

2023 HOUSE HUMAN SERVICES

HB 1473

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1473
1/24/2023

Relating to participation in school-sponsored athletic events exclusively for males or females, the use of restrooms, locker rooms, and shower rooms in a public school, a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.

Chairman Weisz called the meeting to order at 2:44 PM.

Chairman Robin Weisz, Vice Chairman Matthew Ruby, Reps. Karen A. Anderson, Mike Beltz, Clayton Fegley, Kathy Frelich, Dawson Holle, Dwight Kiefert, Carrie McLeod, Todd Porter, Brandon Prichard, Karen M. Rohr, Jayme Davis, and Gretchen Dobervich. All present.

Discussion Topics:

- Biological differences between sexes.
- Rights to privacy and safety

Representative Olson introduced HB 1473 with supportive testimony (#15936).

Jacob Thomson, Policy Analyst for North Dakota Family Alliance Legislative Action, supportive testimony (#16102).

Patricia Leno, North Dakota citizen, spoke in favor of bill.

Gabriela Balf, psychiatrist and citizen from Bismarck, North Dakota, (#16077).

Elia Jay Scott, North Dakota citizen, spoke in opposition to bill (#14943).

Mia Halvorson, North Dakota citizen and student, opposition testimony (#16080).

Additional written testimony:

14889, 14892, 14999, 15029, 15040, 15049, 15114, 15158, 15231, 15469, 15563, 15614, 15664, 15696, 15706, 15752, 15778, 15872, 15877, 15887, 15905, 15925, 15954, 16000, 16002, 16018, 16033, 16034, 16041, 16054, 16068, 16128, 16145, 16168, 16174, 16175, 16193

Chairman Weisz adjourned the meeting at 3:03 PM.

Phillip Jacobs, Committee Clerk By: Leah Kuball

2023 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee Pioneer Room, State Capitol

HB 1473
2/15/2023

Relating to participation in school-sponsored athletic events exclusively for males or females, the use of restrooms, locker rooms, and shower rooms in a public school, a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.

Chairman Weisz called the meeting to order at 6:40 PM.

Chairman Robin Weisz, Vice Chairman Matthew Ruby, Reps. Karen A. Anderson, Mike Beltz, Clayton Fegley, Kathy Frelich, Dawson Holle, Dwight Kiefert, Carrie McLeod, Todd Porter, Brandon Prichard, Karen M. Rohr, Jayme Davis, and Gretchen Dobervich. All present.

Discussion Topics:

- Committee work
- Amendment (23.0498.05001)

Vice Chairman Ruby moved to adopt amendment to HB 1473 (Amend section 5, 6 and, 7)

Seconded by Representative Beltz.

Roll Call Vote:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	Y
Representative Jayme Davis	N
Representative Gretchen Dobervich	N
Representative Clayton Fegley	Y
Representative Kathy Frelich	Y
Representative Dawson Holle	Y
Representative Dwight Kiefert	Y
Representative Carrie McLeod	Y
Representative Todd Porter	Y
Representative Brandon Prichard	Y
Representative Karen M. Rohr	Y

Motion carries: 12-2-0.

Representative Frelich moved to adopt amendment to HB 1473. (add "under 18" section 5 line 2)

Seconded by Representative Holle.

Roll Call Vote:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	Y
Representative Jayme Davis	N
Representative Gretchen Dobervich	N
Representative Clayton Fegley	Y
Representative Kathy Frelich	Y
Representative Dawson Holle	Y
Representative Dwight Kiefert	Y
Representative Carrie McLeod	Y
Representative Todd Porter	Y
Representative Brandon Prichard	Y
Representative Karen M. Rohr	Y

Motion carries: 12-2-0

Representative Reichard moved a DO PASS as amended on HB 1473, (23.0498.05001)

Seconded by Representative Holle

Roll Call Vote:

Representatives	Vote
Representative Robin Weisz	Y
Representative Matthew Ruby	Y
Representative Karen A. Anderson	Y
Representative Mike Beltz	Y
Representative Jayme Davis	N
Representative Gretchen Dobervich	N
Representative Clayton Fegley	Y
Representative Kathy Frelich	Y
Representative Dawson Holle	Y
Representative Dwight Kiefert	Y
Representative Carrie McLeod	Y
Representative Todd Porter	Y
Representative Brandon Prichard	Y
Representative Karen M. Rohr	Y

Motion carries: 12-2-0 Carrier: Rep. McLeod

Chairman Weisz adjourned the meeting at 6:51 PM.

Phillip Jacobs, Committee Clerk By: Leah Kuball

February 15, 2023

49
2-15-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1473

Page 1, line 2, after the third comma insert "and"

Page 1, line 3, remove ", and two new sections to chapter 15.1-19"

Page 1, line 4, remove "participation in school-sponsored athletic events exclusively for males or females,"

Page 1, line 5, remove "public school, a"

Page 3, line 3, after "**females**" insert "**under the age of eighteen**"

Page 3, remove lines 16 through 31

Page 4, remove lines 1 through 7

Re-number accordingly

REPORT OF STANDING COMMITTEE

HB 1473: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1473 was placed on the Sixth order on the calendar.

Page 1, line 2, after the third comma insert "and"

Page 1, line 3, remove ", and two new sections to chapter 15.1-19"

Page 1, line 4, remove "participation in school-sponsored athletic events exclusively for males or females,"

Page 1, line 5, remove "public school, a"

Page 3, line 3, after "**females**" insert "**under the age of eighteen**"

Page 3, remove lines 16 through 31

Page 4, remove lines 1 through 7

Renumber accordingly

2023 SENATE HUMAN SERVICES

HB 1473

2023 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Lincoln Room, State Capitol

HB 1473
3/15/2023

Relating to the use of restrooms, locker rooms, and shower rooms in a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.

9:03 AM **Madam Chair Lee** called the hearing to order. **Senators Cleary, Clemens, K. Roers, Weston, and Hogan** are present. **Senator Lee** was absent for the adjournment presenting a HB.

Discussion Topics:

- Biology of sex
- Equal rights
- Safety space
- Privacy space
- Shower room
- Bathroom
- Locker room

9:04 AM **Representative S. Olson** introduced HB 1473 and testified in favor. #25066

9:05 AM **Representative S. Olson** provided an amendment. LC2304980600 #25068.

9:12 AM **Mark Jorritsma, Executive Director, North Dakota Family Alliance Legislative Action**, testified in favor #25303.

9:16 AM **Don Eaton, citizen**, testified in favor verbally.

9:20 AM **Representative S. Olson** provided additional information verbally.

9:29 AM **Patricia Leno** testified in favor verbally.

9:35 AM **Don Eaton** provided additional information verbally.

9:36 AM **Cody Schuler, Advocacy Manager**, testified in opposition #25101.

9:52 AM **Seth O'Neill, Lobbyist representing Cause North Dakota (CAWS)**, testified in opposition verbally.

9:54 AM **Christina Sambor, Lobbyist Legislative Coordinator, North Dakota Human Rights Coalition/Youthworks**, testified in opposition #25174.

10:06 AM **Caedmon Marx, Outreach Dakota Outright**, testified in opposition verbally.

10:09 AM **Mia Halvorson** testified in opposition # 25124.

10:19 AM **Shelly Farrell** (wrong bill) will testify at another bill.

10:20 AM **Andrew Alexis Varvel** testified neutral #24935.

10:25 AM **Deborah Hill** testified neutral verbally.

Additional Testimony:

Lilly Funk, Assistant Teacher, Head Start in favor #23816

Shawna Grubb in favor #23944

Kristie Miller in favor #24079

Alida Arnegard in favor #24125

Sheila Glasser in favor #24417

Rachel Haidle in favor #24633

Lovita Scrimshaw, Emergency Medicine Physician, North Dakota American Academy of Medical Ethics, North Dakota State Director in favor #25111

Daniel Scrimshaw, Emergency Medicine Physician, North Dakota American Academy of Medical Ethics, North Dakota State Director in favor #25112

Doug Sharbono in favor #25153

Ashley LeFors in opposition #23829

Bree Langemo in opposition #23848

Alannah Valenta, President, North Dakota Association of School Psychologists in opposition #23997

Christopher Brown in opposition #24073

Oliver Jensen in opposition #24687

Amber Lefers in opposition #24800

Brenda Weiler in opposition #24801

Derek Harnish in opposition #24882

Patrick Lonegran in opposition #25015

Emily Coler Hanson, Ellie Mental Health in opposition #25051

Kara Gloe, Mental Health Therapist, Canopy Medical Clinic in opposition #25056

Mariah Ralston Deragon in opposition #25086

Tara Jensen in opposition in opposition #25105

Bradley Farrell, Member, North Dakota Human Rights Coalition in opposition #25118

Faye Seidler in opposition #25120

Stephen McDonough, Pediatrician in opposition #25139

Shannon Krueger in opposition #25157

Karen Van Fossan, Director, Authentic Ministry, Affiliated with the Green Sanctuary Program of the Unitarian Universalist Association in opposition #25173

10:27 AM **Vice Chairman Cleary** adjourned the hearing.

Patricia Lahr, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Lincoln Room, State Capitol

HB 1473
3/28/2023

Relating to the use of restrooms, locker rooms, and shower rooms in a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.

10:00 AM **Madam Chair Lee** called the meeting to order. **Senators Lee, Cleary, Clemens, K. Roers, Weston, and Hogan** were present.

Discussion Topics:

- Biology of sex
- Equal rights
- Safety space
- Privacy space
- Shower room
- Bathroom policy
- Locker room

Senator Lee calls for discussion.

Senator Cleary provided an amendment, LC23.0498.06003 #26890.

Senator K. Roers provided additional information.

Senator Cleary provided information to further amend by striking section 4.

Senator Cleary moved to **adopt amendment** LC 23.0498.06004.

Senator Hogan seconded the motion.

Roll call vote.

Senators	Vote
Senator Judy Lee	Y
Senator Sean Cleary	Y
Senator David A. Clemens	Y
Senator Kathy Hogan	N
Senator Kristin Roers	Y
Senator Kent Weston	Y

Motion passed 5-1-0.

10:25 AM **Lisa Bjergaard, Director ND Division Juvenile Services**, provided information via cell phone. No written testimony.

10:47 AM **Dave Krabbenhoft, Director, ND Department of Correctional Rehabilitation**, provided information verbally.

10:53 AM **Katie Fitzsimmons, Director of Student Affairs, North Dakota University System**, provided information via cell phone. No written testimony.

Senator K. Roers further moved to **adopt amendment**, 6003 version, LC 23.0498.06003, striking lines 29 and 30, adding line 12 page 3, and adding in this section, does not prohibit a dormitory administrator or dormitory staff member from entering rest room or shower room of the opposite sex in the course of their official duties.

Senator Hogan seconded the motion.

Roll call vote.

Senators	Vote
Senator Judy Lee	Y
Senator Sean Cleary	T
Senator David A. Clemens	N
Senator Kathy Hogan	Y
Senator Kristin Roers	Y
Senator Kent Weston	N

Motion passed 4-2-0.

Senator K. Roers moved **DO PASS AMENDED**.
Senator Hogan seconded the motion.

Roll call vote.

Senators	Vote
Senator Judy Lee	Y
Senator Sean Cleary	Y
Senator David A. Clemens	Y
Senator Kathy Hogan	N
Senator Kristin Roers	Y
Senator Kent Weston	Y

Motion passed 5-1-0.

Senator Cleary will carry HB 1473.

11:07 AM **Madam Chair Lee** adjourned the meeting.

Patricia Lahr, Committee Clerk

March 28, 2023

DR
121
3-28-23

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1473

- Page 1, line 2, remove " a new section to chapter 14-07.1,"
- Page 1, line 5, remove " a domestic violence sexual assault organization facility,"
- Page 1, line 16, replace "This section does not prohibit an" with "An"
- Page 1, line 17, replace "from providing" with "shall provide"
- Page 1, line 18, after "inmate" insert ", as deemed appropriate by the administrator"
- Page 2, line 3, replace "This section does not prohibit the" with "An"
- Page 2, line 3, remove "from"
- Page 2, line 4, replace "providing" with "shall provide"
- Page 2, line 5, after "child" insert ", as deemed appropriate by the administrator"
- Page 2, line 13, replace "This section does not prohibit the" with "The"
- Page 2, line 14, replace "from providing" with "shall provide"
- Page 2, line 15, after "inmate" insert ", as deemed appropriate by the warden"
- Page 2, remove lines 16 through 26
- Page 2, line 29, remove "under"
- Page 2, line 30 remove "the age of eighteen"
- Page 3, line 10, replace "This section does not prohibit a" with "A"
- Page 3, line 11, replace "from providing" with "shall provide"
- Page 3, line 12, after "resident" insert ", as deemed appropriate by the director of residence life. This section does not prohibit a dormitory administrator or dormitory staff member from entering a restroom or shower room designated for the opposite sex in the course of official employment duties"

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1473, as engrossed: Human Services Committee (Sen. Lee, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1473 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 1, line 2, remove " a new section to chapter 14-07.1,"

Page 1, line 5, remove " a domestic violence sexual assault organization facility,"

Page 1, line 16, replace "This section does not prohibit an" with "An"

Page 1, line 17, replace "from providing" with "shall provide"

Page 1, line 18, after "inmate" insert ", as deemed appropriate by the administrator"

Page 2, line 3, replace "This section does not prohibit the" with "An"

Page 2, line 3, remove "from"

Page 2, line 4, replace "providing" with "shall provide"

Page 2, line 5, after "child" insert ", as deemed appropriate by the administrator"

Page 2, line 13, replace "This section does not prohibit the" with "The"

Page 2, line 14, replace "from providing" with "shall provide"

Page 2, line 15, after "inmate" insert ", as deemed appropriate by the warden"

Page 2, remove lines 16 through 26

Page 2, line 29, remove "under"

Page 2, line 30 remove "the age of eighteen"

Page 3, line 10, replace "This section does not prohibit a" with "A"

Page 3, line 11, replace "from providing" with "shall provide"

Page 3, line 12, after "resident" insert ", as deemed appropriate by the director of residence life. This section does not prohibit a dormitory administrator or dormitory staff member from entering a restroom or shower room designated for the opposite sex in the course of official employment duties"

Renumber accordingly

TESTIMONY

HB 1473

House Human Services Committee Members:

I am writing in opposition to HB 1473 pertaining to the use of restrooms, locker rooms and shower rooms in multiple locations as well as participation in school-sponsored athletic events. This is another example of a bill that is addressing a problem that does not exist and is a waste of legislators' time and taxpayers' dollars.

As I read through the sections relating to correctional facilities, youth correctional facilities and penitentiaries, I assumed that this issue was already addressed by other laws that regulate safety in these facilities. After speaking to a relative that has first-hand knowledge of this, I was assured that they do have policies that regulate the use of restrooms and shower rooms in these centers and have to follow PREA standards, so there is no need for this redundant bill. A domestic violence sexual assault facility also has policies in place that assure the safety, security and privacy of its clients so I am again wondering what the purpose of this bill is.

Section 5 concerns dormitory or living facilities that are under the control of the state board of higher education. I am not aware of any North Dakota schools that have co-ed bathrooms, but I can share that I went to a Minnesota college in the early 1970s and the floor I lived on voted unanimously to have our bathrooms be co-ed due to the locations of each of the gender assigned rooms. The stalls for the toilets, showers and bathtubs were private and there were never any issues of sexual assault happening in those areas. Instead, it created a situation where the boys on my floor were more like brothers to me. This law would make that decision that was made by consenting adults illegal. I am also wondering whether a co-ed house owned by a college would have to designate male and female bathrooms to comply with this bill.

Section 6 is the part that concerns me the most as it is discriminatory against males and transgender students and includes elementary as well as secondary school activities. This bill would mean that a 4th grade boy who wants to play volleyball would not be allowed to participate in that sport because there are no male volleyball teams. This is just one example that shows how ridiculous this bill is. It appears this is just one of many bills that are trying to ban transgender athletes from participating in a sport that corresponds to their gender identity. The NDHSAA has already written a policy regarding participation by transgender athletes and is approved by schools, coaches and athletes across the state.

I would ask that you send this bill out of committee with a Do Not Pass vote.

Thank you,

Jane Hirst
Minot, ND

1-22-2023

Dear Legislators,

I am writing to express my deep concern for our transgender youth who will struggle in schools in finding solace in a separate bathroom setting should this legislation pass. As an educator, I have seen many youths struggle to understand their identity, some pushed to the brink. In fact, data indicates that 82% of transgender individuals have considered killing themselves and 40% have attempted suicide, with suicidality highest among transgender youth. (<https://pubmed.ncbi.nlm.nih.gov/32345113/>)

Furthermore, **school belonging**, emotional neglect by family, and internalized self-stigma made a unique, statistically significant contribution to past 6-month suicidality. (<https://pubmed.ncbi.nlm.nih.gov/32345113/>) Students who are uncomfortable with the basic human need of going to the bathroom will be uncomfortable at school.

Please end this legislation now.

Sincerely,

Angie Moser

Elia Jay Scott,
Fargo, ND 58103 (district 46).

Please stop the war on trans lives.

Imagine (if you are not) that you are Catholic. And imagine that your state legislature proposes **21 bills** targeting, demonizing, and persecuting the Catholic community. One bans you from wearing a crucifix in public. One bans you from privately praying anywhere near a school. And one bans sale of alcohol for religious purposes, making it illegal for your church to obtain the spiritual medicine that keeps your soul alive, the Eucharist.

Now, instead, imagine that you are **transgender**. Instead of banning crucifixes, the state wants to ban you from going outside your house in clothes consistent with your identity. Instead of banning prayer in schools, they want to ban any school accommodation for your condition, gender dysphoria. And instead of banning the Eucharist, they want to ban the evidence-based, lifesaving healthcare that has saved your **actual, physical life**, and the lives of so many of your beloved friends.

That is what the North Dakota state legislature is doing right now. Republicans have introduced 21 – yes, 21 – bills, targeting, demonizing, and persecuting the transgender community, doing all I have described above and more.

This bill, HB 1473, aims to overrule the scientific judgement of sports certifying boards, and replace actual science with uninformed mob moral panic. Let sporting regulations be based on **actual science**, not culture war hysteria.

Chair and members of the committee, if you are Catholic, Christian, or simply a human being of conscience, I ask you **please to vote NO on all these anti-transgender bills**, and to stop this merciless, hateful war on our trans neighbors – whom, if we are Catholic, Christian, or people of conscience, we are commanded by God and human decency **to love as ourselves**.

†

HB #1473

68th Legislative Session

Senator Paulson and Representatives: Olson, Bellew, Henderson, Hoverson, Prichard, Steiner, and VanWinkle

HB #1473

I am writing in opposition to HB #1473. This bill is very insensitive and lacks understanding of what transgender individuals feel and the struggles that these people face every day. I am a parent of a transgender person and I want to do is shed some light on what devastation this bill will leave in its wake.

For the record, transgender people are born transgender. Being transgender isn't a choice nor a fad. Transgender isn't a way to get an edge in female sports or a way to get a look, peek or touch a CIS person. CIS, is a term referring to those who identify as the gender they were born. My child, as well as all other transgender people are born transgender. In utero, the body forms first, the brain later forms. My daughter and I sat in a doctors office at Mayo Clinic in Rochester, MN, where doctors explained that it is believe that during a crucial point of brain development, it is believe that the mother's body releases hormones that interfere with the brains formation, causing the brain to form the opposite gender than what the body already has developed as. In my daughter's case, her body formed male and her brain later formed female. Doctors at Mayo Clinic also informed me that it is through a MRI, her brain is actually that of other females. You see, males' brains are visibly different than those of females. My daughter's body and brain and not in synch with each other. Nothing I did or didn't do caused this and in turn, nothing my baby did to cause her to be transgender. This is a thing that happens in utero and as we all know nature isn't always creating life as it usually does. Individuals are born every day with cleft pallet, blindness, deafness, spin other irregularities. We as a society take pity on those born with irregularities that can be seen with the naked eye but yet discriminate or negate those who later in life say they are transgender, a boy trapped in a girl's body or vice versa. Society has yet to recognize the apathy and cruelty of denying these individuals the same rights as their CIS counterparts.

Transgender people should be allowed to seek treatment and become whole. It is NOT the transgender person they were born with their body and brain not in synch. Furthermore, it is cruel and just as unjust to deny these people from identifying who they are at school, work, as an incarcerated in jail, penitentiary or youth facility. Imagine going through life having someone call you the opposite sex then what you identify with. How comfortable would you be? Now imagine having to be forced to shower, use the bathroom with the gender you don't identify with. That would be traumatizing for anyone.

What this bill, HB 1473, would do is put transgender people at risk of being assaulted physically and mentally by peers, faculty, staff, employers and people who are in authority positions such as a correctional officer. Transgender people have civil rights just like their CIS counterparts. What this

Legislative body doesn't realize is the transgender people are not the ones who act out aggressively. The aggressors are the CIS people they come in contact with at school, work, out in public or as an inmate. Transgender people just want to live their life as their CIS counterparts do yet it's the insecurities, ignorance and bigotry what causes the CIS population to become violent or aggressive. My daughter suffered indignities from her peers at school as well as the faculty and staff at the schools. Each time there was an incident, the administration protected the aggressor and my daughter had no "safe haven" at school. Yet my daughter carried herself with the dignity and strength that I rarely see in adults let alone in middle school or high school.

Transgender people should not be victimized by the State of North Dakota by forcing these individuals to use bathrooms, locker rooms, shower facilities that they do not identify as. I do believe the State has no idea how to handle this but there are organizations and agencies that do know how to address bathroom and locker room situations. Also I do believe education for everyone involved is also paramount to the success of any policy. Knowledge is power and once people know what to do and what not to do, hopefully, they do better. In the event that a person doesn't do better, after being educated, then a consequence should be given.

You would punish a baby for being born deaf so why punish a transgender person? The transgender person didn't ask to be born transgender. Compassion, understanding and empathy are required. Anything else is discriminatory and cruel. Is that what North Dakota wants to be known for, how cruel it treats it's transgender citizens? Is this a way to drive transgender citizens to leave North Dakota?

As a parent of a transgender person I fear for my child every day due to the lack of protection there is for her here in this state as well as how this Legislative body sees her and others like her. My daughter needs protection, yet your bills read as if the CIS people are the ones that need protection. That is so messed up. My daughter had friends who had to protect her from bullies at school who threatened my daughter and the friends who defended my daughter. The school did nothing to the aggressive CIS female until an actual physical encounter between this aggressive female and a totally different CIS girl, someone whom the aggressive female bullied in the past, had occurred. I had warned the principal before this event that the aggressive female's aggressive behavior was escalating and yet nothing happened until the two CIS youths got into a physical altercation in the cafeteria. This isn't an anomaly. Transgender people don't go out in public to go cause chaos and see what they can get by with; that is the false narrative that the radical religious right wants to depict to it's followers. Fox News and the like are notorious for their fake spin on transgender people.

When my daughter uses the bathroom she is doing what I and every other female does in there, we use the toilet. Plain and simple. She isn't in there to look at anyone else and this goes for using showers and locker rooms. That's a scare tactic that the ignorant and those who lack any understanding of what Christ our Lord taught. Our Lord wouldn't treat transgender people by forcing them to use facilities that makes these people feel unwanted, unsafe and not cared for. Would you want your child to go to

school where their rights were violated. Would you want your child to have to face unsafe situations like using the boy's bathroom when she looks, feels and identifies as a female? Could you tell your daughter that these people are doing the right thing? Well, I can say honestly, I couldn't and didn't feel that forcing my daughter to use the boy's bathroom was the right thing for her. What it did do was cause her to not to eat or drink during the day so she wouldn't have to use the bathroom. Now does that sound like someone who is out to take a look at your daughters? No, but it did put my daughter at risk of physical ailments let alone the discomfort of being thirsty, hungry or needing to use the bathroom. Where was my daughter's "safe haven"?

If you want to do your job as a Legislators the most accurate and complete way, you will talk to a transgender person or a parent of a transgender person. You would take into account how life is for the transgender person and how the bathroom, locker room, showers and even jail would. You will seek out agencies that would discuss how to address your concerns and answer questions you have.

If this bill is successful, who next is in your crosshairs? Gays and lesbians? Native Americans or people who do not identify as being white? These questions and my concerns are legitimate and valid. Anyone who supports a bill yet knows nothing about the people the bill attacks shows how uncaring and misinformed they are.

I strongly encourage you to vote DO NOT PASS and then reach out to a transgender person or parent of a transgender person. Hear their story. These people deserve the same rights and privileges that you and I, all of us enjoy and take for granted.

Thank you,
Kristie Miller

I strongly oppose this bill. Not allowing individuals to use a bathroom that corresponds with their gender (even when it does not match their sex designated at birth) could cause extreme harm. Can you imagine a trans woman – who was assigned male at birth but presents as fully female – being forced to use a bathroom for men? This would be absurd at best and dangerous for the woman at worst. This bill directly goes against all of the research about supporting mental health for trans individuals. The fact that this bill is being considered is embarrassing for our state. It shows such ignorance of factual information and the extreme prejudice of our lawmakers.

Megan Degenstein, Ph.D.
Licensed Professional Clinical Counselor

WRITTEN TESTIMONY IN OPPOSITION TO HB 1473

House Human Services Committee on House Bill 1473

Date of Hearing: January 24, 2023 10:00 a.m.

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

This written testimony is presented in opposition to HB 1473, which prohibits transgender and non-binary individuals from utilizing the restroom, locker rooms, or showers of their identified gender. This bill is aimed at fear-mongering, not actual facts or statistics.

It also effectively prohibits participation of transgender and nonbinary athletes in elementary or high school sports. The North Dakota High School Activities Association (NDHSAA)¹, the National Collegiate Athletic Association (NCAA)², and the International Olympic Committee (IOC)³ 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 1473 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.⁴ Title VII of the Civil Rights Act prohibits discrimination based upon sex, and this includes gender identity.⁵ President Biden 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."⁶

As the parent of a transgender individual, I can assure you that all every person wants (regardless of gender identity or sexual orientation) is to be accepted as they are. More than half of transgender and nonbinary youth have contemplated or attempted suicide.⁷ 83% of transgender and nonbinary youth are worried about being denied participation in athletics due to state or local laws.⁸ If those same students are surrounded by peers, teachers, coaches, and others who are affirming, the suicide rate lowers significantly. Excluding or marginalizing transgender students puts their mental health and their lives at serious risk.

This bill also takes aim at transgender or non-binary utilizing bathrooms, locker rooms, or showers that match their gender identity. Proponents of this bill will argue that this legislation is needed to protect women's and girls' privacy and safety. There is no research, data, or statistics to support a proposition that transgender women attack anyone in a bathroom or use the bathroom for voyeuristic reasons. If this legislation is based upon a fear of a man dressed up as a woman preying on women or girls, that is an instance of a straight male committing a crime. This is not the equivalent of a transgender female utilizing a bathroom or locker room. Transgender individuals only want to use the restroom, locker room, or shower, just like any other individual.

