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**U.S. House Committee on Oversight and Accountability
Subcommittee on Health Care and Financial Services**

**"The Importance of Protecting Female Athletics and Title IX"
December 5, 2023**

Thank you for the opportunity to submit testimony about the Department of Education's ("Department's") proposed regulations for Title IX of the Education Amendments of 1972 ("Title IX") and gender equity in school sports.

I have devoted my career to advancing opportunities for all women and girls, and to eliminating systemic barriers that prohibit us from achieving gender justice for all. These goals are the driving force for the dedicated team of professionals who work at the National Women's Law Center ("NWLC"), where I am honored to serve as President and CEO.

NWLC was founded in 1972, the same year Title IX was enacted. We have worked for over 50 years to advance gender justice in the courts, in public policy, and in our society. NWLC is committed to the robust enforcement of Title IX and eradicating all forms of sex discrimination in school, including sex-based harassment, discrimination against LGBTQI+ students, discrimination against pregnant and parenting students, and intersectional discrimination based on both sex and other protected characteristics, such as discrimination against women and girls of color and women and girls with disabilities. NWLC has participated in all major Title IX cases before the Supreme Court as counsel¹ or amicus. It has also long advocated to protect women and girls' athletic opportunities, including through litigation, Title IX administrative enforcement, and policy advocacy. In our five decades of work on Title IX, NWLC has worked to ensure that we can meet the most pressing issues facing women and girls in school while rejecting efforts to distract and undermine that work through false narratives and fearmongering.

This hearing and my testimony concern Title IX and its application to women's sports programs in schools. The debate over what Title IX demands to ensure fairness in athletic opportunities for women has a long history. Indeed, it is as old as Title IX.² The thrust of today's hearing concerns whether a class of women and girls who have historically suffered violence and persecution have any place in school athletics, as many seek to categorically exclude trans and intersex women and girls from school sports programs.³ It is important therefore to set forth several core principles about the relationship between Title IX and anti-trans policies.

To begin, transgender, nonbinary, and intersex⁴ students must be able to fully access education as their full selves; Title IX guarantees no less. Discrimination against students because of transgender status or sex characteristics *is* sex discrimination, as underscored by many years of federal court decisions⁵ and the Department’s June 2022 proposed Title IX rules.⁶ Title IX’s broad mandate unequivocally encompasses LGBTQI+ students’ protection from harassment, mistreatment, and all forms of discrimination in education suffered simply for being who they are. Transgender, nonbinary, and intersex students must be able to fully access education as their full selves; Title IX guarantees no less.

Anti-trans policies undermine Title IX’s intent for at least three reasons. First, policies excluding trans girls and women from school sports programs threaten all women and girls who excel in athletics, and all who depart from gender stereotypes, by encouraging challenges that place burdens on women to prove they are “real” women and creating risks of intrusive and harmful sex verification practices. Black and brown women and girls who play school sports are at particularly high risk of harm under these policies, because Black and brown women are often viewed as “nonconforming” with white-centric standards of femininity.

We at NWLC know unequivocally that trans women and girls, and intersex women and girls, *are* women and girls who deserve the full benefits and opportunities intended by Title IX. We say this in unison with dozens of coalition groups committed to gender justice.⁷

Second, these policies reinforce a false binary by assuming that those assigned male at birth are inevitably and inherently athletically superior and those identified as female are inherently weaker and less athletic. This reductive narrative harms *all* women and girls. We see it demonstrated in the over-resourcing of men’s sports programs and the chronic failure to invest in women’s sports programs.

Finally, trans-exclusionary policies in women and girls’ school sports programs undermine Title IX’s intent to make athletic participation, with all its educational benefits, available to all students free from sex discrimination. Depriving trans women and girls access to women and girls’ sports denies them of opportunities to gain academic and social benefits, including a sense of community and belonging among their peers.

I urge the Subcommittees to support the Biden Administration’s proposed Title IX regulations and the full inclusion of trans women and girls in all education opportunities, including school sports.

