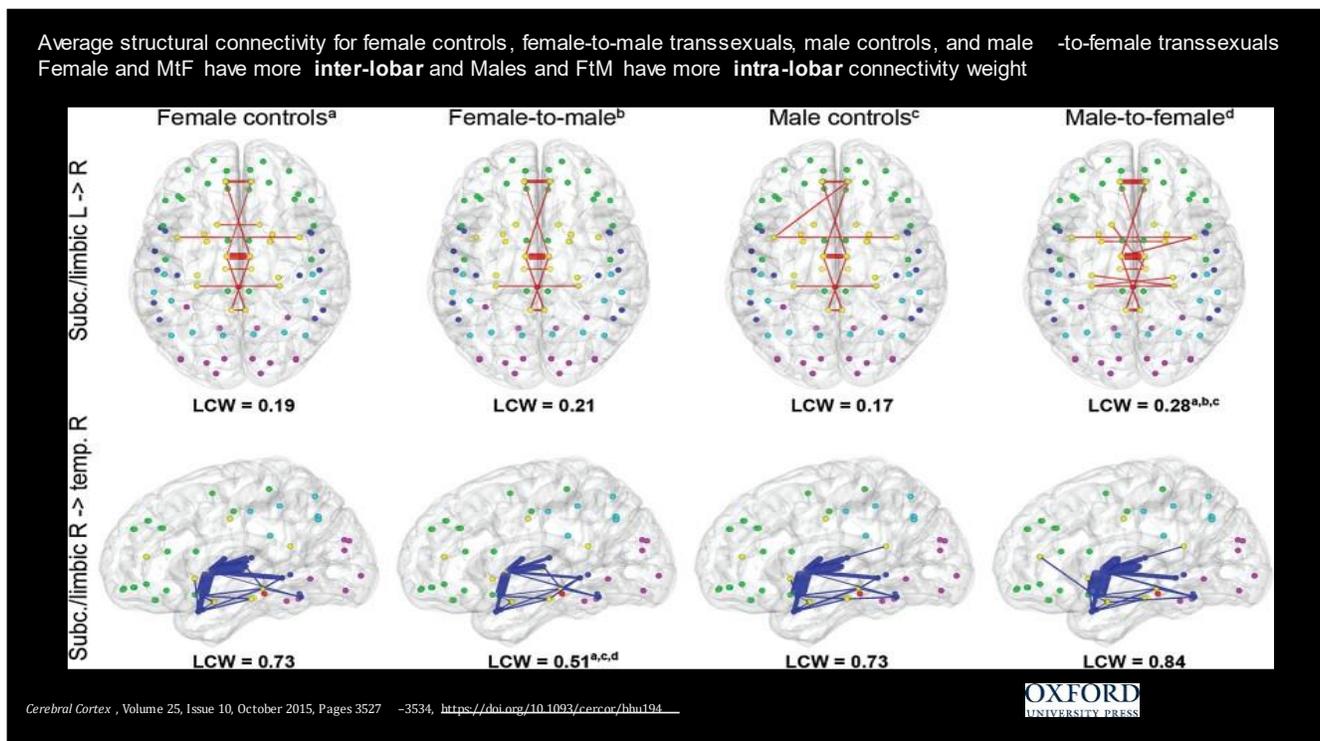
Esteemed Chair Larson and Members of the Senate Judiciary Committee,

My name is Gabriela Balf and I am a psychiatrist in Bismarck and the immediate Past President of the NDPS, and I speak on my psychiatric society as well as on my behalf.

I have treated mental health problems like anxiety, depression, Post Traumatic Stress of transgender adults and adolescents ever since my internist years in Conn.

Trans kids are quite endearing to me, as their character strength, level of health literacy and resilience are way above their age. They have to be strong and smart, because not only do they suffer from a disproportionate increase in mental health problems¹, they also face **severe minority stress**², which further complicates their mental health.

Before I give you the astounding facts stacked in their disfavor, allow me to bring you inside one of these kids' mind:



This 2015 image³, as well as the sayings I hear all the time from my patients, can be translated as: “I am born in the wrong body”. This is one of numerous scientific answers to uninformed, simplistic statements like:” Boys are boys and girls are girls” (ID Gov. NY Times 4/1/2020).

Science evolves. It is our moral obligation to stay informed (*Summa Theologiae*. Thomas Aquinas.) There is no excuse (sin by omission) for choosing to not examine the scientific evidence that may change long-held paradigms. Examples of how our understanding of the universe and society has evolved? We also used to say that Negroes are dumb⁴, women have no place in the school of medicine⁵ and Muslims are all jihadists⁶. A shorthand for “I don’t want to spend time educating myself about these people.”

Why bother? Because these people are your constituents, or children of your constituents, or friends of your constituents. In US, one of three people knows someone who is trans. In North Dakota it may be one in ten. For now.

The stats are sobering: this inner despair translates into feeling inadequate, less than everybody else, unable to enjoy many activities in our binary world (very similar to the definition of depression), worrying about their future and how they will ever play by the society's rules, and being the subject of thorough bullying like only kids (or insensitive adults) can provide.

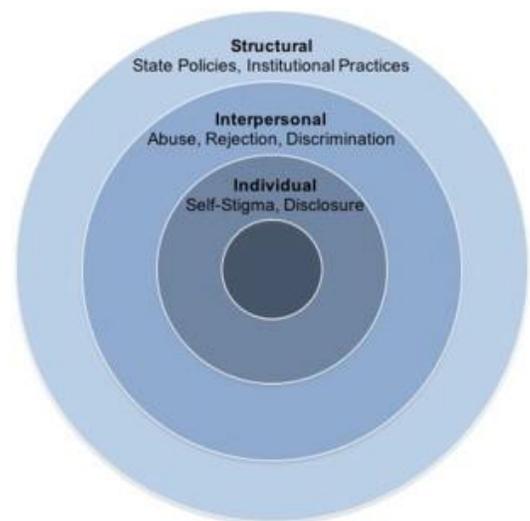
Several sources summarized in ¹ place the lifetime prevalence of depression in transwomen at 51%, 48% for transmen. Anxiety lifetime prevalence at 40% for transwomen, 48% transmen. PTSD up to 42% in trans adults. Serious suicide ideation 87% and suicide attempts 41%. Are these people intrinsically damaged in some way?! The answer is clearly NO: once they get gender-affirming treatment, be that surgery or just hormones, their mental health becomes actually better than that of the general population⁷!!

How can it be that, ideally, left to their own way of developing, trans people are doing so well? Because of the **minority stress** we normally inflict upon them. Fear of rejection.

Stigma as a multi-level construct. ²

The 2015 US Transgender Survey data shows that, overall, discrimination doubles the risk for suicide (see attachment below).

Not allowing trans kids to perform sports according to their gender identity, even after scientific evidence and federal policies indicate it appropriate, constitutes **structural discrimination in our state**. It inflicts harm upon an already disenfranchised population, who is looking up to you for leadership as part of your constituency.



On behalf of our patients, we thank the Senate Judiciary Committee for listening to our presentation of scientific evidence.

Gabriela Balf-Soran, MD, MPH
Assoc Clin Prof – UND School of Medicine – Behavioral Sciences and Psychiatry Dept
ND Psychiatric Society Immediate Past-President
WPATH member

References:

Excerpts from the 2015 US Transgender Survey report (<http://www.ustranssurvey.org/reports>)

“Experiencing discrimination or mistreatment in education, employment, housing, health care, in places of public accommodations, or from law enforcement is associated with higher prevalence of suicide thoughts and attempts. For example, the prevalence of past-year suicide attempts by those who reported that they had been denied equal treatment in the past year because they are transgender was more than double that of those who had not experienced such treatment (13.4% compared to 6.3%).

Those who reported that their spouses, partners, or children rejected them because they are transgender reported higher prevalence of lifetime and past-year suicide attempts. Those who reported rejection by their family of origin, for example, reported twice the prevalence of past-year suicide attempts compared to those who had not experienced such rejection (10.5% compared to 5.1 %).

People who are not viewed by others as transgender and those who do not disclose to others that they are transgender reported lower prevalence of suicide thoughts and attempts. For instance, 6.3 percent of those who reported that others can never tell they are transgender attempted suicide in the past year compared to 12.2 percent of those who reported that others can always tell they are transgender.

The cumulative effect of minority stress is associated with higher prevalence of suicidality. For instance, 97.7 percent of those who had experienced four discriminatory or violence experiences in the past year (being fired or forced to resign from a job, eviction, experiencing homelessness, and physical attack) reported seriously thinking about suicide in the past year and 51.2 percent made a suicide attempt in the past year.”

1. Price-Feeney M, Green AE, Dorison S. Understanding the Mental Health of Transgender and Nonbinary Youth. *J Adolesc Health Off Publ Soc Adolesc Med* 2020;66(6):684–90.
 2. Hatzenbuehler ML, Pachankis JE. Stigma and Minority Stress as Social Determinants of Health Among Lesbian, Gay, Bisexual, and Transgender Youth: Research Evidence and Clinical Implications. *Pediatr Clin North Am* 2016;63(6):985–97.
 3. Hahn A, Kranz GS, Küblböck M, et al. Structural Connectivity Networks of Transgender People. *Cereb Cortex [Internet]* 2015 [cited 2021 Jan 25];25(10):3527–34. Available from: <https://doi.org/10.1093/cercor/bhu194>
 4. F. Tiedemann. The Brain of the Negro Compared with That of the European and the Orang-Outang. *Br Foreign Med Rev* 1839;8(16):374–84.
 5. Blackwell E. Elizabeth Blackwell. *Englishwoman’s J* 1858;80–100.
 6. Samari G, Alcalá HE, Sharif MZ. Islamophobia, Health, and Public Health: A Systematic Literature Review. *Am J Public Health* 2018;108(6):e1–9.
 7. de Vries ALC, McGuire JK, Steensma TD, Wagenaar ECF, Doreleijers TAH, Cohen-Kettenis PT. Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment. *Pediatrics [Internet]* 2014;134(4):696. Available from: <http://pediatrics.aappublications.org/content/134/4/696.abstract>
- WPATH.org – the World Professional Association for Transgender Health
 - <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html>
 - <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=38&compare=percentage#comparison>
 - National Center for Health Statistics: https://www.cdc.gov/nchs/data/series/sr_02/sr02_175.pdf
 - Human Rights Campaign: <http://www.hrc.org/resources> (Resources for the LGBT focused on: adoption, young adult, coming out, federal advocacy, hate crimes, health and aging, HIV/AIDS, interracial marriage, parenting, and transgender)

March 15, 2021

North Dakota Senate Judiciary Committee

Dear Committee Members:

Please vote "DO NOT PASS" on House Bill 1298. It may have the unintended consequence of eliminating many sporting opportunities. The organizations that sanction many sports in North Dakota have already created policies concerning participation by transgender athletes. If this House Bill passes as currently written, it is likely that these national organizations will withhold sanctions for events in North Dakota.

Sincerely,

Kim Schaff

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HUMAN
 RIGHTS
 WATCH

HRW.org

March 15, 2021

North Dakota Capitol
 600 E. Boulevard Ave.
 Bismarck, ND 58505

Re: House Bill 1298 and Athletic Participation for Transgender Students

Dear Senator,

We write on behalf of Human Rights Watch to share our concerns about House Bill 1298, which would only permit transgender students to participate in athletics consistent with their “biological sex,” which would be “based solely on an individual’s reproductive biology and genetics at birth.”

Human Rights Watch has interviewed hundreds of students, teachers, administrators, and parents about lesbian, gay, bisexual and transgender (LGBT) issues in US schools. We have documented the impact of laws and policies that discriminate against transgender students in two reports: [Shut Out: Restrictions on Bathroom and Locker Room Access for Transgender Youth in US Schools](#) and [“Like Walking Through a Hailstorm”: Discrimination Against LGBT Youth in US Schools](#). We believe House Bill 1298 is unnecessary and would have negative consequences for students, school districts, and the State of North Dakota, especially the transgender students you represent.

Research suggests that transgender children are more likely to face significant mental health stressors and have higher rates of obesity and disordered eating than their cisgender peers.¹ Often, transgender students also face isolation and exclusion in school environments, which threaten their physical and mental well-being as well as their ability to learn.²

Instead of supporting transgender kids, House Bill 1298 would effectively exclude them from the physical, intellectual, and social benefits that students who are not transgender are allowed to derive from extracurricular participation. It would also pose significant safety risks for transgender students, who are highly vulnerable to bullying, harassment, and assault when they are required to participate in activities and use facilities that are inconsistent with their gender identity. And it would raise serious privacy concerns for students whose peers may not know they are transgender, exposing their personal and medical history by requiring them to participate according to their sex assigned at birth.

¹ Johns, Michelle M. et al., “Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts, 2017,” *Morbidity and Mortality Weekly Report*, 68.3 (2019): 67-71; Schvey, Natasha A. et al., “Obesity and Eating Disorder Disparities Among Sexual and Gender Minority Youth,” *JAMA Pediatrics* (2020): doi:10.1001/jamapediatrics.2020.5152.

² GLSEN et al., *Separation and Stigma: Transgender Youth and School Facilities*, 2017, https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf (accessed March 7, 2021).

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North Dakota should not take this step. Legislation like House Bill 1298 is not necessary to preserve fairness; transgender athletes do not necessarily have a competitive advantage over their peers. Many states have had inclusive policies for years, and transgender kids competing alongside cisgender kids, without any detriment to competitive equity. All children should be able to participate in school athletics, and the few transgender kids who have trained hard and succeeded at a statewide level should be celebrated rather than punished for their success.

A number of other states have addressed the inclusion of transgender students in extracurricular activities. Adopting House Bill 1298 would not only put North Dakota at odds with most states in the United States,³ but would impose a more rigid standard than the National Collegiate Athletics Association (NCAA),⁴ the International Olympic Committee (IOC),⁵ and other sports organizations that do not look only to an athlete's sex assigned at birth as decisive proof of their gender. We urge you to ensure that every student's gender identity is respected.

Please do not hesitate to contact us if we can provide further information. We appreciate your attention to this important matter.

Sincerely,



Zama Neff
Executive Director, Children's Rights
Human Rights Watch



Ryan Thoreson
Researcher, LGBT Rights
Human Rights Watch

³ TransAthlete, "High School Policies," <https://www.transathlete.com/k-12> (accessed March 4, 2021).

⁴ Office of Inclusion, National Collegiate Athletic Association, NCAA Inclusion of Transgender Student-Athletes, August 2011, https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (accessed March 4, 2021).

⁵ International Olympic Commission, IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, November 2015, https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf (accessed March 4, 2021).

Dear Chairwoman Larson and Members of the Committee,

My name is Tiffany Hardy and I am writing today to express my strong opposition to HB 1298.

As a woman raised in North Dakota playing in most sports offered in my small town, I understand the benefits of having the opportunity to play sports with my fellow teammates while my parents cheered proudly in the stands. I remember the reactions my parents would make when I made a basket or had a great hit. I remember celebrating our wins and mourning our losses with my fellow teammates. Wouldn't we want that for every one of our kids?

Our state has always prided itself on being hard-workers. Playing sports is not just about scoring the big three pointer or having that set point, it's training for everything else in life. Playing sports in high school is like having your first job. Your coach is the boss, teammates are your co-workers, the fans are your customers and the opposing team is your competition. By taking away the opportunity for kids to play on the teams that match their gender identity, you are teaching kids that diversity is not important in life when in fact, the tools of diversity are life long.

When I think of HB1298, I think of the kids who it affects. As you may already know the NDHSAA has current regulations set into place regarding transgender athletes. Changing these regulations that have been working for the past six years takes away the right for transgender athletes to be viewed as "equal." It takes away diversity.

Having two kids of my own, I understand the importance of standing behind them with an open heart and helping them be comfortable in their own bodies. As a mother of a transgender son I've learned the misunderstanding of gender identity is often matched with hatred. That hatred bleeds into our community in ways that make it difficult for others to learn. It becomes a vicious cycle that is so hard to break that it breaks us all.

When our son first came out to us, I can't say I understood it right away. We learned that we ourselves needed to do research. We spoke to our son's therapist, teachers and experts in the community. We mourned. We needed to take in the gravity of what being transgender in ND would mean. We knew he would have difficulties in school with other kids not understanding and we were right.

"Tranny the Transformer" was the first derogatory phrase he was called. It has only gotten worse since then. Our son is 14 years old. Forteen. I ask you at what age does your child stop being your child? At what age do you stop worrying about their safety?

With that, I am asking for you for a "Do Not Pass" on HB 1298 for it singles out real people, real stories and real kids.

Tiffany Hardy
Bismarck, ND

3/15/21

Senator Diane Larson, Vice Chairman Dwyer and Members of the Comedy

For the record my name is Olivia Whitney. I am a 14 year old student athlete from Grand Forks..

I have been a swimmer since I was 8 years old and I have played baseball or softball since I was 5. As a competitive swimmer and softball player, I have played with girls and boys in both sports. I have never felt uncomfortable or unable to compete. If I had a teammate or competitor who was better than me, boy or girl, it made me work harder and be stronger.

I am submitting testimony against HB 1298 in any form. I do not want this bill stopping me from being able to swim or play softball. Playing sports is supposed to be about having fun, making friends, being competitive, and help with stress. Swimming and playing softball do all these things for me. When I am not playing sports I am less happy and less able to deal with stress.

In English class we are learning about argumentative writing, our final assignment for this unit was to choose something that we felt strongly about and make arguments for or against our position using evidence from sources to back up our arguments. I chose to do HB 1298 because I want to keep sports in North Dakota. Here are some of the arguments I am putting into the essay.

Most people like to play or watch sports, some even say it is good for kids and young adults to play sports. But North Dakota is trying to change that. House Bill 1298 targets transgender athletes. The bill sponsors say this is about protecting female athletes but with the way the bill is written it will ruin many athlete's potential careers and mental health. House Bill 1298 is wrong, unconstitutional and should not be passed.

Section 1a of the bill states "State may not allow an individual who was assigned the opposite sex at birth to participate on an athletic team sponsored by or funded by

the state, political subdivision or entity and which is exclusively for females or exclusively males. The first reason this bill is bad is because most sports facilities in North Dakota get some support from state money. For example, the Hyslop pool at UND, the Hulbert Aquatics Center in Fargo, the Scheels Center in Fargo and most of the high schools in the state would not be able to be used.

My second reason is that high school sports would go away because they also get some support from state money. Sports are an important part of many high school students' careers and for their spectators. It is something for students to do and for students to go to and have fun after a long day at school. In North Dakota sports help the economy because you have to travel so far and many people stay in hotels. In 2019, the Fargo - Moorhead area had about \$10 million from spectators, and youth hockey reserved 12,000 hotel room nights that brought in \$2.5 - \$3 million in visitor spending. But Republican senator David Clemens says that money isn't a problem and that "transgender participation doesn't set a good example for West Fargo youth." Money does matter to North Dakota businesses. More important is this bill creates a worse example by not letting kids play sports. Playing sports means kids learn teamwork and communication and coaches teach this to younger people.

North Dakota also has the least amount of openly Gay, Lesbian, Bisexual and Transgender residents in the country. Which makes this bill even more unnecessary. North Dakota only has about 1.7% of their residents who openly identify as a part of the LGBTQ+ community with an even smaller percentage of them identifying as transgender. Being transgender is not a contagious disease that other children will get by being around someone who is trans. It is something that they are born with and that

they feel like they are in the wrong body. Most of the time after someone who is transgender has finished hormone therapy you can never really tell that they were the other gender. It is also called Gender Dysphoria. Gender Dysphoria is “a term that psychologists and doctors use to describe the distress, unhappiness, and anxiety that transgender people may feel about the mismatch between their bodies and their gender identity.”

Part of the reasoning for the bill is that it will make it more fair for the girls and the boys, but part of the transition is that they take hormone therapy so they can be the other gender. So saying that a transgender female would still be stronger than other girls would simply be wrong, the hormone therapy makes it so that they have the same or as close to the same muscle mass as a female. It is also wrong to assume that a female who wants to do wrestling or football would be upset that they lost to a male. They know going into it that they have less of an advantage, but they do it anyways because they love it. They push the limits of what they are told growing up so that they can do what they love. It is not only transgender people that the bill is hurting, it is limiting any female athlete who is doing things what they love. Bill sponsors say the bill is to make it more equal for all genders but it does not and it also means that the transgender athletes discussed in writing this bill can never play a sport and that is unfair.

House Bill 1298 is not only wrong but it is discriminatory. A bill that is being written to not allow transgender athletes play a sport they love, the way they want to, in a state that has the lowest number of LGBTQ+ people in the country is not right. Not only that but the sponsors of this bill say it will make it more equal for females because

they know that they might be beat by a transgender person is very unlikely and does not make it uncompetitive. The bill also has ties to hate crime groups like the Promise to America's Children and Alliance to Defend Freedom who are anti-LGBTQ+ and anti-trans groups. Why, with all of the negative outcomes for ND athletes and discriminatory nature of this bill, would we want our state to pass it?

As a high school, club and local community athlete in North Dakota I ask this committee to vote 'Do Not Pass' for any version of HB 1298. As an athlete I do not feel this is a topic that needs a law to oversee. Our high school and club sport programs already know how to work with us as athletes and create teams that are competitive, welcoming and supportive.

I realize I am not old enough to vote so I want to say thank you for taking time to read this testimony and part of my English essay because I feel strongly about being able to swim and play softball for my school and club teams.

Hello Chairman Larson and Senate Judiciary Committee Members,

My name is Kristie Miller and I was born and raised in ND. I am here today to speak in opposition to House Bill 1298 and I am here today as a ND parent of a transgender teenager. I want to share with you my personal experience in raising a transgender teen in our great state. I want you to know the struggles these kids face today here in North Dakota.

In the spring of 2014, my child came out to me as transgender. My first reaction was one of confusion, anger and then fear. I had no idea what transgender meant or what transgender was. My thinking was something had to be wrong with my child and I needed to fix this immediately. This was the beginning of not only my daughter's transformation but of mine as well. This was the beginning of my learning that things in life are not black and white as well as learning that my understanding of the human body was about to be expanded.

After a year of counseling, we sat down with the counselor and was told frankly that our child was not acting out but was indeed transgender. We were also told that it was time to reach out to a medical doctor to proceed with our journey into transitioning since our child was just beginning puberty. I had to take my child Mayo Clinic in Rochester, MN because I could not find a doctor who would do the extensive testing and evaluating in North Dakota. The closest clinical setting that specializes in transgender health at that time were University of MN and Mayo Clinic

Mayo Clinic had just developed a new clinic that specializes in transgender health. My child underwent a day full of medical tests and time with a psychologist, a team of doctors and nurse practitioner. I asked the Team how did my child become transgender. It was explained to me in very easy terms. In utero the fetus body forms first. After a period of time the brain forms. For some reason still not quite understood, a surge of hormones interferes with the fetus during brain formation and this surge of hormones alters the brains formation process; making the brain change its gender formation from one gender to the other. Meaning the body is formed one gender while the brain is another. Female and males' brains are different when looked at by using an MRI. The two brains are physically different. Nothing I did or didn't do caused this. This is NOT a choice. My child's body and brain are not in synch with each other. It is not medically allowed to have anyone under 18 to undergo gender reassignment surgery. Until the age of 18 these kids are stuck with a body that is not in agreement with who they are as well as having to patiently wait until the age of 18. The age of 18 is when medical procedures for gender reassignment surgery can begin to be addressed.

My child has gone through school being bullied and victimized by a peer using a camera to take video of my child in bathroom stall in school. My child was outed by a teacher in class as well as disrespected by teachers in her classroom by purposefully using the wrong pronouns in class even though these teachers were told NOT to make this mistake again. And yet, my child continued to be humiliated and

traumatized by the teachers. My child was stressed and fearful each academic day, not knowing if she would be subjected to more discriminatory actions towards her while at school. You are probably thinking “why didn’t you move or leave ND? The answer is, ND is our home.

Transgender kids experience ridicule and hatred by peers, faculty, staff and people in their own communities. Suicide rates for transgender youth are twice as high as their peers. School is supposed to be a place that is safe. School should be a place where team building and problem skills develop due to the exposure and interaction with other students that have different interests, life experiences, and backgrounds. Transgender kids just want to be kids, and some transgender kids want to play sports and

HB 1298 is unnecessary and unwarranted. HB 1298 defies modern-day science. HB 1298 defies medical experts, mental health clinicians, sports associations & school administrators in North Dakota; all of whom say this policy that is proposed is harmful and again unnecessary. The North Dakota High School Activities Association already has a vetted policy in place that was created by coaches and officials who best understand their students and respective sports. My child and others like my child are in no way to be blamed for being transgender. Our children have the courage to be who they are despite living in communities where some people believe these children just want to cheat at sports. That is preposterous, and it is also plain wrong.