Like all young people, 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, and leadership. Transgender students need

¹ https://d2q0tptsfejku7.cloudfront.net/uploads/files/Policies/NDHSAA_Transgender_Student_Board_Regulation.pdf

² <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>

³ <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>

⁴ NDCC § 14-02.4-01.

⁵ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

⁶ 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/>

⁷ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2022"

⁸ The Trevor Project, "National Survey on LGBTQ Youth Mental Health 2022"

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 and to be included as part of the community.

Please oppose HB 1473.

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

Members of the House Human Services Committee,

My name is Amber Vibeto and I reside in District 3. I am asking that you render a DO PASS on HB 1473.

Inserting the concept of gender identity into legislation raises serious concerns about privacy, safety, fairness, liberty, and its impact on children. It threatens freedom of religion and conscience, freedom of speech, and women's and parental rights. The radical redefinition of sex is dramatically altering our society for the worse and particularly harming women and girls.

'Trans women' are not women. They are males and always will be - no matter how much estrogen they swallow or body parts they alter. We must not allow subjective ideology to trump established biological facts. We must protect the hard-won sex-based rights of women and girls in order to protect their safety and their opportunities.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

[Women in Prisons](#)

[The Bone-Muscle Relationship in Men and Women](#)

[Males Have Larger Skeletal Size and Bone Mass Than Females, Despite Comparable Body Size](#)

[Comparison of injury during cadet basic training by gender](#)

[A Comparative Study on Strength between American College Male and Female Students in Caucasian and Asian Populations](#)

[Skeletal muscle mass and distribution in 468 men and women aged 18–88 yr](#)

[Elite Strength Sports \(IPF and IWF\) a Comparison of Sex and Performance](#)

[Gender Differences in Spatial Ability](#)

[Comparing Athletic Differences Between Women and Men](#)

[Effect of gender affirming hormones on athletic performance in trans-women and trans-men: implications for sporting organizations and legislators](#)

[Alliance Defending Freedom](#)

[Women's Bill of Rights](#)

January 22, 2023

To Whom It May Concern,

My name is Tim Baumann and I live at 1308 35th Ave. SW in Minot. I am writing today to express my opposition to HB 1473. The state government doesn't need to get into the business of micromanaging bathrooms and locker rooms. There are professional school administrators, athletic directors, and facility managers who should handle all of this.

Respectfully Submitted,

Tim Baumann

1308 35th Ave. SW

Minot, ND 58701

Sixty-eighth
Legislative Assembly
of North Dakota

To whom it may concern,

I am writing this letter in opposition to the House bill #1473.

A person who is transgender isn't playing sports in their identified gender to hurt anyone, but to simply be themselves and enjoy the activity, just like any other person.

To remove trans people from restrooms/showers with exception is simply deplorable and for you to even be caring enough to worry about or know what someone else has for their genitals, is perverted.

I would also love to take this opportunity to ask each and every one of you to reflect on how the LGBTQ community is actually harming anyone- reflect on your own homophobia for there to be such a witch hunt in this and other upcoming bill proposals.

Thank you,

Sydney Glende, LPCC

House Human Services Committee

House Bill 1473

Andrew Alexis Varvel

Written Testimony

North Dakota State Capitol

Pioneer Room

January 24, 2023

10:00AM

Chairman Weisz and Members of the Committee:

My name is Andrew Alexis Varvel. I live in Bismarck, District 47.

This legislation affects prisons. I favor the establishment of a separate prison for trans-gender, trans-species, non-binary, and gender non-specific inmates, separate from both the men's prison and the women's prison.

This legislation does not get in the way of establishing a non-binary prison. That's good.

The specific reasons why I support this bill are section 1, subsection 3; section 2, subsection 3; section 3, subsection 3; section 4, subsection 3; section 5, subsection 4; section 6, subsection 2; and section 7, subsection 3.

Each of them starts with "This section does not prohibit" or "This section may not be construed to prohibit..."

What I like about this bill is its elasticity. It permits discretion.

I appreciate that.

Thank you.

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

I knew that I was different from a very young age. Growing up in Texas with immigrant parents & in a poor immigrant community, my perspective of the world was limited. The first time I kissed a girl, we were hidden in her closet at midnight, scared of being found by her parents. It was a beautiful & deeply sad moment. A memory that should be cute and awkward and funny is tainted forever because of it was clouded by our terror of being found out to be “wrong”. We weren’t wrong.

I’m a fantastic actor. My greatest performance, to date, was convincing those around me that I was heterosexual & cisgender. I hid my feelings, my personhood, & my joy for over a decade. When I learned the word transgender, after I had spent my whole life convinced that I was completely alone, I was beside myself with grief over my life so far & utter joy at the life I now had the chance to start living. My family didn’t accept that I wasn’t their daughter. I attempted suicide multiple times. One attempt landed me in a medically induced coma. When I woke up, to the surprise of even my doctors, my family told me how happy they were that their “little girl” came back to them. I kept trying to kill myself, I ran away from home, my parents threw me out & my guardians in North Dakota took me in. They didn’t accept me either, so I went back to acting.

Three years later, at 18, I was homeless, traumatized from years of abuse, & **still transgender**. No beating took it out of me, no vitriolic words could stem who I was, lack of support couldn’t make me a different person. Now that I have transitioned socially, medically, & legally, I am three years free from a suicide attempt, two years sober, & finally at home within myself. I have friends. I have a place to live. I have pets. I am alive & happy to be so.

The attack on transgender rights all across the country will not stop people from being transgender. Centuries of history have shown, time and time again, from book burnings to murders to genocides, that transgender people cannot be subdued into nonexistence. Even if every single transgender person were to die tomorrow, more would be born the next day. The outcome of bills like these is that transgender people are made to suffer more for existing, suicide rates of transgender people increase dramatically, & the murders of transgender people are normalized.

The Lemkin Institute for Genocide Prevention has classified the actions of lawmakers within the GOP against the LGBTQ+ community as a movement driven by fascistic, genocidal ideology. Transgender people, whether adults or children, deserve the freedom to identify as themselves & to seek treatments that are deemed appropriate by World Health Organization, the World Professional Association for Transgender Health, & other unbiased medical organizations that rely on science to determine the proven safest treatments that lead to the proven best outcomes for people. Transgender people do not pose **any** risk to non-transgender people. Transgender people, very simply, wish to live our lives, as ourselves, in peace.

The push to ban transgender participation in sports is due to mounds of misinformation about transgender bodies. Transgender people have never taken space or opportunity away from cisgender athletes. Transgender athletes have had the ability to participate in the Olympics since 2004 & the National Collegiate Athletic Association since 2010 – yet no transgender woman has received an athletic scholarship in the NCAA & only one transgender woman has competed in the Olympics. In fact, transgender athletes are underrepresented within sports.

The push to ban transgender people from using public restrooms & lockers according to their identity is clearly driven by a desire to out transgender people, keep us out of public spaces, & is based on absolutely nothing but hatred. It is a disgusting show of discrimination that endangers the health, safety, & lives of transgender & cisgender people. Additionally, cities and states that pass bathroom laws are

proven to accrue lawsuits, loss of federal funding, economic burdens due to a reduction or restriction of travel to, and business within, the area that passed the law.

The push to not allow schools to support transgender students is driven by a wish to kill transgender children. 74.7% of transgender middle school students have considered suicide & 46.3% have attempted suicide. **That number drastically decreases when children receive support.** Schools need to be able to help transgender children from the high rates of bullying in middle school (61.0%) & high school (72.7%). With schools able to support children, they can assist if unaccepting families create an unsafe environment for them to live. 27% of transgender high schoolers don't sleep at home, 20% have run away or are homeless, 94.4% don't feel safe talking to their parents when feeling distressed. We need to provide support for these children. It has been proven over and over that acceptance of identity decreases the risk of suicide, homelessness, drug use, etc.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1249. I ask that you give this bill a Do Not Pass.

The reason for this is that I am against bills that endorse discrimination as policy. This bill hurts our state as it intrudes on individual liberties and causes actual harm to LGBTQ+ people in North Dakota, contributing to higher suicide rates among LGBTQ+ youth and mass exodus of youth from our state whether they are LGBTQ or not.

Among queer youth in North Dakota:

- 74.7% Have ever seriously considered suicide (Middle School Data)
- 46.3% Have ever attempted suicide (Middle School Data)
- 94.4% Do not talk to parents when feeling sad, empty, hopeless, or angry (High School Data)
- 72.7% Didn't feel safe at school most of time or always (High School Data)
- 61.0% Bullied on School Property (Middle School Data)
- 27.0% Didn't Sleep in Parents Home + 20.0% Have Run away or homeless (High School)

Thank you for your time, consideration, and service to our state

Best regards,

Kaitlyn Kelly

Dear Members of the Senate Judiciary Committee,

My testimony is in opposition

to Senate Bill 1473. I ask that you give this bill a **Do Not Pass**.

Transgender athletes are not trying to go into restrooms and locker rooms to do harm to other people. They go into those changing rooms to change their clothes with people, not to look at people. It is not fair for a teenage transgender student who presents as female to change in a locker room full of cisgender males.

This bill is a waste of taxpayer time to micromanage the restrooms of school children. There are a lot more pressing things that the government should be dealing with, not deciding on new ways how to make transgender students life miserable.

Please,

consider not passing this dangerous piece of legislation; our children are counting on you.

Thank you for your time,

consideration, and service to our state

Best regards,

Becky Craigo

President of Beach Pride Family; House of Safe Spaces

Beach North Dakota



521 E Main Avenue
Suite 320
Bismarck, ND 58501

Phone 701.255.6240
Toll Free 888.255.6240
Fax 701.255.1904

cawsnorthdakota.org
contact@cawsnorthdakota.org



House Bill No. 1473
House Human Services Committee
Testimony Presented by Seth O'Neill, JD, MSW
Email: soneill@cawsnorthdakota.org
January 24, 2023

Chairman Weisz and members of the Committee, my name is Seth O'Neill and I am representing CAWS North Dakota in opposition to HB 1473. CAWS North Dakota is the statewide coalition of the domestic violence and sexual assault programs in North Dakota.

This bill would require our facilities to designate restrooms or shower rooms for exclusively male or exclusively female and allows for reasonable accommodations for transgender or gender non-conforming clients.

This bill is odd because it is imposing a requirement on a private facility without providing for any penalty and enforcement mechanism. The rest of the entities in this bill are public or state-sponsored institutions and are responsible to the public. If this bill becomes law, these public institutions would be responsible to follow the law. However, domestic violence sexual assault organizations are non-profit organizations. This bill is unnecessary because these our member programs already have appropriate policies in place.

For these reasons, we encourage the committee to give HB1473 a do not pass recommendation. I appreciate your time and I am happy to answer any questions you may have. Thank you.

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on HB 1473. I am at a loss as to why the North Dakota State Legislature is using valuable time and energy to regulate restroom policy. Is our time, energy, and money not better spent on pressing issues that affect most North Dakotans and could improve lives for the better: developing our workforce, expanding safe and affordable childcare, supporting agriculture for a sustainable future, increasing access to healthcare, especially for our rural areas? This legislation is unnecessary and paints North Dakota in a negative light.

I urge a Do NOT Pass on HB 1473.

Sincerely,
Sylvia Bull
522 N 16th St
Bismarck, ND 58501

Bill 1473 is not only a redundant waste of time, as all issues of bathroom usage in these facilities are already regulated by policy and therefore attempting to solve a problem that doesn't exist but is entirely dishonest in its attempt, in section 6, to slip a means by which to ban transgirls from competing in school sports into a bill that has no business including it. **DO NOT PASS** this bill.

If the state legislature is so desperately concerned with the segregation of state bathrooms (???) that it needs to pass clarifying legislation on the matter, that's one thing though I find it hard to believe the existing policy doesn't accomplish the job, as even back in the early 2000s, UND had dorm bathrooms segregated by sex and a unisex single bathroom for guests to the floor and there were never any issues at all during my tenure there. But section six should be struck entirely from this bill if the use of and segregation of bathrooms is the matter at hand and of concern.

I find it extremely telling that section six is the only section which does not explicitly state that the language should not prohibit the accommodation of trans or gender-nonconforming individuals. That the state would choose to make those accommodations in ALL of its other dealings with sex/gender segregation with the **SOLE EXCEPTION** of school sports calls all the more attention to the fact that this section is intended to be entirely discriminatory.

As I have said in my opposition of bills 1489 and 1249, trans kids are **THE MOST** in need of our support and the acceptance of their peers, and participating in school sports, being part of a team that corresponds with their gender identity is **EXACTLY** the kind of activity they should be **ENCOURAGED** to enjoy. This bill excludes, discriminates against, and further marginalizes a group of children already subject to bullying, abuse, and harassment for being brave enough to exist as their true selves. They deserve to be able to be part of teams that reflect the people they know themselves to be!!

NO ONE is asking for this bill, which seeks to solve problems that don't exist on every level, and **NO ONE** needs this bill, because the number of trans kids participating in school sports in this state is so vanishingly small that there is absolutely no reason for such an outsized investment in driving them out of sports teams designated for "Girls." As far as I can tell, the issues of legislating the use of bathrooms is only serving as a smokescreen in order to bypass the will of your constituents, who last session, made **EXTREMELY** clear our feelings in opposition to this kind of legislation. **IF** the legislature cannot pass this legislation honestly, perhaps it should reconsider the effort it has expended in writing these discriminatory and exclusionary anti-trans bills at all.

PLEASE, if you have no empathy for transgirls who are already struggling to find community and belonging in a state that has revealed itself to be (with every one of these bills revealed) **BEYOND** hostile to their existence, remember this: You cannot attack and target transgirls without allowing and encouraging the attack and targeting, the bullying and harassment, of **ALL** girls. For trans exclusionary people, there will always be a girl who is not feminine enough, who is too masculine to possibly be what she says she is, and she will **ABSOLUTELY** be harmed by legislation that codifies a means by which to challenge her gender identification in order to make room for someone who is performing their gender up to the arbitrary standard they've set which will do **FAR MORE** to hurt children across the state than allowing transkids to play grade school sports **EVER** could.

Just let the kids live! Let them play! Let them be part of teams and enjoy their childhoods on their own terms! There is absolutely no reason for the state to interfere in any of this.

As a mother of a transgender teen in the North Dakota Public School System, I strongly oppose HB 1473. To date, my son has had a positive experience with his public school providing him with bathroom accommodations. Prior to his transition, he struggled with mental health and frequently missed school. With the school's support of his transition, his mental health has improved greatly. He rarely misses school, is excelling academically with a 4.03, and is engaged in co-curriculars. If this bill moves forward, it would cause significant distress, increase symptoms of gender dysphoria, and make school an unsafe place for him to be. His anxiety and depression would deteriorate, and all of the progress made over the past few years lost. In short, this bill will harm the well being of my child. Please do not support this legislation and allow schools to make their own policies as it relates to restrooms, locker room, and shower rooms. This bill is harmful and discriminates against transgender people.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1473. I ask that you give this bill a Do Not Pass.

I am a public school educator and a 29 year resident of North Dakota. HB 1473 actively harms the students I serve and the people I love – family, friends, and community members.

All individuals deserve fair access to facilities. Decisions related to personal privacy are not ones to made in haste or with a broad brush. Ostracization and isolation does not create a healthy community.

Thank you for your time and consideration.

Sincerely,

Christopher Brown

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1473. I ask that you give this bill a Do Not Pass. The reason for this is that I question the purpose of the bill

This bill speaks of bathrooms and locker rooms, but also who is and who isn't allowed to play certain sports. According to Section 6 girls can play in any sport, boys can only play in boys sports. Why is this divide in existence?

The bill states in Section 7, subsection 3 that any administrator may provide "reasonable accommodation" for any transgender or non-gender-conforming person. With schools already being so underfunded, where will the funding come from to provide these "single-occupancy restroom or changing facilit[ies]"?

Thank you for your time, consideration, and service

Best regards,
-Jamie Teeples

Chairman Weisz and members of the House Human Services Committee,

My name is Maura Ferguson and I am writing this testimony as a resident of ND and independently from my employer. My views do not represent my employer. I write to you today as a community organizer, a mother, and as someone who cares very much about the LGBTQIA+ community.

I strongly oppose HB 1473 and urge you to do the same. Transgender and gender nonconforming people should have the right to use whatever restroom, bathroom, and/or locker room that correspond to their gender identity without the need for a reasonable accommodation request, as being transgender is not a disability and should not be treated as such. Moreover, making such a request could cause a transgender person to out themselves unnecessarily, which could put their safety at risk.

This bill is completely unnecessary, is rooted in fear, and is an attempt to legislate a complete nonissue. Lastly, this bill is part of a slew of bills aimed to harm LGBTQIA+ North Dakotans. Please don't participate further in this harm.

I urge you to vote Do Not Pass on HB 1473.

Thank you for your time, consideration, and for your dedication to ALL people in the state of North Dakota.

Maura Ferguson, LMSW
Grand Forks

House Bill 1473

Members of the Committee,

Thank you for considering this bill. I have two daughters who attend high school in the North Dakota school system, and this bill would help ensure their safety in the school locker rooms and bathrooms. I also have a son who is attending university in the North Dakota university system, and this bill would also ensure that he does not have to share bathrooms with the opposite gender.

I would not feel safe or comfortable using the restroom or locker room alongside a biological male, and I would be very upset if my daughters were ever in that situation.

I think it is time that the safety and comfort of the vast majority of girls and women, along with boys and men, be considered instead of catering the small amount of individuals who have gender dysphoria.

Thank you,

Joy Ankenbauer

Bowbells, ND

District 2

Dear Chair Weisz and members of the House Human Services Committee,
My testimony is in opposition to House Bill 1249. I ask that you give this bill a Do Not Pass. The reason for this is that it is harmful to our children and you are attacking the constituents that you are relying on to keep you in office. You are wasting the tax payers money attacking them and their children.

- a. Personal Impact: This bill impacts the people I care about, because I have children who are non-conforming and they have friends who are non-conforming.
- b. Unintended Consequence: This bill creates inconsistency with interstate competition and could invite lawsuits, other consequences may include children harming themselves or even attempting suicide. Both things I will not hesitate to make known the role you played in causing this.

Thank you for your time, consideration, and service to our state
Best regards,
Rody Hoover Schultz

January 23, 2023

Chairperson Lee and Committee Members,

I strongly urge a Do NOT Pass on HB 1473. This proposed bill places unnecessary, restrictive, and cost-ineffective regulations upon correctional facilities, penitentiaries, domestic violence assault organizations, higher education institutions, and schools. The bill prohibits these facilities from establishing the best policies for the population they serve.

I urge a Do NOT Pass on HB 1473.

Sincerely,
Gretchen Deeg
Bismarck, ND



North Dakota House of Representatives

#15936



STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

Representative SuAnn Olson

District 8
17763 Highway 83
Baldwin, ND 58521-9724
solson@ndlegis.gov

COMMITTEES:

Judiciary
Agriculture

January 22, 2023

Testimony Re: HB 1473

Thank you Mr. Chairman and Members of the Human Services Committee. My name is Rep. SuAnn Olson.

Late last year I attended a meeting of concerned women and learned of a "Bill of Rights" that was moving across our nation. Don't we already have one of those? Well yes, but the Bill of Rights that has been circulating is a Women's Bill of Rights. Who would have thought that we need one? But we do. Women struggled and sacrificed for decades to gain equal rights. It took our country 140 years before women won the right to vote! And here we are, in 2023, more than a hundred years later, needing to fight for some of our basic rights. Women and girls are needing to fight for their right to safety and privacy.

Here are some excerpts, some truths, in the Women's Bill of Rights that I will be introducing as a Resolution later this week:

Biological differences between the sexes mean that males are, on average, bigger, stronger, and faster than females;

Biological differences between the sexes leave females more physically vulnerable than males to specific forms of violence, including sexual violence;

Females have historically suffered from discrimination in education, athletics, and employment;

Biological differences between the sexes are enduring and may, in some circumstances, warrant the creation of separate social, educational, athletic, or other spaces in order to ensure safety and/or to allow members of each sex to succeed and thrive;

Inconsistencies in court rulings and policy initiatives with respect to the definitions of 'sex,' 'male,' 'female,' 'man,' and 'woman' have led to endangerment of single-sex spaces and resources, thereby necessitating clarification of certain terms,

HB 1473 embodies the practical application of this Bill of Rights. It essentially requires that separate restrooms, shower rooms, and locker rooms be used only by that facility's designated sex. This applies to correctional facilities, the youth correctional center, the penitentiary, domestic violence sexual assault facilities, college dormitories and public schools. The bill does not prohibit reasonable accommodations from being made for others.

This is the fourth bill that you have heard this morning that touches on the same topic. I am open to amending duplicative portions out of this bill or in some manner combining the bills into one or several. What is paramount is that we protect women and girls.

Note that HB 1474, which you will hear tomorrow, includes definitions of sex, male and female, and father and mother so that there is no confusion under state law when these terms are used. Certainly, if the committee recommends that they be included in this bill, I am open to that. If HB 1474 passes, it may make sense to reference the NDCC definitions in this bill.

We don't have to look very hard to find news stories about the danger women face when transgender individuals use the same facilities as women or girls. Certainly, the Loudon County VA school was in the news for months as a result of two incidents of girls being assaulted or raped by a male using a girls' bathroom. About a year ago, a women's prison in New Jersey was reported by several news organizations to have several inmates who had given birth as a result of being housed with males who claimed to be transgender. This is outrageous and beyond common sense.

Women have a right to Privacy and Safety. This is not too much to expect. I have 9 granddaughters. The oldest is nearly 10 and will be moving on to middle school soon. I want her to be safe in a restroom. She has a right to not undress in a girls' locker room in front of males with penises. She has a right to not view penises when she uses the restroom or a locker room. She has a right to be safe. She has a right to her own privacy.

Please. I urge you to Vote Yes on HB 1473.

Dear Chair Weisz and members of the House Human Services Committee,

My testimony is in opposition to House Bill 1473. I ask that you give this bill a Do Not Pass.

I don't believe this bill solves or changes any identified problem within our institutes. It creates a legislative oversight to the century code on regulation of gender spaces that appears to be completely unnecessary micro-managing. It may have unintended logistical consequences for individuals with "X" markers on identification cards or facilities that may require some co-ed spaces due to space and logistics.

As I look at the research impacting suicidality for LGBTQ+ populations, we know discrimination has a huge impact on mental health and accessibility for services. We know that when trans individuals can't use the facilities appropriate for them, they lose opportunity. If they can't use bathrooms appropriate for them they stop drinking water. That said, this bill at present doesn't impact LGBTQ+ individuals to my knowledge. This bill is currently just nonsense.

While it should not pass committee as it stands, I would offer any amendments to this legislation that would restrict LGBTQ+ individuals should be taken with extra consideration for the legality, impact, and opportunity they have on this demographic.

One thing that is of great concern to me is privacy, especially in bathrooms and locker rooms. I would recommend rewriting this entire piece of legislation to focus on privacy. To ensure each individual can experience privacy in these spaces. If we achieve that, we make spaces accessible for all populations without worry who is trans, cis, male, female, or non-binary. We all get to enjoy privacy, we sidestep issues of accessibility, and we all benefit in that system.

Take this time to do something that would be fantastic for all of us. Turn this piece of legislation into something with meaning and impact. Short of that, I recommend Do Not Pass.

Thank you for your time, consideration, and service to our state

Best regards,
Faye Seidler

January 23, 2023

Opposition to House Bill 1473

Dear House Members, My testimony is in opposition to HB 1473. I urge you to give this bill a **DO NOT PASS**.

Gender dysphoria (previously gender identity disorder), according to Diagnostic and Statistical Manual of Mental Disorders are defined as a "marked incongruence between their experienced or expressed gender and the one they were assigned at birth." People who experience this turmoil cannot correlate to their gender expression when identifying themselves within the traditional, rigid societal binary male or female roles, which may cause cultural stigmatization. This can further result in relationship difficulties with family, peers, friends and lead to interpersonal conflicts, rejection from society, symptoms of depression and anxiety, substance use disorders, a negative sense of well-being and poor self-esteem, and an increased risk of self-harm and suicidality. Patients with this condition should be provided with psychiatric support. Hormonal therapy and surgical therapy are also available depending on the individual case and patient needs. (Garg G, Elshimy G, Marwaha R. Gender Dysphoria. [Updated 2022 Oct 16]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2022 Jan.)