I. Title IX’s purpose as a broad remedial statute, its history in protecting gender equity in athletics, and current threats to transgender, nonbinary, intersex students all require strong Title IX protections.

For over 50 years, Title IX has provided broad protection against sex discrimination in education. Title IX ensures no one can “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” on the basis of sex,⁸ an expansive sweep universally recognized to include school sports.

After Congress adopted a statutory directive by Senator Jacob Javits in 1974 that required the Department of Health, Education, and Welfare (“HEW”) to issue Title IX regulations “with respect to intercollegiate athletic activities reasonable provisions considering that nature of particular sports,”⁹ the agency issued regulations in 1975 that addressed gender equity in school sports. Those regulations permitted, but did not require, sex-separated sports teams where “selection for such teams is based

upon competitive skill or the activity involved is a contact sport.”¹⁰ And those regulations also clarified the purpose of separate gender teams is to foster the equitable participation of women and girls in school sports, a context where they have been systematically excluded and denied opportunities.¹¹ The regulations permitted the creation of sex-separated sports to ensure that women and girls were given the resources and opportunities to develop their athleticism given the historical and ongoing denial of those opportunities in sports, and *not* to enforce separation based on purportedly innate differences between men and women.¹²

Before Title IX, women and girls were explicitly—and as a matter of course—denied opportunities to play sports, denied equal training and support, and otherwise denied the opportunities to develop athleticism that were provided to men and boys, all based on the assumption men and boys were categorically athletically superior and naturally inclined towards physical activity and competition in a way that women and girls were not.¹³ By requiring schools to take action to achieve gender equity in sports, Title IX has created an enormous cultural shift toward embracing women and girls’ sports and is still creating a vast array of new opportunities that sharply increase women and girls’ engagement in sports.¹⁴

Decades ago, opponents of gender equity in sports assumed women and girls were less athletic, basing their beliefs on biological determinism—a belief that certain traits are innate and natural to men and women based on their sex assigned at birth. This biological determinism advances a narrow idea of gender and underlies much sex discrimination throughout society.¹⁵ Today, extremists are relying on biological determinism in the context of school sports to exclude transgender women and girls, and they are simultaneously denying the existence of transgender and intersex women and girls. They claim that being assigned male at birth is innately linked to athletic success, while female people and athleticism are in conflict. This is the very same misogyny and stereotyping women and girls fought so hard against before *and* during Title IX’s passage. Supporters of trans-exclusionary policies also often use the phrase “biological males” to describe transgender women in their drive to suggest that transgender women and girls must be excluded from sports because they will always outperform cisgender women. These arguments perpetuate discriminatory and outdated gender constructs, which implicate both anti-trans discrimination and discrimination against all women and girls who challenge sex stereotypes.

At their core, anti-trans sports bans and restrictions function to codify sexist stereotypes of how women and girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity, whether transgender or cisgender. This threatens all women and girls’ safety and athletic opportunities. Strong Title IX protections are a key part of solving this crisis, by protecting the rights of *all* students to play school sports, free from exclusion or restrictions based on who they are.

II. Women athletes face a long history of discrimination in school sports that are not addressed by restrictions on the participation of student athletes who are transgender, nonbinary, or intersex.

Despite the significant progress in addressing sex discrimination in schools since the passage of Title IX, women and girls continue to have fewer opportunities to participate in sports and second-class resources and facilities.¹⁶ There were fewer high school participation opportunities for girls in 2019 than existed for boys in 1972, the year Title IX was enacted.¹⁷ For girls of color, there are fewer spots on teams than for either boys of color or white girls.¹⁸ And most intercollegiate athletic departments are

not meeting any of the standards Title IX sets for schools to demonstrate equity in sports opportunities.¹⁹ NCAA institutions would need to provide women an additional 148,030 sports opportunities to provide women the same ratio of opportunities that are offered to men.²⁰