To be honest any one of you in the Senate could easily be where I am standing today. One of you might have a child who is transgender, the child just hasn’t come out to you yet or future grandchild born transgender. How would this bill effect your loved one? Would you ok telling your transgender child no, you can’t play sports because others don’t understand?

In closing, I urge the committee for a Do Not Pass recommendation on HB 1298 and I will stand for any questions.

Kristie Miller
ND

Hello to Chairman Larson and Senate Judiciary Committee Members,

I am very upset with House Bill 1298. I have just as much right as the other girls. I am a girl. I am legally a female, there is no reason why I cannot use the girl's locker room and bathrooms. How do you think this bill would make me feel?

Excluding me from using the girl's locker room would do some definite damage to my mental health. I already am insecure enough. You would rather force a trans person be uncomfortable and insecure as long as you are comfortable and secure. The rights of us transgender students are being ignored. We transgender students have every right to participate in any sport that we are interested in just like any other student. House Bill 1298 only takes away the opportunities for transgender students, who want to express themselves and to feel good about themselves.

The very idea that female transgender students who want to compete in a sport just to have an edge and excel is so wrong. That statement is fear based and totally dismissed the drive and ambition of a student who is an athlete but also happens to be transgender.

HB 1298 discriminates against transgender students who want to compete with their peers in team sports. When will society learn from the past. Shouldn't we learn from past issues that people deemed wrong such as same sex marriages or inter-racial marriages. Today, these issues are no longer a big deal. There was nothing to fear from these issues and other issues when inclusion or exclusion was the topic of debate. How can you all sit and judge a group of people that none of you know anything about. You don't know me. You don't seem to want to know me or care how we feel. This bill doesn't protect anyone but it does put people at risk of being assaulted. This bill puts people at an increased risk of being bullied and this bill segregates me and others like me from the other kids in school. How can that be right?

I can't help that my brain and body do not match like yours does. I can't surgically change my body until I'm 18. But I look like any other girl, and of course I have the mind of a girl as well. I would only hope to be treated as such, it should be a basic human right for me and others in my situation. It's bad enough that I struggle like any other kid but to have the state I live in mandate the team sport in which I can play in is just unbelievable. School is where we are to learn to work with others and about our differences. Our differences should be accepted and not feared. I thought once a person learns about something that is different than the fear that person once had fads away? How can this fear go away if the state excludes transgender students from sports? How will that state see that there is nothing to fear if you suppress transgender athletes?

Transgender students have a lot to fear and now we are to add the State of North Dakota to the list of bullies? This bill is sending the message that transgender students are less than equal to their peers and should be treated as such. Would you be ok with this bill if your son or daughter were transgender?

Would you vote for this bill if your grandchild was transgender and wanted to play sports? Think of who this bill hurts. These are people who you don't know. The one thing you do know about them is they want to play sports.

Sincerely,

An Anonymous Teen
Resident of North Dakota

3/15/21

Senator Diane Larson, Vice Chairman Dwyer and Members of the Committee

For the record, my name is Amy Whitney and I am testifying today as a citizen of North Dakota, resident of Grand Forks and as an active parent of a local athletic organization. I am submitting testimony today against HB1298, regardless of any amendments made to the language. HB 1298 will not bring equity and equality to sports programs. Instead, HB12198 will create consequences for all athletes across the state, and result in decreased revenue generating opportunities for sporting event venues and the hospitality industry due to the discriminatory language of the bill.

Sponsors and supporters of HB1298 argue that the bill is intended to preserve and protect the competitive nature of female athletic programs. While this argument has moral and altruistic foundations, this bill creates a problem where one does not exist. Less than 2% of North Dakotans openly identify as LGBTQ+ with an even smaller percentage identifying as transgender. In addition, the governing bodies of high school athletics and most (if not all) club have established policies and regulations to create parity. These associations created these policies and regulations after much study, deliberation with experts and coaches, and consideration of competitiveness, equity and inclusion. Passing HB1298 will mean North Dakota is unable to maintain compliance with these sanctioning bodies and therefore jeopardizing our ability to provide competitive opportunities for local athletes.

HB1298 also focuses on state sponsored, state funded, and state sponsored facilities. Most, if not all, sports programs in ND are dependent on facilities connected to some nature of state appropriations, whether through rented or leased time for not just competitions but daily practice. Not having access to these facilities means sports programs will essentially be eliminated due to lack of access to appropriate facilities. Changes to the bill language focused on sponsorship and competition is irrelevant if programs cannot practice and/or they cannot compete against programs who will choose to not come to North Dakota because of this

potential law. Communities that sponsor athletic events, both youth and college level, will face increased challenges to secure national or regional tournaments due to this bill. This lack of ability to host, sponsor and/or compete means lost revenue for the sports facilities as well as the hotels and restaurants who serve these families when they travel for tournaments, games and competitions. In addition, National governing bodies such as USA sports programs, the NCAA, and more will reconsider North Dakota for national tournaments as we do not promote inclusivity.

As a parent, a volunteer for a sports program, and as a resident of North Dakota, I ask this committee to oppose this bill and vote 'Do Not Pass' for HB1298, whether amended or not. This bill is not about creating equity for female athletes. HB1298 creates policy that is unnecessary and creates a law for a problem that does not exist in North Dakota. Instead, if passed, this bill negatively impacts all North Dakota athletes which is unfortunate considering how important sports are for young people all across our state as well as the businesses and organizations supporting them.

Testimony of Chad C. Nodland
Before the North Dakota Senate Judiciary Committee
March 16, 2021 - 2:30pm
In Opposition to HB 1298

I live in Bismarck and am a parent to two boys. I'm not here as a lobbyist or representative of anybody. I'm just a dad whose older son was a youth swimmer with team AquaStorm here in Bismarck but has moved on to college now. And my younger son is a fifth grader and is currently a swimmer with AquaStorm. I am concerned that this bill, if it becomes law, will not only kill my son's swim club, but also destroy many other options kids – including my son – might have for participating in youth club sports in North Dakota. My understanding – based upon a data sheet from the North Dakota club swimming statewide organization (which I've attached to my testimony) – is that somewhere between 1,500 and 2,000 other kids, like my kids, who participate in club swimming in North Dakota. So maybe 750 to 1,000 families. And that's **just** club swimming. Add all the hockey, baseball and wrestling families, and you're probably talking about tens of thousands of North Dakota families with kids, grandkids, etc., in youth club sports.

Most youth club sports operate under national and international parent organizations. This includes youth club swimming, but also includes youth club wrestling, hockey, little-league baseball, gymnastics and possibly others. But swimming is the primary youth sport on my mind right now. With swimming clubs, it's "USA Swimming." With many other sports, it's just the word "USA" followed by the sport. "USA Hockey" for example, for the Bismarck Hockey Boosters or Mandan Hockey Club and all the teams they play against around the state and region. It also includes the Bismarck "Gorillas" wrestling club, and the teams they compete

against around the region. And “USA Gymnastics” and the local gymnastics club. Also, USA Boxing, USA Shooting. If you are interested in a specific sport – let’s say archery – just Google the words “USA Archery diversity inclusion policy” (without the quotation marks) and you’ll probably find the youth sport’s policy on this specific issue.

Most of the local youth club sport programs in North Dakota are feeder programs for national and international amateur competition. We’re talking about – among other things – the Olympics. One of the requirements for having competitive events – or events at all – with trained/sanctioned USA Swimming officials, etc., is to have the event sanctioned by the national parent organization. Having a USA Swimming sanctioned event draws swimmers in from all over the state, and from many neighboring states. At USA Swimming-sanctioned events you’ll see people on the pool deck wearing white polo shirts with “USA Swimming” patches on the chest or sleeve. That’s how I know it’s a USA Swimming sanctioned event. If the “white shirts” are there, I know my kid’s time could count for getting into state, regional and national competitions. I assume (but don’t know) there are similar things at other club sports that show a competition is sanctioned by the national organization.

If a North Dakota youth swimmer wants their time considered as an “official time” for purposes of getting into a state, regional or national competition, the race has to take place at a USA Swimming-sanctioned event. For the event to be USA Swimming-sanctioned, the event has to follow USA Swimming rules.

Most or all of these national/international club organizations have adopted their own rules regarding participation by transgender athletes. (I believe they all have.) If North Dakota House Bill 1298 (“HB 1298”) passes and is signed into law by Governor Burgum, it will mean – at a minimum – North Dakota kids will not be able to participate in sanctioned competitions in North Dakota. Worst-case-scenario it will mean the end of youth club sports – little-league

baseball, gymnastics, wrestling, hockey, etc... -- in North Dakota. Why? Because the clubs have to follow the national rules, and HB 1298 prohibits them from doing so.

Now you may be a transphobic person and that's your prerogative, I guess. But let's set your transphobia aside for just a moment. Let's also forget about all the non-transgender kids who are going to lose their sports clubs. What about the businesses that will be impacted? What about all the employees of those businesses, and their families? How many hotel rooms do you think get filled up in Grand Forks or Fargo when there's a youth hockey tournament? How many families fill their cars with gas at gas stations, eat in restaurants, or shop at the local mall or shopping center while on their way to and from a club wrestling tournament in Mandan? Hundreds of families – and extended families – travel to the club state swim tournaments every year. Those are hosted in Bismarck, West Fargo or Grand Forks, usually, because they have huge public facilities they can use until HB 1298 passes. Imagine the economic impact it will have on the businesses in the communities that host these youth sports competitions. We're talking about tens of millions of dollars in economic impact, at a minimum.

Okay, so let's stop forgetting about the kids. What about these kids? Lots of these kids – hockey players, swimmers, baseball players – love their sports. So do the parents. The kids learned lots of life skills in these clubs. They learn about hard work. They learn about leadership. They learn about sportsmanship. They learn about respect. They learn social skills. I, personally, have dozens of friendships and acquaintances across the state because of my kids' involvement in youth club swimming. HB 1298 will destroy the sanctioned sports these kids love to participate in. And the parents, siblings, grandparents and extended family, too. And all those club organizations have paid employees and officials, too. And they have relationships with local facilities. Maybe they pay rent for use of the pool or auditorium they use. Maybe they get some help from the local CVB. Will all that go away? Yes. It looks like it will.

Another concern I have is that some of you may ask that this bill be amended to make it only apply to high school competitions. While you might be doing less harm by doing that, you will still be doing a lot of harm. Why? Because – with swimming as my example again – USA Swimming officials are on the pool deck at some high school swim meets, but I'm not sure how many. I am certain they officiate at the state swimming championships. I think they may also be at regionals, the WDA and EDC competitions. Maybe they officiate at some invitationals, but I don't remember. (I'd urge you to reach out to the organizations and truly inform yourselves about this, if you hope to do the right thing.) The USA Swimming officials officiate at high school meets to ensure those high school swim meets comply with USA Swimming rules so kids' times can be used as qualifying times for USA Swimming events. An example of why this is important for a lot of swimmers is that the boy's high school state swimming championships were about 10 days ago. The USA Swimming sectionals competition– in Des Moines – was this past weekend. The 11 and older club championship meet is next weekend. The high school boys get their best – and maybe their only – qualifying times for state and sectionals at the high school championships. The youth athletes want to be able to use their high school times to get into those bigger state and regional meets and they want to be properly seeded. If you pass some other version of this bill, the USA Swimming officials probably won't be able to officiate at high school meets (because the meets don't comply with USA Swimming rules), and all those kids will miss out on swimming at the club state championships, and sectionals. You're killing these kids' dreams.

The ND Swimming state organization has info about this bill on its website. It's very informative. Here's a link, but I have also copy-and-pasted their information after this page.

<https://www.teamunify.com//team/czndslsc/page/news/273529/ndlsc-swimming--nd-athletics--the-future-is-in-question>

NDLSC Swimming / ND Athletics – The Future is in Question



ND Swimming - LSC
Feb 25, 2021

NDLSC Membership:

The purpose of this message is to inform you of: (a) legislation that is being discussed in the ND Senate; (b) policies in place at the level of NDHSAA and USA Swimming (USAS); (c) the impact on activities, including swimming, of the legislation; and (d) action items you may choose to take.

Note: If this passes as written, there is no USA Swimming in ND.

Legislation that is being discussed in the ND Senate

[House Bill 1298](#) (please read attached) is what many are hearing as the “transgender bill”. Our focus is not to debate one's beliefs on trans athletes, that is each person's decision. Our focus is on the broad sweep of impacts this bill has that may be unintended or unknown. Some people, including some lawmakers, believe this bill is narrowly targeted at HS sports in ND. Discussions with current legislators gives a far broader impact. It would do two things that would dramatically affect our sport, ALL other HS activities and many other Club sports.

1. Lines 16-20 would not allow any publicly funded or owned facility to host ANY event designated as exclusively for boys or girls in which a transgender athlete of the opposite birth gender under the age of 18 may be allowed to participate. Examples of these publicly funded facilities that could be affected include the majority of the facilities utilized by our member team, i.e. all of those owned by your City, Park District, University/College, all high school facilities such as the Hulbert Aquatic Center, high school pools, etc.
2. Many meets across our host cities are sponsored by the local Convention and Visitor's Bureau (CVB). Since the CVB receives public funding in the form of lodging tax dollars, lines 13-15 of this bill would effectively eliminate their ability to support (financially or otherwise) any of those events, even if the event is held at a privately owned facility.
3. Legal interpretation of it is that these sanctions would apply simply if a sport's governing body has a policy in place that would allow for a transgender athlete to participate. It would not matter whether one actually is participating or not. **The policy alone is enough to enact the above restrictions.**

Policies in Place at the Level of ND High School Activities Association and USAS

NDHSAA and NDLSC are governing and sanctioning bodies that have national governing bodies of the National Federation of HS Athletics and USAS. The decision on where, when,

if and how a transgender athlete be allowed to participate in sporting events **has already** been decided by these governing and sanctioning bodies. These policies do not allow "transient" decisions as some may be inclined to interpret. Each requires a minimum of 12 months of hormone treatment before any process of gender identity reassignment and competition could occur, it requires legal changes of identity. If we are OK with having our children compete as they do now in HS and Club sports, we are tacitly OK with the national governing body policies.

Impact on Activities, Including Swimming

USA Swimming sanctions all of swimming in the US; there is no other entity. As written, our Governing Body has a Diversity, Equity, and Inclusion policy that would be in violation of HB 1298. Therefore every pool in ND, would be prohibited from use for any swim team. This is 1500 - 2000 athletes across the state today that will be negatively impacted in Club swimming alone. This isn't a "what if", it is a "will happen" decision at the level of USAS. It is not about our personal opinions of the bill, it's about what will happen to our teams if we don't take action.

It's also not limited to swimming. This impacts other club sports such as hockey, wrestling, Little League baseball, and all of NDHSAA activities. While we are reaching out as the NDLSA, we are asking you to reach out widely to everyone in ND.

Action Items You May Choose to Take

1.Reach out beyond our swim community. Talking points for non-athlete families include:

- This legislation is an assault on local control. It takes decision making processes out of the hands of local leaders.
- The effect will be raising property taxes by restricting who school districts and public facilities can rent to providing no alternative other than tax revenue.
- Dramatic impact on local communities

2.Find out who your District Senator is. Be ready to CALL your local Senator next week (not yet!) and say you are a voting constituent and state your opposition. Leave a message if no answer. Share this link with your ND network so they can call too.

<https://www.legis.nd.gov/lcn/assembly/constituentViews/public/findmylegislator.htm>

3.Be ready to send emails and testimonial to the Senate Judiciary committee the weekend before the hearing is announced (still be to determined).

4.Attend the hearing if able. Links will be provided.

We wanted to make you aware of the next steps and provide enough background to understand the decision process.

3/15/21

Senator Diane Larson, Vice Chairman Dwyer and Members of the Committee

For the record my name is Olivia Whitney. I am a 14 year old student athlete from Grand Forks..

I have been a swimmer since I was 8 years old and I have played baseball or softball since I was 5. As a competitive swimmer and softball player, I have played with girls and boys in both sports. I have never felt uncomfortable or unable to compete. If I had a teammate or competitor who was better than me, boy or girl, it made me work harder and be stronger.

I am submitting testimony against HB 1298 in any form. I do not want this bill stopping me from being able to swim or play softball. Playing sports is supposed to be about having fun, making friends, being competitive, and help with stress. Swimming and playing softball do all these things for me. When I am not playing sports I am less happy and less able to deal with stress.

In English class we are learning about argumentative writing, our final assignment for this unit was to choose something that we felt strongly about and make arguments for or against our position using evidence from sources to back up our arguments. I chose to do HB 1298 because I want to keep sports in North Dakota. Here are some of the arguments I am putting into the essay.

Most people like to play or watch sports, some even say it is good for kids and young adults to play sports. But North Dakota is trying to change that. House Bill 1298 targets transgender athletes. The bill sponsors say this is about protecting female athletes but with the way the bill is written it will ruin many athlete's potential careers and mental health. House Bill 1298 is wrong, unconstitutional and should not be passed.

Section 1a of the bill states "State may not allow an individual who was assigned the opposite sex at birth to participate on an athletic team sponsored by or funded by

the state, political subdivision or entity and which is exclusively for females or exclusively males. The first reason this bill is bad is because most sports facilities in North Dakota get some support from state money. For example, the Hyslop pool at UND, the Hulbert Aquatics Center in Fargo, the Scheels Center in Fargo and most of the high schools in the state would not be able to be used.

My second reason is that high school sports would go away because they also get some support from state money. Sports are an important part of many high school students' careers and for their spectators. It is something for students to do and for students to go to and have fun after a long day at school. In North Dakota sports help the economy because you have to travel so far and many people stay in hotels. In 2019, the Fargo - Moorhead area had about \$10 million from spectators, and youth hockey reserved 12,000 hotel room nights that brought in \$2.5 - \$3 million in visitor spending. But Republican senator David Clemens says that money isn't a problem and that "transgender participation doesn't set a good example for West Fargo youth." Money does matter to North Dakota businesses. More important is this bill creates a worse example by not letting kids play sports. Playing sports means kids learn teamwork and communication and coaches teach this to younger people.

North Dakota also has the least amount of openly Gay, Lesbian, Bisexual and Transgender residents in the country. Which makes this bill even more unnecessary. North Dakota only has about 1.7% of their residents who openly identify as a part of the LGBTQ+ community with an even smaller percentage of them identifying as transgender. Being transgender is not a contagious disease that other children will get by being around someone who is trans. It is something that they are born with and that

they feel like they are in the wrong body. Most of the time after someone who is transgender has finished hormone therapy you can never really tell that they were the other gender. It is also called Gender Dysphoria. Gender Dysphoria is “a term that psychologists and doctors use to describe the distress, unhappiness, and anxiety that transgender people may feel about the mismatch between their bodies and their gender identity.”

Part of the reasoning for the bill is that it will make it more fair for the girls and the boys, but part of the transition is that they take hormone therapy so they can be the other gender. So saying that a transgender female would still be stronger than other girls would simply be wrong, the hormone therapy makes it so that they have the same or as close to the same muscle mass as a female. It is also wrong to assume that a female who wants to do wrestling or football would be upset that they lost to a male. They know going into it that they have less of an advantage, but they do it anyways because they love it. They push the limits of what they are told growing up so that they can do what they love. It is not only transgender people that the bill is hurting, it is limiting any female athlete who is doing things what they love. Bill sponsors say the bill is to make it more equal for all genders but it does not and it also means that the transgender athletes discussed in writing this bill can never play a sport and that is unfair.

House Bill 1298 is not only wrong but it is discriminatory. A bill that is being written to not allow transgender athletes play a sport they love, the way they want to, in a state that has the lowest number of LGBTQ+ people in the country is not right. Not only that but the sponsors of this bill say it will make it more equal for females because

they know that they might be beat by a transgender person is very unlikely and does not make it uncompetitive. The bill also has ties to hate crime groups like the Promise to America's Children and Alliance to Defend Freedom who are anti-LGBTQ+ and anti-trans groups. Why, with all of the negative outcomes for ND athletes and discriminatory nature of this bill, would we want our state to pass it?

As a high school, club and local community athlete in North Dakota I ask this committee to vote 'Do Not Pass' for any version of HB 1298. As an athlete I do not feel this is a topic that needs a law to oversee. Our high school and club sport programs already know how to work with us as athletes and create teams that are competitive, welcoming and supportive.

I realize I am not old enough to vote so I want to say thank you for taking time to read this testimony and part of my English essay because I feel strongly about being able to swim and play softball for my school and club teams.

Chairman Larsen and the Senate Committee,

Hello, my name is Alex Johnson and I am a resident of Williston, North Dakota. I am very active in volunteering my time here and throughout the state to better our state and local community. I am a board member for the North Dakota Human Rights Coalition, President and founder of The Rainbow Rendezvous, Coordinator for the ND LGBTQ+ Summit, Lead organizer for the Bridging the Gap cultural event. What I am doing, and many others in the state, are working to help people and build a more connected and supportive community. We work to promote awareness and advocacy to which is very much needed in our state. I have met with families that have moved out of the state because they can no longer stand by as their child is suffering. I have met adults who have finally opened up about their sexuality after most of their life, hiding. I have met with people who have lost loved ones to suicide because they felt they could not be accepted for who they are in their own home state. Now, I am having to take note of another issue, a family who has a child that is transitioning who was just talking about wanting to play sports, but will now possibly be denied that opportunity.

All of you are the representatives of my home state. You hold office because you were elected to take a position to help our state become something better than it was when you took office. With bills like this, our state is purposefully pushing out North Dakotans out of our state, it is pushing youth away from following their dreams, and it is creating a very negative view of a place that I have always loved and supported. I would encourage North Dakotans to take a step away from their "traditional" belief systems and reach out to members of their communities that are not of their own traditions and work at creating a sense of understanding. We spend too much time distancing away from that which we don't understand. It causes division. That division allows people to spread hatred and discrimination before trying to even a semblance of understanding to what makes them uncomfortable. I challenge every member of our wonderful state to try to become more aware of those members that are different from them, and to truly try to understand those differences rather than shame them. I want you to take a moment and to think of those members of our state who have left because of the hatred in these beliefs that are being carried out in bills like this, I want you to take a moment to think of those who have chosen they couldn't live with the hatred that they faced because of the bullying and discrimination that you have, in a way, supported through these bills, and then I'd like you to take a moment to think about the youth, who should one day become leaders to promote community, rather than this hatred and division that you are opening trying to promote. Be a true North Dakotan here and care for your neighbors.

Thank you,

Members of Rainbow Rendezvous

Williston, ND

Chairman Larson and members of the Judicial committee.

My name is Sheila Williams.

I wanted to share a Sports Illustrated article that lists our state among other states with bills to try and pass discriminatory laws against Transgender athletes. We should not be puppets of bigots. We should be better than this.

Read Below and Vote Do not Pass on HB 1298

The Next Cultural Battle: States Take Aim at Trans Athletes

Cheered on by Donald Trump, this week Mississippi became the latest state to pass an anti-trans sports law, with fights ahead in 25 more states.

JULIE KLIEGMAN

MAR 12, 2021

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Photo by Heinz Klutmeier/Sports Illustrated; Illustration by SI Art

Emily Wilson likes basketball. Before the seventh-grader came out as transgender a year ago, she played with boys for three years at her local Boys & Girls Club in coastal Mississippi. There, she had coaching, teammates, camaraderie.

Now, at school, she's relegated to practicing her dribble in PE class. She'd love to be part of a team again next year, but her school district allows kids to play sports based only on the sex on their original birth certificate, not their gender identity, says her mother, Katy Binstead.

Organized sports could be a refuge for someone like Emily, who says she gets bullied constantly with little intervention from her teachers, to the point that Binstead is considering homeschooling her or transferring her to private school.

"They call me a f----- behind my back," Emily says of her peers. And when she misses a day of school, they tell her they were glad she was gone.

Emily, who has never considered herself a boy, does not want to try out for basketball on the boys team, like her principal has suggested. Before this week, she could at least hope that her school district would change its policy.