Transgender people (including non-binary and third gender individuals) have existed in cultures worldwide since ancient times. The modern terms and meanings of "transgender", "gender", "gender identity", and "gender role" only emerged in the 1950s and 1960s. Many people in western societies, particularly the United States, have been unaware or ignorant of the existence of people we call transgender today. **Western societies have had an unfortunate history of dismissing or persecuting groups of people who were outside what the majority of the population considered "normal".**

I cannot understand how so many people in this state fail to take the time to understand transgender people or the LGBT community as a whole. The disturbing rhetoric, largely rooted both in bigotry and ignorance, that I hear on an almost daily basis make me sick to my stomach. Homosexuality was considered a mental disorder for decades by the western medical community. Homosexuals are still are executed in many parts of the world today. Homosexuality is no longer considered a mental disorder because it is not a mental disorder. It is a natural variation of human sexuality. The fight for the rights of transgender people today is no different than the gay liberation movement of the late 1960s through the mid 1980s. Transgender people are not going away and deserve to be fully embraced by our society. The confused, hurtful, vile and dehumanizing language that a concerning amount of people use, particularly when discussing transgender members of our community, is absolutely disgusting and needs to stop. Trans people should not be referred to with language such as: anomalies, exceptions, deformities, mentally ill, etc. Similar language has been used throughout history to ostracize groups of people who are different from the majority of the population in an attempt to dismiss them as freaks and perverts for simply trying to exist in the world. **Trans people are not a threat to society.**

People need to understand that being transgender, albeit rare, is also a natural variation among humans. Transgender people deserve respect and access to healthcare just like everyone else. I frequently hear unkind language used by my fellow North Dakotan's regarding trans people, gay people, lesbians, etc. The recent rise in, what I call, anti-trans-panic is largely driven by political right-wing media outlets such as FOX News; far-right outlets such as Newsmax and One America News Network; and other outright hateful organizations such as The Daily Wire (founded in 2015 by religious fundamentalists Ben Shapiro and Jeremy Boreing). The latter organization recently produced a disgusting, misinformed, hateful, and dishonest film titled "What is a Woman". Anyone who has had any exposure to this film should have been able to easily recognize the intentionally dishonest jump-cut editing tactics and the film's overtly cartoonish condescending tone. It was

one of the worst pieces of “journalism” ever produced in the modern era. Anyone with a basic level of critical thinking and media literacy would have been able to identify this film for what it was. Unfortunately, too many people are unwilling to think critically and question any of their preconceived notions of what people are, how people interact in society or how the world actually works. **The existence of transgender people is not a political issue. It is a medical and human rights issue.**

I have heard many people express concerns about irreversible side effects about medical treatments for transgender youth. What people are ignoring is the extensive diagnostic testing and specialized counseling that occurs when determining whether or not a child is transgender in the first place. Children who are suspected of being transgender begin by transitioning socially. This can include letting the child wear clothes typical of the opposite gender, referring to the child by their preferred pronouns, referring to them a different name, etc. Children during this stage of “social transition” are monitored closely by their family, community and their health care specialist. These children are not coerced in any way to maintain their behavior. Evaluation continues until the child reaches a particular stage of puberty and at that time medical intervention can become necessary. The effect of puberty blockers, within the first few years of taking the medication, is indeed reversible and would be stopped if there was evidence that is in the best interest of the child to continue through the puberty that aligned with their assigned gender (sex) at birth. If this is not the case then the child could proceed with further medical intervention which would allow their body to develop in a manner consistent with their gender identity. By contrast, allowing a transgender child to physically develop in a manner consistent with their assigned gender (sex) would indeed cause many irreversible physical characteristics. In adulthood, a transgender person, whose body was developed by their natural puberty, could have a very difficult time transitioning into a body consistent their preferred gender identity. Certain characteristics such as their voice, bone structure, etc., can make it difficult, if not impossible, for them to blend into society and live as the gender they identify as. **The diagnostic and treatment processes need to be left to medical professionals.**

Suicide is the second leading cause of death among people from the ages of ten to twenty-four. Lots of young people think about it. LGBT people, in that age group, are almost five times as likely to have attempted suicide than their heterosexual peers. What is worse is that LGBT youth who report coming from non-accepting and non-supporting families are eight times more likely than the other LGBT youth to have attempted suicide. So, we’re talking about people who are eight times more likely than the people who are already five times more likely than the rest of the population in that age range who may attempt to kill themselves. This is exacerbated even further by people on TV who attribute the suicidal ideation of LGBT people to a mental disorder that these children, and young adults, don’t even have. Everyone in this country deserves access to healthcare. Transgender youth and adults are no exception. HB 1301 seeks to further reduce the limited Healthcare that American’s have access to in the first place. Decisions concerning the health of all American’s need to be kept between the patients, their loved ones and their doctors. **The government has no business intervening in the medical care that people receive from their doctors and any attempt to do so is a massive authoritarian overreach of the government.** Medical care needs to be handled by medical experts who are trained to follow the scientific evidence wherever it leads.

Please be kind, open minded and understand that the children being targeted by this bill do not need your help. They are already loved and in good hands. There is no need to intervene in their medical care. This bill will cause far more pain and suffering in the lives of people who don’t deserve it.

I strongly urge you to oppose HB 1473.

Shawn Nixon

Dear legislators of North Dakota

I plead to you to vote "a do not pass" on these shameful bills Including HB 1473. The more of these bills that are hatefully attempted to pass makes it harder and harder for me to try and sympathize with the individuals attempting to pass these. I'm sure a lot of these letters your gonna be reading from me are gonna be very similar, but these bills are all the same white washed hate repeated again and again so why should I have to create wholly unique responses when they can't even fathom up unique bills instead of the same shitty words in different flowery arrangements? Trans kids do exist, Trans adults exist, and the LGBTQ is not your enemy. Members of this legislation claim to be sheltering kids from things they "needn't worry about " while enforcing a stereotype upon them that damages their opinions of themselves and ruins their chances at safer transitions and happy social lives. In a perfect world people would be allowed to social transition first since it is the safest first step and a very good indicator for them to know if is right for them, Followed by blockers (Alone if below a certain age to delay or slow Puberty till enough time is passed to know if it is ok to proceed) followed by HRT. After some time on hormones evaluating if surgery is what they want then let them.

But even so, if you agree or not, this bill is aimed at more than kids. One of the places that is targeted in these words is dormitories you know like COLLEGE where people become adults and find themselves. Especially when they are already 18 and can begin the transition without their parents express consent. All this does is enforce rules that should be up to the Campus/Dorms/Gym itself. As for sports, a trans female on hormones is subject to muscle atrophy, and if girls can play on guys teams why not vice versa if they are physically losing muscle mass from estrogen? If you as the state want to separate Juvie by gender, don't make the trans/nonbinary showers and restrooms optional accommodations, Make them mandatory seeing as the bill seems to claim that it is so concerned with safety. And believe me, They should be protected for who they are and wish to be. All this bill does is prove the writers want to just make X's and O's out of the whole alphabet.

Trans, Non Binary and Intersex people exist, and they have existed for longer then members of this legislation or even our state. This two gender lie told around the table is significantly more complicated than that. Biology is complex, wonderful, and scary sometimes. Did you know DNA is not a Binary system? Gender is more than yes or no. And I know you are all more compassionate than this. This is all similar to the Left Handed issues of our not so distant past. People are born left handed, and after we as a nation stopped punishing and forcing them to stop doing what came naturally to them, Their lives improved.

I was Born and raised in North Dakota, I have lived here my whole life. This shallow targeted bigotry is not us, We are more kindly and passive aggressive gossipers who just make up an excuse about going to the lake rather than doing something we don't wanna do. I again urge, beg and plead with you to consider this bill and vote for a Do Not Pass. See it for what it is as little more than a band wagon of hysterics.

-Nate Brown

To The Legislators of North Dakota,

This letter encompasses the historic number of LGBTQ+ bills and measures being brought among the committee. As a member of the community, I have seen firsthand the hatred and bigotry that misguided policies like these can not only permit, but encourage.

To have so much legislature brought forward under the guise of religion in a nation that was founded on the basis of separation of church and state appalls me. I will let the medical and psychological experts speak out instead of me on the misguided pseudoscience quoted in the legislature. However, as someone that was born into the Catholic church, baptized into the church, and gone through the sacraments of First Communion and Confirmation, the primary tenet of the church should be love.

Love thy neighbor: Your gay neighbor, your trans neighbor, whoever your neighbor may be.

Please, choose love; do not pass these bills rooted in fear and hatred.

Brian Murphy
Grand Forks

“My name is Wade Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1473.

I would prefer single person showers for all. One at a time so that everyone can have some darn privacy! If that is not feasible, then single sex shower / locker room facilities are the way to go.

Ladies don't want a confused dude in their private quarters. And a trans woman who wants to be a man doesn't really want to be in a room full of undressed males either. That just spells disaster.

I urge you to support the passing of House Bill 1473.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Wade Pulkrabek

“My name is Lisa Pulkrabek and I reside in District 31. I am asking that you please render a DO PASS on HB 1473.

I really feel compassion for those who suffer with gender dysphoria. Their lives have got to suck. However, women are women and men are men.

I would prefer single person showers for all. One at a time so that everyone can have some darn privacy! If that is not feasible, then single sex shower / locker room facilities are the way to go.

Ladies don't want a confused dude in their private quarters. And a trans woman who wants to be a man doesn't really want to be in a room full of undressed males either. That just spells disaster.

I urge you to support the passing of House Bill 1473.

Thank you for your consideration of this important matter and for your service to the state of North Dakota.

Lisa Pulkrabek

**Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1473
in the Sixty-eighth Legislative Assembly of North Dakota**

Dear Chairman Weisz and members of the House Human services Committee,

I am writing as a citizen and believe HB1473 is beneficial legislation. This seems common sense and gives order to situations that have as of late become very disordered. Please give HB1473 a Do Pass.

Thank you,

Doug Sharbono
1708 9th St S
Fargo, ND 58103

Testimony in Support of HB 1473

Dr. Daniel Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
January 23, 2023

Good morning Chairman Weisz and honorable members of the House Human Services Committee. My name is Daniel Scrimshaw and I serve as an Emergency Physician in Minot, ND and as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1473 and I respectfully request that you render a "DO PASS" on this bill.

The government of North Dakota has a great responsibility to protect its female citizens. HB 1473 is a common sense bill that should be passed. Failure to pass this bill would be irresponsible and hazardous to the women of North Dakota.

Thank you for the opportunity to testify on this important matter.

Testimony in Support of HB 1473

Dr. Lovita Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
January 23, 2023

Good morning Chairman Weisz and honorable members of the House Human Services Committee. My name is Lovita Scrimshaw and I am a physician in Minot, ND and also serve as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1473 and I respectfully request that you render a "DO PASS" on this bill.

This bill would protect genetic females from having genetic males in private female spaces, such as restrooms and locker rooms. This protects a genetic female's safety, privacy, and modesty. This is a reasonable bill and protects the rights of women (genetic females) and I strongly support this bill.

Thank you for the opportunity to testify on this important matter.

January 24th, 2023

From: ND Psychiatric Society

Re: In Opposition to HB 1473

Esteemed Chairman Weisz and Committee Members,

My name is Gabriela Balf, I am a psychiatrist in Bismarck and a Clinical Associate Professor at UND, and I speak on my behalf.

Have you gone to the bathroom while in the Capitol yet?

Let me tell you what my transgender patients tell me: they don't go. They avoid going to the bathroom and risk to be **bullied or assaulted** (72.7% ND kids report not feeling safe in school, 62% report bullying on the school property). This bill will only increase their distress, while not addressing any real problems.

The literature presents the consequences of the current bathroom/locker room gender-segregation, which this bill will enshrine into law:

- Kids don't drink fluids all day long and they get **dehydration**
- They may **faint**
- Increased rates of **urinary tract infections**
- Increased rates of **kidney stones**
- Their physical education performance decreases when dehydrated or having a full bladder.
- Their academic performance decreases (reports of **lower GPA**) decreases when dehydrated or having a full bladder
- They start skipping school, or may simply **drop out of school**.
- The rates of depression, suicide attempts and substance use disorders increase, aggravating an already **significant public health problem**.
- The kids who have the possibility **leave the state**.
- Their peers and families suffer.

There have been no reported instances of transgender children/youth assaulting cis children in the bathroom or locker room circumstances.

There are staggering rates of verbal, physical and sexual assault on transgender children/youth.

In 2021 there were at least 50 homicides where the victims were transgender. Since these crimes have been tracked (documented in police records), there were 400+ crimes, and 3/4 of victims are 35 years and younger.

Therefore: Why persist in increasing minority stress for a small number of our children? When we face so many urgent issues related to the mental health of children in our state, why don't we spend your valuable time thinking about productive ways to address those, instead of wasting your days of selfless volunteering on **bills that are proven to harm and/or kill some of our children**, bills that will stain your legacy?

I urge you to be thoughtful when you vote for all the transgender bills that are coming your way, and listen to science. On behalf of our patients, we thank the House Human Services 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 Past-President

World Professional Association Transgender Health member



Testimony of Mia Halvorson

In Opposition to HB 1473: "Relating to participation in school-sponsored athletic events exclusively for males or females, the use of restrooms, locker rooms, and shower rooms in a public school, a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females."

January 24th, 2023

Dear Committee Members,

This bill is a blatant form of discrimination and directly violates the executive order referred to as "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" signed by Joseph R. Biden on January 20th, 2021. The first two lines of this bill 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." This includes transgender individuals.

This bill provides tons of questions, including an overall lack of enforcement. What if a school hosts a girls' basketball game but only has one girls' locker room within the whole school? They can't use the men's locker room to change, as it is designated solely for men. You may say "let's put a piece of paper or something over it to designate who utilizes this locker room." What stops someone with true intent on hurting someone (such as someone intending on committing sexual assault) from putting a piece of paper over it to state that I can use it? How will you prove at an athletic event that someone who is trans has entered the bathroom not correlating to their sex assigned at birth if they appear that sex? Are we going to require DNA testing to enter a restroom within a school? Are we outright going to close all restrooms off so this isn't an issue? Are we going to install cameras inside each stall so we can see penises in women's restrooms and vaginas in men's restrooms? This is an unenforceable bill.

What about facilities sorted based on the gender on your birth certificate? What stops anyone from the states that allow changing your gender marker on your birth certificate to be placed in the wrong facility based on this law? On college campuses, how will you learn the sex assigned at birth of every college student when colleges don't require that information be provided? These questions go on and on.

I ask that you vote NO on HB 1473 for the reasons listed above, the reasons other individuals testifying provide, and the hundreds of additional reasons I could provide.

Thank you for your time and the opportunity to share this testimony.

-Mia Halvorson



Testimony Supporting House Bill 1473

Jacob Thomsen, Policy Analyst
North Dakota Family Alliance Legislative Action
January 24, 2023

Good Morning Chairman Weisz and honorable members of the House Human Services Committee. My name is Jacob Thomsen and I am a Policy Analyst for North Dakota Family Alliance Legislative Action. I am testifying on behalf of our organization in support of House Bill 1473 and respectfully request that you render a "DO PASS" on this bill.

We understand that some individuals choose to identify themselves at various places on the gender spectrum, apart from their biological sex. That is certainly their right. The problems come in when their gender identification causes harm to others around them, whether physical, emotional, or psychological harm. For that reason, we believe that biological males and females should use restrooms, locker rooms, and shower rooms intended for their sex, not gender.

Parents should not have to worry about their child seeing the genitals of the opposite sex in a locker room, or shower room at a school. And this issue cannot simply be ignored, either. Physical Education is a required course in curriculum, and the issue will come up one way or another, since they have to use the locker rooms.

We are not naïve; we realize the internet exists where anyone can see any sort of sexual content imaginable. However, that is a choice to view that content, but having someone of the opposite sex suddenly strip in front of you in a locker room apparently is not your choice, by today's standards. Further, seeing an image on the internet is dramatically different to interacting with a real person.

This likely harm applies to adults as well. Without this bill, it is entirely possible that women and girls might have to share bathrooms, locker rooms, and showers with men. No girl or woman should ever be forced to use the bathroom, shower, or undress next to a man in a public space. North Dakota Family Alliance Legislative Action supports the right to safety and privacy for all North Dakotans.

Section 6 of this bill refers to girls' fairness in sports. While we already testified on House Bills 1249 and 1489 this morning, we appreciate this language in ensuring a level playing field for girls in our state.

With particular reference to daughters, why should they be subjected to seeing boys expose themselves, or be robbed of hard-won sport achievements by boys posing as a girls. When did our society decide that our daughters don't matter?

North Dakota Family Alliance Legislative Action believes in protecting the dignity of women and children, their right to privacy, and their physical and emotional wellbeing. For these reasons, we request that you render a "DO PASS" on this bill.

Thank you for the opportunity to testify and I am happy to stand for any questions.



**Kayla Schmidt – Interim Executive Director, North Dakota Women’s Network
Opposition – HB 1473
North Dakota House Human Services Committee**

January 24, 2023

Dear Chair Weisz and members of the House Human Services Committee,

My name is Kayla Schmidt and I am the Interim Executive Director of the North Dakota Women’s Network. We are a statewide organization with members and advocates located across North Dakota. I am providing testimony in opposition to HB 1473.

Within our mission to improve the lives of women, we have three areas of focus: leadership, opportunity, and equality. HB 1473 is a direct conflict to the positive outcomes we work to create through those areas of focus.

HB 1473 adds needless language regarding the use of restrooms, locker rooms, and shower rooms in a public school, a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary, as well as prohibit transgender students from participation in athletic events.

Bills like HB 1473 create an environment of discrimination and exclusion in North Dakota institutions. It only serves to interfere and create confusion about policies that that are best handled by those working in these environments. Whereas we often hear about the need to invest in North Dakota’s economic growth, legislation like this is a deterrent for modern families and workers to want to live or work in our state.

Similar attempts to pass discriminatory legislation in North Dakota has strongly been opposed by community leaders, athletic organizations, medical experts, social workers, parents, educators, students, faith leaders, representatives of local Chambers of Commerce and tourism organizations, and the LGBTQ+ community.

The North Dakota Women’s Network stands with these groups and asks that HB1473 receives a Do Not Pass Recommendation.

Thank you.

Kayla Schmidt
director@ndwomen.org

As a trans person who grew up in the state of North Dakota, I experienced a large amount of discrimination and bullying in school there. I spent time in a psychiatric ward for my suicidal ideation when I was just 18, and that was long before any legislators chose to make it their life mission to craft laws specifically targeting me and people like me. Many trans students don't come out as transgender when they are in the public school system, but the lasting impact of your bigotry will harm them the rest of their lives. Suicidality in trans youth massively increases in states with youth sports bans, even if the bans only apply to four or five individual students.

The sponsors of this bill lack compassion and moral integrity, and if this bill passes, they should be made to watch the funerals of every trans child who commits suicide as a result of the intentional targeting of the trans community in North Dakota.

Thank you for your time,
Reed Eliot Rahrlich

Olivia Data
Testimony on HB 1473
January 24, 2023

RE: Testimony in Opposition to HB 1473

Good morning, Chairman Weisz and members of the committee. My name is Olivia Data, I am the Youth Action Council Coordinator for the North Dakota Women's Network, and I urge you to vote "Do Not Pass" on HB 1473.

The Youth Action Council is an organization that believes in empowering younger generations to participate in their communities and contribute to a brighter future. This mission includes transgender youth. Prohibiting transgender people from using the restrooms in which they feel safe is incredibly violating and incredibly dangerous.

By all accounts, transgender children pose no threat to their cisgender peers. I understand there are concerns about allowing transgender girls in women's restrooms especially, but these concerns are unfounded. A cisgender man seeking to harass women is not the same as a transgender student seeking to use a restroom in which they feel safe, and transgender girls who are vulnerable now should not have to suffer for future, hypothetical behaviors of grown men.

If we want to build a community of North Dakotans who are compassionate, healthy, and able to pursue happiness, this bill must not pass. Transgender and cisgender people alike deserve to exist as their authentic selves in a community that respects them.

I urge you to vote "Do Not Pass" on HB 1473. Thank you for your time, and I am happy to answer any questions you may have for me regarding my testimony.

Olivia Data
Youth Action Council Coordinator
District 35
Bismarck, North Dakota



Volume 29 | Issue 2


Article 4

8-18-2022

Beyond Bostock: Title IX Protections for Transgender Athletes

Joseph Brucker

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/mslj>

 Part of the [Education Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Human Rights Law Commons](#), [Labor and Employment Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Joseph Brucker, *Beyond Bostock: Title IX Protections for Transgender Athletes*, 29 Jeffrey S. Moorad Sports L.J. 327 (2022).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol29/iss2/4>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

BEYOND BOSTOCK: TITLE IX PROTECTIONS FOR TRANSGENDER ATHLETES

I. INTRODUCTION: WHAT IT MEANS TO BE A TRANSGENDER ATHLETE

“Gender” and “sex” are sometimes erroneously conflated and used interchangeably, but in fact, the terms embody two distinct concepts.¹ Much of western society now distinguishes “sex,” referring to the physiological distinctions between male and female individuals based on anatomical and biological factors, from “gender,” the socially constructed amalgam of behaviors, identities, and expressions of identity.² While some individuals’ gender identities

1. See, e.g., *Sex & Gender*, NIH OFF. OF RSCH. ON WOMEN’S HEALTH, <https://orwh.od.nih.gov/sex-gender> [<https://perma.cc/V9X5-U49D>] (last visited Nov. 6, 2021) (“‘Sex’ refers to biological differences between females and males, including chromosomes, sex organs, and endogenous hormonal profiles. ‘Gender’ refers to socially constructed and enacted roles and behaviors which occur in a historical and cultural context and vary across societies and over time.”); see also Virginia Prince, *Sex vs. Gender*, 8:4 INT’L J. OF TRANSGENDERISM 29, 29 (2005) (“Sex and gender are not the same thing. We are born into a society that is highly polarized and highly stereotyped, not only into male and female, but into man and woman. Man and male, female and woman are considered synonymous pairs of words for the same thing . . . But it is not so. Sex and gender are not the same thing.”); Krista Conger, *Of Mice, Men and Women*, STAN. MED. (Spring 2017), <https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html> [<https://perma.cc/2LS4-2NE7>] (explaining how “gender” is often erroneously used by medical researchers instead of “sex”); Tim Newman, *Sex and Gender: What’s the Difference?*, MED. NEWS TODAY (May 11, 2021), www.medicalnewstoday.com/articles/232363.php [<https://perma.cc/5XEE-FT5N>] (describing shifting public perception of sex and perception of gender over time while distinguishing between those terms).

2. See generally *Gender and Health*, WORLD HEALTH ORG., www.who.int/gender-equity-rights/understanding/gender-definition/en/ [<https://perma.cc/HKC4-W37Z>] (last visited Sep. 22, 2021) (elaborating on differences between sex versus gender). See also *What is Gender? What is Sex?*, CANADIAN INST. OF HEALTH RSCH., <https://cihr-irsc.gc.ca/e/48642.html> [<https://perma.cc/A8UR-YZ6E>] (last visited Nov. 4, 2021) (“Gender refers to the socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people Gender identity is not confined to a binary (girl/woman, boy/man) nor is it static; it exists along a continuum and can change over time. There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society.”); *What is the Difference Between Sex and Gender?*, OFF. FOR NAT’L STAT. (Feb. 21, 2019), <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21> [<https://perma.cc/S3SX-7NJT>] (providing UK government’s definition of sex as referring to biological aspects of individuals determined by anatomy and gender as social construction relating to behaviors, and attributes based on masculinity or femininity).

correspond with their biological sex, this is not always the case.³ Moreover, there is no commonly accepted definition of “sex” or method for distinguishing between sexes, and not every definition or method of sex determination consistently produces a clear, male-female binary.⁴ In response to historical practices among various international sporting organizations that adopted so-called “objective” methods for rooting out “impostors” or intersex athletes, some experts and activists have argued instead for more fluid definitions of sex determined not by any one set of physical features but by a confluence of genetic, hormonal, and physiological factors.⁵ Ultimately, these experts assert that any purportedly objective test or guideline claiming to accurately distinguish between male and female athletes is inevitably flawed due to the inherently amorphous borders between sexes.⁶

3. See, e.g., *Gender Identity, Gender-Based Violence and Human Rights*, COUNCIL OF EUR., <https://rm.coe.int/chapter-1-gender-identity-gender-based-violence-and-human-rights-gende/16809e1595> [<https://perma.cc/R3SQ-RQ3H>] (last visited Nov. 4, 2021) (“Gender is not necessarily defined by biological sex: a person’s gender may or may not correspond to their biological sex. Gender is more about identity and how we feel about ourselves. People may self-identify as male, female, transgender, other or none (indeterminate/unspecified). People that do not identify as male or female are often grouped under the umbrella terms ‘non-binary’ or ‘genderqueer’, but the range of gender identifications is in reality unlimited.”).

4. See J. Brad Reich, *A (Not So) Simple Question: Does Title IX Encompass “Gender”?*, 51 J. MARSHALL L. REV. 225, 227 (2018) (finding gonadic criteria based on reproductive glands is not only factor upon which definition of biological gender rests). Other definitions of sex include genetic sex based on X and Y chromosome combinations, anatomical sex based on the appearance of the genitalia, and hormonal sex based on predominant hormones. See *id.* at 228 (providing overview of various ways of defining “sex”). These commonly accepted methods of defining sex do not lend themselves to neat categorizations of sex along a male-female binary. See *id.* at 227 (explaining chromosomal criteria make definition of sex more nuanced). See generally Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 288–291 (Feb. 19, 2015) (“[I]f biologists continue to show that sex is a spectrum, then society and state will have to grapple with the consequences, and work out where and how to draw the line . . . [I]f the law requires that a person is male or female, should that sex be assigned by anatomy, hormones, cells or chromosomes, and what should be done if they clash? . . . If you want to know whether someone is male or female, it may be best just to ask.”).

5. See Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> [<https://perma.cc/E7RE-82E4>] (explaining various factors forming basis for one’s sex, ways in which international sports organizations have attempted to define or distinguish sex over time, various experts’ finding of criteria to be inadequate, unfair, not founded in science); see also Christie Aschwanden, *The Olympics Are Still Struggling to Define Gender*, FIFTYTHREE (June 28, 2016), <https://fivethirtyeight.com/features/the-olympics-are-still-struggling-to-define-gender/> [<https://perma.cc/VM95-GNE3>] (describing debate over testosterone limits versus chromosomal tests for determining sex or use of gender identity, and tradeoffs of various approaches).

6. See Padawer, *supra* note 5 (“Relying on science to arbitrate the male-female divide in sports is fruitless . . . because science could not draw a line that nature

The increased visibility of transgender athletes and state laws meant to curb their participation in athletics have placed issues of sex and gender at the center of the larger legal, political, and cultural debate.⁷ Transgender (or “trans”) individuals are those whose gender identity differs from the gender they were thought to be at birth.⁸ An increasing number of high school and college-aged individuals are identifying as transgender, and these students and activists are challenging educators and lawmakers to rethink gender as universally fixed at birth.⁹ While transgender individuals generally have enjoyed increased visibility and acceptance in recent years, the transgender community still faces obstacles in gaining access to competitive sports.¹⁰ On July 14, 2021, for example, Texas passed SB 2, a bill that would ban transgender women and girls from par-

itself refused to draw.”); *see also* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/5WGW-2Z73>] (describing some experts’ view of futility of sex determination tests based on genetics or appearance of genitalia as well as sordid history of tests employed by International Olympic Committee).

7. *See generally* Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There are Two Almost Irreconcilable Positions*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/6T72-F4QJ>] (describing increased acceptance of transgender athletes amid increased resistance from some competitors, some lawmakers).

8. *See Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 19, 2016), <http://www.transequality.org/issues/resources/transgender-terminology> [<https://perma.cc/7L6A-2CU2>] (defining basic terminology, commonly used acronyms); *see also* Jaclyn M. White Hughto et al., *Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions*, SOC. SCI. & MED. 147, 222–231 (2015) (finding transgender is umbrella term used to define individuals whose gender identity or expression differs from culturally-bound gender associated with one’s assigned birth sex, is defined by transgender individuals, is expressed in variety of ways); Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 SEXUALITY RSCH. & SOC. POL’Y. 60, 60 (Dec. 2007) (finding “transgender” has no singular, fixed meaning but is largely held as inclusive of identities or experiences of some or all gender-variant, gender or sex-changing, gender-blending, gender-bending people).

9. *See NCAA Inclusion of Transgender Student-Athletes*, OFF. OF INCLUSION OF THE NAT’L COLLEGIATE ATHLETIC ASS’N, Aug. 2011, at 1, 2 (providing guidance to NCAA athletic programs on how to ensure transgender student-athletes fair, respectful, legal access to collegiate sports teams based on current medical, legal knowledge); *see also Model School District Policy on Transgender and Gender Nonconforming Students*, NAT’L CENT. FOR TRANSGENDER EQUAL. (GLSEN), (Sept. 2018), at 1, 2 (providing education lobbying group’s model policy in which individuals determine gender identity for themselves, rejecting medical, legal, or other proof of gender identity).

10. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 272 (2013) (providing background on struggles faced by transgender athletes).

ticipating in sports consistent with their gender identity.¹¹ In the 2020–21 legislative session alone, more than seventy-five bills were introduced throughout the country that would bar transgender students from playing school sports on teams that conform with their gender identity.¹² Some proposals go so far as to suggest criminal penalties if transgender athletes participate on teams consistent with their gender identity.¹³ Notably, sixteen states have passed legislation banning transgender women and girls from participating on teams that conform to their gender identity.¹⁴ Those in favor of these laws often express fears that allowing transgender women and girls to participate in high school and collegiate athletics will jeopardize the existence of women’s sports generally.¹⁵ Others believe transgender participation in athletics does not spell an end to women’s sports but will actually enhance access to it.¹⁶

Moreover, the requisite gender “policing” procedures suggested by some state bills have been described by various international human rights organizations as both discriminatory and a

11. See Wyatt Ronan, *Texas Senate Passes Anti-Transgender Sports Ban Bill*, HUM. RTS. CAMPAIGN (July 15, 2021), <https://www.hrc.org/press-releases/texas-senate-passes-anti-transgender-sports-ban-bill-2> [<https://perma.cc/4BLG-QS9E>] (detailing recent state action both within Texas, within other states, barring transgender girls, women from participating on sports teams in conformity with their gender identity).

12. See Dan Avery, *Biden Administration Sends Trans Students a Back-to-School Message*, NBC NEWS (Aug. 19, 2021), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/biden-administration-sends-trans-students-back-school-message-rca1724> [<https://perma.cc/R6Q7-EER2>] (describing largely positive response to Biden Administration’s executive order by transgender activists).

13. See Elizabeth Sharrow et al., *States Are Still Trying to Ban Trans Youths from Sports. Here’s What You Need to Know*, WASH. POST (Jul. 26, 2021), <https://www.washingtonpost.com/politics/2021/07/26/states-are-still-trying-ban-trans-youths-sports-heres-what-you-need-know/> [<https://perma.cc/BF8Q-AVB5>] (highlighting number of state legislators with proposed bills targeting trans youths).

14. See *K-12 Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> [<https://perma.cc/5VFG-J24C>] (last visited Sep. 6, 2021) (listing states with laws banning transgender students from participating in sports consistent with their gender identity with temporary injunctions blocking enforcement in Idaho, West Virginia).

15. See Abigail Shrier, *Joe Biden’s First Day Began the End of Girls’ Sports*, WALL STREET J. (Jan. 22, 2021), <https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066> [<https://perma.cc/F6MF-HKU4>] (arguing President Biden’s January 20, 2021 Executive Order will result in stripping all Title IX benefits away from women, girls).

16. See *Statement from Women’s Rights and Gender Justice Organizations in Support of the Equality Act*, NOW (Mar. 17, 2021), <https://now.org/media-center/press-release/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act/> [<https://perma.cc/TS4J-U5N9>] (“Girls and women who are transgender should have the same opportunities as girls and women who are cisgender to enjoy the educational benefits of sports, such as higher grades, higher graduation rates, and greater psychological well-being.”).

violation of basic human rights.¹⁷ The National Collegiate Athletic Association (“NCAA”) recognizes all stakeholders involved in collegiate sports benefit from fair and inclusive participation practices enabling transgender student-athletes to participate on teams that align with their gender identity.¹⁸ Yet, despite the strides transgender athletes have made in representation throughout the past few decades, statutory protections under Title IX and the Department of Education’s policies have not always provided adequate protections.¹⁹

The Supreme Court’s recent decision in *Bostock v. Clayton County*²⁰ appears to have set the stage to change this dynamic.²¹ This Comment reviews the legislative history and application of civil rights legislation barring discrimination on the basis of sex, includ-

17. See *They’re Chasing Us Away from Sport*, HUM. RTS. WATCH (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#> [<https://perma.cc/5KRA-KZUA>] (stating nearly century-long history of sex testing of women athletes at international level represents human rights issue); see also *Intersection of Race and Gender Discrimination in Sport*, UNITED NATIONS HUM. RTS. COUNCIL (June 15, 2020), <https://undocs.org/en/A/HRC/44/26> [<https://perma.cc/374U-NAJ3>] (“The implementation of female eligibility regulations denies athletes with variations in sex characteristics an equal right to participate in sports and violates the right to non-discrimination more broadly.”).

18. See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 9, at 8 (“All stakeholders in NCAA athletics programs will benefit from adopting fair and inclusive practices enabling transgender student-athletes to participate on school sports teams. School-based sports, even at the most competitive levels, remain an integral part of the process of education and development of young people, especially emerging leaders in our society.”).

19. See, e.g., Anagha Srikanth, *Taylor Small Becomes Vermont’s First Transgender Legislator*, HILL (Nov. 4, 2020), <https://thehill.com/changing-america/respect/diversity-inclusion/524512-taylor-small-becomes-vermonts-first-transgender> [<https://perma.cc/LUR8-JR9Q>] (discussing Vermont’s first transgender legislator and implications of groundbreaking victory for future LGBTQ legislators); see also *Laurel Hubbard: First Transgender Athlete to Compete at Olympics*, BBC (June 21, 2021), <https://www.bbc.com/news/world-asia-57549653> [<https://perma.cc/AB22-VWM5>] (discussing first transgender athlete to compete at Olympics, including public’s reaction); Caitlin O’Kane, *Chris Mosier, First Openly Transgender Athlete on Team USA, Hopes Sharing His Story Inspires Others*, CBS NEWS (Jan. 4, 2021), <https://www.cbsnews.com/news/chris-mosier-transgender-olympic-athlete-team-usa-sharing-story/> [<https://perma.cc/6BAB-LH8X>] (interviewing first transgender male athlete to represent United States in international competition, prompting International Olympic Committee to change policy on transgender athletes). See generally Maya Satya Reddy, *The Weaponization of Title IX in Sports*, REGULATORY REV. (June 29, 2021), <https://www.theregview.org/2021/06/29/reddy-weaponization-of-title-ix-sports/> [<https://perma.cc/G9DW-4DRV>] (describing ways in which Title IX enforcement can reinforce prevailing views of masculinity and gender stereotypes).

20. 140 S. Ct. 1731, 1734, (2020).

21. For further discussion of *Bostock*’s future impact on Title IX legislation, see *infra* notes 70–156 and accompanying text.

ing Title IX and its corollary in the employment realm, Title VII.²² Moreover, this Comment shows that recent legislation at the state level is destined to fail given recent Title IX challenges bolstered by the *Bostock* decision as well as potential constitutional arguments against these laws.²³ This Comment also discusses what the *Bostock* decision implies for women's sports generally going forward and shows that, despite the pessimistic predictions of some commentators, the future of women's sports is not being threatened by transgender athletes.²⁴ Section II discusses Title IX and guidance provided by the Department of Education relating to the law's application to transgender students.²⁵ The Comment then examines the approach taken by various federal courts to Title IX and competing legal theories for its application.²⁶ Finally, the Comment explores recent state legislation regarding transgender athletes that have brought this issue to the fore.²⁷ Section III shows that this state level legislation is ultimately destined to be overturned on challenge under Title IX, bolstered by equal protection challenges, and what the inevitable inclusion of transgender athletes means for women's athletics going forward.²⁸

II. BACKGROUND: CIVIL RIGHTS LEGISLATION AND TRANSGENDER ATHLETES

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972 by President Richard Nixon.²⁹ The statute itself provides 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 pro-

22. For further discussion of how Title IX and Title IV relate, see *infra* notes 70–156 and accompanying text.

23. For further discussion of implications for recent legislation at the state level, see *infra* notes 158–170 and accompanying text.

24. For further discussion of the impact of *Bostock* on women's sports generally, see *infra* notes 188–200 and accompanying text.

25. For further discussion of the Department of Education's guidance on Title IX application, see *infra* notes 44–69 and accompanying text.

26. For further discussion of the competing legal theories of Title IX's application, see *infra* notes 81–118 and accompanying text.

27. For further discussion of the recent state legislation either banning transgender athletes or enabling their participation, see *infra* notes 120–132 and accompanying text.

28. For further discussion of the implication of recent court developments on women's sports generally, see *infra* notes 188–200 and accompanying text.

29. See generally Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, 83 (2013) (providing overview of history and future of Title IX).

gram or activity receiving Federal financial assistance.”³⁰ Title IX was modeled after Title VI of the Civil Rights Act of 1964.³¹ Where Title VI protects against race discrimination in all programs receiving federal funds, Title IX protects against sex discrimination and applies only to educational programs.³² The U.S. Department of Education’s Office of Civil Rights (OCR) has since provided additional direction in the form of memorandums, “Dear Colleague” letters, clarifications, and other various guidance extending Title IX protections to athletics at educational institutions.³³

A. Title IX and Competing Guidance from the Department of Education

On October 26, 2010, under the Obama administration, the OCR released a “Dear Colleague” letter stating that “Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”³⁴ In an opinion letter dated January 7, 2015, the OCR elaborated further by stating that the portion of Title IX providing for separate bathroom and locker room facilities on the basis of sex should be applied to transgender students consistent with their gender identity.³⁵ In July

30. 20 U.S.C. § 1681(a) (LexisNexis 2021) (emphasis added).

31. See *Overview of Title IX: Interplay with Title VI, Section 504, Title VII, and the Fourteenth Amendment*, JUSTIA (last visited Sept. 23, 2021), <https://www.justia.com/education/docs/title-ix-legal-manual/overview-of-title-ix/> [<https://perma.cc/ZHN8-2D8V>] (describing Congress’s conscious effort to model Title IX on Title VI of Civil Rights Act of 1964).

32. See generally Ann K. Wooster, *Sex discrimination in Public Education Under Title IX — Supreme Court Cases*, 158 A.L.R. Fed. 563 (1999) (describing how Title IX was designed, and how school receiving federal funds remain in compliance).

33. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 333 (2012) (describing mechanisms through which Title IX has been enforced including its application to athletic programs).

34. See Ruslynn Ali, Asst. Secretary for Civil Rts., U.S. Dep’t of Educ., *Dear Colleague Letter* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [<https://perma.cc/YU87-JLFQ>] [hereinafter *2010 Dear Colleague Letter*] (providing Obama administration policy toward LGBT students).

35. See 34 C.F.R. § 106.33 (2022) (providing in part “a recipient [of federal funds] may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex”); see also Letter from James A. Ferg-Cadima, Acting Deputy to Asst. Secretary for Policy, Office for Civil Rights, to Emily Prince, Esq. (Jan. 7, 2015) available at: http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [<https://perma.cc/S2XG-UNUZ>] (“When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch.*

334 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

of that same year, the Department of Justice and OCR approved the nondiscrimination policy of Arcadia Unified School District, created in response to a Title IX complaint filed by a transgender student in that district.³⁶ Finally, on May 13, 2016, OCR released an additional “Dear Colleague” letter stating that departments should treat a student’s gender identity the same as a student’s sex for purposes of Title IX and its implementing regulations.³⁷ Regarding athletics, this letter stated that while a school may operate sex-segregated athletic teams when such selection is based on competitive skill or when the activity involved is a contact sport, schools may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”³⁸

On February 22, 2017, following the election of President Donald J. Trump, the U.S. Departments of Education and Justice issued a joint letter withdrawing the guidance of the 2016 “Dear Colleague” letter.³⁹ In an internal memo, the OCR was advised to rely

Bd., 822 F.3d 709, 715 (4th Cir. 2016) [hereinafter *Grimm I*] (finding U.S. Department of Education entitled to Auer deference in interpreting 34 C.F.R. § 106.33).

36. See KAREN J. LANGSLEY & SHELLY L. SKEEN, *TRANSGENDER ISSUES* (TX. C.L.E. ADVANCED FAM. L. 12.2, 2016) (providing background on nondiscrimination policy for transgender students adopted by Arcadia Unified School District); see also David Vannasdall, *Arcadia Unified Sch. Dist., Transgender Students — Ensuring Equity and Nondiscrimination*, ARCADIA UNIFIED SCH. DIST. (Apr. 16, 2015), <http://www.nclrights.org/wp-content/uploads/2015/07/Transgender-Policy-Bulletin-Approved-w-corrections-April-2015.pdf> [<https://perma.cc/HW8T-FU6X>] (providing Arcadia Unified School District policy regarding issues relating to transgender students).

37. See *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, U.S. DEP’T OF JUST. (May 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights> [<https://perma.cc/TUR3-3F8C>] (“The guidance makes clear that both federal agencies treat a student’s gender identity as the student’s sex for purposes of enforcing Title IX.”); see also Catherine E. Lhamon, Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Asst. Attorney General for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/3N2A-VF2J>] [hereinafter *2016 Dear Colleague Letter*] (“This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.”).

38. See *id.* at 3 (finding under Title IX, schools must treat students consistent with gender identity despite contrary education records, identification documents).

39. See Sandra Battle, Acting Asst. Secretary for Civil Rights, U.S. Dep’t of Educ. & T.E. Wheeler, II, Acting Asst. Atty. Gen. for Civil Rights, U.S. Dep’t of Justice, *Dear Colleague Letter* (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/7CKJ-T8SP>] [hereinafter *2017 Dear Colleague Letter*] (noting withdrawal of guidance documents

solely on Title IX and its implementing regulations as interpreted by federal courts and remaining OCR guidance documents in evaluating complaints of sex discrimination against individuals.⁴⁰ Department enforcement of Title IX protections for transgender athletes once again shifted following the election of President Joseph Biden.⁴¹ The Civil Rights Division of the Department of Justice issued a memo to federal agencies reestablishing protections for gay and transgender students under Title IX.⁴² This memo returned to the Department of Education policies followed under President Obama, bolstered by legal arguments following *Bostock*.⁴³

B. Recent Federal Court Cases and Regulatory Developments:

Circuit courts currently appear on the brink of a split over the rights of transgender students, and the Supreme Court has thus far refused to take up the issue.⁴⁴ Understandably, the unresolved le-

did not leave students without protections from discrimination, bullying or harassment as OCR would continue to hear all claims of discrimination).

40. See Candice Jackson, Acting Asst. Secretary for Civil Rights, Office for Civil Rights, Dep't of Educ., *OCR Instruction to the Field re Complaints Involving Transgender Students* (June 6, 2017), <https://s3.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> [<https://perma.cc/SJN6-H5SH>] [hereinafter *OCR Instruction*] (reiterating withdrawal from Obama Administration guidance documents does not leave students without protections, OCR should rely on Title IX, Department regulations, in evaluating complaints of sex discrimination against individuals whether or not individual is transgender).

41. See Avery, *supra* note 12 (describing new approach taken by Biden Administration in enforcing Title IX).

42. See *Marking the One-Year Anniversary of Bostock With Pride*, OFF. FOR CIV. RTS. (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/blog/20210616.html> [<https://perma.cc/AQ94-8J3F>] (“In *Bostock*, the Supreme Court recognized that ‘it is impossible to discriminate against a person’ because of their sexual orientation or gender identity ‘without discriminating against that individual based on sex.’ That reasoning should—and does—apply regardless of whether the individual is an adult in a workplace or a student in school . . . [O]CR affirms our commitment to guaranteeing all students—including those who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+)—an educational environment free from discrimination.”).

43. See *id.* (issuing Notice of Interpretation enforcing Title IX’s prohibition on sex discrimination to include discrimination based on gender identity consistent with reasoning in *Bostock*).

44. See *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (mem.) (denying writ of certiorari, leaving in place Fourth Circuit ruling that Gloucester County School Board acted unlawfully by preventing transgender boy from using boy’s bathroom); see also *Parents for Priv. v. Barr*, 141 S. Ct. 894, 894 (mem.) (2020) (denying writ of certiorari, leaving in place Ninth Circuit ruling that policy allowing transgender students to use bathrooms, locker rooms, showers matching gender identity rather than biological sex assigned at birth does not violate Fourteenth Amendment right to privacy or create hostile environment or discrimination claim actionable via Title IX); *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, (mem.) (2019) (denying writ of certiorari, leaving in place Third Circuit decision to uphold Pennsylvania school district policy allowing transgender stu-

gal questions surrounding transgender students' rights have resulted in myriad school policies and state laws throughout the country.⁴⁵ Idaho was the first state to pass a law preventing transgender women from participating in women's sports.⁴⁶ The law never went into effect as there was an injunction followed by a Ninth Circuit appeal.⁴⁷ In *Grimm v. Gloucester County School Board*,⁴⁸ the U.S. Court of Appeals for the Fourth Circuit became the first federal court to rule in favor of the right of transgender students to use bathrooms corresponding with their gender identity.⁴⁹ In this case, a transgender student claimed that the use of "alternative pri-

dents to use bathrooms that conform to gender identity); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (holding transgender students protected from discrimination under Title IX, Equal Protection Clause of Fourteenth Amendment). *But see Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (ordering panel's previous opinion that district's policy barring transgender student from using boys' restroom violated Fourteenth Amendment guarantee of equal protection will be reheard en banc, then vacating panel's opinion); *see also* Jo Yurcaba, *Supreme Court Could Hear Transgender Student Bathroom Case, Experts Say*, NBC NEWS (Aug. 27, 2021), <https://www.nbcnews.com/nbc-out/out-news/supreme-court-hear-transgender-student-bathroom-case-experts-say-rcna1797> [<https://perma.cc/HGH5-LK9P>] (citing experts stating Eleventh Circuit likely to find in favor of school district creating split in circuit courts over transgender bathroom access); *see also* Soule by Stanesco v. Connecticut Ass'n of Sch., Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (rejecting potential challenge to Connecticut trans-inclusive laws).

45. *See, e.g.,* Sonali Kohli, *How California Protects Transgender Students*, L.A. TIMES (May 17, 2016), <https://www.latimes.com/local/education/la-me-edu-transgender-student-rights-20160516-snap-htmstory.html> [<https://perma.cc/D7WD-LGA6>] (describing various pro-transgender student policies throughout State of California); *see also, e.g.,* 2012–13 Case Studies, ALA. HIGH SCH. ATHLETIC ASS'N, http://media.wix.com/ugd/2bc3fc_87536da66cad4d6195ae056a573e67da.pdf [<https://perma.cc/U8S3-J853>] (last visited Sept. 6, 2021) ("[P]articipation in athletics should be determined by the gender indicated on the student-athlete's certified certificate of birth."). *See generally* *K-12 Policies*, supra note 14 (providing overview of disparate state, school district policies toward transgender student athletes).

46. *See* Talya Minsberg, *Boys Are Boys and Girls Are Girls: Idaho Is First State to Bar Some Transgender Athletes*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/sports/transgender-idaho-ban-sports.html> [<https://perma.cc/V3WZ-EJFA>] (describing Idaho as first state in United States to bar transgender girls from participating in girls' or women's sports, first to legalize practice of sex testing in order to compete).

47. *See All Women and Girls Can Now Try Out For Fall Teams*, AM. C. L. UNION (Aug. 17, 2020), <https://www.aclu.org/press-releases/judge-blocks-first-law-targeting-transgender-athletes-case-continues> [<https://perma.cc/4R3F-SKG5>] (describing ACLU's successful efforts to block Idaho's law targeting transgender student athletes).

48. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) [hereinafter *Grimm II*].

49. *See id.* (holding Board's application of its restroom policy against Grimm violated Title IX).

vate” restroom facilities rather than communal restrooms violated Title IX and equal protection guaranteed under the Fourteenth Amendment.⁵⁰ The case was initially granted certiorari by the U.S. Supreme Court but was later remanded back to the Fourth Circuit when federal guidelines were withdrawn by the Trump administration in 2017.⁵¹

The Third and Ninth Circuits have rejected invasion of privacy claims filed on behalf of non-transgender students that intended to challenge policies that explicitly permit transgender students to use bathrooms that correspond with their gender identity.⁵² In *Doe v. Boyertown Area School District*,⁵³ the Third Circuit affirmed the district court’s decision to deny a preliminary injunction against the school district’s policy allowing transgender students to use locker rooms that conform to their gender identity.⁵⁴ The court based its decision on the state’s “compelling interest in not discriminating against transgender students.”⁵⁵ Likewise, students in this case brought a Title IX claim, which the Third Circuit rejected because the school district’s policy allowed all students to use bathrooms and locker rooms that aligned with their gender identity, and thus “[did] not discriminate based on sex.”⁵⁶ Therefore the court found

50. *See id.* at 709 (holding Board’s policy does not satisfy heightened scrutiny because it is not substantially related to its important interest in protecting students’ privacy).

51. *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017) (mem.) (holding Fourth Circuit’s “[j]udgment [is] vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of guidance document issued by Department of Education and Department of Justice on February 22, 2017”).

52. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1225 (9th Cir. 2020) (“Plaintiffs fail to show that the contours of the privacy right protected by the Fourteenth Amendment are so broad as to protect against the District’s implementation of the Student Safety Plan. This conclusion is supported by the fact that the Student Safety Plan provides alternative options and privacy protections to those who do not want to share facilities with a transgender student, even though those alternative options admittedly appear inferior and less convenient.”); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (noting “a person has a constitutionally protected privacy interest in his or her partially clothed body,” but rejecting appellant argument privacy rights violated by school district policy allowing transgender students access to “bathrooms and locker rooms that aligned with their gender identities”).

53. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

54. *See id.* at 538 (denying preliminary injunction against Pennsylvania school districts policy allowing transgender athletes to play on teams in conformity with gender identity).

55. *See id.* at 526 (“The District Court correctly concluded that the appellants’ constitutional right to privacy claim was unlikely to succeed on the merits.”).

56. *See id.* at 533 (“The District Court correctly concluded that the appellants’ Title IX claim was unlikely to succeed on the merits.”).

338 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

that school policy allowing transgender students to use facilities that conform with their gender identity did not violate Title IX.⁵⁷ In *Soule v. Connecticut Ass'n of Schools*,⁵⁸ non-transgender student athletes challenged a Connecticut state policy allowing transgender students to compete in girls' high school sports.⁵⁹ This case was ultimately dismissed for mootness since the plaintiffs had graduated and were no longer eligible to compete, but the case is currently on appeal before the Second Circuit.⁶⁰ Finally, in *Adams v. School Board of St. Johns County*⁶¹ a three-judge panel for the Eleventh Circuit held that barring a transgender student from using the restroom that conforms with their gender identity violates the Constitution's guarantee of equal protection.⁶² The Eleventh Circuit ultimately vacated this ruling and will now review the case en banc.⁶³ Some have speculated that the Eleventh Circuit will likely split with other circuits who have unanimously upheld trans-inclusive school policies against challenge and protected transgender student's access to facilities that conform with their gender identity.⁶⁴

While circuit courts have been addressing the applicability of Title IX and gender identity at school, on June 15, 2020, the U.S. Supreme Court issued its watershed *Bostock* decision holding that Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace based on sexual orientation or gender identity.⁶⁵ In

57. See *id.* at 535 (holding school district's policy allowing transgender students to compete on teams conforming to gender identity does not discriminate based on sex or violate Title IX).

58. *Soule v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201(RNC), 2021 WL 1617206 (D Conn., Apr. 25, 2021).

59. See *id.* at *1 ("This case involves a challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference ("CIAC"), the governing body for interscholastic athletics in Connecticut, which permits high school students to participate in sex-segregated sports consistent with their gender identity.").

60. See *id.* at *4 ("Plaintiffs correctly argue that the issue is one of mootness rather than standing."); see also *Soule by Stanescu v. Conn. Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021) (providing appellants opening brief requesting reversal of district court's order, accusing district judge of bias).

61. *Adams v. Sch. Bd. of St. Johns Cty.*, 9 F.4th 1369 (11th Cir. 2021) (mem.).

62. See *Soule by Stanescu*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *15 (stating arbitrariness of school's policy does not pass heightened scrutiny as it targets transgender students for restrictions but not other students, including district failure to demonstrate substantial, accurate relationship between sex classification with policy's stated purpose).

63. See *Adams*, 9 F.4th at 1372 (ordering case be reheard en banc).

64. See Yurcaba, *supra* note 44 (describing potential student rights under Title IX on treatment of transgender student rights under Title IX).

65. See Lawrence Hurley, *In Landmark Ruling, Supreme Court Bars Discrimination Against LGBT Workers*, REUTERS (June 15, 2020), <https://www.reuters.com/article/>

Bostock, the U.S. Supreme Court heard three consolidated cases involving LGBTQ employees who had been dismissed because of their LGBTQ status: (1) *Bostock v. Clayton County II*,⁶⁶ (2) *Zarda v. Altitude Express, Inc.*,⁶⁷ and (3) *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁶⁸ The same week this case was decided, President Biden issued an Executive Order asserting that “[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”⁶⁹

C. Bostock’s Impact on the LGBTQ Community Generally

The majority in *Bostock* referred to Title VII’s protections against discrimination on the basis of sex as “simple but momentous.”⁷⁰ *Bostock* settled the major legal questions regarding LGBTQ employees and Title VII protections, but questions regarding exactly how far the *Bostock* decision extends still remain to be determined.⁷¹ In addition to Title VII and Title IX, sex discrimination is prohibited by several other federal statutes including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act.⁷² Questions remain about *Bostock*’s implication for these statutes.⁷³ Regardless, the Supreme Court’s decision in *Bostock* will certainly have a wide-ranging impact on the LGBTQ community generally.⁷⁴ The

us-usa-court-lgbt/in-landmark-ruling-supreme-court-bars-discrimination-against-lgbt-workers-idUSKBN23M20N [https://perma.cc/KK55-BCGF] (summarizing *Bostock* decision including implications for transgender people).

66. No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016).

67. 883 F.3d 100 (2d Cir. 2018).

68. Equal Emp. Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); see also *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1731 (2020) (discussing consolidated cases as part of *Bostock* decision).

69. Exec. Order No. 13,988, 86 C.F.R. § 7023 (Jan. 20, 2021) (“Under *Bostock*’s reasoning, laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation so long as the laws do not contain sufficient indications to the contrary.”).

70. See *Bostock*, 140 S. Ct. at 1741 (“The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

71. See *id.* at 1753 (“Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases.”).

72. See 15 U.S.C. § 1691(a) (2012) (prohibiting creditors from discriminating against applicant on the basis of sex); see also 42 U.S.C. § 3604 (2012) (prohibiting sex discrimination in “the sale or rental of housing”).