When girls and women do have a chance to play sports, they are frequently provided worse facilities, uniforms, and equipment; only have access to inexperienced coaches; receive less support and publicity from their schools; and experience a whole host of other inequities that send a corrosive message to girls and women that they are “less than” their male peers.²¹ In fact, schools fail to provide equitable economic support—women miss out on more than \$240 million in athletics scholarships annually.²²

Women in professional sports also consistently report gender bias in pay and frequently being passed over for promotions in favor of men in their field.²³ Finally, sexual abuse of student athletes of all ages by their teammates, coaches, and team doctors remains a rampant and persistent issue.²⁴

These significant inequities are what truly reduce access to school sports for women and girls and are not at all addressed or fixed by banning or restricting transgender and intersex women and girls from participating in women and girls’ school sports programs.

III. The chance to play school sports is an important education benefit and opportunity that no student should be denied because of their gender identity or transgender status.

The reasons for providing women and girls equal access to school sports when Title IX was enacted are just as important today for ensuring that trans, nonbinary, and intersex students have an equal opportunity to play school sports. The educational benefits of playing sports are well documented. When students participate in school sports, they experience an increase in academic achievement, attendance, and retention rates. Playing sports also gives students the chance to build social skills, improve their physical health, learn life lessons, and develop feelings of belonging with their peers and school community.²⁵ Research shows this holds true for transgender and nonbinary youth, who have higher grades, higher self-esteem, and lower rates of depression when they play school sports.²⁶ No student should be excluded from these critically important educational benefits because of their gender. Every student, regardless of gender, deserves the opportunity to play.

While participation in sports provides numerous educational benefits, being targeted for exclusion only amplifies the risk of harm that trans, nonbinary, and intersex students disproportionately face in school. Trans, nonbinary, and intersex students face high rates of sex harassment and bullying in school, which are responsible for the high health risks and other disparities linked to marginalization these students disproportionately experience, such as poor mental health outcomes, including depression and anxiety, and academic harms, like lower grades and increased absence from school.²⁷ Black trans and nonbinary youth experience greatly increased rates of sex-based victimization compared to both their Black cisgender LGBTQ peers and their white trans or nonbinary counterparts—with a full 40% of Black trans and nonbinary youth reporting physical threats or harm due to sexual orientation or gender identity.²⁸ In a survey of LGBTQ+ students across the country, an overwhelming majority of all students (76.1%) reported being verbally harassed because of their sexual orientation, gender identity, or perceived gender expression, and over one-third of students (31.2%) reported experiencing physical harassment on the basis of these characteristics.²⁹ Students also frequently reported discriminatory discipline by faculty, with well over one-third of LGBTQ+ students (40.7%) reporting being subjected to such discipline.³⁰ The same survey also showed that trans students experienced higher rates of victimization

than students of all other gender identities, with nonbinary students experiencing the second highest rates of victimization as compared to cisgender students.³¹

But none of the health risks and other outcomes from the high rates of discrimination and harassment that trans, nonbinary, and intersex students face are inevitable. Ensuring that all students have opportunities to play sports is a way to alleviate these risks. Denying trans, nonbinary, and intersex students the right to play sports, and all the significant educational benefits associated with playing sports, because of their gender identity, transgender status, or sex characteristics, is sex discrimination prohibited by Title IX, and deprives these students of these much-needed benefits—benefits that could even be lifesaving.³²

IV. Attacks targeting some women athletes, because they are trans, harm *all* women and undermine gender justice.

Despite the well-documented benefits of playing sports and Title IX's broad mandate prohibiting sex discrimination, hostile lawmakers recently have displayed a horrifying tenacity in attacking trans, nonbinary, and intersex students' right to play, passing laws in at least 23 states categorically banning these students from playing sports alongside their peers.³³ Despite a total lack of any evidence that trans student athletes have harmed anyone, state bans have been pushed with a false narrative of "protecting women's and girls' rights."³⁴ These bans do nothing to address the actual, ongoing profound gender inequities that persist in athletics.³⁵ Instead, they heighten the risk of sex discrimination for all women and girls who play sports. Indeed, CDC data shows from 2011-2019, states that enacted anti-trans sports bans also saw a *decrease* in sports participation by all girls.³⁶

