

March 8, 2023

Committee on Education & the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Virginia Foxx and Ranking Member Bobby Scott,

The National Women’s Law Center and Women’s Sports Foundation, joined by the undersigned women’s and girls’ rights organizations, write to voice our vehement opposition to H.R. 734, “The Protection of Women and Girls in Sports Act of 2023,”¹ and any other similar effort to ban transgender girls from participating in sports. As organizations deeply committed to fulfilling the promise of Title IX of the Education Amendments of 1972 of equal educational opportunity for all women and girls, including in school sports, we have advocated for gender equity in schools for decades. We support the inclusion of all students, including transgender, intersex, and nonbinary students in school sports as part of this mission. While this bill is framed as “protecting women’s and girls’ sports,” we write to call out this hateful measure for what it actually is: a discriminatory attempt to target an already-marginalized group, rather than to promote fairness and safety in school sports for women and girls. We thus urge you to oppose H.R. 734 and join us in rallying behind *all* women and girls and rejecting the efforts to enshrine sex discrimination against an especially vulnerable group within Title IX.

H.R. 734 unmistakably constitutes discrimination on the basis of sex. As recognized by the U.S. Supreme Court,² numerous Federal courts,³ and the U.S. Department of Education,⁴ sex discrimination *includes* discrimination based on gender identity and sex characteristics. Title IX’s mandate that all students must be able to access the benefits and opportunities of an education free from sex discrimination includes the right to play sports. It is well documented that sports participation is linked to increased academic achievement,⁵ and fosters in students increased emotional, mental, and physical well-being and a sense of community.⁶ Amending Title IX to exclude transgender, intersex, and nonbinary students from these essential benefits of sports participation betrays Title IX’s broad purpose to defeat sex discrimination in

¹ H.R. 734, 118th Cong. (2023).

² *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

³ *Soule v. Connecticut Ass’n of Schools*, No. 21-1365 (2d. Cir. 2022); *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) *See also Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (wherein an Idaho district court granted a preliminary injunction barring enforcement of an Idaho law that banned transgender students from competing on women and girls’ sports teams based on the plaintiff’s likelihood of success in demonstrating that the law was unconstitutional sex discrimination against transgender students under the Equal Protection Clause).

⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (proposed 34 C.F.R. § 106.10) (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734> (clarifying that “discrimination on the basis of sex” includes discrimination based on “sex stereotypes, sex characteristics...and gender identity”). *See also id.* at 41571 (proposed 34 C.F.R. § 106.31(a)(2) (explaining that “adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex”).

⁵ National Coalition for Women and Girls in Education, Title IX at 45: Advancing Opportunity through Equity in Education 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

⁶ *Id.* at 42. *See also* Stacy M. Warner et al., Examining Sense of Community in Sport: Developing the Multidimensional ‘SCS’ Scale, 27 *J. of Sport Management* 349, 349-50 (2013) (explaining that sports participation can create social connections and a sense of community in participants, especially for youth populations, whose interest in playing sports is often born out of a desire to connect with their peers).

education in order to further harm these students, who because of stigma and discrimination are already especially vulnerable to isolation and decreased academic performance.⁷

The bill's title, "Protecting Women and Girls in Sports Act," is an intentionally deceptive misnomer, as H.R. 734 makes no effort to address the actual, pervasive discriminatory barriers that women and girls continue to face in school athletics. H.R. 734 does nothing to address the fact that college women have almost 60,000 fewer athletic opportunities to play than men, or that high school girls have over 1 million fewer opportunities than boys do to play sports.⁸ It fails to take any steps to open opportunities for women and girls of color, who are disproportionately impacted by these disparities in participation opportunities.⁹ H.R. 734 does not advance policies to address the second-class treatment women's and girls' teams continue to receive from their schools as compared to men's and boys' teams when it comes to facilities, equipment, and travel.¹⁰ Nor does H.R. 734 seek to strengthen protections against the rampant sexual abuse student-athletes of all ages and genders still face.¹¹ To put it plainly, one would be hard pressed to explain how banning transgender women and girls from playing alongside their peers does anything to address *actual* problems of sex discrimination in sports.

Transgender women and girls have been playing school sports for years, and claims that they have been unfairly "dominating" competition or excluding their cisgender peers from chances to play are utterly false. Indeed, recent data from the CDC shows that state policies that prevent transgender high school students from playing are correlated with lower participation by *all* high school girls between 2011 and 2019; meanwhile, participation by all girls remained unchanged in states with policies allowing transgender students to play.¹² **H.R. 734's real purpose is not to expand opportunities for women and girls, but to deny transgender, intersex, and nonbinary students of their right under Title IX to equal athletic opportunities.** This bill coopts the language of women's rights to undermine protections against sex discrimination.

Not only does H.R. 734 fail to address the actual, ongoing problems that limit women's and girls' opportunities in school sports, but excluding women and girls who are transgender from school sports invites gender policing that threatens *all* women and girls. H.R. 734 is vague and unworkable, and could only be implemented by a combination of invasive and harmful practices. There is no principled way to apply the bill's unclear language to the many girls and young women born with intersex variations, which by definition, are variations in "reproductive biology and genetics at birth."¹³ Similar bans have been

⁷ GLSEN, The 2021 National Climate Survey, The Experiences of LGBTQ+ Youth in Our Nation's Schools 34, 99 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf> (in-school victimization on the basis of students' LGBTQ status is linked to lower grades, increased absences, withdrawal from school altogether, in addition to decreased feelings of connectedness to the school community)

⁸ Women's Sports Foundation, Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women

⁹ National Women's Law Center, Finishing Last: Girls of Color and School Sports Opportunities 1 (2015), <https://nwlc.org/resources/finishing-last>.