73. For further discussion of *Bostock*’s impact on other civil rights laws, see *infra* note 74 and accompanying text.

74. See generally Amanda Hainsworth, *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731 (2020), Bos. B.J. 3, 22, 23 (2020) (describing anticipated

340 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

most immediate impact will likely be within states without preexisting employment discrimination protections for members of the LGBTQ community.⁷⁵ The decision appears to provide an immediate remedy for discrimination within the realm of employment.⁷⁶

Justice Alito in his *Bostock* dissent stated that the problem with the Court's majority decision is most acute in its implication for schools and religious institutions.⁷⁷ Moreover, Justice Alito argued that *Bostock* could infringe on free speech rights if employers refused to use transgender employees' chosen names and pronouns.⁷⁸ In his dissent, Justice Kavanaugh states that he disagrees with the majority regarding the original meaning of the statutory language of Title VII, but recognized the important victory the majority's decision represents for "gay and lesbian Americans."⁷⁹ The Majority asserted that, while those who originally adopted the Civil Rights Act might not have anticipated their work leading to this particular result, "the limits of the drafters' imagination supply no reason to ignore the law's demands."⁸⁰

litigation related to interplay between federal civil rights laws, employers religious beliefs, additional protections for LGBTQ individuals beyond state nondiscrimination laws, federal equal protection claims involving discrimination against LGBTQ individuals).

75. See generally *id.* (describing *Bostock's* effects on federal law).

76. For further discussion of *Bostock's* impact in the employment realm, see *infra* note 83 and accompanying text.

77. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1781 (2020) (Alito, J., dissenting) ("This problem is perhaps most acute when it comes to the employment of teachers. A school's standards for its faculty 'communicate a particular way of life to its students,' and a 'violation by the faculty of those precepts' may undermine the school's 'moral teaching.' Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today's decision may lead to Title VII claims by such teachers and applicants for employment." (footnote omitted)).

78. See *id.* at 1782 ("The position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety.").

79. See *id.* at 1837 ("Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans.").

80. See *id.* at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

D. Title IX's Purpose and Theories on Application to Transgender Individuals

The original intent of Title IX was to “remedy to some extent sex discrimination in education.”⁸¹ The Supreme Court has held that Title IX broadly prohibits a funding recipient from subjecting any person to disparate treatment “on the basis of sex” including sexual harassment or retaliating against one who complains about sexual discrimination.⁸² During the drafting of Title IX, some feared that the Act would mandate gender-mixed sports teams or would otherwise negatively impact men’s access to collegiate sports.⁸³ In response, Senator Bayh stated that the intent of the law was to “provide equal access for women and men students to the educational process and extracurricular activities in school” and not to “desegregate” the men’s locker room.⁸⁴ Moreover, subsequent implementing regulations allow schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”⁸⁵ While no language within the law provides a direct connection between Title IX and athletics, the legislative history and early case law demonstrate that athletics is a vital and

81. Trustees of Univ. of Del. V. Gebelein, 420 A.2d 1191, 1196 (Del. Ch. 1980).

82. See Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) (“We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”).

83. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 Marq. Sports L. Rev. 325, 333 (2012) (describing fears of some during drafting of Title IX that it would mandate gender-mixed athletic teams); see also Doriane Lambelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX's General Non-Discrimination Rule*, 27 DUKE J. OF GENDER L. & POL'Y 69, 72-73 (2020) (describing aftermath of bill's passage including efforts by those who feared Title IX would hinder men's revenue-producing sports such as football).

84. See 117 Cong. Rec. 30407 (Sep. 8, 1971) (statement of Sen. Birch Bayh) (“I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the desegregation of football fields. What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, nor that the men’s locker room be desegregated.”); see also Lambelet Coleman, *supra* note 83, 77–78 no. 40 (describing Senator Bayh’s assurances Title IX would not require women play on football teams, elaborating on origins of “sports exception” of Title IX).

85. 34 C.F.R. § 106.41(b) (2020).

342 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

important part of the educational experience for high school and college students.⁸⁶

To establish a prima facie case of discrimination under Title IX, a student must allege that: (1) he or she was “subjected to discrimination in an educational program”; (2) “the program receives federal assistance”; and (3) the discrimination “was *on the basis of sex*.”⁸⁷ While Title IX’s implementing regulations bar discrimination on the basis of sex, they also permit schools to operate separate teams for members of each sex in certain circumstances.⁸⁸ Various federal courts have recognized that cases interpreting Title VII’s provisions are relevant to and can be useful in analysis of claims of Title IX discrimination.⁸⁹

In early employment discrimination decisions involving the “because of sex” provisions of Title VII, courts have held that Congress intended “sex” to mean biological sex as traditionally understood, denying Title VII protections for transgender individuals and individuals on the basis of their sexual orientation, and even denying Title VII protections for pregnant women.⁹⁰ Beginning in the

86. See Anderson, *supra* note 83 (explaining importance of athletics in Title IX legislative history); see also Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (“Discrimination in high school interscholastic athletics constitutes discrimination in education.”). See generally *History of Title IX*, WOMEN’S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/> [<https://perma.cc/G9U3-RWHZ>] (providing comprehensive overview of legislative history, including subsequent regulatory developments of Title IX).

87. See Bougher v. Univ. of Pitt., 713 F. Supp. 139, 144 (W.D. Pa. 1989) (establishing prima facie case of discrimination under Title IX).

88. 34 C.F.R. § 106.41(a) (1980) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis.”); see also *id.* § 106.41(b) (implementing regulations also permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport”).

89. See, e.g., Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 283 (2013) (“Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII’s provisions are relevant to and can be imported into analysis of Title IX.”); see also Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (holding “it is now established that the Title IX term ‘on the basis of sex’ is interpreted in the same manner as similar language in Title VII”).

90. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (holding Title VII, including its legislative history subsequent to passage, indicates Congress intended “sex” to be understood traditionally to “place women on an equal footing with men” while denying protection to “transsexual” woman alleging she was terminated on basis of sex); see also De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Giving [Title VII] its plain meaning, this

1970s and 1980s, a series of Supreme Court cases expanded the meaning of “because of sex” to encompass protections against sexual harassment, discrimination against men, and discrimination based on women’s familial status.⁹¹ In 1984, the plaintiffs in *Ulane v. Eastern Airlines*⁹² again tried to expand Title VII’s protections against discrimination “because of sex” to transgender individuals, but the Seventh Circuit Court of Appeals rejected their argument, holding that the plaintiff’s transition did not change their biological sex and therefore, their employer did not discriminate “because of sex.”⁹³ Five years later, the Supreme Court did expand the meaning of “because of sex” in *Price Waterhouse v. Hopkins*⁹⁴ by holding that that Title VII prohibited discrimination against individuals based on “sex stereotyping” or non-conformance with perceived gender expectations.⁹⁵ Courts have since typically considered discrimination against transgender individuals under two legal theories: (1) sex or gender stereotyping via *Price Waterhouse* or (2) discrimination on the basis of gender identity constituting per se discrimination “on the basis of sex.”⁹⁶ Courts have therefore found

court concludes that Congress had only the traditional notions of ‘sex’ in mind.” (quoting *Holloway*, 566 F.2d at 662–63)); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (affirming dismissal of employee’s Title VII claim alleging he was fired because of sexual orientation); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding employer’s disability benefits plan that fails to cover pregnancy-related disabilities does not violate Title VII). See generally Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 Wis. J.L. GENDER & SOC’Y 219, 229 (2013) (providing early history of Title VII cases including Title VII’s influence on Title IX cases).

91. See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”); see also *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp’t Opportunity Comm’n*, 462 U.S. 669, 685 (1983) (holding health benefits plan providing greater pregnancy-related coverage to female employees than spouses of male employees constitutes discrimination against male employees on basis of sex under Title VII); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (“Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school-age children.”).

92. *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984).

93. See *id.* (finding *Ulane*’s transition did not change her biological sex, therefore airline did not fire her “because of sex”).

94. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

95. See *id.* at 231–32 (finding in favor of female employee who sued employer for discrimination on basis of sex under Title VII after coworkers said her chances of making partner would be greater if she acted more feminine).

96. See Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 Penn St. L. Rev. 187, 193 (2016) (“Under Title VII, most courts have found that transgender peo-

that discrimination “because of sex” potentially includes not just discrimination based on one’s “biological” sex, but also discrimination on the basis of how one presents one’s gender relative to “biological” sex and the stereotypes associated with that sex.⁹⁷ Prior to *Bostock*, the Sixth and Eleventh Circuits had held that discrimination based on sex stereotypes and *per se* discrimination based on expressed gender identity were actionable under Title VII.⁹⁸ The Equal Employment Opportunity Commission (“EEOC”) similarly found prior to *Bostock* in 2012 that sex, as used in Title VII, encompassed both sex and gender.⁹⁹

ple are protected only on the basis of sex stereotyping, not because they are a protected class *per se*.”).

97. See Buzuvis, *supra* note 90 (describing evolution of interpretations of Title VII’s “because of sex” provision throughout lower courts, including Title VII’s influence on Title IX).

98. See *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”). *But see* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007))); *see also* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 562 (2007) (explaining *Smith v. City of Salem, Ohio* is first time federal court extended Price Waterhouse sex-stereotyping theory to transgender individuals, explaining Eleventh Circuit in *Brumby* found discrimination based on expressed gender identity to be *per se* discrimination under Title VII).

99. See *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (“[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”). The court explained that a transgender person who experiences discrimination based on their gender identity may establish a *prima facie* case of sex discrimination through a number of different formulas. *See id.* at *15 (explaining different formulas by which transgender person may prove *prima facie* case of sex discrimination). A complainant may, for example establish a case of sex discrimination under a theory of gender stereotyping wherein, for example, an employer believing that biological men must present as men and wear male clothing fires an employee for being insufficiently masculine. *See id.* (providing *prima facie* case of sex discrimination established by sex stereotyping). Alternatively, a complainant could prove they were discriminated against if an employer was willing to hire them when they thought they were one gender but is unwilling to hire them when they find out they are another gender. *See id.* at *32. (providing *prima facie* case of sex discrimination established by *per se* discrimination). The commissioner compares gender to religion in this respect; for purposes of establishing a *prima facie* case that Title VII has been violated, employees must demonstrate only that an employer impermissibly used religion (or gender) in making employment decisions. *See id.* at *31–33 (comparing gender-based and religion-based discrimination in hiring).

1. *Sex Stereotyping and Title IX*

The *Price Waterhouse* gender stereotyping interpretation has proven influential in Title IX cases.¹⁰⁰ Cases involving plaintiffs targeted for their perceived gender presentation and sexual orientation have applied Title VII sex-stereotype precedents in analyzing Title IX claims.¹⁰¹ A “Dear Colleague” letter released in 2010 stated that Title IX does not expressly cover discrimination on the basis of sexual orientation or gender identity, but it does protect students who experience sex- or gender-based harassment.¹⁰² Before and after *Bostock*, Circuit Courts have applied Title VII reasoning to Title IX cases involving gender identity discrimination in schools.¹⁰³ Some courts have held that protections against discrimination based on gender stereotypes may provide the most straight-forward route to protecting transgender students facing similar harassment in the future.¹⁰⁴ The Eleventh Circuit suggested in *Glenn v. Brumby*¹⁰⁵ that considerations of gender stereotypes will inevitably

100. For further discussion of sex stereotyping as applied in the context of Title IX, see *supra* note 103 and accompanying text.

101. See e.g., *Montgomery v. Indep. Sch. Dist.*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (“Although no court has addressed this issue in the context of a Title IX claim, several courts have considered whether same-sex harassment targeting the claimant’s failure to meet expected gender stereotypes is actionable under Title VII. The Court looks to these precedents in analyzing plaintiff’s Title IX claim, noting that Title VII similarly requires that the discrimination resulting in the plaintiff’s claims be based on his or her sex . . . The Court for these reasons concludes that by pleading facts from which a reasonable fact-finder could infer that he suffered harassment due to his failure to meet masculine stereotypes, plaintiff has stated a cognizable claim under Title IX.” (citation omitted)); see also *Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997) (holding harassment because Plaintiff did not conform to stereotypical expectations of masculinity was actionable discrimination “because of sex”).

102. See *2010 Dear Colleague Letter*, *supra* note 34 (“Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination.”).

103. See *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Under settled law in this Circuit, gender nonconformity, as defined in *Smith v. City of Salem*, is an individual’s ‘fail[ure] to act and/or identify with his or her gender. . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.’” (quoting 378 F.3d 566, 575 (6th Cir. 2004))); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (finding policy requiring individual to use bathroom that does not conform with his or her gender identity punishes that individual for their gender non-conformance, so it violates Title IX); *Grimm II*, 972 F. Supp. 3d 586, 616 (4th Cir. 2020) (finding after *Bostock* its Title VII interpretation guides court’s Title IX evaluation, so sex stereotyping constitutes sex-based discrimination under Equal Protection clause).

104. For further discussion of sex-stereotyping and its application to Title IX, see *supra* note 103 and accompanying text.

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

346 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

be part of what drives discrimination against a transgender individual.¹⁰⁶ Moreover, some commentators have argued that sex stereotyping may allow plaintiffs to take advantage of widely recognized legal doctrine throughout various circuit courts, but it is potentially problematic in that it forces transgender individuals to focus on their gender nonconformity.¹⁰⁷ “To recover for discrimination claims based on supposed gender-nonconforming conduct, as set forth in *Price Waterhouse*, transsexual plaintiffs must identify themselves as their their biological sex . . .” rather than the gender to which they currently identify.¹⁰⁸ Moreover, this approach counterproductively seeks to reject discrimination on the basis of harmful gender stereotypes by highlighting those same gender stereotypes.¹⁰⁹ Inherent problems in the sex stereotyping approach for protecting transgender students from discrimination and harassment have led some to favor an approach which equates discrimination on the basis of gender identity with per se discrimination on the basis of sex.¹¹⁰

2. *Gender Identity Equates to Basis of Sex*

In *Macy v. Holder*,¹¹¹ the EEOC ruled that in the employment context, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex’ . . .” under Title VII.¹¹² The EEOC went on

106. See *id.* at 1317 (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. . . . We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

107. See Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423, 437 (2012) (arguing sex stereotyping reinforces negative stereotypes forcing transgender plaintiffs to identify with biological sex).

108. See Jackie Barber, *Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 Tul. J.L. & Sexuality 169, 176 (2012) (highlighting paradoxical nature of applying gender-stereotyping approach to proving discrimination on basis of sex).

109. See Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 Wis. J.L. Gender & Soc’y 245, 257 (2013) (discussing how sex-stereotyping approach may reinforce harmful stereotypes).

110. See *id.* (highlighting counterproductive nature of sex-stereotyping approach).

111. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 12, 2012).

112. *Id.* at *6, *11 (holding discrimination against employee for transgender status is per se discrimination on basis of sex).

to state that the term “sex” as contemplated in Title VII “encompasses both sex – that is, the biological differences between men and women – and gender.”¹¹³ Title VII’s treatment of gender and sex as synonymous is logical because if the only proscribed discrimination actionable via Title VII was discrimination on the basis of biological sex, then the only recognized, prohibited treatment would involve an employer’s preference for one sex over the other.¹¹⁴ The statute’s protections against sexual harassment, for example, clearly extend beyond what is encompassed merely by a person’s biological sex and into the realm of cultural and social conceptions of masculinity and femininity.¹¹⁵ Finally, prior to *Bostock*, the Eleventh Circuit in *Glenn v. Brumby* set out a case for why discriminating against a person because of their status as a transgender person is per se discrimination on the basis of sex.¹¹⁶ In that case, the court held that “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”¹¹⁷ Therefore, any discrimination against a transgender person because of their gender-nonconformity is tautologically sex discrimination whether it is on the basis of sex or gender.¹¹⁸

E. Recent State Legislation Barring Transgender Athletes

As discussed above, Idaho became the first state to ban trans women and girls from women’s sports leagues in schools and col-

113. *See id.* at *5 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (holding under Title VII sex discrimination includes discrimination on basis of gender as well); *see also* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”).

114. For further discussion of how Title VII has been extended beyond a narrow reading of the text limited to overt sex discrimination in hiring, *see supra* note 91 and accompanying text.

115. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding discrimination for failing to conform to gender-based expectations such as wearing make-up, jewelry violates Title VII).

116. *See* *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007))).

117. *See id.* (finding discrimination against employee due to transgender status is per se discrimination on basis of sex because transgender status implies disconnect between one’s biological sex, gender presentation, including stereotypes of how one presents their gender given their biological sex).

118. *See* *Lee*, *supra* note 107, at 437 (providing additional information on per se approach taken by minority of courts, most notably by Eleventh Circuit in *Glenn v. Brumby*).

leges in March of 2020.¹¹⁹ H.B. 500, or the “Fairness in Women’s Sports Act,” cites “inherent differences” between men and women and promoting sex equality as part of its reasoning for barring students of the male sex from athletic teams or sports designated for females, women, or girls.¹²⁰ The legislation further states that, if disputed, a student may establish sex by presenting a signed physician’s statement that shall indicate a student’s sex based solely on their internal and external reproductive anatomy, the student’s normal endogenously produced levels of testosterone, and an analysis of the student’s genetic makeup.¹²¹ Mississippi followed suit by passing Senate Bill 2536.¹²² The Mississippi Fairness Act shares identical language to the law passed in Idaho.¹²³ Tennessee and Arkansas legislatures passed laws that require student athletes to participate in sports teams corresponding with the sex listed on a student’s birth certificate.¹²⁴ The laws in Mississippi and Arkansas apply specifically to “transgender girls, while Tennessee’s bill applies to all transgender youth.”¹²⁵ In 2021, seventeen states passed similar legislation, joined by South Dakota in early 2022.¹²⁶ At the

119. See Minsburg, *supra* note 46 (describing legislative history surrounding passage of Idaho law banning trans-women, girls from playing on teams which conform with gender identity).

120. See *Hecox v. Little*, AM. C. L. UNION (Jan. 14, 2022), <https://www.aclu.org/cases/hecox-v-little> [<https://perma.cc/M85N-NXUW>] (describing transgender athletes challenge to Idaho law).

121. See IDAHO CODE ANN. § 33-6203(3) (West 2021) (describing methods for determining student athlete’s gender).

122. See *Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/2CGF-MBW4>] (providing official text of bill).

123. See *id.* § 3(2) (“Athletic teams or sports designated for ‘females,’ ‘women’ or ‘girls’ shall not be open to students of the male sex.”).

124. See Joe Yurcaba, *Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth*, NBC NEWS (Mar. 29, 2021), <https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412> [<https://perma.cc/AN3D-WE4V>] (“The bill is one of two types of legislation being considered in more than two dozen states: measures that ban or restrict access to gender-affirming care for trans minors, and those that ban trans young people from competing in school sports teams of their gender identity.”).

125. See Autumn Rivera, *A Look at Shifting Trends in Transgender Athlete Policies*, NAT’L CONF. OF ST. LEGISLATURES (May 11, 2021), <https://www.ncsl.org/research/education/a-look-at-shifting-trends-in-transgender-athlete-policies-magazine2021.aspx> [<https://perma.cc/6ZU2-EGK5>] (explaining wave of states implementing bans on transgender athletes after Idaho became first state to pass such legislation preventing transgender women, girls from participating in high school or college women’s sports).

126. See Katie Barnes, *Young Transgender Athletes Caught in Middle of States’ Debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates [<https://perma.cc/PA6R-YPRG>] (providing review of state level legislation restricting transgender athletes’ participation and high school association policies); see also Kiara Alfonseca, *South*

federal level, The Protect Women’s Sports Act, H.R. 8932 (116), was introduced by former Rep. Tulsi Gabbard (D-Hawaii) and Rep. Markwayne Mullin (R-Okla.) and would prevent students who are assigned male at birth from participating on girls’ sports teams.¹²⁷ Schools that don’t comply would be ineligible for federal funding.¹²⁸

Athletic eligibility for transgender youth is typically determined not by the state legislature but by states’ high school associations.¹²⁹ In Louisiana, a student-athlete must compete on teams consistent with the gender on their birth certificate unless they have undergone sex reassignment surgery.¹³⁰ A “hardship committee” then considers cases of those who have undergone sex reassignment surgery, taking into account, among other considerations, whether the surgical anatomical changes have been completed.¹³¹ While some state laws restrict transgender athletes’ participation,

Dakota Signs 1st Anti-Transgender Sports Law of 2022, ABC NEWS (Feb. 4, 2022) (providing background on state laws restricting transgender women, girls from playing on sports teams conforming with gender identity).

127. See Madeleine Carlisle, *Tulsi Gabbard Introduces Bill That Would Ban Trans Women and Girls from Female Sports*, TIME (Dec. 11, 2021), <https://time.com/5920758/tulsi-gabbard-bill-transgender-women-sports/> [<https://perma.cc/9HAV-X87B>] (providing background on Protect Women’s Sports Act including its legislative history).

128. See H.R. 8932, 116th Cong. (2020) (explaining purpose of bill is “to provide that for purposes of determining compliance with title IX of the Education Amendments of 1972 in athletics, sex shall be determined on the basis of biological sex as determined at birth by a physician”).

129. For further discussion of individual states’ athletic eligibility criteria, see *supra* note 112 and accompanying text.

130. See LA. HIGH SCH. ATHLETIC ASS’N, POSITION STATEMENT, 164 (n.d.), available at: https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c4403a24e71d4732b89d7162b6e017c7.pdf [<https://perma.cc/U6VD-GCMS>] (providing LHSAA adopts position on Gender Identity Participation as guideline to help direct member schools, including stating student-athletes should compete in gender on birth certificate unless they have undergone sex reassignment).

131. See *id.* (“A student-athlete who has undergone sex reassignment must go through the hardship appeal process to become eligible for interscholastic competition. The Hardship Committee shall consider all of the facts of the situation and shall rule the student-athlete eligible to compete in the reassigned gender when:

1. The student-athlete has undergone sex reassignment before puberty, OR
2. The student-athlete has undergone sex reassignment after puberty under all of the following conditions: a. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy. b. All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies (Driver’s license, voter registration, etc.) c. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports competition. d. Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.”).

350 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

others, as in Connecticut, specifically allow transgender students to compete in accordance with their gender identity without requiring gender affirming surgical interventions prior to participating.¹³²

III. ASSESSING THE LIKELIHOOD THAT BANS WILL SUCCEED POST-BOSTOCK

The Supreme Court's *Bostock* decision was widely celebrated by civil rights activists as an expansion of workplace and hiring protections for vulnerable members of the LGBTQ community.¹³³ The president of the Human Rights Campaign, Alphonso David, referred to it as a "landmark moment in the on-going fight for LGBTQ equality."¹³⁴ Other commentators openly worried that the decision would undermine religious freedom, freedom of speech, parents' right to educate their children in line with their values, women's athletics generally, and privacy in bathrooms and locker rooms.¹³⁵ Justice Alito in his *Bostock* dissent raised pointed questions about the decision's applicability to the world of student ath-

132. See Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students from Girls' Sports. The State Disagrees.*, CT MIRROR (June 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees/> [<https://perma.cc/6HTE-FFCG>] (describing actions taken by Connecticut's Attorney General to halt efforts to deny or cut funding to state for enforcing policy allowing transgender girls, women to participate on athletic teams that conform to gender identity).

133. See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 15, 2020), <http://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [<https://perma.cc/FW4L-C4JE>] ("Supporters of L.G.B.T. rights were elated by the ruling, which they said was long overdue. 'This is a simple and profound victory for L.G.B.T. civil rights,' said Suzanne B. Goldberg, a law professor at Columbia.").

134. See Aryn Fields, *Human Rights Campaign President Celebrates One-Year Anniversary of Supreme Court Bostock Decision*, HUM. RTS. CAMPAIGN (June 15, 2021), <https://www.hrc.org/press-releases/human-rights-campaign-president-celebrates-one-year-anniversary-of-supreme-court-bostock-decision> [<https://perma.cc/3MSG-8JTH>] (citing *Bostock* ruling as victory for LGBTQ equality, calling for passage of further protections).

135. See, e.g., Melissa Moschella, *The Supreme Court Has Imperiled Parents' Right to Pass Their Values on to Children*, HERITAGE FOUND. (July 29, 2020), <https://www.heritage.org/gender/commentary/the-supreme-court-has-imperiled-parents-right-pass-their-values-children> [<https://perma.cc/NP76-C9WM>] ("Justice Neil Gorsuch's majority opinion explicitly declines to address questions about bathrooms, locker rooms, women's sports, and so on. But the logic of *Bostock* [sic] implies that it would violate Title IX, for example, to prevent a student with male anatomy who identifies as female from changing and showering in the girls' locker room or competing on the girls' track team. . . . [A] growing number of parents will have no choice but to send their children to an educational environment that may sow profound confusion about the basic truths of human identity.").

letics and whether the *Bostock* definition of “sex” extends to youth and college athletics.¹³⁶

A. Extending Title VII to Title IX

The Court’s decision in *Bostock* resolved the issue of whether Title VII protections against sex-based employment discrimination extend to LGBTQ+ employees.¹³⁷ The Supreme Court in *Bostock* announced that the plain language of the 1964 civil rights legislation prohibiting discrimination based on “race, color, religion, sex, or national origin” also prohibited discrimination based on homosexual or transgender status.¹³⁸ Perhaps most illuminating, the majority in *Bostock* concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹³⁹

The statutory prohibitions against sex discrimination in Title VII and Title IX are similar, and the Supreme Court and other federal courts have often looked to interpretations of Title VII to inform Title IX analysis.¹⁴⁰ Following President Biden’s January 25, 2021 Executive Order, the Civil Rights Division of the U.S. Department of Justice issued an additional application of *Bostock* on March 26, 2021.¹⁴¹ In this application, the Department of Justice asserts

136. See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1779 (2020) (“Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.”).

137. See *id.* at 1731, 1737 (holding Title VII protections extend to LGBTQ employees).

138. See *id.* (holding legislative intent may differ from express terms of statute but written word of statute is controlling); see also 42 U.S.C. § 2000e-2(a)(1)–(2) (2012) (“The Civil Rights Act of 1964, Title VII, reads in relevant part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

139. *Bostock*, 140 S. Ct. at 1741 (adopting per se discrimination approach).

140. See, e.g., *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–91 (D. Minn. 2000) (discussing application of Title VII precedent). But see *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643–45 (1999) (distinguishing between Title IX versus Title VII with respect to agency).

141. See Memorandum from Principal Deputy Assistant Atty. Gen. Pamela S. Karlan, Civil Rights Division to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), available at: <https://www.justice.gov/crt/page/file/1383026/download> [<https://perma.cc/7DCB-369C>] (asserting *Bostock* applies to Title IX).

that Title IX’s “on the basis of sex” language has historically been seen as sufficiently similar to the “because of” sex language in Title VII such that the two are “interchangeable.”¹⁴² Therefore, because Title VII’s prohibition of discrimination “because of” sex includes discrimination because of sexual orientation and transgender status, the same reasoning supports the notion that Title IX’s prohibition of discrimination “on the basis of” sex also prohibits discrimination against individuals based on sexual orientation or transgender status.¹⁴³ This is consistent with the Supreme Court’s directive to “give Title IX . . . a sweep as broad as its language.”¹⁴⁴ Similarly, the Department of Education released a Federal Register Notice of Interpretation on the enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity in light of *Bostock* on June 16, 2021.¹⁴⁵ The Notice of Interpretation laid out several reasons why Title IX prohibits discrimination based on sexual orientation and gender identity.¹⁴⁶ First, it points to the textual similarity between Title VII and Title IX.¹⁴⁷ The Department of Education asserts that, as in *Bostock*, no ambiguity exists about how to apply the title’s terms to the facts before it.¹⁴⁸ The Department also asserts that subsequent case law supports ap-

142. *See id.* (citing holdings from *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992), *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001) as evidence of interchangeable nature of “because of sex” versus “on the basis of sex”).