This data supports Professor Deborah Brake's Title IX analysis: when extremists argue opening girls' sports to all athletes who identify as girls creates unfair prejudice for cisgender girls, that sends a "powerful message of innate biological inferiority" for women and girls. Claiming participation by "even a tiny number of trans girls is enough to undermine competitive opportunity for cisgender girls speaks volumes about how fragile" the athleticism of girls must be in the minds of anti-trans extremists.³⁷

Moreover, the premise that excluding or restricting participation by trans, nonbinary, and intersex student athletes is necessary for "fairness" or "safety" invokes false and harmful myths—specifically, that transgender and intersex women and girls are categorically bigger, faster, and stronger and pose an inherent threat to the physical safety and athletic success of their peers. These myths rely on biological determinist notions that to be a woman or a girl means to fit within a narrow and frail box. Denying trans, nonbinary, and intersex students the ability to play based on generalizations about their abilities is inconsistent with both Title IX and the Equal Protection Clause, which prohibits state actors from relying on overbroad generalizations about gender to support sex-based classifications.³⁸

The Supreme Court's Equal Protection Clause sex discrimination precedent forbids restrictions that rely on overbroad sex-based generalizations "about . . . different talents [or] capacities."³⁹ Sex-based restrictions on trans, nonbinary, and intersex students playing sports consistent with their gender identity rely on extremely poor and inexact proxies for injury risk and are not substantially related to an important interest in avoiding injury. Restrictions that rely on injury prevention will inevitably be both overinclusive (sweeping in trans students who do not have any physical characteristics that create a particular risk of injury) and underinclusive (failing to regulate cisgender students who do have such characteristics). Ultimately, some risk of injury is inherent in playing sports, but precisely because of the

absence of a close fit and substantial relationship between a sex-based restriction and preventing injury, there is no reliable evidence demonstrating that trans or intersex women and girls pose a risk of injury to other women and girls.

Schools have a multitude of nondiscriminatory ways to minimize risk of injury in sports that are substantially related to achieving this interest, including adequate and effective coaching resources, training for student athletes on best safety practices and compliance with rules in their particular sport, incorporating protective gear into uniforms, and regular maintenance and inspection of equipment and facilities.⁴⁰ The availability of alternative, more effective ways to minimize the risk of injury in sports suggests any assertion that sex-related criteria limiting trans, nonbinary, and intersex students' ability to play is necessary to prevent injury is nothing more than a pretext for animus against trans, nonbinary, and intersex students.⁴¹

For the same reasons schools will also rarely, if ever, maintain a legitimate, non-discriminatory reason for exclusion when relying on competitive fairness as an interest to prevent trans, nonbinary, and intersex students from playing consistent with their gender identity. Here too, transgender, nonbinary, or intersex status is an extremely inexact proxy for unfair competitive advantage.

Indeed, fairness in sports has *never* been about equalizing all physiological differences among athletes. In fact, body diversity is an inherent part of sports, and there are numerous physiological differences that impact athletic ability⁴² that, unlike trans status or sex characteristics, are not subject to scrutiny when it comes to determining athletes' eligibility to play. When some women and girls are barred from playing women and girls' sports because they fall outside stereotypical ideals of what women's bodies should look like, this contravenes Title IX's purpose and constitutes sex discrimination.⁴³

Additionally, there are numerous sources of competitive advantage that are not policed under a mandate of fairness and that contribute substantially to inequities in athletic success. Socioeconomic factors, such as the ability to afford and access quality equipment, coaching, and nutrition, in addition to having enough time to train are hugely significant in contributing to athletic success—yet these factors are not scrutinized or written into team eligibility policies.⁴⁴ Any of these, however, would be more substantially related to competitive fairness than trans, nonbinary, and intersex status.

V. Sex testing and verification procedures in school sports inherently cause harm because of their invasive and traumatizing nature.