But now, that hope is gone: A new law passed by the state has made it illegal for her to suit up to play on her school's girls team.

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Starting July 1, the so-called Mississippi Fairness Act, signed into law on Thursday by Governor Tate Reeves, will ban trans women and girls throughout the state from playing school sports on women's and girls teams.

The Mississippi law is similar to one passed in Idaho last year; together, they represent the leading edge of a nationwide wave of legislation seeking to ban trans youth from athletics. Cheered on by former President Donald Trump—who recently spoke in support of the push—legislators in at least 26 states have proposed new laws. A bill in South Dakota is awaiting the governor's signature, and bills in Tennessee, and Montana are close to passing. Meanwhile, one in Minnesota would take the ban a step further by criminalizing the act of a transgender athlete playing in girls or women's sports: It would be a petty misdemeanor to do so.

The proposed laws evoke the “bathroom bills” of the previous decade, which sought to ban transgender people from public restrooms matching their gender identity. Those bills were widely introduced and campaigned on, but ultimately the only state to pass one was North Carolina, which faced swift backlash from organizations threatening to pull business (that included the NBA, which relocated an All-Star Game, and the NCAA, which moved out championship events). Unlike bathroom bills, these new bills are likely to pass in meaningful numbers. They also center on sports, which occupy a unique space at the emotional center of U.S. culture. So far, corporate response to Idaho and Mississippi has been muted, as has the NCAA's response.

Even though they're still heavily discriminated against, as transgender people slowly gain more prominence and more rights, activists say that bills like these—as well as others that would criminalize medical care for trans youth—are the backlash.

“We might have trans people on the cover of magazines and having their own TV shows, but that doesn't say much about the systemic ways that transphobia ... is still very much alive and well,” says CJ Jones, a Ph.D. candidate at UC Santa Barbara researching feminist studies and sport. “I think this is sort of a response to that.”

Emily, 13, says she plans to be a plaintiff should the American Civil Liberties Union sue the state of Mississippi over this law, like it did Idaho last year (a lawyer for the group says it is considering it).

“I want to do something about it,” Emily says. “Because it's not right. It doesn't matter if you're cisgender, transgender or gay. Everyone should be able to play sports if they're good at it or really want to.”

The Idaho law, passed on March 30, 2020, was set to effectively ban trans women and girls from competing in public sports before a judge granted a preliminary injunction in August that currently prevents its enforcement. Lindsay Hecox, a trans would-be cross-country runner for Boise State, had sued the state, along with the ACLU, a cisgender Jane Doe, and the northwestern feminist organization Legal Voice.

The next fight is Mississippi, then South Dakota, advocates say. But they know this is just the beginning.



Mississippi Governor Tate Reeves signed a new law on Thursday restricting trans participation in sports.

Eric Shelton/Clarion Ledger/USA Today Network

It's no coincidence that sports are proving a particularly popular and effective cudgel for legislators targeting transgender civil rights. It's a sentimental pastime to which nearly everyone has some connection. Sports and cultural issues, of course, have always been inseparable: from Muhammad Ali's anti-Vietnam War stance, to the implementation of Title IX, to Colin Kaepernick's protests against police brutality.

"People have a lot of feelings about sports competition," says Elizabeth Sharrow, an associate professor of public policy and history specializing in gender and sports at the University of Massachusetts, Amherst. "There's a lot of emotion tied up in their memories of participating as a youth. Maybe it's their memories of watching their children participate. Maybe it's their memories of being spectators."

"Sports is something that permeates almost every aspect of our lives," adds Jones, "whether or not we play sports, whether or not we watch sports, whether or not we *like* sports."

In other words, sports—and the question of whether a game is *fair*—provides the type of emotional battleground perfectly suited to a political wedge issue. Complicating matters, the science as to whether trans athletes retain a physical advantage over their cisgender competitors is still unsettled. While advocates of these anti-trans bills contend that trans women and girls are inherently bigger and stronger than their cisgender peers, those who oppose

the bills counter the advantage is overstated, if it even exists—and, in youth sports, ultimately not that important. The research on trans athletes is slim, and it can't be neatly applied to trans athletes undergoing puberty, Joanna Harper, a Loughborough University Ph.D. student researching performance analysis in trans athletes, [has told Sports Illustrated](#).

The NCAA and International Olympic Committee both have well-established policies, neither of which is as aggressive toward elite athletes as bans like Mississippi's and Idaho's are toward youth ones. Per both the NCAA and IOC, trans men are welcome to compete on the men's team, no matter what. In the NCAA, trans women can compete on the women's team after a year of hormone-suppression treatment; in the Olympics they are required to keep their testosterone levels below 10 nanomoles per liter of blood for a year.

What is settled is the severe toll being sidelined from competition takes on trans competitors' mental health. Transgender youth are more [likely to experience](#) negative mental health effects, including suicidality, when faced with gender-exclusive policies, including sports policies, according to a policy review by the Center for American Progress. Trans youth are already at greater risk of suicide and self-harm than their cisgender peers. Moreover, suicide attempts over the course of a year were more than double for trans and nonbinary youth who experienced discrimination based on their gender identity, compared with trans and nonbinary youth who did not, according to a peer-reviewed study by Trevor Project researchers in [The Journal of Adolescent Health](#).

“What I am hoping for is that trans youth get the same thing, that they get to experience that joy, that they get to experience the things that I got to experience,” says Zoey Zephyr, a 32-year-old trans woman in Montana who was a state-ranked wrestler in her high school. “I got to experience it prior to my transition. I want them to be able to experience it during and after their

transitions. I want trans girls to have a girlhood. I want trans boys to have a boyhood.”

Particularly dangerous are the components of the laws—both proposed and newly enacted—that govern how school districts should handle any “challenge” of someone’s gender. The Mississippi law does not specify a method, but the Idaho law, like many other bills, indicates that students could confirm their gender by getting a genetics test confirming XX chromosomes, a test showing their *natural* hormones fall within a certain range or a genital exam by a doctor. Experts say that these types of examinations or tests could be traumatic for children, whether they are trans or incorrectly identified by competitors as being trans.

“This doesn’t only hurt trans women and girls, but it also hurts cis [nontransgender] women and girls who don’t conform to gender stereotypes,” says Anne Lieberman, director of policy and programs at Athlete Ally, a nonprofit dedicated to promoting LGBTQ inclusivity in sports. “This is for every cis woman who’s just a tomboy, right? It sets up a very damaging and terrifying precedent for states to have to figure out how actually administratively they are going to test people and police folks’ gender if it’s called into question.”

“You’re going to subject a six-year-old to genital examinations or chromosomal testings?” asks Pidgeon Pagonis, an advocate for intersex people, meaning those born with reproductive anatomy that doesn’t neatly check either a “male” or “female” box. “Or seven- or eight- or nine-year-olds or high schoolers? That is sexual abuse.”

Passing these bills doesn’t pose the only threat to trans health—simply proposing them signals to trans kids and young adults that their humanity is up for debate, according to experts. A spokesperson for the Trevor Project, which runs a confidential suicide hotline for LGBTQ youth, says that in a

national survey conducted between October and December 2020, the group found that more than 90% of queer kids said that recent politics have negatively affected their well-being.

“[These bills are] not costless,” says Erin Buzuvis, a Western New England University law professor who specializes in gender and discrimination in athletics. “Even if you’re trying to score some political points like, ‘Oh, this would never pass, because the state would never,’ the fact that the bill is introduced is just reminding a vulnerable community that they’re not wanted and not validated.”

ACLU attorney Chase Strangio agrees: “I’m a grown 38 years old listening to these debates,” he says. “At the end of the day, you sort of feel like you need to take a shower and build up your confidence just to face the next day.”

Meanwhile, athletes—especially children—just want to play.

“I mean, we’re kids, O.K.?” says William, a 15-year-old trans boy in **North Dakota** who wants to join his tennis team for his sophomore season and asked SI to identify him by his first name only. “We’re not out there to take people’s scholarships and stuff. No, we just want to compete. We don’t have a secret agenda.”

North Dakota is one of several states whose bills would prevent trans boys and men, in addition to trans girls and women, from competing in the division that matches their gender identity. These bills, therefore, stray from the stated objective of protecting girls and women’s sports; on their face, they seem less concerned with competitive fairness than exclusion.

And while technically allowed under these bills, playing with girls is a humiliating prospect for William, he says: “That would be absurd.”



Lindsay Hecox, who would like to run for Boise State's cross-country team, is part of a lawsuit challenging an Idaho law that would prevent her from doing so.

Kohjiro Kinno/Sports Illustrated

Speaking at the Conservative Political Action Conference in February, Trump showed his support for bills like Mississippi's. "Women's sports as we know it will die," he warned, if transgender women and girls are allowed to compete. Stephen Miller, Trump's former senior adviser for policy, recently told [*Politico*](#) that he believes campaigning on the issue of trans women in sports will help Republicans win the 2022 midterm elections.

"We're seeing a lot of Republicans scrambling to figure out their position, what position they're going to take with respect to the party," says Heath Fogg Davis, a Temple University political science professor and the chair of the gender, sexuality and women's studies department. "It is interesting in a lot of these cases in a lot of these states, you're not seeing the request for legislation coming from the populus."

National anti-trans interest groups like the Alliance Defending Freedom are [working behind the scenes](#), and in some cases more publicly, with state

lawmakers to conceive of and write these bills, as they did the bathroom bills before them.

That raises the question: What issue are these bills trying to address? [The Associated Press](#) recently asked two dozen state legislators who have sponsored bills to cite cases from their state or district where trans girls participating in sports had led to a problem, and found that hardly any of them could. Instead, only a small handful of situations came up over and over again. Namely, the case in Connecticut where four cisgender runners sued two trans competitors for winning championship races.

Yet legislators have made attempts to ban trans women and girls from sports on the national level, as well, including bills last session from Representative Tulsi Gabbard (D-Hawaii) and [Senator Kelly Loeffler](#) (R-Ga.). This session, Senator Tommy Tuberville (R-Ala.) attempted to add an amendment to the COVID-19 relief bill that would prohibit schools that allowed trans women to compete in women's athletics from receiving federal funding. The measure, which required 60 votes, failed mostly along party lines, 49–50.

Mississippi state Senator Angela Burks Hill, the Republican who wrote the bill banning trans woman and girl athletes, says this is all about protecting cisgender women: “We have enjoyed 50 years of Title IX with women being able to compete within their own right against other females without having a disadvantage with biological males, who are physically bigger stronger, coming over and taking all their titles and scholarships,” she recently told [TV station WLOX](#). (It is widely considered offensive to refer to trans women and girls as “biological males.” Hill did not respond to SI’s requests for comment.)

June Eastwood, a 23-year-old trans runner who in 2019, at the University of Montana, became the first out trans woman to compete on an NCAA Division I team across all sports, says that legislators pushing bills like Mississippi’s are disregarding trans people altogether.

“I kind of doubt that many of the Republican legislators that are introducing these bills have a trans person in their life, or if they do I feel bad for those trans people they have in their lives,” she says.



In a Feb. 28 speech at CPAC, Trump railed against trans participation in women's sports.

Joe Raedle/Getty Images

The day President Joe Biden took office in January, he issued an [executive order](#) signaling that his administration is prepared to fight discrimination on the basis of sexual orientation and, importantly, gender identity.

“Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports,” it read.

But that largely symbolic order alone won't stop states from passing bills targeting trans youth. We're headed for a larger “showdown,” says Buzuvis. Right now, there's a patchwork of local and state policies on the issue, but eventually it will be decided at the national level. One avenue would be if Idaho's *Hecox v. Little* makes its way to the Supreme Court. However, while that path could lead to the verdict upholding or striking down Idaho's law as unconstitutional, it's possible that other states' laws, if slightly different, could still live in a gray area.

Congress could also choose to take up the issue and pass legislation on a federal level about trans inclusion in sports. That avenue, Buzuvis says, would

likely require a compromise of sorts between those who want trans students included in sports without question and those who want them banned entirely from the group that matches their gender identity. The end result could be NCAA-like restrictions on youth sports, requiring trans kids to meet certain testosterone requirements. Different levels of restrictions could also apply to different sports, or to postseason contests, specifically.

There is another potential route for Biden: He could amend the regulations of Title IX, the civil rights law enacted in 1972 that prohibits sex-based discrimination in education, including athletics. It could explicitly include gender-based discrimination, similar to how the Supreme Court last year ruled that “sex discrimination” in Title VII includes discrimination based on gender identity. The process could take a couple of years, but couldn’t be instantly undone by the next administration.

Then the Department of Education’s Office of Civil Rights could bring enforcement actions against public schools in states that have passed bills that don’t comply with federal law, leaving those schools to decide whether to include transgender people in sports or risk losing federal funding. So this outcome, too, would likely result in a court battle.

In the meantime, the NCAA, too, could force states’ hands by moving championship games out of states that pass these bills, as it did with North Carolina in 2016 after passage of its bathroom bill. On Wednesday, nearly 550 college athletes [sent a letter](#) to NCAA president Mark Emmert and its Board of Governors demanding the governing body move all championship events out of states that pass or even consider anti-trans sports legislation.

“The NCAA continues to closely monitor state bills that impact transgender student-athlete participation,” the collegiate governing body said in a statement to SI. “The NCAA believes in fair and respectful student-athlete participation at all levels of sport.”

None of these potential remedies to the bills are certain, and nearly all would take significant time. Trans people, caught in the middle of this fraught legislative battle, seek the love of the game and all that comes with it.

“[Legislators] paint an image of a trans person as someone who can flick a light switch and decide to be trans and then a person assigned male at birth can say, ‘I’m trans now and run in the 400 meter,’ and then after that day go out and say, ‘Just kidding, but I still won,’ ” Zephyr says. “They paint this image of being trans as if it were a box you could tick to gain an advantage. It’s just not that. It’s finally getting your head above water. It’s getting to live.”

BY

JULIE KLIEGMAN

Vote – Do Not Pass on HB 1298

Letter of Opposition to HB 1298

Chairman Larson, Vice Chair Dwyer and Member of the Committee

My name is Dave Williams

I am here today in opposition to House Bill 1298. A bill aimed directly at my child ever having the opportunity to play school sports under their true identity. My child is not trying to rewrite women's rights, just play high school sports. To have to face my child and tell them that the North Dakota legislature feels they are unfit to be given equal rights as any other children because they are different has really set them back and made them wonder what happen to the kind state, they used to live in. No parent should ever have to try and explain that, ever.

This bill seems to have been sponsored and supported by those who feel that Transgender children are arbitrarily taking on sex identities of their choice and in turn infringing on the opportunities of the genders they identify as today. Having also two daughters that played sports, one even having a scholarship opportunity from it. I could see where someone who never took the time to research for themselves or as our family, had the opportunity to raise a Transgender child would be troubled by the outward appearance of this.

It really seems to come down to "Nurture vs Nature" as someone once said.

Nurture being that this is a choice, a lifestyle, a way to get attention, just be different.

Nature being that the spectrum of the human existence is created great enough to support that someone who is born one gender on the outside can discover that it does not fit the gender on the inside. That gender is not as cut and dry as we thought it was.

Having had the privilege of raising a Transgender child. I thought it important to try and explain our experience of how a Transgender youth's journey somewhat goes.

Imagine feeling like you are hiding behind a mask that everyone accepts and realizing something is wrong. You just do not identify or belong to whom you see in the mirror. Imagine the confusion, despair, and agony with having to come to a self-realization that this is a real problem, and you need to say and do something. You need help dealing with this. Is this real? Is this contrived? Think of the hardest thing you have ever had to try and explain to your family, now magnify it by a 100. It's no wonder the suicide rate is so high in Transgender youth.

Now imagine that you find the courage to bring this to the attention of your family who understandably has the view its Nurture and tells you to just get over it. And when you press it, says we do not accept it, you either fix yourself or find somewhere else to live. That this behavior will not be tolerated. Or maybe only some of the family such as a mom or dad begins to realize there is something more to it and the other does not. This often leads to unbearable shaming, persecution and even violence. But say by some miracle the family decides to at least investigate it. They begin to reach out to Doctors, Therapist, and Experts in this field to find out what to do. To their shock and surprise, the family is told that what their child is experiencing inside is as real as what the family sees on the outside. So, after what seems like an unreal amount of time testing, and all the expert's forming consensus, on every level, you ask your family to let you transition your outside to meet your inside. They take a very hard look at all the evidence and agree to support you to be your true self. Able to finally be open, honest, and authentic inside and out. This rarely happens. And sadly, a Transgender child is 50% more likely to do self-harm when part of the family does not support them.

Now imagine that even if you have made all those hurdles. You are confronted and attacked one day by the very state you live in, by leaders who you thought were there to make your life better. Who feel that they know what gender is, and do not need Medicine, Science, PhD's, or anyone else to tell them what is or isn't all the real facts. With the narrow opinion that if these transgender kids want to resist birth gender, do it in private. Just do not inconvenience us with it. We are going to discriminate against you and if you do not like it, then MOVE!

As a family, we and our daughters have come to see that our Transgender child is no threat to their birth or true gender. That they with all their heart want to live and honorably represent their true gender and are appalled when lawmakers treat them as some wave coming to ruin women or men's sports. Anyone transgender posing to find an unfair advantage is an enemy to them as well. Transgender youth are not POSERS. We find it horrendous that when a cis male or female athlete excels at their sport, they are hardworking, gifted people to be emulated. But when a Transgender athlete excels, they are cheaters and advantage seekers, ruining sports for everyone. Amazingly, Federal, State, even Olympic athletic boards have and continue to put endless hours and research into making the sports field fair and fun for everyone. Yet some lawmakers seem to think that all that is not good enough, they need to ruin it for some.

Is it not time to really look at each other as lawmakers and see these children should not be fodder for political rhetoric, votes, or advantage? As we all have witnessed in our lifetimes. history does not tend to favor states with laws of discrimination. That like so many other human issues as a country, that laws like this one have discriminated against, that are now being found to have been overreactions, unwarranted, racist, and bigoted. As history starts labelling past and present laws and lawmakers as racist and bigots, Will you be among them? And even worse, labelled, not for doing this to adults, but to children?

It is high time to say enough is enough. North Dakota is better than this.

Just let Kids Play, Free, Open, and Honorably!

My family asks you to look your children, grandchildren, nieces, and nephews in the eye and ask yourself. What if one day this is one of them asking to be real, respected and accepted. And having to one day give account to them as to, "Why did you, Mom, Dad, Grandpa or Grandma, Aunt, or Uncle do this to us or allow it by not standing up for us".

Please don't just vote no, but hell no, on House Bill 1298!

Dave Williams

March 15, 2021

Re: Opposition to HB 1298

Good afternoon Chairman Larson and Committee Members:

We represent the executive board for Magic City Equality, an LGBTQ2S+ (lesbian, gay, bisexual, transgender, queer/questioning, Two Spirit) advocacy group based in Minot, North Dakota. We join the LGBTQ2S+ North Dakota community in our opposition to HB 1298.

Through HB 1298, transgender youth will undoubtedly suffer increased discrimination and perhaps higher risk of mental anguish. Transgender youth already have high rates of self-harm and suicide. The second annual National Survey on LGBTQ Youth Mental Health, conducted by The Trevor Project, showed that 60 percent of transgender and non-binary youth engaged in self-harm over the past year. In addition, more than half of transgender and non-binary youth surveyed reported having seriously considered attempting suicide during that period.

Preventing participation in school activities is exclusionary and sends a hateful message to our LGBTQ2S+ youth. It also sends a message to the rest of the country that the “North Dakota nice” stereotype only applies to cisgender citizens. Our elected representatives should realize this bill is unnecessary. The policy that this bill represents is harmful and unnecessary.

Magic City Equality strives to fight the battle in the war against discrimination aimed at the LGBTQ2S+ community. We will not stand down to discrimination and inequality. We highly recommend the representatives of North Dakota to not focus on winning a “sports game,” but instead focus on equality, tolerance, equity, and acceptance.

Discrimination is **not** a North Dakota principle.

Respectfully,
James C. Falcon
Christopher Dix
Shannon Krueger
Jordan Laducer

Co-executive directors, Magic City Equality

www.magiccityequality.com

#9476

March 16, 2021

To: Senate Judiciary Committee

Re: Opposition to House Bill 1298

This is a terrible Anti-Trans Athlete bill that cruelly targets trans-students under the age of 18, particularly trans girls. I do not understand why our state government would act to hurt our very own children. Growing up and being different as a child is a burden and scary. We need to find ways to take care of each other; not hurt each other. Please do not support this bill.

Thank you for your support.

Kaye Carlson

March 16, 2021

Senate Judiciary Committee Members,

Thank you very much for your time and also for your service to North Dakota.

I am writing to you with concerns regarding House Bill 1298 and how it effects my children. Specifically speaking I have two sons who are high school and club swimmers and have been so for seven years. They have practices and competitions at the Jamestown High School and also at the Hulbert Aquatic Center in West Fargo. With the passing of House Bill 1298 I am afraid that they will no longer have access to the pools they swim in and the competitions that drive their goals and dreams. Because they are public school owned facilities and compete in meets sponsored by our convention and visitor bureau's, this Bill will nullify their participation. Simply due to the fact that our governing bodies have transgender policies, not because we have transgender athletes, my children will not be allowed to participate in their sport.

As a citizen of Valley City, District 24, I also a volunteer throughout the state of North Dakota in various roles for the sport of swimming, and I do not support House Bill 1298. I do not believe that it is in the best interest for North Dakota to negate decades of work done by the International Olympic Committee and the policies and procedures they have put into place to address transgender athletes competing in club sports, nor North Dakota High School Athletics Association policies for high school athletics.

I am not in favor of House Bill 1298 and hope that you will take my opinion, and how it relates to both high school and club athletics, and not penalize the athletes and sports that compete in North Dakota

Again, thank you very much for your time and service. I greatly appreciate the opportunity to voice my concerns to you.

Healthiest regards,

Bret Haglund

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March 16, 2021

North Dakota Senate Judiciary Committee

Re: HB 1298
Submission in Opposition

Dear Senators:

I am writing in opposition to HB 1298 as it would destroy youth sports in North Dakota.

I come before you wearing many "hats" and will speak to each and how each is negatively impacted if HB 1298 were to become law.

First, I am a practicing attorney in Fargo for over fifteen (15) years. I review and interpret statutes on a daily basis and have successfully argued cases involving statutory interpretation in front of both the North Dakota and Minnesota Supreme Courts. I have carefully reviewed HB 1298 and considered the impact it would have on youth sports in North Dakota. The language used in HB 1298 is extremely broad and impacts virtually every youth athletic event in this state – including all high school sports.

Next, I am a father of a high school athlete. My daughter swims for the Fargo North Spartan swim team. HB 1298 prohibits any team that allows transgender athletes from competing in any "publicly funded facility." As you know, the North Dakota High School Activities Association allows transgender athletes to compete if they undergo strict protocols. Therefore, HB 1298 prohibits **all** high school sports from using any public high school facility for competitions. This would include all high school pools where my daughter would compete. As written, HB 1298 would effectively end all high school sports including swimming.

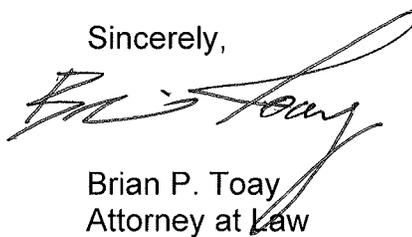
Third, I am the Age Group Chair for North Dakota Swimming. That means that I review and sanction any club swim meets that occur in North Dakota. North Dakota Swimming is a member of USA Swimming and is bound by the rules set forth by USA Swimming. USA Swimming has a very strict program that does allow transgender athletes to compete in certain situations. Before I can sanction a meet to occur in North Dakota, I have to ensure that the USA Swimming Rules are in place and will be enforced.

Nearly every swimming pool used for club meets in North Dakota is a publicly funded facility – such as the Bismarck Aquatic Center and the Hulbert Aquatic Center in West Fargo. Some of the meets held at these facilities are a massive draw to their communities bringing in 400-600 swimmers from throughout the Midwest. The Hulbert Aquatic Center (a publicly-funded facility) is quickly being recognized as the premier facility in the Midwest and has been chosen to host more and more prestigious national meets. If HB 1298 were to pass, we would not be able to host any USA Swimming sanctioned swim meets in the State of North Dakota because those meets would need to be held at one of the many fantastic publicly funded pools. There are no other national swimming organizations that North Dakota Swimming could join. Therefore, HB 1298 would effectively kill youth swimming in North Dakota as we would have nowhere to compete or host meets.