143. *See id.* (describing how Title IX protections apply to those whose status is of transgender student analogous to Title VII’s application to transgender employee).

144. *See N. Haven Bd. Of Ed. V. Bell*, 456 U.S. 512, 521 (1982) (holding broad language of Title IX encompasses employment discrimination in federally financed education programs).

145. *See Making the Roster: Conflicting Title IX Interpretations Present Challenges for Transgendered Athlete Participation*, NAT’L L. REV. (Jun. 25, 2021), <https://www.natlawreview.com/article/making-roster-conflicting-title-ix-interpretations-present-challenges-transgendered> [<https://perma.cc/3DQP-LW2Z>] (explaining executive actions taken by President Biden on first day in office).

146. *See Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32640 (Jun. 22, 2021) (citing textual similarity between Title VII versus Title IX, including additional case law).

147. *See id.* at 32638 (“Both statutes prohibit sex discrimination, with Title IX using the phrase ‘on the basis of sex’ and Title VII using the phrase ‘because of’ sex. The Supreme Court has used these two phrases interchangeably.”).

148. *See id.* at 32639 (“Numerous Federal courts have relied on *Bostock* to recognize that Title IX’s prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.”).

plying the reasoning of *Bostock* to Title IX.¹⁴⁹ Finally, the Department concludes that this interpretation is most consistent with Title IX's purpose of ensuring equal opportunity and protecting individuals from the harms of sex discrimination.¹⁵⁰

It seems clear – given the arguments put forward by the majority in *Bostock* and the Biden Administration's apparent willingness to extend this decision beyond merely the employment realm – that Title VII protections are likely to extend beyond employment law and impact interpretations of Title IX.¹⁵¹ In fact, the Eleventh Circuit already adopted *Bostock*'s reasoning in *Adams v. School Board of St. Johns County*,¹⁵² decided only a few weeks after the *Bostock* decision.¹⁵³ In that case, the court held that Title IX protects students from discrimination based on their transgender status and not simply against harassment or discrimination for gender nonconformity.¹⁵⁴ Moreover, the court held that the public school board's policy prohibiting a transgender boy from accessing the bathroom consistent with their gender identity "singled him out for different treatment because of his transgender status" and caused him harm in violation of Title IX.¹⁵⁵ *Bostock* represented more than a major legal victory for transgender employees; it sent a symbolic message of equal treatment and respect moving courts away from the out-

149. For further discussion of the subsequent case law applying *Bostock* in the Title IX setting, see *supra* note 148 and accompanying text.

150. For further discussion of the Department of Education's arguments for applying *Bostock* to Title IX, see *supra* note 146 and accompanying text.

151. See John Dayton & Micah Barry, *LGBTQ+ Employment Protections: The U.S. Supreme Court's Decision in Bostock v. Clayton County, Georgia and the Implications for Public Schools*, 35 WIS. J.L. GENDER & SOC'Y 115, 137 (2020) (noting "public educational institutions are commonly a key battleground in legal/culture wars battles, and the Court's decisions on these issues generally have significant implications for public educational institutions" (citations omitted)).

152. *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020). For further discussion of the pending Eleventh Circuit appeal, see *supra* note 90 and accompanying text.

153. See *Adams*, 968 F.3d at 1286 (holding school board's policy violates Title IX while applying lessons from *Bostock*). For further discussion of recent circuit court developments, see also *supra* note 98 and accompanying text.

154. See *Adams*, 968 F.3d at 1304 ("We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.").

155. See *id.* at 1307 ("The record leaves no doubt that Mr. Adams suffered harm from this differential treatment. Mr. Adams introduced expert testimony that many transgender people experience the 'debilitating distress and anxiety' of gender dysphoria, which is alleviated by using restrooms consistent with their gender identity, among other measures.").

354 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

dated model which bars discrimination on the basis of sex stereotypes and toward one which recognizes and protects transgender individuals by labeling discrimination against transgender individuals as per se discrimination on the basis of sex.¹⁵⁶ While a victory for transgender activists and allies, the decision has caused a great deal of anxiety among those who feel that allowing transgender women and girls to compete with cisgendered women undermines the initial purpose of Title IX.¹⁵⁷

B. How Courts and Legislatures Will Likely Respond to *Bostock*

With the possible exception of the Eleventh Circuit, circuit courts throughout the country have thus far consistently held that Title IX requires schools to treat transgender students consistent with their gender identity.¹⁵⁸ Already we are seeing the effects of *Bostock*, with its Title VII reasoning applied in a Title IX context, and likewise, claims that educational settings are somehow different than employment settings making Title VII arguments inapplicable in a Title IX context have also been widely rejected.¹⁵⁹

Drafters of legislation barring transgender athletes from participating on teams that conform to their gender identity often point to the Department of Education's implementing regulations, which emphasize the importance of sex-segregated teams and express fears that transgender athletes jeopardize the very existence of separate teams for men and women.¹⁶⁰ This focus misconstrues transgender students' argument.¹⁶¹ Transgender plaintiffs have not

156. See generally Devon Sherrell, "A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively, 68 Emory L.J. 1101, 1129 (2019) (discussing strong social signal transmitted by national antidiscrimination legislation).

157. See Abigail Shrier, *supra* note 15 (arguing transgender athletes may undermine women and girls sports generally).

158. See *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 552 (M.D. Pa. 2019) (discussing recent circuit court decisions finding Title IX protections extend to transgender students). For further discussion of the current holdings of circuit courts on treatment of transgender students under Title IX, see *supra* note 44 and accompanying text.

159. See *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *opinion vacated and superseded*, *Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) ("*Bostock* has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex.").

160. For further discussion of the potential negative consequences of actions allowing transgender women and girls to participate on teams that conform to their gender identity, see *supra* note 15 and accompanying text.

161. See Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls->

challenged sex-segregated teams, but rather have challenged laws that bar them from accessing teams that conform with their gender identity.¹⁶² Moreover, the implementing regulations do not override the statutory prohibition against discrimination on the basis of sex.¹⁶³ The regulation is a broad statement that sex-segregated sports teams are not unlawful, and not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-segregated teams.¹⁶⁴

Courts have variously held that a transgender student's "psychological and dignitary harm" caused by a school bathroom policy is legally cognizable under Title IX.¹⁶⁵ This harm provides transgender students who have been barred from participating on teams that conform to their gender identity with sufficient standing to bring a Title IX case for discrimination under the act.¹⁶⁶ In the Title IX context, discrimination "mean[s] treating that individual

sports-teams/ [https://perma.cc/592D-ZEHU] (finding there is no scientific or moral basis for treating transgender girls differently from cisgender girls—therefore policies excluding transgender girls from sports are harmful to girls generally).

162. See *Gloucester County School Board v. G.G - School Administrators from 31 States and the District of Columbia Brief for Amici Curiae*, AM. C.L. UNION <https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-school-administrators-31-states-and-district> [https://perma.cc/ZT4S-R984] (last visited Sept. 23, 2021) ("Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that 'slippery slope' argument, however, all amici continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students reinforces the concept of separate facilities for girls and boys; requiring a transgender girl to use the boys' restroom or a transgender boy to use the girls' restroom undermines the notion of gender-specific spaces.").

163. See e.g., *Grimm II*, 972 F.3d 586, 618 (4th Cir. 2020) *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (June 28, 2021) ("[T]he implementing regulation cannot override the statutory prohibition against discrimination on the basis of sex.").

164. See, e.g., *Grimm II*, 972 F.3d at 619 n.16 (stating 20 U.S.C. § 1686 is "broad statement that sex-separated living facilities are not unlawful – not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities").

165. See *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306–07, 1310–11 (11th Cir. 2020) (holding transgender student's "psychological and dignitary harm" caused by school bathroom policy was legally cognizable under Title IX).

166. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045–47 (7th Cir. 2017) (affirming finding of irreparable harm because excluding transgender student from boys' restroom "stigmatized" student, caused him "significant psychological distress"); see also *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (affirming finding of irreparable harm because excluding young transgender student "from the girls' restrooms has already had substantial and immediate adverse effects on [her] daily life[,] . . . health[,] and well-being").

356 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

worse than others who are similarly situated.”¹⁶⁷ Laws which prevent transgender individuals from playing on teams that conform to their gender identity treat these athletes worse than students with whom they are similarly situated because they do not allow transgender athletes to play on teams that correspond with their gender identity, unlike their non-transgender peers.¹⁶⁸ Recent state level legislation that bars transgender athletes from playing on the teams consistent with their gender identity is therefore susceptible to challenge and will likely be held to violate Title IX.¹⁶⁹ While the Biden Administration has so far been vocal about its support of transgender students’ access to facilities that conform to their gender identity, it has been silent on enforcement actions it would take against noncompliant institutions.¹⁷⁰ As in all issues involving federal statutory interpretation, Congress may also resolve the ambiguity of the meaning of “sex” in Title IX by amending the statute or providing additional legal protections.¹⁷¹

C. Other Avenues to Challenge Anti-Trans State Legislation (Equal Protection)

While Title IX challenges are the most likely grounds upon which state legislation banning transgender women and girls from participating in high school and collegiate sports in accordance with their gender identity will be overturned, the Fourteenth Amendment offers a second avenue by which such laws mayulti-

167. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1740 (2020) (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)) (finding disparate treatment based on sex must also be intentional).

168. For further discussion of the benefits of “trans-inclusive” school policies, see *supra* note 162 and accompanying text.

169. See Katie Rogers, *Title IX Protections Extend to Transgender Students, Education Dept. Says*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/16/us/politics/title-ix-transgender-students.html> [<https://perma.cc/DLB4-2NCD>] (citing Education Department officials who claim Title IX protections extend to transgender students, so will likely impact recent state legislation to ban transgender students from playing sports that correspond with their gender identity).

170. See *id.* (providing opinions of some commentators explaining Biden Administration may be reluctant to enforce Executive Order); see also Nikki Hatza et al., *Biden Executive Order Expands Title IX Protections*, JDSUPRA (Mar. 10, 2021), <https://www.jdsupra.com/legalnews/biden-executive-order-expands-title-ix-3384512/> [<https://perma.cc/ASQ9-BVGX>] (providing summary of Biden Administration’s Executive Order on “[g]uaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity” including its implications for Title IX enforcement).

171. See, e.g., S. 2584, 115th Congress (2018) (providing text of proposed bill barring identity-based discriminations against students in program or activities receiving federal financial assistance).

mately be challenged.¹⁷² The Fourteenth Amendment guarantees “equal protection of the laws.”¹⁷³ Sex or gender “generally provide . . . no sensible ground for differential treatment.”¹⁷⁴ Therefore, the Equal Protection Clause allows only “exceedingly persuasive” classifications based on sex or gender.¹⁷⁵

The Supreme Court has applied heightened scrutiny to sex-based classifications in order to eliminate discrimination on the basis of gender stereotypes.¹⁷⁶ Policies that bar transgender girls and women from participating in sports broadly discriminate on the basis of sex and thus could be subjected to heightened scrutiny.¹⁷⁷ Ostensibly, laws that ban transgender athletes from participating in high school and collegiate sports are done to promote an important government interest.¹⁷⁸ However, there is not a substantial relationship between banning transgender athletes from teams that conform to their gender identity and promoting sex equality.¹⁷⁹ Governmental gender classifications must be “reasonable, not arbi-

172. See generally Krista D. Brown, *The Transgender Student-Athlete: Is There A Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 314–16 (2014) (discussing due process arguments, equal protection arguments against state laws banning transgender athletes from participating on teams in conformity to gender identity).

173. U.S. CONST. amend. XIV, § 1.

174. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating general rule classifications based on gender or sex bear no relation to ability, gender or sex classifications fail equal protection scrutiny unless substantially related to sufficiently important government interest).

175. See *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding State must at least show challenged classification serves important governmental objectives, must show discriminatory means employed are substantially related to achievement of those objectives).

176. See *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (“The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.”).

177. See, e.g., *Adams ex. Rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (applying heightened scrutiny because school board’s bathroom policy singles out transgender students for differential treatment because they are transgender).

178. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

179. See Krista D. Brown, *supra* note 172, at 325 (“Under Equal Protection jurisprudence regarding gender equity in high school athletics, courts have found that categorically denying underrepresented sexes the opportunity to play on an athletic team because of health and safety concerns is not substantially related to that objective.”).

trary.”¹⁸⁰ For example, policies often are administered arbitrarily by relying on student’s enrollment documents to determine sex assigned at birth and thus do not treat all transgender students alike.¹⁸¹ Already, various circuit courts have appeared eager to apply equal protection arguments in addition to sex-stereotyping and *per se* discrimination arguments post-*Bostock* to strike down bans on transgender athletes.¹⁸² In *Grimm v. Gloucester County School Board*, for example, the Fourth Circuit agreed with the Seventh and Eleventh Circuits that when a school district decides which bathroom a student may use based upon sex listed on a birth certificate, this is sex-based discrimination and is subject to intermediate scrutiny.¹⁸³ Moreover, the court rejected the school board’s argument that privacy interests constitute an “exceedingly persuasive” justification of the policy.¹⁸⁴ Given the trend among circuit courts, including recent decisions of the Eleventh Circuit – seen by many as least likely to apply *Bostock* to a Title IX setting – it appears highly unlikely that state laws restricting the rights of transgender individuals will survive challenges on both Equal Protection and Title IX grounds.¹⁸⁵

180. See *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting *Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920))).

181. See *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding students’ sex on school enrollment documents not “legitimate, accurate proxy” for sex assigned at birth).

182. See, e.g., *Grimm II*, 972 F.3d 586, 620 (4th Cir. 2020) (“The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past. . . . How shallow a promise of equal protection that would not protect Grimm from the fantastical fears and unfounded prejudices of his adult community.”).

183. See *id.* at 608 (“We agree with the Seventh and now Eleventh Circuits that when a ‘School District decides which bathroom a student may use based upon the sex listed on the student’s birth certificate, ‘the policy necessarily rests on a sex classification.’” (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))); see also *Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (“Mr. Adams and the School Board are in agreement that our Court is required to review the School District’s bathroom policy with heightened scrutiny. Although this standard of review is not in dispute, we first review why heightened scrutiny is warranted in order to chart a course for our analysis.”).

184. See *Grimm II*, 972 F.3d at 623 (Wynn, J. concurring) (“Put simply, Grimm’s entire outward physical appearance was male. As such, there can be no dispute that had he used the girls’ restroom, female students would have suffered a similar, if not greater, intrusion on bodily privacy than that the Board ascribes to its male students. The Board’s stated privacy interests thus cannot be said to be an ‘exceedingly persuasive’ justification of the policy.”).

185. See generally *id.* (holding school board policy banning transgender students from using bathroom conforming to gender identity violates Title IX, Equal Protection Clause protections). See also *Glenn v. Brumby*, 663 F.3d 1312, 1321

D. What this Signifies for Women's Sports Going Forward

Recently, a federal judge issued a preliminary injunction on the Idaho law banning transgender women and girls from sports teams citing *Bostock's* reasoning that discrimination against an individual for being transgender necessarily discriminates on the basis of sex.¹⁸⁶ This ruling and others could imply that laws which discriminate on the basis of sexual orientation or gender identity may be increasingly subjected to heightened scrutiny analysis going forward.¹⁸⁷ Following the *Bostock* decision, Olympic track-and-field coach Linda Blade stated that she feared that “all the benefits society gets from letting girls have their protected category so that competition can be fair, all the advances in women's rights . . . [will] be diminished.”¹⁸⁸ Similar concerns have been echoed in state legislation banning transgender girls and women from school athletics.¹⁸⁹ Several bills specifically point out that sex-specific teams promote sex equality by providing opportunities to female athletes to “demonstrate their skill, strength and athletic abilities while also providing them with opportunities to obtain . . . the numerous other long-term benefits that flow from success in athletic endeavors.”¹⁹⁰ Following President Biden's executive order calling on agencies across the federal government to review regulations and policies that prohibit sex discrimination to include sexual orienta-

(11th Cir. 2011) (“Brumby has advanced no other reason that could qualify as a governmental purpose, much less an ‘important’ governmental purpose, and even less than that, a ‘sufficiently important governmental purpose’ that was achieved by firing Glenn because of her gender non-conformity.”). In applying equal protection logic to striking down a claim of sex-based discrimination in the employment setting, the Eleventh Circuit has indicated its willingness to apply heightened scrutiny in future cases within the school setting as well. *See id.* (implying termination of employment due to gender non-conformity would likely not serve sufficiently important governmental purpose).

186. *See Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (ordering preliminary injunction on Idaho law).

187. *See Sharita Gruberg, Beyond Bostock: The Future of LGBTQ Civil Rights*, CAP ACTION (Aug. 26, 2020), <https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/366U-6BAS>] (describing *Bostock's* impact on Equal Protection Clause as well as impacts on access to housing under Fair Housing Act, and access to healthcare under Affordable Care Act).

188. For further discussion of critics of Biden Administration's Executive Action directing all federal agencies to reevaluate treatment of transgender individuals in light of the *Bostock* decision, see *supra* note 15 and accompanying text.

189. For further discussion of justifications used by states that adopted laws banning transgender athletes, see *supra* notes 121, 123 and accompanying text.

190. *See, e.g., Senate Bill 2536* § 1–7, MISS. LEGISLATURE (2021), <http://bill-status.ls.state.ms.us/documents/2021/html/SB/2500-2599/SB2536IN.htm> [<https://perma.cc/5JDZ-SG8X>] (citing benefits to male, female students of sex-segregated teams barring transgender individuals from participating on teams conforming with gender identity).

360 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327]

tion and gender identity per *Bostock*, the hashtag #BidenErasedWomen trended on Twitter.¹⁹¹ Inherent in this argument, however, is the idea that what is good for transgender girls and women is not also good for girls and women generally and that transgender girls and women are somehow not part of this larger group.¹⁹²

On the other hand, in a joint statement, twenty-three women's rights and gender justice organizations voiced their support of the full inclusion of transgender people in athletics.¹⁹³ While Linda Blade's concerns are by no means unusual, they are likely unfounded.¹⁹⁴ Twenty-four states and the District of Columbia have had trans-inclusive athletic laws or policies for more than a decade.¹⁹⁵ It has also been found that many of these states actually saw higher participation rates in athletics among cisgender women after such policies were implemented.¹⁹⁶ University of Pennsylvania swimmer Lia Thomas became a central figure in the debate over transgender inclusion in competitive women's sports after setting the fastest women's time in the nation for the 200 meter free swim.¹⁹⁷ All else being equal, it does appear that transgender women may have a competitive advantage over cisgender female ath-

191. See Samantha Schmidt et al., *Biden Calls for LGBTQ Protection in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/> [<https://perma.cc/EP5G-JYFC>] (describing backlash to Biden Administrations Executive Order).

192. For further discussion of how arguments in favor of excluding transgender women or girls from school sports are unscientific and unjust, see *supra* note 161 and accompanying text.

193. See *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People*, AM. C.L. UNION, <https://www.aclu.org/letter/statement-womens-rights-and-gender-justice-organizations-support-full-and-equal-access> [<https://perma.cc/U2CU-6FC6>] (last visited Sept. 23, 2021) ("We speak from experience and expertise when we say that nondiscrimination protections for transgender people — including women and girls who are transgender — are not at odds with women's equality or well-being, but advance them.").

194. See *id.* (stating equal participation in athletics for transgender people does not mean end to women's sports generally).

195. See *K-12 Policies*, *supra* note 16 (downplaying recent fears about transgender athletes, citing prior "trans-inclusive" laws).

196. See *Statement of Women's Rights and Gender Justice Organizations*, *supra* note 193 (indicating participation in women's sports generally increased when trans-inclusionary laws or policies were adopted).

197. See David Rieder, *Controversy of the Year: Transgender Swimmer Lia Thomas Swims Fastest Times in the Nation*, SWIMMING WORLD (Dec. 31, 2021), <https://www.swimmingworldmagazine.com/news/controversy-of-the-year-transgender-swimmer-lia-thomas-swims-fastest-times-in-the-nation/> [<https://perma.cc/VJ5L-NJMB>] (providing background on Lia Thomas, including her college swimming records).

letes, and conceivably could lead many women's sports competitions if a small percentage of elite athletes transition after puberty.¹⁹⁸ However, competitors like Lia Thomas are extremely rare and a world in which transgender athletes dominate the upper echelons of female athletics has not yet materialized—and transgender athletes in general remain quite rare.¹⁹⁹ The likeliest result of the *Bostock* case is that transgender girls and women who are currently barred or discouraged from high school and collegiate athletics will be able to participate, thus avoiding the potential psychological harms that come about from denying such participation.²⁰⁰

IV. CONCLUSION: BEYOND BOSTOCK AND INTO THE FUTURE

The *Bostock* decision will inevitably be an incredibly important development in protections for LGBTQ individuals in the employment sphere.²⁰¹ Moreover, as federal courts continue to expand the *Bostock* decision into other realms, it will continue to afford transgender individuals additional protections.²⁰² One such protection will likely include transgender athletes' ability to play on

198. See Megan McArdle, *We Need To Be Able To Talk About Trans Athletes and Women's Sports*, WASH. POST (Jan. 13, 2022), <https://www.washingtonpost.com/opinions/2022/01/13/trans-women-sports-uncomfortable-questions/> [<https://perma.cc/Z483-S4QP>] (discussing Lia Thomas, other transgender athletes', potential competitive edge over cisgender athletes).

199. See David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [<https://perma.cc/Y6H3-KRYL>] (highlighting inability of legislators advocating bans on transgender girls competing on girls' sports teams to cite examples of transgender athletes compromising ability of cisgender girls to participate); see also Jo Yurcaba, *Amid Trans Athlete Debate, Penn's Lia Thomas Loses to Trans Yale Swimmer*, ABC NEWS (Jan. 10, 2022), <https://www.nbcnews.com/nbc-out/out-news/trans-athlete-debate-penns-lia-thomas-loses-trans-yale-swimmer-rcna11622> [<https://perma.cc/UE7R-WNAC>] (citing underrepresentation of transgender athletes in NCAA compared to general population while reporting Lia Thomas recently lost to male transgender athlete who competes on women's team because he has not begun gender-affirming hormone treatment).

200. See, e.g., Grimm I, 822 F.3d 709, 727–28 (4th Cir. 2016) (Davis, J., concurring) (citing expert declaration by psychologist specializing in working with children, adolescents, with gender dysphoria, who stated treating transgender boy as male in some situations but not in others is “inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child”).

201. For further discussion of the impact of the *Bostock* decision in the employment field, see *supra* note 128 and accompanying text.

202. For further discussion of the impact of *Bostock* beyond employment, see *supra* notes 128–140 and accompanying text.

362 JEFFREY S. MOORAD SPORTS LAW JOURNAL [Vol. 29: p. 327

sports teams that conform to their gender identity in high school and collegiate athletics.²⁰³

At the same time, as transgender athletes increasingly compete on teams that conform to their gender identity, there will be those who oppose the change and claim that this represents a violation of Title IX protections of cisgendered women.²⁰⁴ Ultimately, it will fall upon either the courts, federal agencies, and Congress to further clarify the meaning of sex in Title IX.²⁰⁵ While there are some who fear that these new rights will come at the expense of rights enjoyed by cisgender female athletes, these fears are likely unfounded.²⁰⁶

*Joe Brucker**

203. For further discussion of why *Bostock* may eventually extend to school athletics, see *supra* notes 150–164 and accompanying text.

204. See, e.g., *Soule v. Conn. Assn. of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206, at *1 (D. Conn., Apr. 17, 2020) (challenging Connecticut’s law allowing transgender athletes to compete on teams corresponding with gender identity as violating Title IX protections for cisgender female athletes).

205. See *Title IX: Who Determines the Legal Meaning of “Sex”?*, CONG. RSCH. SERV. (Dec. 12, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10229> [<https://perma.cc/7LV7-4SKC>] (delineating roles played by courts, Congress, federal agencies in interpreting Title IX).

206. For further discussion of the impact of *Bostock*’s protection expanding to Title IX on women’s sports, see *supra* notes 188–200 and accompanying text.

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; I would like to thank my family and friends for all their encouragement and support throughout my academic and professional endeavors.

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

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

North Dakota House Human Services Committee

January 24, 2023

Chairman Weisz and Members of the Committee:

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

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

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

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

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

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

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

To whom it may concern,

My testimony is in opposition to House Bill 1473 I ask that you give this bill a Do Not Pass.

The reason behind this is that this bill affects people I care about a lot, as well as people I don't know well enough yet. I am aware of the impacts this bill will have on the transgender community because I am a transman who has lived in this state my entire life. Who is not afraid to be out and proud of who I am. Yet, this bill would make us feel as if our existence in this state is meaningless, even for those who have lived in this state their entire lives and refuse to leave. If you look at it through our eyes, House Bill 1473 would be classifying restrooms and locker/shower rooms in schools and other state facilities as single sex, with sex defined as the gender assigned at birth, this is the case. This means that transgender people will be denied access to places that affirm their gender identity.

Whereas why you should care about that, is because there are transgender people who do still live in North Dakota. A survey done by the Williams Institute, a UCLA School of Law, found that 0.43% of adults (18+) identify as transgender. Yet, when it comes to the youth (13-17), it is 1.16% of their population. To put that in numbers, there were 500 youth and 2,500 adults that identify as transgender. That is little more than the population of New Town, ND if you know where that is located.

Some of us stay here in North Dakota because either we can't afford to move, or because we don't want to leave our families. Honestly, with this bill, it is making it harder to live in this state restricting our rights to use the restroom that fits gender identity. How often have you been looking at the type of restrooms available at both public and private places? I am not sure how often you see family restroom, or even gender neutral restroom in places. I even still remember my high school, Central High School, having about two, and the one that was available was located all the way in the basement. There was a lot of stairs to climb down and up every day. There were times I avoided drinking and eating due to the fear of not being able to use the restroom or even the changing room due to the fact that the single use was sometimes locked and unavailable for no reason.

Yes, you heard me right, I was afraid to use restrooms and changing rooms in my own high school due to my safety. I know for the fact there are others like me who are afraid. This bill will add on to these feelings due to you are restricting where we belong. Sure, this bill has in section 7 part 3 states that it does not prohibit a school administrator from providing a reasonable accommodation for a student, including a transgender or gender-nonconforming student. Reasonable accommodation may include the use of a single occupancy restroom or changing facility. This section is on public schools or building on school district premises. Yet, I still remember what my gym teacher offered for accommodations for I could use in high school when I came out as trans. I had two options, change in the single-use restroom in the new gym that was across was in the other building next door to the locker room, but I would be counted late. The second option was I could get change in the women gym teacher's office behind a curtain. None of those felt safe or welcoming. I didn't pick either, because what I did instead was, I had my gym clothes underneath my clothes. Just imagine what I experienced happening to many others in this state if this bill passes.