Enforcing trans-exclusionary sports policies in women and girls' school sports programs often relies upon dangerous practices known as "sex verification" or "sex testing" that harm *all* women and girls. These dangerous and discredited practices range from collecting sensitive medical records to needless and traumatizing genital examinations, creating new risks for harassment and assault of student athletes.

Restrictions on play targeting women and girls who are trans, nonbinary, or intersex threaten to sweep up any girl or woman who does not conform to white-centric stereotypes of femininity.⁴⁵ Such restrictions can dangerously allow anyone to question whether any woman or girl is "actually" a woman or a girl for purposes of playing sports.⁴⁶ We know from the history of international competitive athletics that medicalized, pseudoscientific sex verification practices have resulted in widespread abuses against women athletes,⁴⁷ including medicalized abuse, leaks of private medical information, and harassment

campaigns featuring racist caricatures⁴⁸—all causing serious damage to the targeted women and benefitting nobody. These reasons are central to NWLC’s conclusion that Title IX should never be weaponized to reinforce sex-based stereotypes, including by barring students from sex-separated sports teams just because they are trans, nonbinary, or intersex.

All girls and women deserve the opportunity to attend school and fully participate in all its benefits without harassment or having their access to educational spaces conditioned on harmful and inappropriate “sex verification” requirements. At their core, trans-exclusionary policies in women and girls’ sport function to codify sexist stereotypes of how women and girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity, whether transgender or cisgender. This threatens all women and girls’ safety and athletic opportunities.

Sex verification practices fundamentally encourage sex discrimination, as they impose traumatizing and stigmatizing procedures on a discriminatory and arbitrary basis, which often result in the policing of any woman or girl who falls outside sexist, stereotypical ideals of femininity. For example, journalists recently exposed a Utah commission secretly investigating whether a cisgender girl was “a real girl” based on complaints that she didn’t look “feminine enough” and was performing well in her sport, to enforce the state’s anti-trans sports ban.⁴⁹

Sex verification is also disproportionately enforced against Black and brown women and girls, whose bodies have historically been subject to excessive scrutiny for nonconformity with white-centric ideals of femininity. For example, throughout her career, Serena Williams has endured racist and sexist scrutiny of her body, including comments alleging that “[s]he is built like a man” or that “[she] was born a guy” because of “[her] arms, or because [she’s] strong.”⁵⁰ Another Black woman, Caster Semenya, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete, for the purpose of determining whether she was “feminine enough” to continue competing with women.⁵¹ And, when Dutee Chand, an Indian woman sprinter, faced scrutiny from fellow athletes for her “stride and musculature” being too “masculine,” she was ordered by an international sporting body to undergo invasive medical exams.⁵²

To justify sex verification practices, anti-trans advocates often list specific factors that supposedly confer athletic advantages upon trans women and girls, such as lung capacity, arm length, and muscle surface area—but if a university creates a policy saying any student with an arm span over 5’8” is ineligible for the girls swimming team, they will inevitably exclude some cisgender women who happen to have greater height and arm reach when attempting to exclude only trans women, and vice-versa. The same holds true for every physiological metric, including hormone levels and chromosomes. As a factual matter, schools cannot single out the body of a trans student, versus a cisgender student, for scrutiny or “medicalized” requirements without enforcing impermissible sex stereotypes. There is no way to single out trans, nonbinary, and intersex students’ bodies for scrutiny and regulation without recreating deeply harmful sex and race stereotypes and giving them legal imprimatur.

For these reasons, endorsing or permitting sex verification as a condition of participating on sex-separated teams is directly contrary to Title IX’s purpose of achieving gender equity in education.

VI. The Biden administration’s proposed Title IX rules protect trans, nonbinary, and intersex students from trans-exclusionary policies that would categorically bar them from participating in women and girls’ school sports and reject the use of a harmful sex stereotyping framework.