Finally, I am the meet manager for my children's club swim team, the FM Gators. As meet manager, I manage all of the meets that we host throughout the year. The Gators pride ourselves on our fall meet held the weekend before Thanksgiving. This meet has grown in size and popularity over the years and brings in approximately 400 swimmers from throughout North Dakota, Minnesota, and South Dakota. In hosting this large meet, the Gators receive awesome assistance from the FM Conventions and Visitor's Bureau. The FMCVB will help in making signage for the meet, arranging hotel deals for the athlete families, and providing other "swag" for the swimmers. The FMCVB receives public funding. Therefore, under HB 1298, they could no longer provide us any assistance with any of our meets as those meets would allow transgender athletes to compete under the strict regulations already put in place by USA Swimming. In addition to our fall meet, we host several other meets throughout the year. These meets are held at (1) Davies High School Pool, (2) Fargo North Pool, or (3) Island Park Pool. These 3 facilities are publicly funded. Therefore, under HB 1298 we would no longer be able to host these meets. Without these meets, the Gators would lose the source of revenue we use pay for our operations, and the kids would all lose the opportunity to compete.

I am just one person with a couple kids that like to swim. Yet I can fill over 2 pages outlining the various ways this horribly-drafted Bill would impact my family. The NDHSAA and USA Swimming have already addressed the subject matter outlined in this Bill. These governing bodies are in the best position to determine how to address this issue. In a State that prides itself on a lack of State Government regulation, this Bill needs to fail. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian P. Toay". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Brian P. Toay
Attorney at Law
(BTtoay@woldlaw.com)

16 March 2021

North Dakota Senate Judiciary Committee

I write in opposition of HB 1298.

There simply is no need for this bill. It addresses a concern that does not exist.

The bill as currently written would be devastating to youth activities in ND. The consequences of the language of the bill are far reaching leading to negative impacts in physical, emotional, and financial health. It is clear the collateral ramifications of the bill were not vetted before the legislation was written and passed in the House. I am concerned of the same happening in the Senate.

The intent of the bill is to prevent transgender females from competing in sports. Governing bodies of youth and high school sports have regulations in place that have been developed and vetted by medical professionals. There are hormone therapy policies in place that must happen for 12 or more months prior to competition. There are blood testing requirements to measure hormone levels. The governing bodies have done the work. North Dakota High School Activities Association (NDHSAA) has a policy in place that models the national governing bodies. This bill negates of those entities to put an absolute ban in place.

The “unintended” consequences of this bill impact everyone in ND. This bill prevents rental use of publicly funded or owned facilities to organizations in which governing bodies that would allow transgender participation. School facilities will sit empty as NDHSAA has policies that would allow transgender participation after 12 months of hormone suppression. Passing this bill would either shut down HS sports or force NDHSAA to consider legislation changes as well. School facilities would no longer be rented to organizations with governing bodies that have vetted policies in place. The only mechanism to make up loss of rental revenue would be an increase in taxes. The impact of lost events will be felt by businesses within the communities. I fail to see how a transgender girl participating in swimming warrants these trickle-down impacts of the legislation.

There are amendments that will likely be proposed to “fix” some these concerns. They, too, will create other unintended or yet unknown consequences. Other states considering similar bills are losing events that have scheduled to be hosted in those states. The economic impact is in the billions. Again, I fail to see how this legislation fixes anything. Rather, it creates many more real concerns.

I write to you as a parent, educator, and volunteer and urge you to vote NO to HB 1298 in its current or potentially amended form.

Lisa Montplaisir

My name is Rachel Thomason. I am an attorney living in Bismarck with my husband of 12 years and two children, ages 6 and 9. I am a small business owner, active in Bismarck in my religious, social, and political communities.

I make this written testimony today to urge you to strike down this proposed bill.

Firstly, this bill has been said to be a champion for women's rights. However, as written, the bill is unconstitutional, ignores the U.S. Supreme Court decision of Bostock v. Clayton County, and violates Title VII of the Civil Rights Act of 1964. Notably, the Supreme Court indicated in Clayton that discrimination on the basis of an individual's transgender status violates Title VII. Bill 1298 is a manifestation of that discrimination because it does not propose regulations in "male" and "female" sports activities. Rather, it would result in an outright ban on transgender students' participation in school sports as an all-or-nothing, exclusionary approach. Furthermore, to claim that this bill encourages no more than fair participation in young women's sports is deceitful at best, and does nothing more than create fear of a problem that does not exist.

The bill also illuminates a harrowing issue facing trans youth today. In 2018, the American Academy of Pediatrics indicated that nearly half of youth identifying as trans male and 30% of teens identifying as trans female had attempted suicide. Their reasons? Rejection, bullying, harassment, and exclusion.

Exclusion. That is precisely what this bill would do, exclude trans youth from participation, singling them out amongst their classmates and reinforcing rejection.

Exclusion and rejection are powerful. As a bisexual woman, I have dealt with depression and anxiety about who I am nearly my entire life. I grew up in a small town in North Dakota. Growing up and into adulthood, I too feared rejection and exclusion from my church community, my friends, and my family. I am 36 now, and only came out as bisexual two years ago because I feared exclusion and rejection. I worried that I may lose work. I feared that my family, my friends, and my colleagues would abandon me because I live in a community that, as evidenced by this bill, is still not entirely accepting and/or harbors fear or resentment of individuals in the LGBTQ+ community.

I bring up my own struggles because I am not a child. I have it easy; I am an adult bisexual woman in a straight passing marriage of 12 years. Yet, even as an accomplished woman in a happy marriage with two beautiful children, I've still faced sometimes debilitating depression because for so long, I denied and hid a part of who I was out of fear. I wasn't brave enough as a teen—or even an adult until just recently—to embrace who I am.

But here, we're not talking about adults. We're talking about children who are innocent, emotionally fragile, and want to belong. But kids now are also so beautifully aware, more so than they often get credit for. Today, trans youth in our own community have taken ten brave steps forward by being themselves and telling others who they are at such a young age. This bill will set them back twenty. That's because this bill isn't put

forward by their equally emotionally fragile peers. It's been promoted by their peers' parents. Its advocates are adults, whom they look to, in turn, to lead them into adulthood so that they may also be responsible, loving, hard-working adults. To our youth, this bill must appear as though their role models are embracing exclusion. That is heartbreaking.

As legislators, your duty is to pass viable laws that will help the people of North Dakota. This bill fails that test in so many ways. First, it ignores constitutionality and U.S. Supreme Court precedent. Second, it fabricates a problem that simply does not exist in the guise of championing women's rights. And certainly not least of all, it threatens the wellbeing and very livelihood of our children, North Dakota's future.

Please. Strike down this bill. Set an example of love and acceptance, not rejection. Let kids participate, not be excluded. Let kids be kids, not a statistic.

I am writing in opposition to HB1298. As a healthcare provider and a business owner who routinely works with youth and transgender individuals, I believe this bill provides little benefit and instead discriminates against youth in our state. Numerous professional athletic organizations have released statements over the years stating that bills, policies and laws such as HB1298 aren't necessary and actually can be harmful. As a business owner in Fargo, I would feel ashamed offering healthcare services to transgender youth in a state that has laws that may discriminate against them. I urge you to vote against this bill.



DEPARTMENT OF COMMERCE TESTIMONY HB 1298
MARCH 16, 2021, 2:30 P.M. CST
Senate Judiciary Committee
Peace Garden Room
SENATOR DIANE LARSON, CHAIR

**SARA OTTE COLEMAN, TOURISM AND MARKETING DIVISION DIRECTOR-
DEPARTMENT OF COMMERCE**

Good afternoon Madam Chair and members of the committee, I am Sara Otte Coleman. I have had the privilege of promoting North Dakota, as the state tourism director for the past 18 years. I am here today to ask for your thoughtful consideration on how HB 1298 would impact our state's ability to host future athletic events.

While I understand the bill sponsors' well-intended goal is to provide a level playing field for female athletes, I also believe this work is being done by sports organizations that sanction youth sports in North Dakota and across the world. These organizations have dedicated resources in place to develop the protocols needed to establish fair and equitable competitions.

The amended bill relates to high school sports, however unintended consequences of the bill would likely result in our communities' inability to host youth regional or national competitions, as most of our sporting venues receive public funding. These events are also supported by local convention and visitors bureaus that have staff and sports commissions dedicated to attracting these events for the benefit of small businesses in their communities. This bill would make both hosting and sponsoring these events unlawful should even one of the athletes participating not meet the gender at birth requirement.

Sports tourism benefits communities statewide by providing visitor revenue throughout the year. This revenue helps sustain our world-class sports facilities which are part of North Dakota's sports culture that enhances our quality of life.

Our state has lost \$1.2 billion in visitor spending, of which \$94 million was from lost taxes paid by visitors, since last March. Please consider how this bill will negatively impact an industry so important to North Dakota's recovery.



TOURISM ALLIANCE OF FARGO MOORHEAD

Senate Judiciary Committee –

The Tourism Alliance of Fargo Moorhead represents 68 tourism related businesses in the hotel, restaurant, and attractions businesses, plus a number of companies that service our industry. As an alliance, we are deeply concerned about the implications that HB1298 will have on our industry – specifically in regards to youth and collegiate sports in the state of ND.

The Fargo Moorhead Convention and Visitors Bureau and its legal team asserts that the current language of HB1298 would prevent the CVB, a publicly funded organization, from providing any sort of financial assistance to youth tournaments that allow persons born of one sex to play on a team designated for persons of the opposite sex. Whether this is applicable to a transgendered youth, or simply a girl wanting to play on the boys' team, this bill is unnecessarily discriminatory and burdened by a tremendous amount of red tape that youth sports organizations will have to navigate.

It should be noted that USA Wrestling likely cannot be held in North Dakota if this bill is passed, and USA Swimming will effectively cease to exist under this bill. Governing bodies such as these have policies in place to navigate the topic, and suggesting that the ND legislature knows more about what is appropriate for youth sports than their governing bodies is inappropriate and misguided. Furthermore, the North Dakota High School Athletic Association has policies in place addressing transgendered youth, and asserts that policy has not once been activated. Our elected officials are literally solving a problem that does not exist, and potentially creating a plethora of economic fallout in its wake. Lastly, we should be watching closely what is happening with our neighbors to the south, and the pushback they are seeing from NCAA athlete in response to their attempt to pass a similar bill.

During the COVID-19 pandemic, the importance of youth sports tournaments in our community has been made abundantly clear, and support from agencies such as CVBs and Parks Board are critical towards making sure these events happen throughout our state. COVID aside, hotels and restaurants simply cannot afford to lose such a significant piece of our revenues, and in 2021 and 2022 as other forms of tourism are slow to rebound, youth sports are more important now than ever.

Our board of directors, on behalf of our membership base, appreciates your consideration of these concerns, and look forward to seeing our legislative bodies do what is ultimately right for North Dakota businesses and citizens.

Sincerely,

Tourism Alliance Fargo Moorhead
Board of Directors

**Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1298
in the Sixty-seventh Legislative Assembly of North Dakota**

Dear Chairwoman Larson and members of the Senate Judiciary Committee,

I am writing as a citizen and believe HB1298 is great legislation.

I have a little knowledge of this issue. I am involved as a USA Swimming swim meet official, judging stroke and turns and also starting. Our family is a swimming family. Three of our daughters and our one son have been involved in USA Swimming. We know a little bit about diversity, equality, and inclusion. House Bill 1298 is rightly all of that. In my opinion, it truly balances diversity, equality, and inclusion.

My position on House Bill 1298 is simple. For equality, I believe females should be timed only against other females for rankings and records. Females should not be timed and competed against biological males in exclusively female swimming competitions. It is patently unfair and does not acknowledge the differences between females and males. I have included in Appendix 'A' the current USA Swimming time records for both males and females in North Dakota. With some notable exceptions, there are generally significant time differences between males and females. The obvious advantage to faster times is natural testosterone.

We have been told by opponents to HB1298 there will be no USA Swimming in ND with HB1298. That is a statement that is rather draconian and rings hollow. USA Swimming has recommended guidelines for gender diverse swimming (meaning a biological male swims as a declared female). These are NOT requirements and do not prevent the North Dakota Local Swimming Committee's (NDLSC) from conforming to state requirements that HB1298 will require. This will NOT shut down swimming as we are told. It will preserve the conditions for which we are currently accustomed. Appendix 'B' includes USA Swimming recommended practices for gender diverse athletes. Notice the language "should" and not "shall". This does not expressly prohibit a difference in local rules from the USA Swimming recommendations.

Competing female athletes against biological males in an exclusively female event is patently unequal even after the required 12 months of hormone treatment. Nationally, there are numerous cases of the biological female records being shattered by the new entrance of biological males within the female class.

This is more prominently seen in track and field right now. I believe it is coming to all sports including swimming, and that belief is well founded based on the data. Appendix 'C' provides information on a recent Gallup Poll which studied the percentage of the population which identified as non-heterosexual. The percentage of population currently identifying as non-heterosexual is: 1.3% of Age 74+, 2% of Ages 56-74, 3.8% of Ages 40-55, 9.1% of Ages 24-39, and **16%** of Ages 18-23. What was no apparent issue in previous generations due to low numbers of transgressors is now very much an issue that needs to be carefully balanced. There is a conflict between equality and diversity. Equality should not take a backseat in a sport where hundredths of a second do matter. Ignoring this conflict with inaction does not resolve the issue. The time to act is now before the traditional competitions of female sports are adversely affected. If legislative action is delayed, there will be much difficulty in properly balancing equality interests with diversity interests. HB1298 is in the right time, and done in the right place, the ND legislature.

You will hear opponents to House Bill 1298 say revenue matters to them, while expressing little to no concern about the equality considerations. I do get that. I acknowledge our striving for equality for female athletes may deter some of the national competitions from occurring in North Dakota. However, we do not know that, and that argument is speculative. I believe it is better that principle is placed over the risk of losing a large national meet held every few years in North Dakota.

The real world on equality for female athletes and preventing males competing as females is that it will only be stopped with the assistance of the ND legislature. The vehicle rendering this assistance is HB1298. HB1298 is great legislation. I believe this is THE only way to maintain true equality for female athletes in North Dakota.

I am not opposed to amendments that DO NOT alter the original intent of the bill. However, after studying (the opponent's material too), and learning about HB1298, I want it just the way it is.

Thank you,

Douglas B Sharbono

Doug Sharbono
1708 9th St S
Fargo, ND 58103

APPENDIX A

“Short Course Overall Records”

By North Dakota Local Swim Committee (NDLSC)

https://www.teamunify.com/czndslsc/UserFiles/Image/QuickUpload/sc-overall-records-as-of-09-01-20_051678.pdf

RECORDS Overall

Yards-Women

8 & U	25 Free	13.35	16-Mar-13	AQST ND	Erin Palmer	2013 ND SC State Championships
	50 Free	30.15	21-Mar-03	FMY ND	Alexis Halberstadt	2003 ND SC State Championships
	100 Free	1:13.56	2-Apr-16	WFF ND	Lauren McDonagh	at 2016 MN Midwest Regional Swim Meet
	25 Back	17.91	1-Jan-96	CBSC ND	Jessica Bubel	
	50 Back	37.48	23-Feb-13	AQST ND	Erin H. Palmer	2013 Jamestown WinterBlast
	25 Breast	16.97	16-Dec-12	AQST ND	Erin H. Palmer	2012 AQST December Meet
	50 Breast	38.81	9-Feb-13	AQST ND	Erin Palmer	2013 SD Capital City Qualifier
	25 Fly	16.24	9-Feb-13	AQST ND	Erin Palmer	2013 SD Capitol City Qualifier
	50 Fly	36.11	15-Mar-13	AQST ND	Erin H. Palmer	2013 ND SC State Championships
	100 IM	1:16.99	15-Mar-13	AQST ND	Erin H. Palmer	2013 ND SC State Championships
	10 & U	50 Free	27.61	11-Jan-03	MSC ND	Dagny Knutson
100 Free		1:01.72	11-Jan-03	MSC ND	Dagny Knutson	2003 Williston Swim Meet
200 Free		2:15.48	18-Mar-05	MSC ND	Katie Clark	2005 ND SC State Championships
500 Free		5:56.99	19-Mar-10	RRVY ND	Alexis K. Ljunggren	2010 ND SC State Championships
50 Back		31.25	20-Mar-15	AQST ND	Erin Palmer at 2015 ND SC Championships	
100 Back		1:07.84	15-Mar-02	WFF ND	Ashley Reiter	
50 Breast		34.58	13-Jan-12	WFF ND	Andie Peterson	2012 Aquastorm Catagory 5 Swim Meet
100 Breast		1:15.34	20-Mar-15	AQST ND	Erin Palmer	2015 ND SC State
50 Fly		30.14	* 19-Jan-19	NLSA ND	Arianna D. Hoff at 2019 MW Midwest All Stars	
50 Fly		30.14	* 14-Dec-02	MSC ND	Dagny Knutson	2002 Krista Rust Swim Meet
100 Fly		1:10.13	15-Mar-02	GFY ND	Arenne Clark	
100 IM		1:10.20	20-Mar-15	AQST ND	Erin Palmer	2015 ND SC State
200 IM		2:32.78	15-Mar-02	WFF ND	Ashley Reiter	
200 Free Relay		1:58.55	1-Feb-89	BSC NC	Bismarck Swim Club	L. Olausen; K. Delvo; J. Angell; E. Pierce
200 Medley Relay		2:14.23	4-Mar-07	FMY ND	FMY	Blazek, Roche, Mengelkoch, Astrup
11-12		50 Free	24.67	7-Jan-05	MSC ND	Dagny Knutson
	100 Free	53.50	1-Dec-97	FMY ND	Heather Harris	
	200 Free	1:56.80	1-Dec-97	FMY ND	Heather Harris	
	500 Free	5:17.30	1-Dec-97	FMY ND	Heather Harris	
	1000 Free	11:38.89	15-Mar-19	WFF ND	Brooklyn A. Keney at 2019 ND SC Swim Championship	
	1650 Free	19:32.10	15-Mar-19	WFF ND	Brooklyn A. Keney at 2019 ND SC Swim Championship	
	50 Back	27.98	15-Jan-05	MSC ND	Dagny Knutson	2005 Marv Fiest Invitational
	100 Back	1:00.64	2-Apr-04	MSC ND	Dagny Knutson	2004 Boys & Girls Nationals
	200 Back	2:16.65	17-Mar-17	AQST ND	ERIN Palmer	at 2017 ND SC Championships
	50 Breast	31.96	7-Feb-04	WFF ND	Ashley Reiter	
	100 Breast	1:09.34	19-Mar-10	FMY ND	Ellie Roche	2010 ND SC State Championships
	200 Breast	2:32.94	15-Nov-09	FMY ND	Elizabeth Roche	2009 ND YMCA State Meet
	50 Fly	26.77	7-Jan-05	MSC ND	Dagny Knutson	2005 Dickinson Swim Meet
	100 Fly	1:00.51	16-Mar-18	WFF ND	Tierney L. Howell	at 2018 ND SC Championships
	200 Fly	2:19.93	15-Mar-19	NLSA ND	Alayna L. Janke at 2019 ND SC Swim Championship	
	100 IM	1:01.46	15-Jan-05	MSC ND	Dagny Knutson	2005 Marv Fiest Invitational
	200 IM	2:14.60	2-Apr-04	MSC ND	Dagny Knutson	2004 FL Boys & Girls Club Nationals
	400 IM	5:20.82	15-Mar-19	DDST ND	Aryana L. Twist at 2019 ND SC Swim Championship	
	12 & U	200 Free Relay	1:47.88	16-Mar-18	WFF ND	West Fargo Flyers
400 Free Relay		3:57.74	16-Mar-18	WFF ND	West Fargo Flyers	T. Howell; L. McDonagh; M. Shea; B. Triplett
200 Medley Relay		2:00.92	16-Mar-18	WFF ND	West Fargo Flyers	McDonagh, Triplett, Howell, Shea
400 Medley Relay		4:25.14	16-Mar-18	WFF ND	West Fargo Flyers	McDonagh; Triplett; Howell; Shea

RECORDS Overall

13-14	50 Free	23.93	16-Mar-18	RRV ND	Elsa Musselman	at 2018 ND SC Championships
	100 Free	51.97	6-Apr-99	FMY ND	Heather Harris	
	200 Free	1:51.07	11-Apr-00	FMY ND	Heather Harris	2000 YMCA Nationals
	500 Free	4:58.36	5-Apr-05	RRVY ND	Hannah Whitehead	2005 YMCA Nationals
	1000 Free	10:02.03	5-Apr-05	RRVY ND	Hannah Whitehead	2005 YMCA Nationals
	1650 Free	16:52.26	5-Apr-05	RRVY ND	Hannah Whitehead	2005 YMCA Nationals
	50 Back	27.29	18-Mar-15	AQST ND	Briana Rittenbach	2015 ND SC Championship
	100 Back	57.68	4-Apr-06	MSC ND	Dagny Knutson	2006 FG YMCA Nationals
	200 Back	2:06.81	17-Dec-06	MSC ND	Dagny Knutson	2006 December Fun Meet
	50 Breast	29.52	18-Mar-16	AQST ND	Carly Palmer	at 2016 ND SC Championship
	100 Breast	1:03.95	9-Dec-15	AQST ND	CARLY Palmer	at 2015 Speedo Short Course Junior Nationals
	200 Breast	2:23.00	16-Jan-15	AQST ND	Vanessa Herrmann	AQST Cat 5 Meet
	50 Fly	25.91	6-Aug-20	WFF ND	Tierney Howell	WFF Summer Survival
	100 Fly	55.74	4-Apr-06	MSC ND	Dagny Knutson	2006 FG YMCA Nationals
	200 Fly	2:06.80	17-Dec-06	MSC ND	Dagny Knutson	2006 December Fun Meet
	100 IM	59.35	13-Jan-07	MSC ND	Dagny Knutson	2007 Williston Invite
	200 IM	2:05.55	4-Apr-06	MSC ND	Dagny Knutson	2006 FG YMCA Nationals
	400 IM	4:31.95	17-Dec-06	MSC ND	Dagny Knutson	2006 December Fun Meet
	200 Free Relay	1:41.01	1-Jan-84	MSC ND	MINOT	J. Berkey, M. Menono, S. Snyder, P. Rudser
	400 Free Relay	3:45.97	15-Mar-19	WFF ND	WEST FARGO FLYERS	T. Howell, B. Triplett, M. Shea, H. Potter
	200 Medley Relay	1:52.13	15-Mar-19	WFF ND	WEST FARGO FLYERS	B. Triplett, H. Potter, T. Howell, M. Shea
	400 Medley Relay	4:12.23	16-Mar-14	AQST ND	Aquastorm	A. Bourgois, V. Herrmann, T. Sether, A. Warren
15-16	50 Free	23.02	12-Dec-19	AQST ND	Alexis Duchsherer	Winter Junior Nats
	100 Free	47.80	4-Dec-08	MSC ND	Dagny Knutson	2006 Conoco Phillips Championships
	200 Free	1:43.90	4-Dec-08	MSC ND	Dagny Knutson	2008 Conoco Phillips Championships
	500 Free	4:48.61	14-Mar-08	MSC ND	Dagny Knutson	2008 ND SC State Championships
	1000 Free	9:57.44	4-Apr-06	RRVY ND	Hannah Whitehead	2006 FG YMCA Nationals
	1650 Free	16:52.80	4-Apr-06	RRVY ND	Hannah Whitehead	2006 FG YMCA Nationals
	50 Back	25.88	17-Mar-17	AQST ND	Briana G. Rittenbach	at 2017 ND SC Championships
	100 Back	55.56	13-Jan-17	AQST ND	Briana G. Rittenbach	at 2017 ND Aquastorm Category 5 Swim Meet
	200 Back	2:00.38	14-Mar-08	MSC ND	Dagny Knutson	2008 ND SC State Championships
	50 Breast	30.78	18-Mar-11	AQST ND	Veronica L. Herrmann	2011 ND SC State Championships
	100 Breast	1:02.75	3-Aug-20	AQST ND	Erin Palmer	2020 AQST Intrasquad
	200 Breast	2:16.74	9-Dec-15	AQST ND	Vanessa L. Herrmann	at 2015 Speedo Short Course Junior Nationals
	50 Fly	25.98	14-Mar-08	WFF ND	Alexis Halberstadt	2008 ND SC State Championships
	100 Fly	54.47	2-Apr-07	MSC ND	Dagny Knutson	2007 FG YMCA Nationals
	200 Fly	2:00.31	2-Apr-07	MSC ND	Dagny Knutson	2007 FG YMCA Nationals
	100 IM	1:00.44	17-Mar-17	NLSA ND	Gracie Lingle	at 2017 ND SC Championships
	200 IM	1:54.03	4-Dec-08	MSC ND	Dagny Knutson	2008 Conoco Phillips Championships
	400 IM	4:00.62	4-Dec-08	MSC ND	Dagny Knutson	2008 Conoco Phillips Championships
	200 Free Relay	1:40.51	15-Mar-19	AQST ND	Bismarck Aquastorm	P. Keller, S. Dorrheim, O. Schuchard, A. Duchshere
	400 Free Relay	3:35.51	1-Jan-07	RRVY ND	RRVY	Erin Grabanski, Mirna Kojic, Addy DiCristina, Ali
	200 Medley Relay	1:48.89	17-Mar-17	AQST ND	Aquastorm	Ritenbach, Herrmann, Bender, Zottnick
	400 Medley Relay	4:01.32	19-Mar-16	AQST ND	Aquastorm	Rittenbach, Herrmann, Sether, Bourgois
15-18	200 Free Relay	1:38.36	20-Mar-15	AQST ND	Aquastorm	D.Bergeson;A.Bourgois;A. Warren;E.Hepper
	400 Free Relay	3:34.98	20-Apr-15	AQST ND	Aquastorm	A.Bourgois;A. Warren;D.Bergeson;E.Hepper
	200 Medley Relay	1:49.81	20-Mar-15	AQST ND	Aquastorm	E.Hepper;D.Bergeson;T.Sether;A.Bourgois
	400 Medley Relay	3:59.89	1-Apr-96	BSC ND	BISMARCK	L. Haunz, K. Giese, E. Pierce, J. Farnsworth
17-18	50 Free	22.72	19-Mar-10	ASK ND	Dagny Knutson	2010 ND SC State Championships