¹⁰ United Nations Women, COVID-19, Women, Girls and Sport: Build Back Better, (2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/briefcovid-19-women-girls-and-sport-en.pdf>.

¹¹ See, e.g., Aaron Slone Jeckell et al., *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10 *Sports Health* 558, 560 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6204631> (estimating that up to 48% of athletes experience some kind of sexual mistreatment); Julie Mack & Emily Lawler, *MSU doctor's alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017),

https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.

¹² Ctr. for American Progress, Fair Play: The Importance of Sports Participation for Transgender Youth 14-17 (2021), <https://www.americanprogress.org/wp-content/uploads/2021/02/Fair-Play-correction2.pdf>.

¹³ See interACT: Advocates for Intersex Youth, Intersex Variations Glossary (2022), <https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf>.

widely used to push girls and women born with these variations out of sports opportunities and have chilled their participation in school sports.¹⁴ Additionally, H.R. 734 would inevitably lead to some schools adopting invasive and dangerous “sex verification” practices, which police women and girls’ bodies by forcing them to submit to a variety of humiliating and unscientific practices for the purported purpose of determining whether they are “really” girls or women.¹⁵ These procedures make all women and girls vulnerable to sexual abuse, but are especially likely to be used to target Black and brown women and girls who do not conform to white ideals of femininity,¹⁶ other women and girls who do not conform to sexist stereotypes, and nonbinary and gender nonconforming students. If H.R. 734 becomes law, it would permit school districts, colleges and universities, and athletics associations to become the arbiters of who is “sufficiently” feminine to play, thereby perpetuating harmful racist and sexist stereotypes that punish students for who they are or how they look, and placing students at further risk for sexual abuse.

Transgender and intersex women and girls are women and girls, and should have the right to participate in athletics consistent with their gender identity. The blanket, discriminatory exclusion that H.R. 734 would mandate for every age, every sport, and every level of competition flies in the face of Title IX’s mandate of equal access to educational opportunities. H.R. 734 promotes fear, dangerous stereotypes, and sex discrimination based on misinformation, and it should not become law.¹⁷

As women’s rights and gender justice organizations, we vehemently reject the dangerous legislation and rhetoric pushed by politicians seeking to marginalize transgender, nonbinary, and intersex people. Supporting the civil rights of women and girls cannot be separated from championing policies that protect the rights of transgender, intersex, and nonbinary individuals’ rights to be free from sex discrimination, including in school sports. This, at a minimum, includes voicing strong opposition to H.R. 734.

If you have questions about this letter, please contact Emily Martin (emartin@nwlc.org), Shiwali Patel (spatel@nwlc.org), and Sarah Axelson (saxelson@womenssportsfoundation.org).

¹⁴ Anne Branigin, Intersex youths are also hurt by anti-trans laws, advocates say, *Washington Post* (Jul. 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

¹⁵ For example, Idaho passed a sports ban in 2020 which prevented transgender, intersex, and nonbinary students from competing according to their gender identity, along with an alarming provision allowing anyone to challenge the sex of girls or women seeking to play for their school’s girls’ or women’s teams. A student whose sex was challenged would then have to shoulder the humiliating burden of “verifying” their sex in order to play. H.B. 500, 2020 Leg., 65th Sess. (Id. 2020). There is currently a temporary injunction blocking enforcement of this sports ban, pending further review. *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020), on appeal, No. 20-35815 WL 2189094 (9th Cir. 2022).

¹⁶ See, e.g., Patricia Vertinsky et al., *More Myth than History: American Culture and Representations of the Black Female’s Athletic Ability*, 25 *J. of Sport Hist.* 532, 541 (1998) (Black women athletes are often described as “masculine,” which is rooted in the myth that African Americans were suited for physical labor during slavery because of their “‘natural’ brute strength”); Elizabeth Adetiba, *Caster Semenya and the cruel history of contested Black femininity*, *SB Nation* (Apr. 20, 2020), <https://www.sbnation.com/2020/4/20/21227661/caster-semenya-world-athletics-regulation-body-racism> (governing sports bodies enforce the belief that the white, cisgender woman’s body is the paradigm of “womanhood,” and anything outside of that is “manly” and “unacceptable”).

¹⁷ Myths about transgender athletes having categorical dominance over their cisgender peers are untrue and unsupported by evidence; in fact, most sports policies are not evidence-based and implement participation requirements that are arbitrary and have no clear link to the factors that actually influence performance. Canadian Centre for Ethics in Sports, *Transgender Women Athletes and Elite Sport: A Scientific Review* 7 (2022), <https://cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-ascientificreview-e-final.pdf>. Research shows that factors like testosterone, lung capacity, bone density, and hip-to-knee joint angle are not correlated with competitive advantage or athletic performance. *Id.* at 25, 29. Factors that are often overlooked (and more influential when it comes to conferring athletic advantage than testosterone is) are social factors such as the ability to access and afford quality equipment, time spent training, and nutrition. *Id.* at 6.

Sincerely,

National Women's Law Center and Women's Sports Foundation, *joined by:*

Advocates for Youth

American Association of University Women

Clearinghouse on Women's Issues

End Rape On Campus

Equal Rights Advocates

Feminist Majority Foundation

Futures Without Violence

Girls Inc.

It's On Us

Jewish Women International

Just Solutions

Know Your IX, Advocates for Youth

Legal Momentum, the Women's Legal Defense and Education Fund

National Council of Jewish Women

National Network to End Domestic Violence

National Organization for Women

Public Justice

The Army of Survivors

Tucker Center for Research on Girls & Women in Sport

ValorUS

VOICE IN SPORT Foundation

Women's Law Project

YWCA USA