Which brings me to section 5, part 1: "In a dormitory or living facility controlled by an institution under the control of the state board of higher education, a restroom or shower room accessible by multiple residents at the same time must be designated for use exclusively for males or exclusively for female." This part of the bill is affecting higher education living. I know for a fact some dormitories at UND are co-

ed. They share restrooms and living spaces, and there has yet to be an issue. I can not say about other colleges through, so that's just my own statement from what I know.

The thing with this section is like many of the sections in this bill, it restricts transgender students. Sure, it states, "This section does not prohibit a dormitory administrator or dormitory staff member from providing a reasonable accommodation for a resident, including a transgender or gender-nonconforming resident." Have you thought what that would look? You are pretty much separating transgender students from experiencing dorm life on campus. I feel like it should be up to the college when it comes to things like this due to the fact most college students are 18 or older. Our brains are a bit more developed compared to youth. We belong in this state no matter what others think.

That is why I ask you once again to give this bill a Do Not Pass.

Thank you for your time, consideration, and service to our state.

Best Regards,

A handwritten signature in black ink, reading "Charles J Vondal". The signature is written in a cursive, flowing style with a large initial "C" and a long, sweeping tail.

Signed

Charles J Vondal

Dear Honorable Members of the North Dakota senate,

My name is Lilly Funk, and I live in Minot, North Dakota. I am a federal employee at Head Start (as an assistant teacher). The purpose of this written testimony is to persuade members of the North Dakota senate to support HB 1473.

I am in support of this bill because if biological males are allowed in spaces that are meant for biological females, this poses a problem. It is dangerous for biological females to be in a vulnerable position like this because they are at risk for harassment or even rape. Even if a biological male identifies as female, they are naturally stronger than women, and if they are left in a private space with males, they are put in a dangerous and unfair position.

Women need to be kept physically safe. It is more imperative that women feel safe in private space than it is for males to be allowed to intrude their safe spaces simply for psychological comfort.

Thank you for considering making the moral decision to pass HB 1473 to protect biological women against biological men violating their private spaces!

Dear Chair Weisz and members of the House Human Services Committee,
My testimony is in opposition to House Bill 1473. I ask that you give this bill a Do Not Pass.

One of the concerns my transgender teen had when they were alive was access to spaces where they could change clothes for gym or to use the restroom. There was only one "gender neutral" bathroom at their high school and it was not easily accessible given the time constraints associated with class transition times. There simply was not enough time to go to that bathroom and get to the next class without being penalized with a tardy. My teen stopped drinking fluids at school. They stopped eating at school. The end result was mild dehydration and chronic migraines, missed school, and general malaise.

In the locker room for gym at school, there were constant battles with finding a safe place to change clothes. A person should be able to wear the undergarments that make them feel most comfortable, and they should not be subjected to teasing, or physical assaults because someone else "feels" its not necessary. So, my child avoided PE, took the poor grade and decided school was overrated and that there were better "safe" opportunities elsewhere.

A solution to both these issues would be designated spaces where there were private stalls, in gender neutral bathrooms. That "dressing for PE" be an optional, and the class be pass/fail. Another alternative altogether could be a virtual PE class, where students can use their assigned chrome books to attend a PE virtual class with an instructor leading the class. Students could exercise in the privacy in their own space. There should be alternatives for students who do not feel safe in gym locker rooms. All students should feel safe at school.

All of these concerns were factors that contributed to their suicide on 9/28/22.

One thing that is of great concern to me is privacy, especially in bathrooms and locker rooms. I would recommend rewriting this entire piece of legislation to focus on privacy. To ensure each individual can experience privacy in these spaces. If we achieve that, we make spaces accessible for all populations without worry who is trans, cis, male, female, or non-binary. We all get to enjoy privacy, we sidestep issues of accessibility, and we all benefit in that system.

Take this time to do something that would be fantastic for all of us. Turn this piece of legislation into something with meaning and impact. Short of that, I recommend Do Not Pass.

Thank you for your time, consideration, and service to our state,

Very Respectfully,
Asheley LeFors, Raven's Mom
Raven, Forever 16

As a mother of a transgender teen in the North Dakota Public School System, I strongly oppose HB 1473. To date, my son has had a positive experience with his public school providing him with bathroom accommodations. Prior to his transition, he struggled with mental health and frequently missed school. With the school's support of his transition, his mental health has improved greatly. He rarely misses school, is excelling academically with a 4.03, and is engaged in co-curriculars. If this bill moves forward, it would cause significant distress, increase symptoms of gender dysphoria, and make school an unsafe place for him to be. His anxiety and depression would deteriorate, and all of the progress made over the past few years lost. In short, this bill will harm the well being of my child. Please do not support this legislation and allow schools to make their own policies as it relates to restrooms, locker room, and shower rooms. This bill is harmful and discriminates against transgender people.

HB 1473 – Biological bathrooms/locker rooms

Dear Members of the Senate Human Services Committee,

My name is Shawna Grubb and I reside in District 35. I am writing today to urge you to vote yes on HB 1473.

- The Gender Ideology movement is imperialistic in nature, meaning it will continue to spread until it dominates every law and policy in every state. It's time for North Dakota to play offense - not defense - against this destructive cult.
- Finding accommodations for individuals who identify as transgender need not come at the cost of bodily privacy and safety for people across the board, especially that of women and children.

Thank you for your consideration of this important topic and your service to the people of District 35.

Shawna Grubb



The North Dakota Association of School Psychologists (NDASP) asks lawmakers to oppose the harmful policies outlined in the table below that target LGBTQ+ youth. These policies disallow students from using school facilities consistent with a student’s gender identity; require parental consent to have a student’s gender identity affirmed and acknowledged in school; mandatory parental notification when a student discloses they may be questioning their sexuality or gender identity; prohibition of classroom instruction on nonheteronormative sexual orientations and gender identities; removal of classroom materials that are inclusive of LGBTQ+ students and families; and afford protections for individuals who refuse to affirm a student’s identity and punitive measures for individuals who do. The following bills are discriminatory, against best practices, and do not reflect the peace and tranquility North Dakota is known for.

Vote NAY on House Bills			Vote NAY on Senate Bills
HB1249	HB1333	HB1489	SB2199
HB1254	HB1403	HB1522	SB2231
HB1297	HB1473	HB1526	SB2260
HB1301	HB1474		
HB1332	HB1488		

These proposed bills are in direct conflict with NDASP’s adopted position statement from the National Association of School Psychologists (NASP) which states that:

Positive educational and social outcomes for all children and youth are possible only in a society—and schools within it—that guarantees **equitable treatment to all people**, regardless of race, class, culture, language, gender, gender identity, religion, sexual orientation, nationality, citizenship, ability, and other dimensions of difference (NASP, 2019).

Additionally, school psychologists are guided by an ethical code that calls for beneficence, through which they respect the rights and dignity of all persons, and nonmaleficence, which requires that they do no harm. NASP’s ethical standards require school psychologists to validate and affirm a young person’s authentic lived experience, value their integrity, ensure their safety, and promote their well-being (NASP, 2020b). The proposed laws would prohibit school psychologists from practicing ethically.

Our LGBTQ+ youth need our support now more than ever. Some alarming statistics from The Trevor Project 2022 Survey include:


- 45% of LGBTQ youth seriously considered attempting suicide in the past year.
- 60% of LGBTQ youth who wanted mental health care in the past year were not able to get it.
- 73% of LGBTQ youth reported experiencing symptoms of anxiety
- 58% of LGBTQ youth reported experiencing symptoms of depression

NDASP also vehemently supports the use of evidence-based practice through an ethical lens. Conversion 'therapy' is not evidence based and has been determined to be fraudulent by several states. In fact, "The present-day scientific consensus is that such practices are not only ineffective, but highly harmful and fundamentally unethical." (Conine, Campau, Petronelli, 2022). Examples of historical unethical practices used in conversion therapy include corporal punishments such as spanking and electroshock therapy, among other questionable practices. The United Nations Human Rights Council (2020) goes as far to say that these practices are not only a public health problem, but also "violate the prohibition of torture and ill-treatment." 17% of LGBTQ youth reported being threatened with or subjected to conversion therapy (The Trevor Project, 2022), which can have life-threatening effects.

Support for LGBTQ+ youth leads to better outcomes for them and society as a whole. LGBTQ+ youth report that when adults talk to them respectfully about their LGBTQ+ identity and use their names and pronouns correctly, they feel supported. Research indicates that LGBTQ+ youth are more resilient when they have supportive people in their lives. Further, LGBTQ+ youth with higher resilience are 59% less likely to attempt suicide and 69% less likely to consider suicide (The Trevor Project, 2022). NDASP supports legislative actions to increase access to mental health for all individuals, including LGBTQ+ youth.

Please join NDASP in supporting our LGBTQ+ youth by voting "nay" on the house and senate bills listed above.

Sincerely,



Alannah Valenta, PsyS, NCSP

NDASP President, on behalf of North Dakota Association of School Psychologists

References:

Conine, D. E., Campau, S. C., & Petronelli, A. K. (2022). LGBTQ+ conversion therapy and applied behavior analysis: A call to action. *Journal of Applied Behavior Analysis* (55, 6-18).

National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students. [Position Statement].

National Association of School Psychologists. (2020b). The Professional Standards of the National Association of School Psychologists.

National Association of School Psychologists. (2019). Prejudice, Discrimination, and Racism. [Position Statement].

The Trevor Project. (2022). 2022 National Survey on LGBTQ Youth Mental Health. www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

United Nations Human Rights Council. 2020, Report on Conversion Therapy, <https://www.ohchr.org/en/calls-for-input/report-conversion-therapy>. Accessed 27 Jan. 2023.

Dear Legislators and Committee Members,

My testimony is to ask that you give this bill a Do Not Pass.

I am a public school educator and a 29 year resident of North Dakota. This bill actively harms members of community.

Thank you for your time and consideration.

Sincerely,

Christopher Brown

HB #1473

68th Legislative Session

Senator Paulson and Representatives: Olson, Bellew, Henderson, Hoverson, Prichard, Steiner, and VanWinkle

HB #1473

I am writing in opposition to HB #1473. This bill is very insensitive and lacks understanding of what transgender individuals feel and the struggles that these people face every day. I am a parent of a transgender person and I want to do is shed some light on what devastation this bill will leave in its wake.

For the record, transgender people are born transgender. Being transgender isn't a choice nor a fad. Transgender isn't a way to get an edge in female sports or a way to get a look, peek or touch a CIS person. CIS, is a term referring to those who identify as the gender they were born. My child, as well as all other transgender people are born transgender. In utero, the body forms first, the brain later forms. My daughter and I sat in a doctors office at Mayo Clinic in Rochester, MN, where doctors explained that it is believe that during a crucial point of brain development, it is believe that the mother's body releases hormones that interfere with the brains formation, causing the brain to form the opposite gender than what the body already has developed as. In my daughter's case, her body formed male and her brain later formed female. Doctors at Mayo Clinic also informed me that it is through a MRI, her brain is actually that of other females. You see, males' brains are visibly different than those of females. My daughter's body and brain and not in synch with each other. Nothing I did or didn't do caused this and in turn, nothing my baby did to cause her to be transgender. This is a thing that happens in utero and as we all know nature isn't always creating life as it usually does. Individuals are born every day with cleft pallet, blindness, deafness, spin other irregularities. We as a society take pity on those born with irregularities that can be seen with the naked eye but yet discriminate or negate those who later in life say they are transgender, a boy trapped in a girl's body or vice versa. Society has yet to recognize the apathy and cruelty of denying these individuals the same rights as their CIS counterparts.

Transgender people should be allowed to seek treatment and become whole. It is NOT the transgender person they were born with their body and brain not in synch. Furthermore, it is cruel and just as unjust to deny these people from identifying who they are at school, work, as an incarcerated in jail, penitentiary or youth facility. Imagine going through life having someone call you the opposite sex then what you identify with. How comfortable would you be? Now imagine having to be forced to shower, use the bathroom with the gender you don't identify with. That would be traumatizing for anyone.

What this bill, HB 1473, would do is put transgender people at risk of being assaulted physically and mentally by peers, faculty, staff, employers and people who are in authority positions such as a correctional officer. Transgender people have civil rights just like their CIS counterparts. What this

Legislative body doesn't realize is the transgender people are not the ones who act out aggressively. The aggressors are the CIS people they come in contact with at school, work, out in public or as an inmate. Transgender people just want to live their life as their CIS counterparts do yet it's the insecurities, ignorance and bigotry what causes the CIS population to become violent or aggressive. My daughter suffered indignities from her peers at school as well as the faculty and staff at the schools. Each time there was an incident, the administration protected the aggressor and my daughter had no "safe haven" at school. Yet my daughter carried herself with the dignity and strength that I rarely see in adults let alone in middle school or high school.

Transgender people should not be victimized by the State of North Dakota by forcing these individuals to use bathrooms, locker rooms, shower facilities that they do not identify as. I do believe the State has no idea how to handle this but there are organizations and agencies that do know how to address bathroom and locker room situations. Also I do believe education for everyone involved is also paramount to the success of any policy. Knowledge is power and once people know what to do and what not to do, hopefully, they do better. In the event that a person doesn't do better, after being educated, then a consequence should be given.

You would punish a baby for being born deaf so why punish a transgender person? The transgender person didn't ask to be born transgender. Compassion, understanding and empathy are required. Anything else is discriminatory and cruel. Is that what North Dakota wants to be known for, how cruel it treats it's transgender citizens? Is this a way to drive transgender citizens to leave North Dakota?

As a parent of a transgender person I fear for my child every day due to the lack of protection there is for her here in this state as well as how this Legislative body sees her and others like her. My daughter needs protection, yet your bills read as if the CIS people are the ones that need protection. That is so messed up. My daughter had friends who had to protect her from bullies at school who threatened my daughter and the friends who defended my daughter. The school did nothing to the aggressive CIS female until an actual physical encounter between this aggressive female and a totally different CIS girl, someone whom the aggressive female bullied in the past, had occurred. I had warned the principal before this event that the aggressive female's aggressive behavior was escalating and yet nothing happened until the two CIS youths got into a physical altercation in the cafeteria. This isn't an anomaly. Transgender people don't go out in public to go cause chaos and see what they can get by with; that is the false narrative that the radical religious right wants to depict to it's followers. Fox News and the like are notorious for their fake spin on transgender people.

When my daughter uses the bathroom she is doing what I and every other female does in there, we use the toilet. Plain and simple. She isn't in there to look at anyone else and this goes for using showers and locker rooms. That's a scare tactic that the ignorant and those who lack any understanding of what Christ our Lord taught. Our Lord wouldn't treat transgender people by forcing them to use facilities that makes these people feel unwanted, unsafe and not cared for. Would you want your child to go to

school where their rights were violated. Would you want your child to have to face unsafe situations like using the boy's bathroom when she looks, feels and identifies as a female? Could you tell your daughter that these people are doing the right thing? Well, I can say honestly, I couldn't and didn't feel that forcing my daughter to use the boy's bathroom was the right thing for her. What it did do was cause her to not to eat or drink during the day so she wouldn't have to use the bathroom. Now does that sound like someone who is out to take a look at your daughters? No, but it did put my daughter at risk of physical ailments let alone the discomfort of being thirsty, hungry or needing to use the bathroom. Where was my daughter's "safe haven"?

If you want to do your job as a Legislators the most accurate and complete way, you will talk to a transgender person or a parent of a transgender person. You would take into account how life is for the transgender person and how the bathroom, locker room, showers and even jail would. You will seek out agencies that would discuss how to address your concerns and answer questions you have.

If this bill is successful, who next is in your crosshairs? Gays and lesbians? Native Americans or people who do not identify as being white? These questions and my concerns are legitimate and valid. Anyone who supports a bill yet knows nothing about the people the bill attacks shows how uncaring and misinformed they are.

I strongly encourage you to vote DO NOT PASS and then reach out to a transgender person or parent of a transgender person. Hear their story. These people deserve the same rights and privileges that you and I, all of us enjoy and take for granted.

Thank you,
Kristie Miller

Dear Senator,

Good morning. Thank you for your time in reviewing my testimony. Please vote to protect womens sports at our institutions of higher learning and vote yes to HB 1473.

Male-born athletes should not be allowed to participate on an athletic team that is exclusively for females! The testimonies I listened to online were in favor of protecting Womens Sports and safeguarding them so that biological females could have the chance to compete with other women now and in the future. I want my daughters and granddaughter to have a safe domain to train, dominate and earn well-deserved scholarships!

I heard testimonies against this bill and my heart went out to the people who struggle with mental illness and suffer in ways that we cant even begin to imagine. However, I find it unfortunate that professionally trained people ignored legitimate pleas of biological women damaged emotionally and psychologically by having to compete against athletes born as men.

It seems so wrong to take away Womens Sports for a small group of people! It seems unfair and and it seems unreasonable to ignore their pleas.

I dont support taking away what is held dear by many for the sake of a few individuals. Please render a Do Pass for HB 1473.

Sincerely,
Alida Arnegard
District 26

Testimony HB 1473

Dear Members of the Senate Human Services Committee,

My name is Sheila Glaser and I am a registered voter from District 7. I am asking for a DO PASS on HB 1473. As the attack of womanhood transpires in the United States of America, it will soon hit our front door step in North Dakota. As a mother of 3 beautiful daughters, and two gorgeous granddaughters, I cannot imagine the degrading and shameful emotions that would have been or will be created while in the school locker room. Puberty is enough of a challenge without adding a biological male in the room. I was recently in a Target in Omaha, NE where my 3 year old granddaughter had to go to the bathroom. As we entered the restroom, the first stall was in use and the door was not closed as I saw an individual with a dress stand in front of the toilet and relieve themselves. SAD – and thankful I was able to rush her by without notice! I fail to understand the unbelievable push of excessive sexuality on our youth and the demise of womanhood! I cannot believe the hush of the “Women’s Lib” movement. Again, I am strongly in favor of a DO PASS ON HB 1473.

Chairman and Committee Members,

I urge a DO PASS committee recommendation on HB1473. I am so weary of the assaults on women and children. Please take this step to help protect us. We should have the fundamental right to privacy and safety in public spaces such as restrooms, locker rooms, etc.

Thank you.

Rachel Haidle

Dear legislators,

I write to you as a human being, born in North Dakota, that has been openly transgender for over 8 years now. I genuinely fear for my life in these times. Trans women are mainly affected by this bill. A TERF is a trans exclusionary radical feminist, which means it's a person who supports feminism until it comes to trans women. It seems they believe that trans women are not women, which is not true. If you cannot recognize that these bills proposed around the country are an attack on a group of marginalized peoples I don't know what to tell you.

I fortunately went to a school that was fully prepared and equipped to make me and every other student comfortable; I didn't have to not go to the bathroom all day, and no one in my entire school cared at all, because everyone was educated and kind. Now, I am no longer in school but my heart aches thinking of how these young people may be treated differently and alienated from their peers. Segregating does no good but teach kids an us versus them mentality which will inevitably lead to someone getting bullied. Plus, what, is every school supposed to build new bathrooms? It's unrealistic. We need to do better for these individuals in our communities, especially now when it really just feels like the whole world wants us dead. Transgender people don't want to hurt anyone, we just want to be who we are without people wanting us gone forever.

If you care about the children of North Dakota you won't put them in risk of alienation, bullying, self-harm, or suicide. I am a transgender man from North Dakota in opposition of HB1473.

Thank you,
Oliver G Jensen
Fargo, ND

Transgender individuals are merely trying to go to the bathroom. In truth, transgender individuals are at a far higher risk of violence and assault from others, particularly for trans women if they are forced to use men's bathrooms.

While trans men typically have lower visibility in public, I am confident you do not want a trans man going to the women's bathroom. They often have full beards, are incredibly ripped, and quite frequently easily pass as a "born male" individual.

Finally, women who are "born women" sometimes do not fit the stereotypical appearance that society views as a "woman". These are often hard working moms and wives on the farm – no doubt a population that is widespread throughout North Dakota. These innocent women would be the target of vigilante bathroom police if this bill were to pass.

I am writing in opposition of House Bill 1473. I ask that you give this bill a Do Not Pass.

As a mother of young child and an advocate for suicide prevention in our state, I feel this legislation is discriminatory and does not reflect the values of inclusion and compassion that our state should represent. Our LGBTQ+ community is already at a much higher risk for suicide and self-harm and this bill will only increase that risk.

Transgender people deserve to live as themselves in a state that respects and supports them.

Please oppose HB 1473.

Thank you,
Brenda Weiler

I am writing in opposition of House Bill 1473. I ask that you give this bill a Do Not Pass.

As a father of a young child and an advocate for suicide prevention in our state, I feel this legislation is discriminatory and does not reflect the values of inclusion and compassion that our state should represent. Our LGBTQ+ community is already at a much higher risk for suicide and self-harm and this bill will only increase that risk.

Transgender people deserve to live as themselves in a state that respects and supports them.

Please oppose HB 1473.

Thank you,
Dr. Derek Harnish

Senate Human Services Committee

House Bill 1473

Andrew Alexis Varvel

Written Testimony

North Dakota State Capitol

March 15, 2023

Fort Lincoln Room

9:00AM

Madame Chairman Lee and Members of the Committee:

My name is Andrew Alexis Varvel. I live in Bismarck, District 47.

I am submitting neutral testimony to indicate that I have no objection to this bill as presently written. This is because Section 1 Subsection 3, Section 2 Subsection 3, Section 3 Subsection 3, Section 4 Subsection 3, and Section 5 Subsection 4 make allowance for reasonable accommodations to be provided to transgender or gender non-conforming people.

This legislation is not perfect, and it would be better if the language said “shall provide reasonable accommodations”, but the important thing is to provide reasonable accommodations to fellow residents of North Dakota.

Although I have no objection to this bill as presently written, my neutrality would turn into opposition if the aforementioned subsections were deleted.

Thank you.

Chairman Weisz and members of the House Human Services Committee

My name is Patrick Lonergan and I am writing this testimony as a resident of North Dakota. I write to you of my opinion and that of the six North Dakota voting residents of my family.

We strongly oppose HB 1473. Transgender and gender nonconforming people have a right to use whatever restroom or locker room that corresponds to their gender identity and without the need for an accommodation request.

We join business owners and executives, community leaders, clergy of all faiths, medical experts, parents, educators, athletic organizations, and tourism promoters in recommending that HB 1473 DOES NOT PASS!

Thank you,

Patrick Lonergan

I am writing in opposition of HB 1473. I ask that you give this bill a DO NOT PASS recommendation.

This bill reeks of past discrimination. Creating spaces where specific populations were not welcome should be a thing of the past. If you've taken a US History course, you know that "separate but equal" was never about equality. This bill aims to segregate transgender individuals from restrooms and other spaces. It forces people to out themselves, increasing their risk of personal safety.

There currently isn't an issue with the policies that schools and other agencies have in place currently. A bill such as this isn't necessary but it is unnecessarily cruel.

I ask that you give it a DO NOT PASS recommendation.



100 4th St S, Ste 608,
Fargo, ND, 58103
Phone: 701-264-5200
Fax: 701-999-2779
www.canopymedicalclinic.com
Email: info@canopymedicalclinic.com

March 14, 2023

Re: HB 1473 - Relating to the use of Restrooms, Locker rooms, and Shower rooms

Dear Chair Lee and members of the Senate Human Services committee,

My name is Kara Gloe. I am a mental health therapist licensed in both North Dakota and Minnesota. I work at Canopy Medical Clinic. Among the primary populations of people I serve, are LGBTQIA2S+ folks. As such, I urge you to please vote **DO NOT PASS on HB 1473**. Transgender people are not sexually assaulting cisgender people in North Dakota or anywhere else. Therefore, this bill addresses no problem, rather it further adds the stigmatization of LGBTQIA2S+ people. Easy access to a safe restroom should be considered a basic human right. Anything less will lead to increased rates of physical and mental health issues.

When I search for statistics on the number of cisgender people assaulted by transgender people in bathrooms, I find nothing in the news for North Dakota or anywhere in the country. However, I do find article after article citing statistics about the increased risk transgender folks face for merely existing. In 2019, CNN reported that researchers analyzing the Youth Risk Behavior Surveillance Survey found that 25% of trans or gender diverse students who had restricted access to restrooms in school reported being sexually assaulted in the last 12 months. That number jumps to 36% when trans or gender diverse students report having restricted access to bathrooms and locker rooms. For comparison, 15% of cisgender girls and 4% of cisgender boys reported being sexually assaulted in the last 12 months that same year. This bill does not protect our children. In fact, it does just the opposite by enabling more harm to befall them. That alone should make any consideration of this bill moot. Additionally, it cannot be overstated how much psychological harm is being done by merely introducing this bill, furthering the statistically defunct myth of the "transgender predator," and further marginalizing citizens of this state who already face higher rates of victimization in every facet of their life.

Also, transgender folks just need to pee! That biological fact does not change when people affirm their gender identity. Creating an environment where people must constantly perform mental gymnastics around accommodations of a basic human function leads to higher levels of stress, dehydration, UTIs, fatigue, and a variety of other physical and mental health issues. If enabling higher rates of victimization for children and adults and higher rates of mental and physical health issues is not enough, please know the taxpayers of North Dakota will pay for the public health crisis that follows this and other bills like it.

This bill has no redeeming qualities. Rather, it enables environments where children and adults are at higher risk for victimization, increase rates of physical and mental health issues, and dramatically increases minority stress. **Please vote DO NOT PASS on HB 1473.**

Sincerely,
Kara Gloe, LMSW
Canopy Medical Clinic



North Dakota House of Representatives

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative SuAnn Olson

District 8
17763 Highway 83
Baldwin, ND 58521-9724
solson@ndlegis.gov

COMMITTEES:

Judiciary
Agriculture

Testimony in support of HB 1473

March 15, 2023

Thank you, Madam Chairwoman and Members of the Human Services Committee. My name is Rep. SuAnn Olson and I'm here today to speak in favor of HB 1473.

Late last year I attended a meeting of concerned women and learned of a "Bill of Rights" that was moving across our nation. Don't we already have one of those? Well yes, but the Bill of Rights that has been circulating is a Women's Bill of Rights. Last week, this committee heard HCR 3010 which is North Dakota's version of a commonsense declaration on the biology of sex. Who would have thought that we need this? But we do. Women struggled and sacrificed for decades to gain equal rights. It took our country 140 years before women won the right to vote! And here we are, in 2023, more than a hundred years later, needing to fight for our basic rights. Women and girls are needing to stand up for their right to safety and privacy.