RECORDS Overall

17-18	100 Free	48.27	3-Dec-09	ASK ND	Dagny Knutson	2009 SCY Sectionals	
	200 Free	1:42.61	3-Dec-09	ASK ND	Dagny Knutson	2009 AT&T Championships	
	500 Free	4:31.18	3-Dec-09	ASK ND	Dagny Knutson	2009 AT&T Championships	
	1000 Free	9:50.48	30-Jan-10	ASK ND	Dagny Knutson	2010 Minot Winter Meet	
	1650 Free	16:30.44	16-Jan-10	ASK ND	Dagny Knutson	2010 Iceberg Invitational	
	50 Back	27.29	16-Mar-18	AQST ND	Briana Rittenbach	2018 ND SC Championship	
	100 Back	54.86	10-Mar-10	ASK ND	Dagny Knutson	2010 MN Twin Spring Speedo Championships	
	200 Back	1:55.56	10-Mar-10	ASK ND	Dagny Knutson	2010 MN Twin Speedo Championships	
	50 Breast	29.64	12-Mar-20	AQST ND	Carly Palmer	2020 CSCAA Nat'l Inv.	
	100 Breast	1:02.90	21-Nov-19	AQST ND	Carly Palmer	2019 Mizzou Invitational	
	200 Breast	2:16.70	6-Dec-17	AQST ND	Vanessa Herrmann	2017 Speedo Jr Champs West	
	50 Fly	25.30	19-Mar-10	ASK ND	Dagny Knutson	2010 ND SC State Championships	
	100 Fly	55.17	10-Oct-09	ASK ND	Dagny Knutson	2009 WY Boys & Girls Invitational	
	200 Fly	1:58.16	5-Mar-09	UN ND	Dagny Knutson	2009 Austin GP	
	100 IM	56.89	19-Mar-10	ASK ND	Dagny Knutson	2010 ND SC State Championships	
	200 IM	1:58.04	5-Mar-09	ASK ND	Dagny Knutson	2009 Austin GP	
	400 IM	4:08.61	10-Mar-10	ASK ND	Dagny Knutson	2010 MN Twin Speedo Championships	
	200 Free Relay	1:48.37	1-Jan-12	FMY ND	FMY	E.Roche, C. Hoff, M. Smith, C. LeDoux	
	400 Free Relay	3:53.90	1-Jan-12	FMY ND	FMY	E. Roche, C. Hoff, C. LeDoux, M. Smith	
	200 Medley Relay	1:55.18	1-Jan-12	FMY ND	FMY	C. Hoff, C. LeDoux, E. Roche, M. Smith	
	18 & U	800 Free Relay	7:41.11	7-Apr-11	RRVY ND	RRVY	HM Kojic, A. Dicristina, E. Grabanski A. Church

RECORDS Overall
Yards-Men

8 & U	25 Free	13.96	21-Jan-92	DDST ND	Kyle Steffes	
	50 Free	31.31	1-Mar-92	DDST ND	Kyle Steffes	
	100 Free	1:08.09	17-Mar-17	ASK ND	Julian/Moto Tucker	at 2017 ND SC Championships
	25 Back	16.63	1-Mar-97	CROC ND	Shane Reynolds	
	50 Back	36.74	17-Mar-17	ASK ND	Julian/Moto Tucker	at 2017 ND SC Championships
	25 Breast	18.57	1-Dec-91	BYSC ND	Ryan Berreth	
	50 Breast	41.46	24-Jan-04	BWST ND	Derek Meyer	2004 Jamestown Eagles Winter Blast
	25 Fly	15.01	1-Mar-92	BYSC ND	Kyle Steffes	
	50 Fly	36.68	17-Feb-07	UN ND	Delton Gabel	2007 Marv Fiest Invite
	100 IM	1:19.16	17-Mar-17	ASK ND	Julian/Moto Tucker	at 2017 ND SC Championships
10 & U	50 Free	27.85	18-Nov-12	ASK ND	Austin Aguirre	2012 Minot Pentathlon
	100 Free	1:03.14	2-Feb-13	ASK ND	Austin P. Aguirre	at Minot Winter Fun Meet
	200 Free	2:16.64	7-Feb-09	WFF ND	Jared Norton	2008 Brian Prochnow Invite
	500 Free	5:58.83	20-Mar-09	WFF ND	Jared Norton	2009 ND SC State Championship
	50 Back	32.90	18-Nov-12	ASK ND	Austin P. Aguirre	at 2012 Minot Pentathlon
	100 Back	1:10.22	15-Dec-12	ASK ND	Austin P. Aguirre	at Mandan Marlins Winter Swim Meet
	50 Breast	36.30	1-Mar-94	DDST ND	Kyle Steffes	
	100 Breast	1:18.93	1-Nov-96	FMY ND	Ronnie Hehn	
	50 Fly	30.68	2-Feb-13	ASK ND	Austin P. Aguirre	at Minot Winter Fun Meet
	100 Fly	1:11.04	18-Jan-13	ASK ND	Austin P. Aguirre	at 2013 ND AQUASTORM Category 5 Swim Meet
	100 IM	1:09.67	18-Nov-12	ASK ND	Austin P. Aguirre	at 2012 Minot Pentathlon
	200 IM	2:38.08	16-Dec-12	ASK ND	Austin P. Aguirre	at 2012 AQST December Meet
	200 Free Relay	2:04.40	20-Mar-09	WFF ND	WEST FARGO FLYERS	L. Bergstrom, V. Isaak, B. Olson, J. Norton
	200 Medley Relay	1:51.54	13-Nov-05	FMY ND	FMY	E. Richardson, C. Nasset, J. Vanl
11-12	50 Free	24.40	13-Jan-17	MSC ND	Caleb Rist	2017 ND AQST Cat 5 Invitational
	100 Free	52.69	11-Feb-17	MSC ND	Caleb Rist	2017 WSL Invitational
	200 Free	1:57.17	11-Feb-17	MSC ND	Caleb Rist	2017 WSL Winter Invitational
	500 Free	5:22.89	11-Feb-17	MSC ND	Caleb Rist	2017 WSL Winter Invitational
	1000 Free	12:16.29	29-Feb-20	DDST ND	Bjorn Pederson	WSL Last Solash
	1650 Free	20:23.50	1-Feb-20	DDST ND	Bjorn Pederson	WSL Winter Invitational
	50 Back	28.63	1-Mar-93	WET ND	Joey Schneider	
	100 Back	1:02.88	1-Mar-93	WET ND	Joey Schneider	
	200 Back	2:19.10	6-Mar-11	UN ND	Jared Norton	2011 Wahoo Invitational
	50 Breast	31.70	17-Mar-07	BYSC ND	Ian Ballantyne	2007 ND SC State Champions
	100 Breast	1:09.43	23-Mar-19	MSC ND	Logan Hill	at 2019 MN MYAS Meet
	200 Breast	2:35.34	18-Jan-19	MSC ND	Logan Hill	at 2019 ND Aquastorm Category 5 Swim Meet
	50 Fly	25.66	13-Jan-16	MSC ND	Caleb A. Rist	2017 ND AQST Cat 5 Invitational
	100 Fly	57.22	28-Jan-17	MSC ND	Caleb A. Rist	2017 WSL Winter Invitational
	200 Fly	2:16.23	28-Jan-17	MSC ND	Caleb A. Rist	Minot Winter Fun Meet
	100 IM	1:00.61	21-Nov-10	AQST ND	Taylor Hedge	2010 Minot Pentathlon
	200 IM	2:13.85	11-Feb-17	MSC ND	Caleb Rist	2017 WSL Winter Invitational
	400 IM	5:16.09	26-Jan-19	MSC ND	Logan Hill	at Minot Winter Fun
	200 Free Relay	1:41.01	11-Mar-06	FMY ND	FMY	S. Rider, M. Wenzel, J. Joachim, S. Fisher
	200 Medley Relay	2:03.19	1-Apr-81	BYS ND	Bismarck	S. Locken, S. Ottmar, C. Riecke, W. Ritter
400 Medley Relay	4:48.03	19-Mar-16	MSC ND	Minot Swim Club	Hill, VonBokern, Rist, Bubach	
12 & U	400 Free Relay	4:13.99	18-Mar-16	MSC ND	Minot Swim Club	K. Hill; J. Bubach; J. Reinke; C. Rist

RECORDS Overall

13-14	50 Free	22.19	6-Apr-09	RRVY ND	Isaac Loegering	2009 FG YMCA Nationals	
	100 Free	49.46	17-Mar-00	MSC ND	Matt Lowe		
	200 Free	1:51.25	14-Mar-08	WFF ND	Alan Repak	2008 ND SC State Championships	
	500 Free	4:57.97	16-Mar-12	AQST ND	Loren Sether	2012 ND SC State Championships	
	1000 Free	10:31.36	20-Mar-09	WFF ND	Ethan Doll	2009 ND SC State Championship	
	1650 Free	17:38.81	20-Mar-09	WFF ND	Ethan Doll	2009 ND SC State Championships	
	50 Back	24.87	20-Mar-09	BYSC ND	Ian Ballantyne	2013 ND SC State Championships	
	100 Back	53.65	6-Apr-09	BYSC ND	Ian Ballantyne	2009 FG YMCA Nationals	
	200 Back	2:02.24	20-Mar-09	BYSC ND	Ian Ballantyne	2009 ND SC State Championships	
	50 Breast	28.63	19-Mar-10	AQST ND	Collin Kemmesat	2010 ND SC State Championships	
	100 Breast	1:00.80	17-Mar-00	AQST ND	Loren Sether	2012 ND SC State Championships	
	200 Breast	2:13.95	16-Mar-12	AQST ND	Loren Sether	2012 ND SC State Championships	
	50 Fly	24.72	16-Mar-18	MSC ND	Caleb Rist	at 2018 ND SC Championships	
	100 Fly	54.08	19-Jan-19	MSC ND	Caleb Rist	at 2019 MW Midwest All Stars	
	200 Fly	2:01.12	16-Mar-18	MSC ND	Caleb Rist	at 2018 ND SC Championships	
	100 IM	57.72	15-Mar-19	WSL ND	Kolden L. Kringen	at 2019 ND SC Swim Championship	
	200 IM	2:03.10	13-Feb-04	MSC ND	Matt Lowe	2004 AZ Lost Dutchman Invite	
	400 IM	4:28.24	16-Mar-12	AQST ND	Loren Sether	2012 ND SC State Championships	
	200 Free Relay	1:35.93	20-Mar-16	AQST ND	Aquastorm	Johnson, Nodland, Koebele, Birnbaum	
	400 Free Relay	3:35.71	19-Mar-16	AQST ND	Aquastorm	C. Birnbaum, C. Koebele, A. Nodland, R. Johnson	
	200 Medley Relay	1:48.16	14-Mar-08	WFF ND	WEST FARGO FLYERS	E. Doll, D. Hulbert, A. Repak, M. Duncan	
	400 Medley Relay	3:57.04	19-Mar-16	AQST ND	BISMARCK AQUASTORM	Koebele, Birnbaum, Nodland, Johnson	
	15-16	50 Free	21.25	2-Apr-02	MSC ND	Matt Lowe	2002 US YMCA Nationals
		100 Free	46.20	14-Dec-19	NLSA ND	Eric Anderson	2019 Winter Junior Nats
200 Free		1:44.10	15-Mar-19	NLSA ND	Eric p. Anderson	at 2019 ND SC Swim Championship	
500 Free		4:47.47	16-Mar-14	AQST ND	Loren Sether	2014 North Dakota SC State Championships	
1000 Free		10:07.14	16-Mar-14	AQST ND	Loren Sether	2014 North Dakota SC State Championships	
1650 Free		16:48.76	7-Mar-13	AQST ND	Loren Sether	2013 Speedo Champions Series Meet	
50 Back		25.02	16-Mar-14	NLSA ND	Connor Bjellum	2014 North Dakota SC State Championships	
100 Back		53.67	10-Mar-10	AQST ND	Ian Ballantyne	2010 Spring Speedo Championship Series	
200 Back		1:58.29	5-Apr-05	RRVY ND	Jacob Gerszewski	2005 YMCA Nationals Short Cour	
50 Breast		25.85	15-Mar-09	MSC ND	Brandon Hamel	2009 Minot Last Chance	
100 Breast		56.83	9-Dec-10	AQST ND	Ian Ballantyne	2010 Speedo Short Course Junior Nationals	
200 Breast		2:04.36	2-Apr-02	MSC ND	Matt Lowe	2002 US YMCA Nationals	
50 Fly		23.80	17-Mar-17	AQST ND	Adam Nodland	at 2017 ND SC Championships	
100 Fly		51.80	10-Mar-11	AQST ND	Ian Ballantyne	2011 WI West Speedo Champions	
200 Fly		1:58.28	18-Mar-11	AQST ND	Dylan Sether	2011 ND SC State Championships	
100 IM		53.23	18-Mar-11	AQST ND	Ian Ballantyne	2011 ND SC State Championships	
200 IM		1:55.26	2-Apr-02	MSC ND	Matt Lowe	2002 US YMCA Nationals	
400 IM		4:11.12	10-Mar-11	AQST ND	Dylan Sether	2011 WI West Speedo Champions	
200 Free Relay		1:30.78	17-Mar-17	AQST ND	Aquastorm	Birnbaum; Krug; Johnson; Nodland	
200 Medley Relay		1:40.09	16-Mar-18	AQST ND	Aquastorm	Koebele, Birnbaum, Nodland, Johnson	
15-18		200 Free Relay	1:26.18	17-Mar-12	AQST ND	BISMARCK AQUASTORM	Riepl, Stromme, Sether, Ballantyne
		400 Free Relay	3:12.98	17-Mar-12	AQST ND	BISMARCK AQUASTORM	Riepl, Stromme, Sether, Ballantyne
		200 Medley Relay	1:35.17	17-Mar-12	AQST ND	BISMARCK AQUASTORM	Sether, Kemmesat, Ballantyne, Riepl
		400 Medley Relay	3:34.85	17-Mar-12	AQST ND	BISMARCK AQUASTORM	Schmidt, Ballantyne, Sether, Riepl
17-18	50 Free	20.66	14-Apr-03	MSC ND	Matt Lowe		
	100 Free	45.70	14-Apr-03	MSC ND	Matt Lowe		
	200 Free	1:41.37	9-Mar-00	FAST ND	Tim Springer	2000 US American SC Champs	
	500 Free	4:39.55	4-Apr-06	FMY ND	Andrew WOLF	2006 FG YMCA Nationals	

RECORDS Overall

17-18	1000 Free	9:41.37	4-Apr-06	FMY ND	Andrew WOLF	2006 FG YMCA Nationals
	1650 Free	16:41.89	15-Mar-13	NLSA ND	Alex Brock	2013 ND SC State Championships
	50 Back	24.51	16-Mar-12	AQST ND	Dylan Sether	2012 ND SC State Championships
	100 Back	51.49	9-Mar-00	FAST ND	Tim Springer	2000 US American SC Champs
	200 Back	1:50.13	9-Mar-00	FAST ND	Tim Springer	2000 US American SC Champs
	50 Breast	26.19	15-Mar-03	MSC ND	Matt Lowe	
	100 Breast	54.84	14-Apr-03	MSC ND	Matt Lowe	2003 FG YMCA Nationals
	200 Breast	1:58.84	14-Apr-03	MSC ND	Matt Lowe	2003 FG YMCA Nationals
	50 Fly	22.56	13-Feb-04	MSC ND	Matt Lowe	2004 AZ Lost Dutchman Invite
	100 Fly	50.00	13-Feb-04	MSC ND	Matt Lowe	2004 AZ Lost Dutchman Invite
	200 Fly	1:52.93	7-Mar-13	AQST ND	Dylan Sether	2013 Speedo Champions Series Meet
	100 IM	55.06	16-Mar-18	WFF ND	Luke BERGSTROM	at 2018 ND SC Championships
	200 IM	1:52.47	7-Mar-13	AQST ND	Dylan Sether	2013 Speedo Champions Series Meet
	400 IM	4:04.93	7-Mar-13	AQST ND	Dylan Sether	2013 Speedo Champions Series Meet
18 & U	800 Free Relay	7:02.92	16-Mar-14	NLSA ND	NLSA	T. Bjorlie, A. Brock, C. Bjellum, N. Duncan
Open	200 Medley Relay	1:38.18	15-Mar-19	NLSA ND	Northern Lights Swimming -	P.GABEL;E.Dougherty; A Hollingsworth E Ander:

RECORDS Overall

Yards-Mixed

8 & U	100 Free Relay	1:04.32	17-Mar-17	ASK ND	ASK	Tucker, Altringer, Stevick, Tucker
	100 Medley Relay	1:12.89	1-Apr-89	FMY ND	Fargo	R. Garaas, K. Schindler, J. Rooks, M. Lysne
10 & U	200 Free Relay	2:11.48	17-Mar-17	MSC ND	Minot Swim Club	Osborn; Larson; VonBokern; Hill
	200 Medley Relay	2:31.97	19-Mar-16	MMSC ND	Mandan Marlins	Schaff, Vosberg, Jackson, Haag
12 & U	200 Free Relay	1:54.69	16-Mar-18	MMSC ND	Mandan Marlins Swim Club	Vosberg; Haag; Schaff; Jackson
	400 Free Relay	4:23.07	16-Mar-18	MMSC ND	Mandan Marlins Swim Club	E. Vosberg; T. Adamski; T. Haag; B. Schaff
	200 Medley Relay	2:08.97	16-Mar-18	MMSC ND	Mandan Marlins Swim Club	Jackson, Schaff, Vosberg, Haag
	400 Medley Relay	4:48.46	16-Mar-18	MMSC ND	Mandan Marlins Swim Club	Jackson, Schaff, Vosberg, Haag
13-14	200 Free Relay	1:40.76	23-Feb-18	MSC ND	Minot Swim Club	King, Brugman, Luzardo, Rist
	400 Free Relay	3:50.35	19-Mar-16	MSC ND	Minot Swim Club	Huss, Wolsky, Jessen, Webb
	200 Medley Relay	1:52.78	17-Mar-17	NLSA ND	NLSA	Strobel, Anderson, Brooks, Iverson
	400 Medley Relay	4:14.92	17-Mar-17	NLSA ND	NLSA	Strobel, Anderson, Brooks, Iverson
15-16	400 Free	3:40.68	17-Mar-17	MSC ND	Minot Swim Club	Huss, Webb, Jessen, Miller
	200 Free Relay	1:33.68	16-Mar-18	NLSA ND	Northern Lights Swimming	Anderson, Hollingsworth, Lingle, Tracy
	200 Medley Relay	1:45.69	16-Mar-18	NLSA ND	Northern Lights Swimming	Lingle, Anderson, Tracy, Hollingsworth
	400 Medley Relay	3:51.26	16-Mar-18	NLSA ND	NLSA	Lingle, Tracy, Hollingsworth, Anderson
15-18	200 Free Relay	1:33.04	20-Mar-16	NLSA ND	Northern Lights Swimming	Poynter, Hollingsworth, Anderson, Lingle
	200 Medley Relay	1:44.88	19-Mar-16	NLSA ND	Northern Lights Swimming	Johnson, Weisz, Winter, Anderson
	400 Medley Relay	4:01.06	16-Mar-18	RRV ND	Red River Valley	Ljunggren, Woitdtko, Rygh, Craven
17-18	400 Medley Relay	3:59.47	20-Mar-16	NLSA ND	Northern Lights Swimming	Lingle, Weisz, Smith, Anderson
18 & U	800 Free Relay	7:38.67	18-Mar-16	NLSA ND	Northern Lights Swimming	J. Smith; G. Lingle; B. Anderson; C. Weisz
Open	400 Free Relay	3:25.94	19-Mar-16	NLSA ND	Northern Lights Swimming	Gabel, Hollingsworth, Anderson, Lingle

APPENDIX B

“Recommended Practices for Gender Diverse Minor Athletes”

By USA Swimming

https://www.usaswimming.org/docs/default-source/diversity-inclusion/5.-other-related-documents/recommended-practices-for-gender-diverse-minors.pdf?sfvrsn=c32c5332_20

RECOMMENDED PRACTICES FOR GENDER DIVERSE MINOR ATHLETES

The following are recommended practices to assist USA Swimming member clubs who wish to develop a club policy for the inclusion of gender diverse minor athletes. These recommendations are consistent with USA Swimming values of equal opportunity and the right for all members to participate. USA Swimming strongly encourages the use of this resource and offers assistance to teams that need guidance in its implementation.

**Athletes qualifying for or competing in Elite level or senior competitions (with time qualifications) must follow current USA Swimming Policies and Procedures for selection, which also fall under the current IOC guidelines. **

DEFINITIONS (taken from transequality.org)

Transgender: a broad term that can be used to describe people whose gender identity is different from the gender they were thought to be when they were born

Gender identity: a person's internal knowledge of their gender

Gender expression: how a person presents their gender on the outside, often through behavior, clothing, hairstyle, voice or body characteristic

Sex: The classification of a person as male or female based on what our bodies look like at birth.

Gender Diverse: equitable or fair representation between genders, most commonly the ratio of men and women and may also include non-binary gender categories.

RECOMMENDED POLICY FOR PARTICIPATION

A minor transgender athlete member of a swim club should be allowed to participate in accordance with his/her/their gender identity, irrespective of the sex listed on the athlete's birth certificate or other records and regardless of whether the athlete has undergone any medical procedure.

This means an athlete who is biologically female but identifies as a boy/man should be allowed to participate in men's events and an athlete who is biologically male but identifies as a girl/woman should be allowed to participate in women's events.

RECOMMENDED PRACTICES FOR CLUBS AND MEETS

1. When a current minor member athlete transitions and wishes to compete in his/her/their gender identity, the athlete or his/her/their designee should request a change of the athlete's gender in SWIMS by contacting Diversity & Inclusion staff at USA Swimming at inclusion@usaswimming.org. Once this process is completed, the athlete will be able to be entered and compete in events that match his/her/their gender identity.

2. At all times, teammates, coaches, and all others should respect the confidentiality of an athlete. Discussion or disclosure of an individual's gender identity should only take place after expressed permission is given by the individual or the individual's parent or another designee.