In April 2023, the Biden administration proposed changes to Title IX regulations that clarify state laws that categorically ban trans, nonbinary, and intersex students from playing sports violate Title IX. The proposed regulations would sharply restrict the ability of schools to deny these students the right to play sports. Title IX and the Constitution prohibit schools from denying opportunities based on “overly broad generalizations about the talents, capacities, or preferences” of male and female students.⁵³ This is the true purpose of Title IX—to make space for girls and women to develop their skills and interests without regard to others’ assumptions about how women and girls should look, act, and feel. That includes women and girls who defy gender stereotypes of all kinds. And decades of legal precedent regarding civil rights laws and the Constitution demand heightened scrutiny of laws and policies that enforce sex stereotypes.

When properly implemented and vigorously enforced, the Department’s proposed rule will sharply limit schools’ ability to impose trans-exclusionary policies in school sports. But given the increasing threats against trans, nonbinary, and intersex students, we have encouraged the Department to provide even greater clarity and protection against sex discrimination in education in its final regulations.

Additionally, in 2022, the Biden administration proposed changes to Title IX that would undo harms to student survivors of sexual harassment inflicted by the Trump administration and clarify protections for LGBTQI+ students and pregnant and parenting student, including by:

- Restoring the definition of sex harassment so schools are no longer required to dismiss Title IX complaints of harassment that are not deemed “serious” enough, based merely on the location of the harassment, or because the complainant has been pushed out of school after being victimized.
- Requiring schools to offer supportive measures to help all students who report sex discrimination to feel safe and to continue learning aligned with Title IX’s broad mandate to protect equal access to educational opportunities and benefits.
- Ensuring schools are not allowed to ignore reports only because the student reported it to the “wrong” person.
- Removing the unduly burdensome deliberate indifference standard for sexual harassment complaints.
- Requiring school grievance procedures to be equitable and no longer uniquely burdensome and hostile for complaints of sexual harassment.
- Clarifying that sex discrimination encompasses discrimination based on sex stereotypes, LGBTQI+ students, and pregnant or parenting status. This includes requiring schools to make reasonable accommodations for student pregnancy or related conditions, including medical leaves of absence and lactation breaks.

- Ensuring schools are engaged in monitoring and trainings around sex discrimination in schools.
- Letting schools follow state/local laws that offer greater protections against sex discrimination.

These protections are key to realizing Title IX’s mandate. The Department’s proposed Title IX regulations regarding nondiscrimination in athletics and addressing the needs of student survivors of sexual harassment and of pregnant and parenting students are critical to ensuring equal opportunity in education, so that all women and girls can thrive and maintain access to the full range of educational opportunities.

VII. Title IX does not create a zero-sum game: when all women and girls have opportunities to play school sports, that is a victory for all girls and women.

Title IX and its corresponding regulations permit separate gender teams—*not* to facilitate “elite” competition, but to allow women and girls to participate equitably in school sports. Historically, women and girls have been excluded and denied opportunities to play and develop athletic talents. Scarce opportunities and resources persist when compared to those provided to men and boys, and Title IX is part of a legal and societal effort to undo myths that say femininity and athleticism are in conflict. They are not.

Strong protections for trans, nonbinary, and intersex students in school sports further this purpose and the goal of the gender justice movement to expand opportunities for all women and girls. It is deeply wrong and misleading to claim that if trans women and girls get to play, cisgender women lose—or that for cisgender women and girls to win, trans girls cannot play at all. Nothing could be further from the truth. When trans and intersex girls and women are included, celebrated, and empowered within girls’ and women’s sports, all girls and women benefit. That is because women and girls’ sports programs are intended to empower *all* women; not to cut some women and girls off from opportunities because of who they are or what they look like.⁵⁴

For years, organizations dedicated to women’s rights and gender justice have expressed consistent support for trans, nonbinary, and intersex youth and their Title IX rights,⁵⁵ specifically uplifting the ways trans-exclusionary policies harm *all* women and girls and underscoring trans and intersex women’s right to be included and celebrated in sports.⁵⁶ trans, nonbinary, and intersex students to play sports are not at odds with the cause of women’s rights. Instead, they advance women’s rights by empowering all women and girls to participate in sports without being pressured to conform to sex stereotypes or having to fear that their bodies will be scrutinized and found to be insufficiently feminine to participate.