Here are some excerpts, some truths, contained in HCR 3010 that you heard last week:

Biological differences between the sexes mean that males are, on average, bigger, stronger, and faster than females;

Biological differences between the sexes leave females more physically vulnerable than males to specific forms of violence, including sexual violence;

Biological differences between the sexes are enduring and may, in some circumstances, warrant the creation of separate social, educational, athletic, or other spaces in order to ensure safety and/or to allow members of each sex to succeed and thrive;

HB 1473 embodies the practical application of this Bill of Rights. It requires that separate restrooms, shower rooms, and locker rooms be used only by the designated sex or where facilities are available to multiple people at the same time. This applies to correctional facilities, the youth correctional center, the penitentiary, domestic violence sexual assault facilities, and college dormitories. The bill does not prohibit reasonable accommodations from being made for others.

All of the Sections of the bill are quite similar and are described separately because the various facilities are located in different parts of Century Code. Section 1 addresses correctional facilities. Section 2 addresses the youth correctional center, Section 3 addresses the penitentiary, Section 4 addresses domestic violence sexual assault facilities, and Section 5 addresses facilities under the control of the state board of higher education. The goal for colleges is to meet the reasonable expectations of residents. If a person signs up for a female or male dormitory, their expectation is that only that single sex is using the facilities. Certainly, if a dorm or floor of a dorm is designated as co-ed, the expectation is different.

This bill was amended in the House committee to take out references to women's athletics and public school restrooms. It was acted on in the rush before crossover and unfortunately one of the amendments got attached to Section 5 when the clarification would have been more appropriate in the K-12 section that was removed. I am including a suggested amendment to remove the reference to "under the age of 18" phrase on page 3, lines 3 and 4 and request that you include this amendment in the bill. Without it, Section 5 doesn't make much sense and is inapplicable since very few college students are under age 18. I asked the Chairman and 4 committee members what the intent of adding this phrase was and they all pointed to some confusion as they were trying to move bills through committee. Being a new legislator, I wasn't sure what to do about it when the amendments were included on the 6^h Order and missed my opportunity to separately address the amendments on the House floor.

Note that HB 1474, which is still not assigned to a committee hearing yet, is the "sister" bill to HB 1473. It includes definitions of sex, male and female, and father and mother so that there is no confusion under state law when these terms are used. Certainly, if the committee recommends that they be included in this bill, I am open to that. If HB 1474 passes, it may make sense to reference the NDCC definitions in this bill.

We don't have to look very hard to find news stories about the danger women and girls face when separate spaces are not assigned based on biological sex. About a year ago, a women's prison in New Jersey was reported by news organizations to have several inmates who had given birth as a result of being housed with males who claimed to be transgender. This is outrageous and beyond common sense.

Separating people based on sex has been addressed by the courts a number of times over the years. A recent 11th Circuit court case 18-13592 was issued in December 2022 and explained the application of the Equal Protection Clause of the 14th Amendment to sex-based classifications by stating that "a policy will pass constitutional muster only if it satisfies intermediate scrutiny." Intermediate scrutiny means "the government must show that the classification serves important governmental objectives and that discriminatory means employed are substantially related to the achievement of those objectives." In that particular case, protecting personal privacy was found to be an important government objective.

Here is quote from Ruth Bader Ginsburg: "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, *Wash. Post*, Apr. 7, 1975

We need to acknowledge that females as a sex are inherently more vulnerable than males and government policies must recognize and protect their privacy and safety.

Please. Vote Yes on HB 1473.

23.0498.06001
Title.

Prepared by the Legislative Council staff for
Representative S. Olson
March 8, 2023

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1473

Page 2, line 29, remove "under"

Page 2, line 30, remove "the age of eighteen"

Renumber accordingly

Chairman Weisz and members of the House Human Services Committee,

My name is Mariah Ralston Deragon, and I am writing to urge you to VOTE NO on HB1473.

I would suggest you read Alannah Valenta's testimony on this bill. Alannah is the current NDASP President, and she submitted her testimony on behalf of the North Dakota Association of School Psychologists.

I would also suggest you read the dozens of other testimony provided on this bill, written by transgender individuals, family members, and allies- who spell out exactly for you why this bill is harmful, cruel, intrusive, unnecessary, and ultimately discriminatory.

Transgender and gender nonconforming people have a right to use whatever restroom or locker room that corresponds to their gender identity and without the need for an accommodation request.

I am joining business owners and executives, community leaders, clergy of all faiths, medical experts, parents, educators, athletic organizations, and tourism promoters in recommending you choose to VOTE NO on HB1473.

Sincerely,
Mariah Ralston Deragon
Bismarck, ND

Senate Human Service Committee
HB1473 and HB1522
 March 15, 2023

Chair Lee, Vice Chair Cleary, and Committee members:

On behalf of the ACLU of North Dakota, I submit joint testimony in opposition to HB1473 and HB1522.

The ACLU was counsel in *Carcaño et al. v. Cooper et al.*, the legal challenge to North Carolina’s “bathroom ban” bills, HB 2 and HB 142. Additionally, The ACLU is currently counsel for Plaintiffs in litigation challenging anti-trans bills that have passed across the country over the past two years. As such, the ACLU is familiar with the prevailing doctrine governing litigation in this area of law and have direct knowledge of the costs and fees associated with litigation of this kind.

By singling out transgender students for discrimination and excluding them from restrooms and locker rooms that match their gender identity, 1473 discriminates based on transgender status and sex in violation of the United States Constitution and Title IX of the Civil Rights Act. If passed, this bill would send a message to vulnerable transgender youth that they are not welcome or accepted in their communities. It would expose school districts and the state to costly litigation and the potential loss of federal funding for education.

The Supreme Court has already declined to review a federal appeals court decision holding that policies like the one proposed here violate the constitutional and statutory rights of transgender students.¹ That is because the law is clear on this issue.

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.”² As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”³ There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.⁴ This bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.⁵

Parties who seek to defend gender-based and trans-status based discrimination 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 HB1473 and HB 1522 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

¹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

² *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741 (2020).

³ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁴ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁵ See, e.g., *Grimm*, 972 F.3d at 611 (“Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class.”).

⁶ *Virginia*, 518 U.S. at 531.

⁷ *Id.* at 533.



P.O. Box 1190
 Fargo, ND 58107
 701-404-7269
 northdakota@aclu.org
 aclund.org

Cody J. Schuler
 Advocacy Manager
 ACLU of
 North Dakota
 cschuler@aclu.org

room for a state to hypothesize harms that have not come to pass in the many years that transgender students have used appropriate restrooms and locker rooms.

Likewise, if passed, HB1473 and HB 1522 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.”⁸ 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.⁹ Since the Supreme Court’s decision in *Bostock*, at least one federal appeals court has affirmed that Title IX’s prohibition on sex discrimination likewise prohibits discrimination against transgender students when accessing single-sex spaces and activities.¹⁰



P.O. Box 1190
Fargo, ND 58107
701-404-7269
northdakota@aclu.org
aclund.org

Cody J. Schuler
Advocacy Manager
ACLU of
North Dakota
cschuler@aclu.org

The federal government has made clear that it intends to enforce federal civil rights statutes, including Title IX, consistent with the Supreme Court’s holding in *Bostock*.¹¹ This means that should North Dakota pass HB1473 and HB 1522 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 the state’s federal education funding at risk.

Even just considering lawsuits by private individuals, these cases are extremely costly. A Virginia school district paid \$1.3 million in attorneys’ fees after spending years unsuccessfully defending its policy of banning transgender students from restrooms that align with their gender identity.¹² If passed, this bill will put school districts in the untenable position of facing huge liability if forced to comply with state law.

Because this bill violates the United States Constitution and federal civil rights law, it puts North Dakota at risk of losing hundreds of millions of dollars in federal funding, and harms transgender youth, all to solve a problem that plainly does not exist. Transgender students already live and go to school in North Dakota, they go to the restroom just like everyone else and their presence harms no one. But if passed, this bill would cause severe harms to transgender students who are just trying to live their lives and go to school alongside their peers.

We urge a “do not pass” recommendation on HB1473 and HB 1522.

⁸ 20 U.S.C. § 1681(a).

⁹ 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).

¹⁰ 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).

¹¹ 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/>.

¹² <https://www.cnn.com/2021/08/27/us/gavin-grimmtrans-student-legal-fees/index.html>

March 14, 2023

RE: Opposition to HB 1473

Chairman Weisz and members of the Committee:

Ability to use facilities such as bathrooms is a basic human right. Imposing regulations to restrict or segregate specific groups of people invites further divide and hate rather than understanding and compassion.

If you have not traveled outside of ND or the USA much, I invite you to explore what other states and countries have done to recognize that humans have basic physical needs and use universal all-gender bathroom models. No one seems adversely affected and everyone is comfortable to go about their business and be on their way. We don't segregate our bathrooms in our own homes. Many businesses and buildings are too small or old to make modifications, but an option for inclusion can be achieved in most cases with ease. Locker rooms traditionally have had an option for private areas or all-gender options.

I appreciate the all-gender model in public spaces and often choose to use that option as a cis-gender, straight, middle-aged woman!

The transgender people I know are far more concerned with making sure they are simply accepted and fit in, they are not out to make anyone else uncomfortable as some news propaganda leads people to believe.

Let's show the rest of the USA that we are forward thinking here in North Dakota, and issue a recommendation of DO NOT PASS on HB 1473.

Thank you,

Tara Jensen

Fargo ND 58102

Testimony in Support of HB 1473

Dr. Lovita Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
March 14, 2023

Good morning Madam Chair Lee and honorable members of the Senate Human Services Committee. My name is Lovita Scrimshaw and I am a physician in Minot, ND and also serve as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1473 and I respectfully request that you render a "DO PASS" on this bill.

This bill would protect genetic females from having genetic males in private female spaces, such as restrooms and locker rooms. This protects a genetic female's safety, privacy, and modesty. This is a reasonable bill and protects the rights of women (genetic females) and I strongly support this bill.

Thank you for the opportunity to testify on this important matter.

Testimony in Support of HB 1473

Dr. Daniel Scrimshaw, DO, Emergency Medicine Physician
American Academy of Medical Ethics, North Dakota State Director
March 14, 2023

Good morning Madam Chair Lee and honorable members of the Senate Human Services Committee. My name is Daniel Scrimshaw and I serve as an Emergency Physician in Minot, ND and as the North Dakota State Director of the American Academy of Medical Ethics. I am testifying in regard to House Bill 1473 and I respectfully request that you render a "DO PASS" on this bill.

The government of North Dakota has a great responsibility to protect its female citizens. HB 1473 is a common sense bill that should be passed. Failure to pass this bill would be irresponsible and hazardous to the women of North Dakota.

Thank you for the opportunity to testify on this important matter.

As a child, and as an adult, there were several situations where I faced harassment, physical assault, and attempted sexual assault in the men's restroom. Ironically I am a white cisgender male.

At the age of 5 a group of older boys attempted to force their way into the bathroom stall with me. Others climbed onto the walls and made comments about my genitals. In middle school bullies often tried to target me in the men's room. On the other end of the spectrum there are transgender people who just want the same human dignity that rest of us have. To be able to use the restroom without fear of harassment, intimidation or violence. The idea that transgender people are sexual predators is malicious argument used to stir up fear, anger and hate. In fact a recent study shows 70 percent of transgender people have experienced verbal harassment in a situation involving gender segregated bathrooms, while nearly ten percent have reported physical assaults.

We need to quit trying to rob transgender children of their dignity, safety and basic human rights and allow them to use the restroom without fear, intimidation, harassment and discrimination. This bill holds life threatening potential for our transgender children.

Senate Human Service Committee
March 15th, 2023 HB 1473
Testimony in Opposition

Dear Chair Lee and the members of the Senate Human Service Committee,

I'm writing to urge a "**Do Not Pass**" vote from the committee, with exception.

Likely conflicts with or violates existing law.

Representative SuAnn Olson proposed this bill with the intention of "Sex" being defined with consistent language with other bills - i.e. determined by a selection of biological traits present at birth. With this understanding:

1. This will likely conflict with [North Dakota Department of Labor and Human Rights](#)
2. This will likely conflict with the [Prison Rape Elimination Act of 2003](#). (PREA)

It is worth noting that the Prison Rape Elimination Act's inclusion of transgender inmates was a direct response to the increase risk transgender individuals face within correctional facilities, especially related to things like rape and assault. [Research in 2012](#) continued to support that finding, even after PREA and [community surveys](#) continue the trend. I only bring this up in response to Rep. Olson's testimony that defined her intention with this bill, because those intentions would violate the rights and safety of transgender women and girls. These individual's rights and safety must be weighed fairly, which has detailed instructions through PREA.

Isolated instances of trans individuals engaging in harmful or criminal behavior is not justification for exclusion of the entire group. Incidentally, trans women are sometimes put within male facilities for their own safety, due to abuse and assault from cisgender women. These issues are extremely sensitive and difficult, often trans individuals are simply not safe in facilities and this legislation is not doing any favors to the complexity of situations trans inmates or their wardens face.

Does not solve the intended aim of the bill - increased privacy - but it could.

I understand Rep. Olson's paramount concern is privacy, as she was moved nearly to tears talking about her grandchildren. This isn't a privacy bill. Even within the language of this bill, you could still find every concern Rep. Olson brings up. I recommend changing the language of the amendments to mirror this for each section.

SECTION 1. A new section to chapter 12-44.1 of the North Dakota Century Code is created and enacted as follows:

Relating to use of restrooms and shower rooms

1. Facilities must provide reasonable accommodations for anyone who experiences distress in shared showers, restrooms, or changing rooms.

While this will put an extra burden on many of our facilities, I think Rep. Olson's desire for privacy is worth it. If the change as above is made, I would recommend "Do Pass".

Thank you for your time, consideration, and service to our state,
Faye Seidler

Testimony of Mia Halvorson

In Opposition of HB 1473: “Relating to the use of restrooms, locker rooms, and shower rooms in a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.”

March 15th, 2023

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, our youth, and marginalized communities.

I take issue with the enforceability of this bill. Part of this bill seeks to force transgender individuals to use the restroom in college dormitory spaces where an individual under 18 is present. For one, it is not often an 18-year-old is present in these areas. I am currently a senior at my university, and I've only come across one individual who was under 18. They turned 18 around a week into the academic year. The only common reason I can think of where an individual isn't 18 yet is due to the weird dynamic of birthdays and a public school's policy around when a child can start attending kindergarten.

I was also recently discussing this legislation with the state penitentiary, and they indicated that in their newest shower room, all showers are single-unit. The state penitentiary also indicated that there are special policies around transgender inmates to ensure the comfort of all inmates.

I ask that you vote NO on HB 1473 for the reasons listed above, the reasons other individuals testifying provide, and the hundreds of additional reasons I could provide.

Thank you for your time and the opportunity to share this testimony.

-Mia Halvorson

Testimony in opposition of HB 1473

Relating to the use of restrooms, locker rooms, and shower rooms in a dormitory or living facility controlled by the state board of higher education, a correctional facility, a domestic violence sexual assault organization facility, the North Dakota youth correctional center, and the penitentiary exclusively for males and females.

Senate Human Services Committee March 15, 2023

Senator Lee and committee members. My name is Stephen McDonough. I am providing testimony in opposition to HB 1473.

I am a board certified pediatrician who worked in North Dakota for forty years, from 1980 to 2020. I worked at the NDDoH from 1985 to 2000 and served at times as the State Epidemiologist, AIDS/Project Director, Director of Maternal and Child Health and Chief Medical Officer. As a pediatrician, I provided primary care to LGBTQ adolescents and treated them with dignity and respect.

In 1989, the North Dakota Legislature passed AIDS/HIV legislation which balanced good public health and compassion and led our state to have the LOWEST HIV cumulative case rate in the United States for the next 30 years. We reached out to the LGBTQ community to reduce HIV transmission.

At that time there were extremist haters that called HIV the "Gay Plague" and would have been pleased if HIV wiped out the gay community. At the time, these haters were a very small minority and not a major component of a prominent political party.

Now we have a Legislature considering around 20 anti-transgender bills, all based on lies and misinformation. These terrible bills have given our state the reputation of being anti-science and one of intolerance and hate. Nearly 70 religious leaders and over 200 medical providers have recently published letters to the editor opposing these hateful bills.

This bill is not needed. Transgender individuals should use the restroom that they identify with.

The North Dakota Legislature should not be bullying transgender individuals. HB 1473 needs to be defeated.

Stephen McDonough MD

**Do Pass Testimony
of Doug Sharbono, citizen of North Dakota
on HB1473
in the Sixty-eighth Legislative Assembly of North Dakota**

Dear Madam Chair Lee and members of the Senate Human services Committee,

I am writing as a citizen and believe HB1473 is beneficial legislation. This seems common sense and gives order to situations that have as of late become very disordered. Simply, who doesn't want their daughter to feel safe in a public restroom or locker room situation? Please give HB1473 a Do Pass.

Thank you,

Doug Sharbono
1708 9th St S
Fargo, ND 58103

**Senate Education Committee
March 15th, 2023
HB 1473 - Testimony in Opposition**

Dear Chair Lee and the members of the Senate Human Service Committee,

My name is Shannon Krueger and I am writing in opposition of HB 1473. As an educator and high school counselor, I see firsthand the disastrous effects of anti-lgbt rhetoric—specifically when the basis is fear, not facts. LGBT children deserve our protection, not punishment. They deserve acceptance, not discrimination. When my students suffer at the hands of agencies who are entrusted to protect them, we all suffer. Ignorance is no excuse for mistreatment. All children are afforded the rights to safely exist in school spaces. I urge a “no not pass” on HB 1473.

Thank you.

March 15, 2023

Dear Chair Lee and Members of the Senate Human Services Committee:

My name is Rev. Karen Van Fossan. I am an ordained minister and licensed professional counselor, serving as a pastoral counselor in the state of North Dakota. **I ask that you give HB 1473 a Do Not Pass recommendation.**

A few years ago, I was adopted by a young mother and her beautiful transgender child. Having been rejected by their family of origin, they asked me to become their mom and grandma. Due to a fundamental misunderstanding about what it means to be transgender, their family had become unable to love them. As painful as this breach has been for my chosen daughter and grandchild, I believe the real losers in this scenario are the family members who don't get to experience the Halloween costumes, the spontaneous dances, and the joyful utterances (like "I love you, Grandma!") that I now enjoy as a matter of course. I do indeed love my transgender grandchild from the deepest place in my soul.

This bill would have devastating effects on my grandchild, our family, and our larger community. The American Counseling Association, my own ministerial association, and numerous respected bodies advocate for gender-affirming locker room and bathroom opportunities for people like my grandchild. Please vote on the side of my family and vote Do Not Pass on this bill.

Thank you.

Testimony in Opposition to HB 1473, HB 1254, HB 1522

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

North Dakota Sen Human Services Committee

January 24, 2023

Chairman Lee and Members of the Committee:

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

HB 1473 and HB 1522 both deny a transgender person or student's ability to use the bathroom that corresponds to their gender. First of all, these types of policies are rooted in the idea that allowing a trans person, in particular a trans woman, access to the women's bathroom poses some sort of threat to the safety of women generally. There is no evidentiary support for this inflammatory and discriminatory position. Second, there is no reason that these issues can't and shouldn't be left up to individual school boards to handle. Conservative principles purport to value local control. School Boards and administrators are in a much better position to assess how a particular school district can handle these matters in a way that diffuses harmful speculation and considers the rights of the trans student as well as any concerns of the other students. There is no evidence that this is a statewide problem that requires a broad, discriminatory response.

Additionally, these policies go against the recommendations of many national education organizations such as National School Boards Association, the National Association of Secondary School Principals, the American School Counselor Association, the National Education Association, and the National Federation of High School Associations.

Most importantly, we know that affirming transgender students and respecting their rights shows them they are equal members of society, that they are welcome here, and that their worth is not diminished by their school. This is the position that the Legislature should be taking, that we can and will hear from, and uphold the rights of, a group of our citizens who are being unfairly attacked on a coordinated national level.

As to HB 1522, a group of doctors have testified to the scientific validity of safe and well managed care for transgender individuals. Our state policy should be guided by their expertise and compassion, not by fear. Societal changes certainly can be difficult, especially when they involve children, and the desire to make sure we are condoning practices that are helpful, not harmful, is a valid and understandable concern. Those with expertise in this area have provided their clinical knowledge to this committee, and we encourage our policy makers to give their expertise the respect and acceptance it deserves.

For all of these reasons, please vote do not pass on HB 1473, HB 1254, and HB 1522.



Testimony Supporting House Bill 1473

Mark Jorritsma, Executive Director
North Dakota Family Alliance Legislative Action
March 15, 2023

Good morning Madam Chair Lee and honorable members of the Senate Human Services Committee. My name is Mark Jorritsma and I am the Executive Director of North Dakota Family Alliance Legislative Action. I am testifying on behalf of our organization in support of House Bill 1473 and respectfully request that you render a "DO PASS" on this bill.

We understand that some individuals choose to identify at various places on the gender spectrum, apart from their biological sex. That is certainly their right. The problems come when their gender identification causes harm to others around them, whether physical, emotional, or psychological harm. For that reason, we believe that biological males and females in state facilities should use restrooms, locker rooms, and shower rooms intended for their biological sex, not gender.

To give an example, a parent should not have to worry about their child or teen seeing the genitals of the opposite sex in a locker room or shower room in the ND State Youth Correctional facility. How can we justify requiring that a wife who has suffered sexual violence at the hands of a male must share a restroom at a domestic violence sexual assault shelter with a male, who might intentionally or unintentionally expose his genitals to her. For us as state to permit a situation where this traumatized woman would be reliving her emotional and psychological pain is simply unconscionable.

We are not naïve; we realize the internet exists where anyone can see any sort of sexual content imaginable. However, it is a choice to view that content, but having someone of the opposite sex suddenly strip in front of you in a locker room apparently is not your choice, by today's standards. Further, seeing an image on the internet is dramatically different to interacting with a real person.

North Dakota Family Alliance Legislative Action supports the right to safety and privacy for all North Dakotans. We believe in protecting the dignity of women and children, their right to privacy, and their physical and emotional wellbeing. For these reasons, we request that you render a "DO PASS" on HB 1473.

Thank you for the opportunity to testify and I am happy to stand for any questions.

1515 Burnt Boat Dr., Suite C-148, Bismarck, ND 58503
mark@Ndfamilyalliance.org
701-355-6425
www.ndfamilyalliance.org

23.0498.06003

FIRST ENGROSSMENT

Sixty-eighth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1473

Introduced by

Representatives S. Olson, Bellew, Henderson, Hoverson, Prichard, Steiner, VanWinkle

Senator Paulson

1 A BILL for an Act to create and enact a new section to chapter 12-44.1, a new section to chapter
2 12-46, a new section to chapter 12-47, a new section to chapter 14-07.1, and a new section to
3 chapter 15-10 of the North Dakota Century Code, relating to the use of restrooms, locker
4 rooms, and shower rooms in a dormitory or living facility controlled by the state board of higher
5 education, a correctional facility, a domestic violence sexual assault organization facility, the
6 North Dakota youth correctional center, and the penitentiary exclusively for males and females.

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

8 **SECTION 1.** A new section to chapter 12-44.1 of the North Dakota Century Code is created
9 and enacted as follows:

10 **Restrooms and shower rooms exclusively for males or exclusively for females.**

- 11 1. In a correctional facility, a restroom or shower room accessible by multiple inmates at
12 the same time must be designated for use exclusively for males or exclusively for
13 females.
- 14 2. In a correctional facility, a restroom or shower room designated for one sex may be
15 used only by members of that sex.
- 16 3. ~~This section does not prohibit an~~ An administrator or correctional facility staff member
17 from providing shall provide a reasonable accommodation for an inmate, including a
18 transgender or gender-nonconforming inmate, as deemed appropriate by the
19 administrator.

20 **SECTION 2.** A new section to chapter 12-46 of the North Dakota Century Code is created
21 and enacted as follows:

- 1 **Restrooms and shower rooms exclusively for males or exclusively for females.**
2 1. At the North Dakota youth correctional center, a restroom or shower room accessible
3 by multiple inmates at the same time must be designated for use exclusively for males
4 or exclusively for females.
5 2. At the North Dakota youth correctional center, a restroom or shower room designated
6 for one sex may be used only by members of that sex.
7 3. ~~This section does not prohibit the~~An administrator, an officer, or an employee from
8 ~~providing~~shall provide a reasonable accommodation for a child placed at the North
9 Dakota youth correctional center, including a transgender or gender-nonconforming
10 child, as deemed appropriate by the administrator.

11 **SECTION 3.** A new section to chapter 12-47 of the North Dakota Century Code is created
12 and enacted as follows:

- 13 **Restrooms and shower rooms exclusively for males or exclusively for females.**
14 1. At the penitentiary, a restroom or shower room accessible by multiple inmates at the
15 same time must be designated for use exclusively for males or exclusively for females.
16 2. At the penitentiary, a restroom or shower room designated for one sex may be used
17 only by members of that sex.
18 3. ~~This section does not prohibit the~~The warden, a deputy warden, an officer, or an agent
19 ~~from providing~~shall provide a reasonable accommodation for an inmate, including a
20 transgender or gender-nonconforming inmate, as deemed appropriate by the warden.

21 **SECTION 4.** A new section to chapter 14-07.1 of the North Dakota Century Code is created
22 and enacted as follows:

- 23 **Restrooms and shower rooms exclusively for males or exclusively for females.**
24 1. At a domestic violence sexual assault organization facility, a restroom or shower room
25 accessible by multiple clients at the same time must be designated for use exclusively
26 for males or exclusively for females.
27 2. At a domestic violence sexual assault organization facility, a restroom or shower room
28 designated for one sex may be used only by members of that sex.
29 3. ~~This section does not prohibit an~~An agent, employee, or volunteer from providing
30 provide a reasonable accommodation for a client, including a transgender or gender-

1 nonconforming client, as deemed appropriate by the organization's executive
2 leadership personnel.

3 **SECTION 5.** A new section to chapter 15-10 of the North Dakota Century Code is created
4 and enacted as follows:

5 **Restrooms and shower rooms exclusively for males or exclusively for females under**
6 **the age of eighteen.**

- 7 1. In a dormitory or living facility controlled by an institution under the control of the state
8 board of higher education, a restroom or shower room accessible by multiple residents
9 at the same time must be designated for use exclusively for males or exclusively for
10 females.
- 11 2. In a dormitory or living facility controlled by an institution under the control of the state
12 board of higher education, a restroom or shower room designated for one sex may be
13 used only by members of that sex.
- 14 3. This section applies to a dormitory or a dormitory floor in which residents are
15 segregated by sex or gender.
- 16 4. This section does not prohibit a dormitory administrator or dormitory staff member
17 from providing shall provide a reasonable accommodation for a resident, including a
18 transgender or gender-nonconforming resident, as deemed appropriate by the director
19 of residence life.