3. In all cases, teammates, coaches, and all others should refer to an athlete by the name and pronoun they go by.

4. An athlete should be able to use the locker rooms, changing facility, and restroom that is consistent with his/her/their gender identity. When requested and/or where available, an athlete should be provided access to a gender-neutral bathroom or changing facility (i.e., family restroom, gender neutral bathroom).

5. When overnight travel is involved, an athlete should be assigned to share a hotel room based on his/her/their gender identity. An athlete who requests extra privacy should be accommodated whenever possible.

6. An athlete should be permitted to dress consistently with his/her/their gender identity, including warm-ups and team gear.

7. Per USA Swimming's Rule Book in article 102.8.1 B "In swimming competitions, the swimmer must wear only one swimsuit in one or two pieces, except as provided in 205.10.1. All swimsuits shall be made from textile materials. For men, the swimsuit shall not extend above the navel nor below the knees, and for women, shall not cover the neck, extend past the shoulder, nor extend below the knee" Any athlete requesting a deviation from this policy must submit a swimsuit waiver to the Chair of Rules and Regulations Committee. The current Chair is Clark Hammond (ruleregs@gmail.com). No exemption to the swimsuit rule will be made that gives a swimmer a competitive advantage (i.e. tech suits). It is important for all members to be aware of relevant state laws with regards to appropriate coverage.

8. Meet Directors and Club Leadership should identify and publicize available gender-neutral bathroom and changing room options at the host facility for meets and practice. Where possible, include information about availability and location of gender-neutral facilities in meet information and on the club's website.

9. Meet Directors and Club Leadership should be aware of and abide by the relevant state and local laws and the rules of the host facility for meets and practice.

10. Clubs should provide training to their staff and regular volunteers regarding their responsibilities to prevent, identify, and respond to bullying, harassment, and discrimination. Such topics should include terms and concepts of gender identity and expression and bystander intervention strategies related to bullying. Contact USA Swimming Diversity & Inclusion staff for training program recommendations.

The US Center for Safe Sport and USA Swimming prohibit discrimination against any member or participant on the basis of gender, sexual orientation, gender expression and gender identity is prohibited (304.3.3). In the event that a question should arise about whether an athlete's request to participate in a manner consistent with his/her/their gender identity is bona fide, USA Swimming will refer to the Code of Conduct and follow its standard procedures of enforcement.

ADDITIONAL RESOURCES

Trans*Athlete: a resource for students, athletes, coaches, and administrators to find information about transgender inclusion in athletics at various levels of play.
www.transathlete.com

NCAA Inclusion of Transgender Student-Athletes:

<http://www.ncaa.org/about/resources/inclusion/lesbian-gay-bisexual-transgender-and-questioning-lgbtq>

National Center for Transgender Equality:

<https://transequality.org/>

GLAAD Reference Guide (updated 2016):

<https://www.glaad.org/reference>

APPENDIX C

“Poll: Stunning Percentage of Generation Z Identifies as LGBT”

By Jack Davis, The Western Journal

<https://www.westernjournal.com/poll-stunning-percentage-generation-z-identifies-lgbt/>

News

NEWS

Poll: Stunning Percentage of Generation Z Identifies as LGBT

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By Jack Davis
Published February 24, 2021 at 12:37pm

The percentage of emerging voters who identify as LGBT is roughly eight times as high as that of older Americans, according to a new survey.

A Gallup poll conducted for the year 2020 found that in the age group classified as Generation Z — people between 18 and 23 in 2020 — almost 16 percent said they were in a category that was not heterosexual.

Among Americans age 56 and over, only 2 percent labeled themselves in this way.

Gallup editor Jeffrey Jones said the generational shift reflects a greater acceptance of varied lifestyles.

“Younger people are growing up in an environment where being gay, lesbian or bisexual is not as taboo as it was in the past,” Jones told NBC News.

“So they may just feel more comfortable telling an interviewer in a telephone survey how they describe themselves. In the past, people would maybe be more reluctant.”

The percentage of those who identify as something other than heterosexual declines with age, the survey found.

According to the survey, the LGBT population among Millennials (ages 24-39) was at 9.1 percent, while for Generation X (ages 40-55) the same population reported was at 3.8 percent. Among Baby Boomers (ages 56-74), 2 percent identified as LGBT. Among what the poll called Traditionalists who were over the age of 74, 1.3 percent said they identified as LGBT.

Is this bad news for the country's future?

Yes No

Enter your email

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The survey found that overall, 5.6 percent of those surveyed said they were LGBT — up from 4.5 percent in 2017 when Gallup previously conducted a similar poll.

Within the LGBT population, 54.6 percent identified as bisexual, 24.5 percent as gay, 11.7 percent as lesbian and 11.3 percent as transgender. Respondents were also able to choose more than one category.

The Gallup poll surveyed 15,349 adults aged 18 and older in the U.S. and reported a margin of error of +/- 1 percentage point.

Jones told NBC that because identity can be perceived in different ways, not everyone who responded to questions the same way would act in the same fashion.

“People may think of it differently, in the same way they may have different ideas of what a liberal or a moderate or conservative is,” he said. “Basically, we try and use terms that are familiar to most people, that are fairly well understood. But we recognize that people may understand the terms differently.”

Gary Gates, a demographer who has previously worked with Gallup, said the poll is an imprecise snapshot.

“What they’re trying to come up with is the people who self-identify,” Gates told NBC. “It’s a measure of identity, not behavior or feelings or some other measurements we might use. They weren’t trying to count all the people in the closet.”

Some said the numbers could be impacted by the fad of identifying as transgender.

Glenn Greenwald 
@ggreenwald



Some really fascinating findings in this big new Gallup survey on Americans identifying as "LGBT." It should lead to lots of deeper investigation to understand what explains some of these astronomical changes, but for now, a few points to note:

LGBT Identification Rises to 5.6% in Latest U.S. Estimate

Gallup finds 5.6% of U.S. adults identifying as lesbian, gay, bisexual or transgender, with the majority of them saying they are bisexual.

news.gallup.com

10:46 AM · Feb 24, 2021



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In a California Polytechnic University study, titled “Political Behavior of Sexual and Gender Minorities,” liberal arts and political science professor Royal G. Cravens III noted, “The majority of the literature reveals sexual minorities to be politically distinct from heterosexuals, in that sexual minorities are more ideologically liberal and, in the United States, more likely to support Democratic partisans.”

“Largely because of heterosexism, sexual and gender minorities are also more likely to participate in political activities that directly implicate their sexual orientation or gender identity,” he wrote.

In a Tuesday Facebook post, Rev. Franklin Graham issued a warning concerning the LGBT agenda.

“Have you heard of the Equality Act? The name might sound good, but it’s deceiving. It has nothing to do with equality. It’s just a smokescreen to force Americans to accept the LGBTQ agenda and it creates a lot of INEQUALITY for Christians and all people of faith. It punishes individuals and organizations that disagree based on their moral convictions,” Graham wrote.

“If passed into law, the Equality Act could prohibit religious organizations — Jewish, Protestant, Catholic, Muslim, all — and churches from hiring only like-minded people who believe what they believe.”

“The Equality Act would destroy women’s and girls’ sports in this country as we know it. It would allow biological males who choose to identify as females to compete for titles, scholarships, and recognition at all age levels,” Graham continued.

“The Equality Act would erase women’s privacy—in locker rooms, dressing rooms, homeless shelters, restrooms, and more.”

“God made us male and female, and that’s it. With some 6,000 years of human history, it has only been in the last few years that people have come up with all of these additional designations for gender identity.”

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Jack Davis
Contributor, News

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Jack Davis is a freelance writer who joined The Western Journal in July 2015 and chronicled the campaign that saw President Donald Trump elected. Since then, he has written extensively for The Western Journal on the Trump administration as well as foreign policy and military issues.

Tags: children, Franklin Graham, homosexual agenda, LGBT, politics, polls, transgender, US news

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Dear Chairman Larson and Members of the Senate Judiciary Committee:

We oppose House Bill 1298, which seeks to block transgender youth from participating in athletics. House Bill 1298 is discriminatory, contrary to federal law and athletic policies, in opposition to positive social development, and inconsistent with science.

House Bill 1298 puts North Dakota at odds with federal law. On January 20, 2021, President Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. This Order states, "Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or **school sports**." States that fail to comply with this law risk federal legal action and the loss of federal education funding.

House Bill 1298 further ignores established policies created by the National Collegiate Athletic Association (NCAA) in 2011 and the North Dakota High School Athletic Association in 2015, which specifically addresses and supports the participation of transgender athletes. The NCAA has removed postseason and championship events in states with laws that violate their policy.

The ability to participate in sports has been well documented to have a positive effect on mental health in kids of all ages. Involvement in sports, particularly as a member of a sports team, is an important way for youth to develop psychosocially and help form their social identity. Sports participation helps athletes develop self-esteem, correlates positively with overall mental health, and appears to have a protective effect against suicide. This is of particular importance due to the fact that risk factors for suicide are already dramatically higher in transgendered children with studies showing 56% of youth who identified as transgender reporting previous suicidal ideation, and 31% reporting a previous suicide attempt. Keeping transgender students connected with fellow peers and participating in activities is vital for their development and mental health.

In 2017, a systemic review of medical literature found, "There is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery)." Any disingenuous attempts to defend this law by suggesting otherwise is flatly contradicted by research. There is simply no place in North Dakota for the discriminatory policies proposed in Bill 1298 and we urge you to vote no.

Sincerely,

Grant Syverson, MD
Luis Casas, MD
David Newman, MD
Kathy Anderson, MD
Brenda Thurlow, MD
Tracie Newman, MD, MPH
Rebecca Schreier, MD
Natalie Dvorak, MD
Amy Oksa, MD

Jagila Minso, MD
Chris Tiongson, MD
Barbara Bentz, MD
Maria Weller, MD
Gabriela Balf, MD, MPH
Stephen Tinguely, MD
Julie Erpelding-Kenien, MD

Rebecca Preussler, PsyD
Justin Horner, MD
Alex Thompson, MD
Brandon Meyer, MD
Stephanie Antony, MD
Vanessa Nelson, MD
Jenifer Jones-Dees, MD

Sarah Paur, CPNP

Kurt Kooyer, MD
Bonnie Kvistad, MD



To: Senate Judiciary Committee
From: Katie Mastel, Government Affairs Manager, FMWF Chamber of Commerce
Date: March 16, 2021
RE: **Oppose HB 1298**

Chair Larson, members of the Senate Judiciary Committee,

Thank you for the opportunity to submit testimony in regards to House Bill 1298. For the record, my name is Katie Mastel, and I serve as the Government Affairs & Advocacy Manager at the Fargo Moorhead West Fargo Chamber of Commerce. Our **Chamber respectfully opposes House Bill 1298 based on the detrimental economic impact it would have on our state.** Various other philosophical arguments could be brought forward, however as The Chamber, we are testifying in opposition solely on the merits of the negative economic impact of this bill. This legislation has a plethora of expected adverse effects to our state including a loss of economic stimulation in the hospitality and tourism industry and an impediment to successful business and workforce attraction.

This legislation puts our local hospitality industry, with the CVB's Sports Team estimating more than \$10 million of annual economic stimulation from the more than 100 sports events they assist, in jeopardy. If passed, this bill would pose a threat for large sporting events such as USA Wrestling, USA Swimming, Fargo Youth Hockey Association tournaments to cease their tournaments in North Dakota, due to the constraints of this legislation. These sporting events fill hotels, restaurants and retail stores with teams and their families, contributing to our local economies. The loss of even one of these tournaments could prove a loss of millions to our economy.

In addition, there have been conversations in South Dakota, where a bill with similar language has moved through the legislature, that this could potentially pose adverse impacts on recruiting new businesses, such as Amazon, to the state. As in South Dakota, the passage of this legislation could prove damaging for the brand of our state, in turn hindering the recruitment of businesses and workforce, negatively impacting our economic growth.

We realize The Chamber isn't the expert when it comes to policy related to transgender athletes competing in sports. Instead, we would advocate that those decisions be made by those that have studied this issue – the governing and sanctioning bodies of these sports organizations – not our legislative body. Many of these governing bodies such as those of USA Wrestling and USA Hockey, already have policies in place related to this issue. As they have been engaged in this issue for decades, and are better suited to address this issue in an equitable and appropriate fashion.

With these deep economic concerns in mind, **we respectfully ask that you oppose House Bill 1298.** Thank you for your consideration.

Katie Mastel
Government Affairs and Advocacy Manager
FMWF Chamber of Commerce
kmastel@fmwfchamber.com | 701.516.2114

Written Testimony In Opposition to HB1298

Angela Schmidt Benz – D28 – Moffit, ND

Chairperson Larson and Members of the Senate Judiciary Committee,

I am writing you today in opposition to HB1298. I am doing this as a concerned parent, a member of my community, and a professional in the hospitality industry. Today I am going to talk about some of the issues with this bill. This is not all encompassing, and I am sure you will hear many in our state that agree with me and of course a few that disagree.

1. HB1298 is NOT a women's right issue as Senator Myrdal would like you to believe. Women have long been playing on co-ed teams. When I was in grade school in Steele-Dawson public school in the late 1980's the boys team was short a player for a trip to Medina for a tournament. Who got the call up? Me. A female. A female that played on the boys team. I can't remember if we won or lost that day. What I do remember is that I was a kid. A kid that loved basketball and would have played on any team that allowed me to do so....regardless of gender. When Sen. Myrdal talks about women's right and Title IX she is twisting the meaning. Title IX is simply a federal law that protects people from sex-based discrimination in school programs and activities that receive federal money. Sex-based discrimination. If I identify as a female then they can't discriminate against me for playing on a women's team. And vice versa if I identify as a male. I also find it difficult that Sen. Myrdal is all of a sudden a women's right proponent.
2. NDHSAA has already written a policy that is working. Why are we fixing what isn't broken? I would think that our governing body of high school activities knows what is best for their people. In our ND Legislature it is always talked about how we want to keep our decisions local. Allowing NDHSAA to make this policy is about as local as it gets.
3. Economic Impact on our communities and states. I work as a Director of Sales for the Marriott hotels in Bismarck and have recently taken on hotels in Fargo and Grand Forks. I know how impactful USA sanctioned sporting events are on our bottom lines. If these communities were to lose these events it would be detrimental to our industry, food service, shopping and so much more. If this bill passes all USA sanctioned sporting events would end in our state due to their existing policies. We currently have rooms sold to teams for the 2021 USA Wrestling event held in Fargo. If that event cancels my three hotels alone would lose around \$20,000 in sleeping room revenue over the two days. That doesn't take into account all the other industries and monies they will be spending. The potential revenue loss after coming off of COVID would be devastating to our local economies and our hotels. We simply can't afford to lose anymore than we already have.
4. This is the most important piece of this legislation. The kids. These kids are just trying to stay alive and fit in. We teach our kids to be inclusive. To be kind. To not bully. And then we try to pass legislation that says you are not worthy. You are not normal. You are not good enough. As adults we are the ones with the issue. Most kids don't care. They just want to play a sport and been seen as a human. We as adults need to take a hard look at ourselves and decide what world we want to leave for our kids and grandkids. The future is changing. We need to support and honor that.

I am requesting a Do Not Pass from this committee on HB1298. Thank you for your time.

North Dakota

Travel Alliance Partnership

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Bismarck, ND 58502
(701) 355-4458
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MEMBERS

- America's Best Value Inn & Suites
- Basin Electric Power Cooperative
- Bismarck Airport
- Bismarck-Mandan CVB
- Bottineau Area Chamber of Commerce
- Destination Marketing Association of North Dakota
- Devils Lake CVB
- Dickinson CVB
- Eastbay Campground
- Fargo Air Museum
- Fargo-Moorhead CVB
- Friends of Lake Sakakawea
- Greater Grand Forks CVB
- Hampton Inn & Suites Minot Airport
- Jamestown Tourism
- Leistikow Park Campground
- Lone Butte Ranch/Log Cabin Vacations
- McKenzie County Tourism
- Minot Convention & Visitors Bureau
- Missouri Valley Heritage Alliance/
Fort Abraham Lincoln Foundation
- Municipal Airport Authority of the City of Fargo
- National Hospitality Services
- Newman Outdoor Advertising
- Norsk Hostfest Association
- North Dakota Association of Rural Electric Cooperatives
- North Dakota State Fair
- North Dakota Tourism Division (ex-officio)
- Odney
- Rocky Mountain International
- Roosevelt Park Zoo
- State Historical Society of North Dakota Foundation
- Theodore Roosevelt Medora Foundation
- Valley City CVB/Sheyenne RV Scenic Byway
- Vern's Rental
- Williston CVB

Testimony of Terri Thiel

Chair, Travel Alliance Partnership

In opposition of HB 1298

March 16, 2021

Chairman Larson and members of the Senate Judiciary Committee, my name is Terri Thiel, and I am the chair of the ND Travel Alliance Partnership (ND TAP). ND TAP is a coalition of travel industry stakeholders, including CVB's, state attractions, businesses, and other interested stakeholders, in this number three industry of North Dakota's economy.

ND TAP wishes to voice its opposition to HB 1298. The bill, as written, would have negative consequences to the state's travel industry if passed. Specifically, the bill would threaten sporting events and negatively impact multiple businesses and industries in North Dakota including hotels, restaurants, small businesses, and tourism destinations who rely on visitor spending.

HB 1298 would prohibit transgender athletes from participating on sports teams and forbid public venues from hosting sporting events that allow transgender participation on teams exclusively for males or females. The bill would also prevent CVB's and other organizations that receive public funding from sponsoring events that allow transgender participation. These provisions would jeopardize youth sports in North Dakota as many teams and clubs currently make accommodations for transgender athletes.

The COVID-19 pandemic taught us, unfortunately, what a year without events, including sports, looked like. For communities and industries reliant on events, the lockdown was devastating. According to the North Dakota Tourism Division, the pandemic led to \$1.2 billion in losses for North Dakota's tourism industry, resulting in \$94 million in lost state and tax revenue. While the lockdown was only temporary, HB 1298 would compound its many consequences, essentially serving as a long-term "lockdown" on sporting events, further straining athletes, communities and businesses.

HB 1298 also eliminates the rights of sporting clubs to adopt their own policies governing transgender athletic participation. USA Wrestling¹, for example, which hosts its tournaments and events in Fargo and draws hundreds of visitors to the community, has a transgender policy to fairly address the concerns of both athletes and parents. USA Hockey², USA Gymnastics³ and USA Swimming⁴, similarly, all have policies in place to address trans-inclusion. HB 1298 would threaten the future of their events in North Dakota.

ND TAP urges a do-not pass on HB 1298. Its passage would jeopardize the future of youth sports in North Dakota, dramatically slow, if not reverse the tourism industry's post-pandemic economic recovery and impose further economic strain on hundreds of hotels, restaurants and small business owners. North Dakota is already weary from the COVID-19 lockdown. HB 1298 would negatively impact industries reliant on the health and viability of sporting events in North Dakota.

1. <http://content.themat.com/forms/USAWrestling-Transgender-Policy.pdf>
2. https://cdn3.sportngin.com/attachments/document/8a0b-1766565/USA_Hockey_Transgender_Athlete_Eligibility_Policy.pdf?ga=2.109113287.37295163.1548347375-712316268.1548347375
3. https://usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf
4. https://www.usaswimming.org/docs/default-source/diversity-inclusion/5.-other-related-documents/recommended-practices-for-gender-diverse-minors.pdf?sfvrsn=c32c5332_20



Great Public Schools

Great Public Service

Testimony on HB 1298
Senate Judiciary Committee
March 16, 2021

Chairwoman Larson and members of the Senate Judiciary Committee, for the record my name is Nick Archuleta, and I am the president of North Dakota United. I am appearing before you today to urge a Do Not Pass recommendation for HB 1298.

Madam Chairwoman, I am the first to admit that I am not an expert on the physiology and science as they pertain to transgender youth or anyone else for that matter. I am thankful that there are many people here today that do have that expertise to share with you and all North Dakotans. As a teacher, however, I have gotten to know something about young people in general. I know that they are stressed, particularly as they are working through the current pandemic. I know, too, that they do not like to be singled out for attention, particularly if it is negative attention. And I know that they like to have a voice in matters that affect them.

HB 1298, as I read it, increases the stress that transgender young people feel, casts a negative but bright light on them, and to the best of my knowledge, was written without any input from the transgender community or any consideration of its impact on the emotional and mental health of transgender youth.

Members of the Committee, this bill, like the 20+ bills like it being considered in statehouses across the country, are misguided. This legislation appears to be part of yet another larger cultural fight between conservatives and progressives. The problem is that some of the most vulnerable young people in the country are getting caught up in the crossfire. Please consider the following:

- The Trevor Project, which advocates for LGBT+ youth, maintains that young trans people are less likely to consider suicide if they are supported in their identities. HB 1298 does not support young trans people and makes them less secure in their identities.
- As in the Idaho case, if HB 1298 becomes law, ND will likely end up in years long and expensive litigation.
- HB 1298 is a solution to a problem that does not exist. Our ND High School Activities Association has already adopted a nationally recognized and scientifically informed policy on the issue of transgender athletes. Further, there is not a single case in ND that claims that anyone was disadvantaged in competition due to the participation of a transgender athlete.



Great Public Schools

Great Public Service

Chairwoman Larson, teachers and education support professionals have an obligation to educate every child that walks, rolls, is carried through our schoolhouse doors, or is learning remotely. They embrace that obligation whole heartedly and work tirelessly every day to ensure that all students feel safe, valued, welcome, and loved throughout their educational career. We want them to participate in school sponsored activities, including sports, because all students want to belong to something bigger than themselves. It is where they build community, friendships, and confidence in their abilities as human beings. It is where they grow.

HB 1298 turns all that on its head by singling out transgender kids and depriving them of their opportunity to compete in athletics and be treated with the same dignity and respect as their cisgender peers.

Chairwoman Larson and members of the Committee, the beauty of school sports and other school sponsored activities is that they have historically provided lessons that kids carry with them throughout their lives. Let us not let bigotry be among them.

Please give a DO Not Pass recommendation to HB 1298.

Testimony in Opposition to HB1298

March 16, 2021

Chairman Larson, members of the Senate Judiciary Committee, my name is Barry Nelson, I am a resident of Fargo, North Dakota, a lifelong resident of the state of North Dakota, a social worker by training. I am married, father of two and grandfather of four, soon to be five, all residents of North Dakota. I am opposed to HB 1298.

Never in my long, lifetime citizenship in this state, have I seen a bill that is so egregious, so hatefully targeted, and so cruel. As a social worker, I was just beginning my career in the state when the state passed the Child Abuse and Neglect reporting law. I personally investigated many cases of suspected child abuse, some of them dismissible, many too tragic to recount. Thank goodness, we had the force of law and supportive services to intervene. How does one intervene when the perpetrator is our own state, in the guise of policy makers who are intentionally targeting children, not only that, the most vulnerable children in our state. These are children already struggling with their own identity, with the cruelty of classmates and other community members to contend with. To further target and vilify this small but vulnerable group of children places policy makers and the state as the greatest of perpetrators.

We extoll our "North Dakota nice". Should this law pass, it creates a huge stain on the reputation of this state. My grandchildren are outraged by this action.

Vote NO on HB1298.

Barry Nelson

2850 Lilac Lane

Fargo, ND 58102

PROPOSED AMENDMENTS TO HOUSE BILL 1298

Page 1, line 22, after “individual's” replace “reproductive biology and genetics at birth” with “DNA profile”

Page 1, after line 24, insert”

4. If a neuter individual, who either identifies as neither male nor female or who identifies as a gender other than the individual's biological sex, is not permitted to participate in an athletic event exclusively for males or exclusively for females, accommodations shall be made to ensure that neuter individuals have an opportunity to participate in athletic events exclusively for neuter individuals.

Renumber accordingly

House Bill 1298
Senate Judiciary Committee
Peace Garden Room

Andrew Alexis Varvel

March 16, 2021

*Madame Chairman Larson and
Members of the Senate Judiciary Committee:*

Good afternoon. My name is Andrew Alexis Varvel. I live in Bismarck, District 47.

As it is customary at the North Dakota Legislature to rise in opposition to a bill if one seeks to propose an amendment, that is what I am now prepared to do.

The amendment is included as a supplement to my written testimony, and each member of this committee should already have a copy of it.

The North Dakota Legislative Drafting Manual for 2021 has some good advice for us. On page 92, paragraph 2, it states, "In English, gender is related to sex or lack of sex. The genders are masculine, feminine, and neuter, e.g. he, she, and it."

Just as the English language has three genders, the State of North Dakota should also recognize three genders. We should recognize not only male and female, but also a third gender, variously called other, neuter, intersex, or nonbinary.

North Dakota was one of the earliest states to decriminalize homosexuality during the forty-third legislative assembly in 1973, effective July 1, 1975. Our state has not gotten enough credit for doing the right thing back then. North Dakota now has an opportunity to lead the nation in recognizing not two but three genders.

Both sides have valid points to make. It is inappropriate for people on either side to presume evil intent from those who disagree with them, or act as a crybully who seeks a coveted place in the great feasting hall of eternal victimhood.

Female athletes have every right to object to getting outcompeted by imposters in their midst. That said, transgender athletes must be treated with dignity and respect, including being accepted for who they are. We need to balance the downstream effects of gender identity on women's shelters and women's prisons with the downstream effects of openly defying the Biden administration.

Fertility is an important aspect of being a man or being a woman, but it is not an essential feature for being part of a third gender. Unless and until a transgender man can impregnate a transgender woman to conceive a baby that is brought to full term, gender reassignment surgery should be considered to facilitate an outward expression of gender rather than changing that person's DNA.

Rather than get mummified in the red tape of birth certificate verification, biological sex should get determined by a person's DNA profile. If a person's professed gender identity does not correspond to biological sex, then that is where state recognition of a third gender becomes so important. We should recognize that involuntary hermaphroditism exists due to natural developmental variation during pregnancy. We should recognize that intersex people exist who are neither male nor female, but people with their own nonbinary gender identity. We should also recognize that voluntary hermaphroditism also exists, consisting both of males who effectively sterilize themselves so they can outwardly express themselves as females, and females who effectively sterilize themselves so they can outwardly express themselves as males.

The question is not whether intersex people exist in their various manifestations, but rather how our society should recognize their identity in a way that recognizes the dignity of all of us. Just as girls have sports that are separate from boys, intersex athletes should have an opportunity for a league of their own separate from boys and girls so they too can have a chance to shine.

If the number of transgender students is truly as large as transgender activists claim, then there should be no problem in finding a critical mass of interest in intersex athletics in this state. North Dakota could probably field at least five intersex teams at a high school level, and that number could go up once our state becomes a place of refuge for intersex youth from throughout the United States.

Let's be clear – this proposal will probably please nobody. I don't expect some traditional Christians to be happy with recognizing more than two genders. I don't expect some transgender activists to be happy with getting a league of their own rather than gaining an opportunity to outcompete girls in girls' sports. Still, a “my way or the highway” approach to this issue is definitely not what our state needs.

For what it's worth, I do think it's very likely that some version of this bill will pass. Senator Myrdal is a sponsor of this legislation and a member of this committee. She has excellent leadership skills, drive, and energy, and all of the huffing and puffing in the world will not deter her from doing what she believes is right.

If this bill does pass, we need to strengthen this bill so that North Dakota will be in the best possible position to defend itself in court from President Biden's executive order that bans discrimination based on “gender identity”. If North Dakota is challenged on the subject, it needs to situate itself legally so that it will receive court costs rather than paying them out. By recognizing three genders rather than two, North Dakota will be able to argue that people with alternative gender identities that are independent of their DNA profile will have more athletic opportunities in this state than would exist under present circumstances.

If you must choose between protecting biological girls from transgender competition and defending recognition of two genders at all costs, let's hope that you would regard the actual needs of biological girls as coming first. I think that recognizing three genders rather than two genders provides the best framework to advance this cause, so you should adopt the provided amending language.

If this bill cannot be satisfactorily changed to recognize three genders rather than two, then please provide this bill a **DO NOT PASS** recommendation. Our state should not be throwing around money right and left to defend lost causes.

Thank you.

Andrew Alexis Varvel
2630 Commons Avenue
Bismarck, ND 58503
701-255-6639
mr.a.alexis.varvel@gmail.com

Dear Members of the Senate Judiciary Committee,

I am in support of HB1298. Please pass HB1298.

I have 5 children; 3 of them are girls ranging in ages 10-15. My girls are involved in basketball, volleyball, swimming, and track through their schools and in clubs. They have aspirations of competing competitively and earning scholarships through sports to further their educations. By allowing biological males to compete it gives them a large disadvantage. We were created with biological diversity that should be celebrated not penalized.

I am aware of statements being made by those opposing the bill that if this bill passes it will be an end to club sports in ND. This is a false claim being made. There are no provisions for USA swimming or USA volleyball that will prohibit athletes from participating in the state of ND if HB1298 passes. Please vote to support HB1298.

Respectfully submitted,

Kristin R. Sharbono

Testimony Presented on HB 1298 to the

Senate Judiciary Committee
Senator Diane Larson, Chairman

by

Matuor Alier, Chair of Human Relations Commission
Nicole Crutchfield, Planning Director City of Fargo

On behalf of the City of Fargo's Human Relations Commission, we submit testimony in opposition of HB 1298.

We know that the State of North Dakota prides itself on being an inviting and welcoming community and opposes discrimination. We believe this proposed bill is contrary to this goal. This bill negates fairness and equal rights for all people in our state and counters freedom for individuals defining their identity and gender.

National research tells us that 75% of transgender youth feel unsafe at school, have significantly lower GPAs, are more likely to miss school out of concern for their safety, and are less likely to continue their education.

According to Municipal Equality Index, gender identity and expression are central to the way we see ourselves and engage in the world around us. We know that transgender people, especially youth, are targeted unfairly and suffer from increased difficulties at school, including bullying and denial of participation based on identity. This can lead to depression, anxiety and suicidal thoughts.

The proposed legislation singles out school-aged students and risks that students are not able to find a safe place to participate in their sports or community based on their identity. We believe this bill creates an additional barrier and causes harm to our youth. To keep and enhance a welcoming and inclusive community in North Dakota, we strongly encourage DO NOT PASS.

#9564

**Testimony on HB 1298
16 March 2021**

My name is Cheryl Biller, from Fargo. Thank you for the opportunity to provide input into your deliberations on HB 1298 – I ask that you give this bill a do NOT pass recommendation.

This bill portends to be about protecting women's sports, but in reality it is nothing less than an invasion of privacy for student athletes and a license to discriminate. This bill does not provide solutions to problems, rather it will create problems. There do not exist concerns among the vast majority of student athletes, including female student athletes, about their fellow competitors. In fact, hundreds of student athletes signed onto a letter in opposition to this type of legislation.

This bill is a thinly veiled attempt to require release of private medical information for all female athletes that should cause alarm at every level. No one should be required to bare their bodies or their private medical information to anyone except those they choose to. It is both disturbing and creepy that politicians seem to think they have a right to this kind of legalized assault.

And I am so weary of the majority arrogantly believing they can pull one over on the supreme court, costing us tens and hundreds of thousands of tax payer dollars to defend blatantly discriminatory bills. Just stop it already.

I appreciate your careful deliberation of this bill, although it is really beyond any sense of dignity and reason that you would even have it before you; and ask you for a DO NOT PASS vote.

Cheryl Biller

HB 1298

Testimony in opposition from Sen. Joan Heckaman

Good afternoon, Chairman and Committee Members:

I am Senator Joan Heckaman from D-23 and am here to voice my opposition to HB 1298. While you will hear a lot of testimony today, I wanted to raise a couple of points for the committee to consider as you work on this bill.

1. I believe this bill will do the opposite of the intentions of the bill sponsor. Instead of providing more opportunities for young ladies to participate in sports, a lot of those opportunities are sponsored by organizations that have non-discrimination language in their by-laws and policies. Thus, a number of events sponsored through or by organizations with national connections will not be possible in North Dakota.
2. Skill levels vary, even within an age group. Young ladies in grade level activities do not all have the same skill levels as their peers, nor do they all have the same body structure. That is not a negative thing. That is just the way kids are.
3. Pointing this out as a Title IX issue begs the question of whether the committee has really studied what Title IX involves. Title IX started as a much broader model of inclusiveness and non-discrimination throughout our schools and involves the rights of boys/young men as well as girls/young women. I would invite this committee to look further into Title IX.
4. And finally, there have been no applications for individuals to enter the protocol to participate as a transgender individual through the North Dakota High School Activities Association according to their Director, Matt Fetch.

Chairman Larson, thank you for your time today and I recommend a Do Not Pass recommendation on HB 1298.

My name is Phyllis Johnson. I live in Grand Forks.

I strongly oppose HB 1298, which would effectively ban transgender youth from participating in sports teams that align with their gender identity.

My oldest grandchild is transgender, and I have two friends who have transgender children. I love my granddaughter with all my heart, and I know that my friends love their children as all parents do. Sports are an important part of school for many youth, and sports play a significant role in social development for many young people. Transgender youth do not pose any risk to schoolmates, other youth, or adults. They simply want to participate in school and society like anyone else. They should not be prohibited from participating on sports teams. A prohibition such as this bill would create would be a negative for the mental health of many transgender youth.

As a Christian, I believe we are called to love one another and not to judge others. Fearmongering and bullying are not what Christ calls us to do.

My granddaughter is extremely reluctant to visit me and my husband in Grand Forks because of bias against transgender people such as that evident in HB 1298. Simply put, she is afraid for her safety in North Dakota.

If we want young people to live and work in North Dakota, we cannot enshrine bias in state law. Many of our own youth will leave, many as soon as they can after high school. We will attract fewer students to our fine universities and fewer applicants for our job opportunities.

Please give this bill a Do Not Pass recommendation.

Testimony from Kara L. Geiger in OPPOSITION to HB 1298

Thank you for this opportunity to provide testimony in opposition to HB 1298.

On the high school level, the North Dakota High School Activities Association already has a policy in place for transgender athletes. My concern with the bill in question is, Would the entity hosting an event be responsible for checking birth certificates of all athletes to ensure that they have the right genitalia or DNA for participating in a certain sport? That sounds like an undue burden on the school, not to mention a gross violation of the rights of the student athletes, most of whom are under the age of 18.

Despite what the proponents of this bill are saying, science does NOT support a gender OR a sex binary. There's no hard scientific line between male and female. It is not a simple matter of XX vs XY. In addition, certain medical conditions can cause cis-female individuals to display more masculine traits, like PCOS (which can cause excess hair growth on the face and chest). What happens when a cis-female child has naturally high testosterone? Will she be forced to prove that she's biologically female? What would that look like: blood test? Physical examination? I can tell you, if my daughter were subject to that just because someone thought she looked too masculine, I would seek legal counsel.

Remember, we're talking about high school sports here. The primary purpose is NOT athletic achievement or scholarships. The primary purpose of high school sports is to promote values of teamwork, leadership, and hard work. No student should be denied that.

I implore you to read and watch all of the testimony submitted for this bill. Many are opposed to it, including medical professionals and people who work with children, because this bill is harmful.

This bill is simply discrimination against transgender people. This bill does not aim to solve a problem, because there is no problem. No one is transitioning or pretending to transition just to get ahead in high school sports.

Greetings Committee Members,

I am transgender, like many other North Dakotans, and I love my community here in ND and I love my family. And I stand in opposition to House Bill 1298.

North Dakota will have athletes who will perform at the national level. We must teach our young people how to compete within the rules of the NCAA, Olympic boards, and various professional organizations.

House Bill 1298 will negatively impact North Dakota's sports community. There are many small towns that give kids the opportunity to play sports in their communities. The way that House Bill 1298 is also written, it wants to ban trans people from using state facilities for sporting events.

Lawsuits should never be the answer to the anti-science approach that has been taken by the writers of these bills, who have been influenced by out of state special interest groups.

My other big fear I have is that I know that this will cause young people to feel suicidal because it will remove them from teams they've either inspired to be a part of or were already a part of. This could have the indirect consequence of breaking up some families.

I want to make sure people know that transgender people exist within every religion, political affiliation, and nationality. Transgender people across the United States have made major contributions and are a major part of the American workforce. I would hate to see a North Dakota student lose a scholarship because they weren't taught about transgender rights within the NCAA and the US as a whole.

Also the way that this bill is written in a way that doesn't allow groups to rent out facilities and have their own private space that is gender-neutral. I personally have no desire to compete with cisgender males or cisgender females. There are things about the way I've transitioned and that makes it uncomfortable too long to partake in either side and would like to attend gender neutral functions. One gender inclusive function I could see happening at one of our publicly funded facilities is spirit pow wow. I think it would be great to disservice to our culture in North Dakota to prevent people celebrating their own heritage.

Thank you for your time

Rebel Marie
Fargo, ND

Senator Diane Larson, Chair
Senator Michael Dwyer, Vice Chair
Judiciary Committee

Mackenzie Swenson
Students Advocates of North Dakota

Tuesday, March 16, 2021

In Opposition to H.B. No. 1298, Relating to Participation in Athletic Events Exclusively for Males or Females

My first experience in team athletics as a middle school student was not marked by kindness. A teammate said that I looked like “a fat elephant” on the court, and upon seeing that it was acceptable to make fun of the ‘different’ kid, a few other members began making similar remarks. For reference, I weighed about 100 pounds at the time and was 5’6”. I would have left sports entirely if not for the support of my mother, who informed my coach about the incidents and asked him to reprimand the bullies. Fortunately, my team the following year was supportive and inclusive, allowing my self-confidence to blossom. I bring up this anecdote to demonstrate that athletes, especially those in younger leagues, take cues from the behaviors of those around them. I believe that House Bill 1298 normalizes discrimination against transgender athletes, demonstrating to young athletes that a subgroup of athletes are not welcome to be whom they want to be while participating in sports.

These are not individuals who want to unfairly skew competition in their favor. These are individuals who have been prescribed hormone therapy after medical consultation and want to experience the personal and physical benefits of being involved in high school athletics. The North Dakota High School Activities Association already has guidelines in place regarding the participation of transgender athletes - guidelines that account for hormone therapy and other transition measures. The National Collegiate Athletic Association has also been working with transgender athletes for years and has experienced no issues relating to their participation.

Denying transgender athletes the right to participate on an athletic team of their gender is harmful to their mental health - and ultimately, their physical health as well. Furthermore, it teaches budding athletes that discrimination in athletics is acceptable. For the sake of promoting inclusion in North Dakota sports and protecting all athletes, including those who are transgender, I urge you to vote ‘no’ on H.B. 1298. Thank you for this opportunity to testify.



Hello,

My name is Molly Swanston and I am the owner of Swanston Equipment Corporation in Fargo, ND. We also have branch offices in Minot, ND and Fergus Falls, MN. I am writing in opposition to HB 1298. I oppose this bill because I support people who identify as Transgender. I am a part of the LGBTQ community and cannot imagine living and working in a state who would pass such legislation. My wife and I are expecting our first child in May and I dream of raising them in a community that is inclusive. I urge you to recommend a Do Not Pass on HB 1298.

Thank you,

Sincerely,

Molly Swanston

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(218)739-4505

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For the past six years I have been a cheerleader, for the past four years I have been a competitive cheerleader, for the past three years I have been an All American nominee, and for the past year I have been an All American cheerleader. I have won numerous titles at competitions, and my team has placed above fourth nearly every competition since my freshman year. Yet, since those awards, competitions, and hard work I have been told for the past six years, that cheerleading is not a sport. There are problems in female sports, and predominantly female sports being mocked, belittled, and shamed is one of them. Trans women in female sports, is not. The worry that trans women will have an unfair advantage, because their “stronger”, and “taller” so they’ll win, is illegitimate. As an athlete in one of few non designated male female sports, I can say, genetics do not prioritize skill. I have seen numerous teammates beat biological males, and I, myself, have beaten numerous males, despite genetics going against me. Males have stronger hip flexor muscles, so their jumps should be better, their shoulders are naturally stronger, so their tumbling should be better, but the biological factors do not define the athlete, and do not make them immediately dominating.

Not only is House Bill #1298 unnecessary, but in other states with similar legislation it has backfired. According to the Guardian, Mack Beggs won the Texas girls title numerous times. He transitioned from female to male, and because of a law similar to this one, he had to compete in female wrestling. If you want to avoid trans athletes dominating, then let trans women play with women and let trans men play with men.

House Bill #1298 is discriminatory, overreaching, and unnecessary. In the words of Kathy Skroch, this bill “is about girls competing with girls, ensuring equal opportunity.” If you

want girls to compete with girls, making a bill that bans girls from competing with girls is not the approach. If you wanna preserve equal opportunity, a discriminatory bill essentially banning trans athletes is not the approach. Trans women are women, and if you want to protect women, making a bill that harms women, is not the approach. Protecting women means protecting all women, not just CIS women. As a female, as an All American athlete, I'm asking you to vote no on House Bill #1298.



March 1, 2021

#9581

Vote YES on HB1298

Dear Honorable Legislators,

My name is Dr. Michelle Cretella. I am a pediatrician and the Executive Director of the American College of Pediatricians (ACPed), a national organization of pediatricians and health professionals dedicated to the promoting the optimal health of children from conception to young adulthood. As such, the ACPeds urges you to support HB1298, the "Fairness in Girls Sports Bill".

Long-term research on elite athletes has consistently shown that when matched for training, males outperform females in regard to speed, strength and endurance. Although predominantly related to sex hormones, these differences are also the result of sex-differential gene expression. For example, studies have identified over 3,000 genes that are differentially expressed in male and female skeletal muscle.

Obvious anatomical differences also exist between the sexes. For instance, men's larger and denser bones result in taller stature as well as a larger fulcrum which provides greater leverage for muscular limb power to be exerted in jumping, throwing and other explosive power activities. Even at birth, the average male is heavier and longer (taller) than the average female and this advantage for most athletics continues, when controlled for Tanner Stage of puberty, throughout life. Differences in the bone mass of the axial skeleton are present prior to puberty, with boys having thicker vertebral bodies than girls of the same height, weight, and age.

The predominant influence affecting male versus female athletic performance is hormonal, particularly during puberty. The sex hormone testosterone plays an important role in regulating bone mass, fat distribution, muscle mass and strength, and the production of red blood cells leading to higher circulating hemoglobin. After puberty, male circulating testosterone concentrations are 15 times greater than those of females at any age. The result is a clear male advantage in regard to muscle mass, strength and circulating hemoglobin levels even after adjusting for sex differences in height and weight.

On average, females have 50-60% of male's upper arm muscle cross-sectional area and 65-70% of male's thigh muscle cross-sectional area with a comparable reduction in strength. Young males have on average a skeletal muscle mass over 12kg greater than age-matched females at any given body weight. While numerous genes and environmental factors such as physical activity and diet contribute to muscle mass, the major cause of the sex difference in muscle mass and strength is the difference in circulating testosterone. Taken together, these discrepancies render females, on average, unable to compete effectively against males in power-based or endurance-based sports.

Phone: 352-376-1877 • Fax: 352-415-0922 • admin@acpeds.org

American College of Pediatricians is a not-for-profit corporation organized for scientific and educational purposes, exempt from income tax under Section 501(c) (3) of the U.S. Internal Revenue Code.

These sex-based differences also influence the risk for and type of injuries athletes experience. For instance, stress fractures involving the long bones of the legs in runners are more frequent in females. Male athletes are far less susceptible due to their larger and denser bones. Abundant data also demonstrates that female athletes are particularly vulnerable to anterior cruciate ligament (ACL) rupture resulting in the incidence of non-contact ACL injuries being 2 to 8 times higher in females compared with males who participate in basketball, soccer, team handball, netball, and alpine skiing.

Sex differences arise from at least four different genetic mechanisms, in addition to the actions of sex hormones and environmental influences. These biological sex differences impact all organ systems, affect the propensity to develop certain diseases, alter responses to drugs, toxins and pain, and also result in important physical, cognitive, emotional and behavioral differences. **For these reasons, a male who self-identifies as female remains male, and giving estrogen to a male does not transform him into a female.** While it is true that a male who uses estrogen after puberty will lose muscle strength and impair other aspects of his physiology, he does not alter his genetics; he remains male at the cellular level in all body systems. **Similarly, a female who self-identifies as male remains female, and giving her testosterone does not transform her into a male.** In terms of genetics, she remains female at the cellular level. **Just as a female doping testosterone would be prohibited from competing against other females, so too should all males be barred from competing against females.**

Vote YES on HB1298, the “Fairness in Girls Sports Bill”.

Sincerely,

Michelle Cretella, MD

Executive Director

American College of Pediatricians

The Best for Children

<https://www.acpeds.org/>

I'm Jay Scott; I'm a lifelong North Dakota resident; NDSU 2016 graduate with a bachelor's in physics and computer science (Go, Bison!); daughter of Scott Wieber, former tournament director at the Bowler, in Fargo; citizen; taxpayer; voter; Christian; and transgender woman.

I am testifying in support of a “do not pass” vote on HB 1298.

Existing sporting regulations already require trans athletes to be on hormone therapy 1 full year before competing in the division of their gender identity. At the age of 18 or younger – the age range which will be affected by this bill – 1 year of hormone therapy will have profound effects on muscle mass, bone density, & other performance-related characteristics of a student athlete. It is eminently reasonable and fair for transgender student athletes to compete in the appropriate division if they meet this standard.

HB 1298 goes beyond this reasonable standard, barring transgender students from competing altogether in a category fair to both them and their teammates.

Beyond unreasonable and unfair, it is not even constitutional— it clearly denies transgender children the equal protection of the laws, in violation of the XIV Amendment. It will only waste taxpayer money to defend, and in the end be struck down in court, as it should.

But worse than unreasonable, worse than unfair, worse than unconstitutional, worse than all these things, it is just plain un-Christian.

Christ said, “You shall love your neighbor as yourself.”

There are only 2 reasons you might vote “do pass” on this legislation – ignorance, or malice. And the excuse of ignorance, I hope, has been taken away from you by the testimonies today. Which leaves 1 possible reason.

Vote “do pass” on this legislation, and you say to me and to all transgender North Dakotans, “I do not love you as I love myself. I do not love you as I love my neighbor. You are not my neighbor. Leave this state.”

Vote “do pass” and all you accomplish is stoke the image of North Dakota, both inside the state and without, to her transgender residents and to those who love us, as a place where people of diverse backgrounds and identities are unwelcome, unprotected, and unloved.

If you love your neighbor – your transgender neighbor – as yourself, vote “do not pass” on this discriminatory and ignorant legislation.

Christ will watch your votes, and so will your transgender neighbor.

†

Jay Scott
1105 8 Avenue N # 5
Fargo, ND 58102
701-318-4873

**Testimony of Alanna Smith
in Support of North Dakota HB 1298**

My name is Alanna Smith, and I am a junior at Danbury High School in Connecticut. Please give a favorable recommendation to HB 1298. Since my freshman year, I have been a major contributor in the overall success of our girls' outdoor track team. Excelling on the track, setting personal records gives me a sense of personal achievement and confidence that carries over into all parts of my life. I love training, I love competing. The thrill of competing against girls like myself who train hard, work hard is rewarding. I compete to be the best, to be the fastest, to be a champion ... on a level playing field.

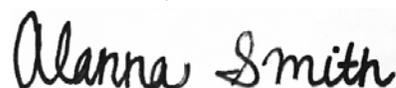
My physical success on the track, however, has been limited by the introduction of males into the girls' category. I go to the blocks and know that I am the fastest girl on the line. However, I also know that it will never be enough because there is a biological male on the starting line with me. It has taken me years to develop the personal confidence and sense of belonging I now feel on my track and field team. But the addition of males to girls' sports fills me with a sense of defeat before I even get set up in the blocks.

Biological females deserve the opportunity to be confident, to be competing against girls who are biologically the same as us, to have fairness of play, and to know we have a chance to win in our own sport.

Males will always have a physical advantage over females. Isn't that why we have women's sports in the first place? No matter how much testosterone levels are suppressed, boys remain stronger with more efficient physical bodies to excel in sports. That biological unfairness doesn't go away because of what someone believes about gender identity. Common sense tells me that biology and NOT identity is what matters in athletics.

Please save women's sports for all biological female athletes like myself in your state. Please restore a level playing field for women athletes, and restore the fairness of play we train so hard for and truthfully deserve! PLEASE give a favorable recommendation to HB 1298.

Thank You,



Alanna Smith
Danbury, CT

**Testimony of Chelsea Mitchell
in Support of North Dakota HB 1298**

My name is Chelsea Mitchell, and I'm writing to ask you to give a favorable recommendation to HB 1298.

I ran track in Connecticut during high school. Unfortunately, I was forced to compete against male students every year of my high school sports experience. I rarely got to compete in fair races in my state.

I lost four state championships because our state policy ignored the biological reality and physical advantages of males over females in sport. Four times I was the fastest female in my race, but I didn't get the gold medal or the state title – the males in my race took that honor. I have watched this happen over and over again in my sport in Connecticut – so many girls have been impacted – missing out on their chance to advance in competition or take home a gold medal. It isn't fair and it isn't right. We need separate sports categories based on biological sex in order to fairly compete.

Please protect the young female athletes in North Dakota so they don't have to go through what we in Connecticut have been through. We are watching and counting on you to stand up for women and girls. Please give a favorable recommendation to HB 1298.

Respectfully,

A handwritten signature in black ink that reads "Chelsea Mitchell". The signature is written in a cursive, flowing style.

Chelsea Mitchell
Canton, Connecticut

**Testimony of Selina Soule
in Support of North Dakota HB 1298**

My name is Selina Soule. I write in support of HB 1298 and ask you to give a favorable recommendation to the bill.

I have been competing in track and field since my mom introduced me to it when I was a little girl. Track means everything to me. I would wake up every day and go through high school, just waiting to get to the track, waiting to run, waiting to jump. I spent countless hours training to shave even a few seconds off my time so I could win—so I could be the best. However, my chances of being first – of being the best – were shattered.

In 2017, the Connecticut Interscholastic Athletic Conference began allowing boys who identify as girls to compete in girls' sports. As a result, during my 4 years of high school track and field in Connecticut, I was forced to compete against two biological boys identifying as girls. In that time, these two biological male athletes won 15 women's state championship titles in track and field, titles that were previously held by 9 different girls in 2016.

I remember what it was like to line up for a race and get into my blocks, but already knew the outcome long before the start of the race. Those two biological male athletes would dominate the field, and female athletes were left competing for third place and beyond. No matter how hard we trained and how far we pushed ourselves, they beat us time and time again. This isn't about self-expression, this is about our right – a woman's right – to win.

Not only was it frustrating, heartbreaking, and demoralizing to know I could not win, it was even more concerning to see how it was affecting girl's track and field, and if changes are not made soon, we are facing the complete eradication of women's sports.

Boys will always have a physical advantage over us girls, and that is why we have women's sports in the first place. Science and common sense show us that boys are, on average, stronger and faster than girls. That is why it is fundamentally unfair to let boys who identify as girls come in and dominate any sport.

I have lost countless opportunities over the past few years. I lost opportunities to compete on world class tracks. And I lost opportunities to win titles. During my junior year, I was denied the chance to compete at the New England Regional Championship. I missed

advancing to the next level of competition in the 55-meter dash by just two spots—two spots that were taken by biological males. Because they were permitted to participate in a girl's division, I was forced to become a spectator in my own sport.

Even worse, female athletes throughout Connecticut and New England also missed out on chances to compete in front of college coaches and compete for college scholarships. I worry how many college recruiters, who only have a limited number of scholarships and slots on college track teams to award, will skip over the names of other female athletes and only look at the name at the top of those results—a name that belongs to a biological male athlete.

Female athletes deserve the same opportunity as boys to excel and chase our dreams. Allowing male athletes to compete in girls' sports shatters those dreams and strips away opportunities that so many of us have spent years working to obtain.

I encourage you to give a favorable recommendation to HB 1298 because I don't want other girls to have to go through the same pain, frustration, and discouragement that I and many Connecticut and New England girls experienced for the past several years. No one thinks it is fair, but everyone is afraid of retaliation from the media, other kids at school, coaches, and other athletes. I'm just trying to make sure that young girls don't have to face the same pain that I felt throughout my four years of high school.

I urge you to give a favorable recommendation to HB 1298 to guarantee girls in North Dakota a level playing field. Women fought long and hard to earn equal athletic opportunities. You have the chance today to protect and save women's sports.

A handwritten signature in cursive script that reads "Selina Soule". The ink is dark and the handwriting is fluid and personal.

Selina Soule

#9590

Greetings Chairwoman Larson and Members of the Committee,

My name is Amanda Strauss and I urge the Committee to vote NO on HB 1298.

I am a proud and active member of the indigenous community. We honor all people and celebrate many genders throughout our tribal communities for their roles and responsibilities. There are 5 tribes in North Dakota and many other native families who have moved here. This bill does not speak for North Dakota.

Our youth already struggle with isolation living in our rural communities and some lack access to basic resources.

Why would we want to add more barriers for them?

It is very harmful to one's emotional and spiritual being to be left out. Youth can carry that pain with them throughout life. Is that a life skill we want to teach? This bill is an attack on our youth. This is not the North Dakota way I was raised to live.

I will feel so much shame being a North Dakota voting resident if this bill passes. Please give this bill a Do Not Pass recommendation.

Amanda Strauss
 Fargo, ND

My name is Crystal Cossette Knight. I'm writing today in opposition of HB 1298, not as an expert on transgender studies, not as a transgender individual, and not as a parent of a transgender youth. I am a friend of multiple transgender individuals, a parent, and a ND resident who cares deeply about all children in our state being accepted and not discriminated against. Banning transgender girls from playing on the team they identify with is telling transgender students loud and clear that they aren't welcome living as they are. The argument for supporting HB 1298 is that it will protect biologically born girls from having to compete against someone who is stronger than them so that competitions are fair. I ask you this: If there is a girl who is much larger and stronger than the other girls, even stronger than most of the boys in sports, would that girl still be allowed to participate? If so, that seems like it would also be unfair to the majority of the girls. If transgender girls are not allowed to participate in the name of fairness, then where do we draw the line in what is fair or unfair? In addition, do we want to start policing girls and making them verify their gender? If a girl is new to a school, therefore no one knows her well, and excelling at sports, will she need to be questioned and somehow prove she is biologically a girl in order to keep competing? That makes me feel like HB 1298 is not protecting our girls, but instead opening the door to having their gender questioned. I ask you a second question: have any of you talked to any transgender people about this bill? If you are going to possibly pass something that greatly affects a specific group, then you should really sit down and have a conversation with that group. If you were to sit down and speak with transgender youths, you would learn that many just want to be accepted. Students who are openly transgender are incredibly brave for being honest about who they are. They should be applauded and accepted. If only we could all be so brave.

#9594

Dear Chair Larson and Members of the Senate Judiciary Committee:

I urge you to vote DO NOT PASS on HB 1298, which would prohibit young athletes from participating in sports activities, solely on the basis of their sex and gender identity.

In the United States, discrimination on the basis of sex is expressly prohibited and has repeatedly been upheld by the Supreme Court of the land. People who are male must be allowed to take home economics, for instance; people who are female must be allowed to run for student government; and people who are transgender, those whose identities complicate the simplistic categories of male and female, must also be allowed to participate in the full range of school activities, including school sports.

As an ordained minister, and also as the chosen mother of a beautiful transgender human being, I have been truly blessed by the presence of gender nonconforming people in my life. From many transgender people, I have learned that God's creation is both more vast and more intricate than I had ever imagined. Just as there are many colors in the rainbow and trees in the forest, there are many ways of expressing human identity and potential. Many of the transgender people whom I am privileged to call my loved ones come from Indigenous cultures that have, for centuries, reserved a special and sacred role for those who are Two Spirit. Perhaps we North Dakotans of diverse backgrounds could learn from the original peoples of this place and offer transgender people full respect and participation in our communities – rather than arbitrary exclusion from activities such as sports, which should be open to girls, boys, and transgender students alike.

I urge your DO NOT PASS vote on HB 1298. Thank you so much for taking the time to hear from the people of North Dakota. Let's let transgender students on the team.

Sincerely,

Rev. Karen I Van Fossan
Minister
Fargo-Moorhead Unitarian Universalist Church
121 9th St. S.
Fargo, ND 58103

Christina Sambor
Lobbyist #312, Youthworks
Testimony in opposition to HB 1298
Senate Judiciary Committee
March 16, 2021

Chairperson Larson and Members of the Committee:

My name is Christina Sambor, and I am here today to deliver testimony in opposition to HB 1298 on behalf of Youthworks. Youthworks is a private non-profit youth serving agency serving Runaway and Homeless Youth in North Dakota. In its work with runaway, homeless, trafficked and struggling youth, Youthworks often sees the dramatic impact that social rejection has on transgender youth. Sadly, for many of our trans clients, Youthworks is actively working with them to deal with suicidal thoughts and attempts, most often due to the treatment they suffer at the hands of others who do not understand or who outright reject their identity. In addition to negatively impacting their overall health and well-being, the discrimination suffered by trans and LGBTQ+ youth also causes many to end up homeless and vulnerable to exploitation.

For example, one in five transgender people in the United States has been discriminated when seeking a home, and more than one in ten have been evicted from their homes, because of their gender identity. One in five transgender individuals have experienced homelessness at some point in their lives. Family rejection and discrimination and violence have contributed to a large number of transgender and other LGBTQ-identified youth who are homeless in the United States – an estimated 20-40% of the more than 1.6 million homeless youth.

I bring up these statistics to highlight the dramatic effects that discrimination has on trans youth. This bill, in Youthworks' eyes, is not simply about sports, and cannot be viewed as such.

This bill carries with it a message that trans youth cannot be who they are and do the things they love to do. It encourages others to point out their gender identity, and to exclude them from some aspect of society for it. These types of laws and attitudes cause direct harm to trans youth, and in Youthworks' experience, quite literally threaten their lives and their safety.

Youthworks strongly urges the Senate Judiciary Committee to vote "do not pass" on HB 1298.

16 March 2021

Markita Rohde
Mother
1217 Cottagewood Ln NW #3
Mandan, ND 58554

North Dakota Legislative Assembly
State Capital
600 East Boulevard
Bismarck, ND 58505

Dear North Dakota Legislative Assembly:

I am the mother of a beautiful child. He is funny, smart, goofy and full of love. He is just like your child. I love him just like you love yours. However, maybe unlike your child, my child is transgender. My child, just like your child, has an innate need to belong. Like your child, he needs to feel included. The passage of this legislation ensures that my child belongs nowhere. It ensures that he cannot benefit from all the wonderful things that team sports provide. It ensures that he cannot play on a team that affirms his identity, name, and pronouns.

The lack of access to affirming spaces and a community that supports transgender youth by affirming their gender identity, name, and pronoun has specifically been tied to increased suicidality and decreased mental well-being among transgender youth. For example, in The Trevor Project's 2020 mental health survey, transgender and nonbinary youth who reported that no one in their lives affirmed or respected their pronouns were twice as likely to have attempted suicide in the past year as transgender youth whose pronouns were affirmed by all or most people they knew—28 percent versus 12 percent.

Given the well-documented benefits of sports—and disproportionate mental health struggles among transgender youth—transgender sports bans can have disastrous consequences, particularly as they continue to perpetuate and legitimize rejection of gender identity. While inclusion in sports is not a cure-all for the deep-seated discrimination against transgender youth, their exclusion from such activities can potentially put their lives at risk.

My son just wants to belong. He wants to be included.

Sincerely,

Markita Rohde

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1298
3/17/2021

Relating to participation in athletic events exclusively for males or females

Hearing called to order, [2:45] all senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Title IX and definition of sex vs gender
- Competition among biological and gender identified sexes
- Tourism & Sports Dollars
- Litigation costs and Idaho Transgender case

Hearing adjourned [3:25]

Jamal Omar, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1298
3/22/2021

Relating to participation in athletic events exclusively for males or females

Chairwoman Larson called the meeting to order @ 9:59 AM

Senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Gender as it relates to sports
- Title IX Provisions

Senator Myrdal Moved to adopt the amendment

LC 21.0140.02003 [10:03]

Senator Heitkamp Seconded the Motion

Vote Passed 7-0-0

Moved to Amend HB 1298	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Senator Myrdal Moved a DO PASS AS AMENDED [10:05]

Senator Luick Seconded the Motion Vote Passed 6-1-0

Senator Dwyer Carried the Bill

Moved a DO PASS AS AMENDED On HB 1298	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	N
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Meeting adjourned [10:06]

Jamal Omar, Committee Clerk

March 19, 2021

CS
3/19/21
1041

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1298

Page 1, line 8, remove the underscored colon

Page 1, line 9, replace "a. Allow" with "knowingly allow"

Page 1, remove lines 13 through 20

Page 1, after line 24, insert:

"4. An individual who is deprived of an athletic opportunity or suffers direct or indirect harm as a result of a violation of this section has a private cause of action."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1298, as engrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1298 was placed on the Sixth order on the calendar.

Page 1, line 8, remove the underscored colon

Page 1, line 9, replace "a. Allow" with "knowingly allow"

Page 1, remove lines 13 through 20

Page 1, after line 24, insert:

"4. An individual who is deprived of an athletic opportunity or suffers direct or indirect harm as a result of a violation of this section has a private cause of action."

Renumber accordingly

2021 CONFERENCE COMMITTEE

HB 1298

2021 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1298
4/9/2021
Conference Committee

Relating to participation in athletic events exclusively for males or females

Chairman Kathy Skroch opened the conference committee at 10:00 a.m.

Representatives	Attendance	Senators	Attendance
Chairman Kathy Skroch	P	Chairman Michael Dwyer	P
Rep. Karen Rohr	P	Sen. Janne Myrdal	P
Rep. Mary Schneider	P	Sen. JoNell Bakke	P

Discussion Topics:

- State economic and social impact
- Mental illness
- Gender discrimination
- Title IX
- Constitutionality

Chairman Kathy Skroch adjourned at 10:25 a.m.

Tamara Krause, Committee Clerk

2021 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Pioneer Room, State Capitol

HB 1298
4/12/2021
Conference Committee

Relating to participation in athletic events exclusively for males or females

Chairman Kathy Skroch opened the conference committee at 10:01 a.m.

Representatives	Attendance	Senators	Attendance
Chairman Kathy Skroch	P	Chairman Michael Dwyer	P
Rep. Karen Rohr	P	Sen. Janne Myrdal	P
Rep. Mary Schneider	P	Sen. JoNell Bakke	P

Discussion Topics:

- Sex reassignment
- Elected policy makers
- Rights protection

Sen. Michael Dwyer (10:07) presented proposed **Amendment 21.0140.02009** - #11490

Sen. Janne Myrdal (10:09) moved **Amendment 21.0140.02009**

Rep. Karen Rohr (10:09) second

Chair Kathy Skroch called for a Roll Call Vote on **Amendment 21.0140.02009**

Motion to adopt **Amendment 21.0140.02009** passed 4-2-0

Sen. Janne Myrdal (10:26) moved **Senate Recede from Senate Amendments and Amend**

Rep. Karen Rohr (10:26) second

Roll Call Vote – Motion Carried Senate Recede from Senate Amendments and Amend 4-2-0

House Bill Carrier: Rep. Kathy Skroch

Senate Bill Carrier: Sen. Michael Dwyer

Chairman Kathy Skroch adjourned at 10:30 a.m.

Tamara Krause, Committee Clerk

April 9, 2021

JD
4/12/21

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1298

That the Senate recede from its amendments as printed on page 1341 of the House Journal and pages 1050 and 1051 of the Senate Journal and that Engrossed House Bill No. 1298 be amended as follows:

Page 1, line 2, after "females" insert "; and to provide for a legislative management study"

Page 1, line 7, remove "The state, a political subdivision of the state, or an entity that receives public funding"

Page 1, line 8, replace "from the state or from a political subdivision of the state" with "A public elementary or secondary school"

Page 1, line 8, remove the underscored colon

Page 1, line 9, replace "a. Allow" with "knowingly allow"

Page 1, line 9, remove "who is under eighteen years of age or"

Page 1, line 10, replace "high" with "a public elementary or secondary"

Page 1, line 10, replace "an" with "a school-sponsored"

Page 1, line 10, remove "sponsored or funded"

Page 1, line 11, replace "by the state, political subdivision, or entity and which" with "that"

Page 1, remove lines 13 through 20

Page 1, after line 24, insert:

"SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDENT ATHLETIC EVENTS. During the 2021-22 interim, the legislative management shall consider studying student athletic events that are exclusively for males or exclusively for females and the impact of a policy that prohibits participation in those events by individuals who are of the opposite sex. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Renumber accordingly

**2021 HOUSE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. HB 1298 as (re) engrossed

House Human Services Committee

- Action Taken**
- HOUSE accede to Senate Amendments
 - HOUSE accede to Senate Amendments and further amend
 - SENATE recede from Senate amendments
 - SENATE recede from Senate amendments and amend as follows
 - Unable to agree**, recommends that the committee be discharged and a new committee be appointed

**AMENDMENT
 ROLL CALL
 VOTE**

Motion Made by: Sen. Janne Myrdal Seconded by: Rep. Karen Rohr

Representatives	Yes	No	Senators	Yes	No
Chairman Kathy Skroch	Y		Chairman Michael Dwyer	Y	
Rep. Karen Rohr	Y		Sen. Janne Myrdal	Y	
Rep. Mary Schneider		N	Sen. JoNell Bakke		N
Total Rep. Vote	2	1	Total Senate Vote	2	1

Vote Count Yes: 4 No: 2 Absent: _____

House Carrier _____ Senate Carrier _____

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

**2021 HOUSE CONFERENCE COMMITTEE
ROLL CALL VOTES**

BILL/RESOLUTION NO. HB 1298 as (re) engrossed

House Human Services Committee

- Action Taken**
- HOUSE accede to Senate Amendments
 - HOUSE accede to Senate Amendments and further amend
 - SENATE recede from Senate amendments
 - SENATE recede from Senate amendments and amend as follows
 - Unable to agree, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Sen. Janne Myrdal Seconded by: Rep. Karen Rohr

Representatives	4/9/21	4/12/21		Yes	No	Senators	4/9/21	4/12/21		Yes	No
Chairman Kathy Skroch	P	P		Y		Chairman Michael Dwyer	P	P		Y	
Rep. Karen Rohr	P	P		Y		Sen. Janne Myrdal	P	P		Y	
Rep. Mary Schneider	P	P			N	Sen. JoNell Bakke	P	P			N
Total Rep. Vote				2	1	Total Senate Vote				2	1

Vote Count Yes: 4 No: 2 Absent: 0

House Carrier Rep. Kathy Skroch Senate Carrier Sen. Mike Dwyer

LC Number 21.0140 . 02009 of amendment

LC Number 21.0140 . 06000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

HB 1298, as engrossed: Your conference committee (Sens. Dwyer, Myrdal, Bakke and Reps. Skroch, Rohr, Schneider) recommends that the **SENATE RECEDE** from the Senate amendments as printed on HJ page 1341, adopt amendments as follows, and place HB 1298 on the Seventh order:

That the Senate recede from its amendments as printed on page 1341 of the House Journal and pages 1050 and 1051 of the Senate Journal and that Engrossed House Bill No. 1298 be amended as follows:

Page 1, line 2, after "females" insert "; and to provide for a legislative management study"

Page 1, line 7, remove "The state, a political subdivision of the state, or an entity that receives public funding"

Page 1, line 8, replace "from the state or from a political subdivision of the state" with "A public elementary or secondary school"

Page 1, line 8, remove the underscored colon

Page 1, line 9, replace "a. Allow" with "knowingly allow"

Page 1, line 9, remove "who is under eighteen years of age or"

Page 1, line 10, replace "high" with "a public elementary or secondary"

Page 1, line 10, replace "an" with "a school-sponsored"

Page 1, line 10, remove "sponsored or funded"

Page 1, line 11, replace "by the state, political subdivision, or entity and which" with "that"

Page 1, remove lines 13 through 20

Page 1, after line 24, insert:

"SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDENT ATHLETIC EVENTS. During the 2021-22 interim, the legislative management shall consider studying student athletic events that are exclusively for males or exclusively for females and the impact of a policy that prohibits participation in those events by individuals who are of the opposite sex. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Re-number accordingly

Engrossed HB 1298 was placed on the Seventh order of business on the calendar.

21.0140.02009
Title.

Prepared by the Legislative Council staff for
Senator Dwyer

April 9, 2021

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1298

That the Senate recede from its amendments as printed on page 1341 of the House Journal and pages 1050 and 1051 of the Senate Journal and that Engrossed House Bill No. 1298 be amended as follows:

Page 1, line 2, after "females" insert "; and to provide for a legislative management study"

Page 1, line 7, remove "The state, a political subdivision of the state, or an entity that receives public funding"

Page 1, line 8, replace "from the state or from a political subdivision of the state" with "A public elementary or secondary school"

Page 1, line 8, remove the underscored colon

Page 1, line 9, replace "a. Allow" with "knowingly allow"

Page 1, line 9, remove "who is under eighteen years of age or"

Page 1, line 10, replace "high" with "a public elementary or secondary"

Page 1, line 10, replace "an" with "a school-sponsored"

Page 1, line 10, remove "sponsored or funded"

Page 1, line 11, remove "by the state, political subdivision, or entity and"

Page 1, remove lines 13 through 20

Page 1, after line 24, insert:

"SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDENT ATHLETIC EVENTS. During the 2021-22 interim, the legislative management shall consider studying student athletic events that are exclusively for males or exclusively for females and the impact of a policy that prohibits participation in those events by individuals who are of the opposite sex. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly."

Renumber accordingly

Section 1. A new section to chapter 14-02.4 of the North Dakota Century Code is created and enacted as follows:

Athletic events exclusively for males and exclusively for females.

1. A public elementary or secondary school may not knowingly allow an individual of the opposite sex who is enrolled in a public elementary or secondary school to participate on a school-sponsored athletic team which is exclusively for females or exclusively for males.
2. For purposes of this section, sex means an individual's biological sex and is based solely on an individual's reproductive biology and genetics at birth.
3. This section may not be construed to prohibit a female from participating in a school-sponsored athletic team or event that is exclusively for males.

Section 2. LEGISLATIVE MANAGEMENT STUDY – STUDENT ATHLETIC EVENTS. During the 2021-22 interim, the legislative management shall consider studying student athletic events that are exclusively for males or exclusively for females and the impact of a policy that prohibits participation in those events by individuals who are of the opposite sex. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-eighth legislative assembly.

Sixty-seventh
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1298

Introduced by

Representatives B. Koppelman, Meier, Paulson, Schauer, Skroch, Steiner, Vetter

Senators Clemens, Kannianen, Myrdal

1 A BILL for an Act to create and enact a new section to chapter 14-02.4 of the North Dakota
2 Century Code, relating to participation in athletic events exclusively for males or females; and to
3 provide for a legislative management study.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 14-02.4 of the North Dakota Century Code is created
6 and enacted as follows:

7 **Athletic events exclusively for males or exclusively for females.**

- 8 1. ~~The state, a political subdivision of the state, or an entity that receives public funding~~
9 ~~from the state or from a political subdivision of the state~~ A public elementary or
10 secondary school may not:
- 11 ~~a. Allow~~ knowingly allow an individual of the opposite sex ~~who is under eighteen~~
12 ~~years of age or who is enrolled in high school~~ public elementary or secondary school to
13 participate on a school-sponsored athletic team sponsored or funded by the
14 ~~state, political subdivision, or entity and which is exclusively for females or~~
15 exclusively for males.
- 16 ~~b. Sponsor an athletic event exclusively for males or exclusively for females which~~
17 ~~allows participation by an individual of the opposite sex who is under eighteen~~
18 ~~years of age or who is enrolled in high school.~~
- 19 ~~c. Use or permit to be used an athletic facility, stadium, field, structure, or other~~
20 ~~property owned by or under the control of the state, political subdivision, or entity~~
21 ~~for an athletic event conducted exclusively for males or exclusively for females in~~
22 ~~which an individual of the opposite sex who is under eighteen years of age or~~
23 ~~who is enrolled in high school is allowed to participate.~~

1 2. For purposes of this section, sex means an individual's biological sex and is based
2 solely on an individual's reproductive biology and genetics at birth.

3 3. This section may not be construed to prohibit a female from participating in a
4 school-sponsored athletic team or event that is exclusively for males.

5 **SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDENT ATHLETIC EVENTS.**

6 During the 2021-22 interim, the legislative management shall consider studying student athletic
7 events that are exclusively for males or exclusively for females and the impact of a policy that
8 prohibits participation in those events by individuals who are of the opposite sex. The legislative
9 management shall report its findings and recommendations, together with any legislation
10 required to implement the recommendations, to the sixty-eighth legislative assembly.