VIII. Conclusion

Sex discrimination remains a pressing concern for LGBTQI+ students, with trans, nonbinary, and intersex students facing especially alarming rates of harassment, assault, disproportionate discipline, and other discrimination based on transgender status and/or perceived nonconformity with sex stereotypes. Recently, these harms have been exacerbated by an unprecedented wave of attacks on trans youths’ civil rights and safety, ranging from hostile state laws and policies, including attacks on access to necessary, lifesaving healthcare, to coordinated nationwide bomb threats against hospitals that serve transgender youth.⁵⁷ The proliferation of attacks upon transgender youth have especially singled out

and harmed trans and intersex women and girls, attacking their rights to access sex-separated school activities and spaces, including women and girls' sports.

Excluding trans and intersex women and girls hurts all women and girls and contravenes Title IX's letter, spirit, and intent. Neither Congress nor the Department should endorse sexist stereotypes that dangerously police who is a woman or girl and subject all women and girls to intrusive and humiliating sex verification procedures.

Instead, I encourage Congress to pursue policies that meaningfully increase gender equity and promote fairness. For example, we could make it safer and easier for student athletes to report harassment and sexual misconduct. We could ensure schools offer women and girls' sports resources equivalent to the resources they provide programs dedicated to men and boys' sports. We could protect all women and girls' access to healthcare, including the need for reproductive and gender affirming health care. We also could address barriers to gender equity in other contexts—inequity in pay and promotions, workplace harassment and bias, the failure to support women who both work and have caregiving responsibilities. Daily, my colleagues and I at NWLC work on these issues to advance opportunities and equity for all women and girls, and we invite all policymakers to focus on these urgent issues with us.

Thank you again for the opportunity to submit this testimony.

¹ *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

² Deborah L. Brake, *Title IX's Trans Panic*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 41, 64 (2023).

³ This testimony focuses Title IX's purpose and the ways that anti-trans school sports policies violate Title IX and harm all girls and women, including cisgender women, transgender women, and/or Black and brown women. Although many trans exclusionary policies are designed to target trans women and girls, many trans boys and men and many nonbinary students are also harmed by these policies and denied equal education opportunities. Research shows that trans and nonbinary youth are significantly less likely to play school sports than their cisgender peers, due in part to fears of being unsafe and unwelcome. GLSEN, *LGBTQ Students and School Sports Participation* (Feb. 2022), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

⁴ "Intersex" refers to people who have natural variations in sex-linked characteristics. People who are not intersex are sometimes referred to as "endosex."

⁵ *See, e.g.*, *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, (2020), *as amended* (Aug. 28, 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Doe v. Horne*, 2023 WL 4661831 (D. Az. July 2023); *A.M. v. Indianapolis Pub. Sch.*, 617 F.Supp.3d 950 (S.D. Ind. July 26, 2022); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 564 (M.D. Pa. 2019). *See also Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), <https://federalregister.gov/d/2022-13734> [hereinafter "2022 Proposed Rule"]; Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance, 88 Fed. Reg. 22860 (proposed Apr. 13, 2013) <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf> [hereinafter "Athletics Rule"].

⁷ *See, e.g.*, Open Letter Supporting Trans Women & Girls (Mar. 31, 2021), <https://nwlc.org/press-release/open-letter-supporting-trans-women-girls/>; Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People (Apr. 9, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>.

⁸ 20 U.S.C. §§ 1681 et seq.

⁹ Known as the Javits Amendments, this directive replaced the Tower Amendment, which was proposed by Senator John Tower and sought to exempt from Title IX, any sport that produced gross revenue or donations from a school. 120 Cong. Rec. 15,322-23 (May 20, 1974); S. Conf. Rep. No. 93-1026, at 4271 (1974). *See also* NCWGE, *Title IX Timeline* (2008), <https://www.ncwge.org/PDF/Title%20IX%20Timeline.pdf>.

¹⁰ 34 C.F.R. § 106.41(b).

¹¹ Unlike the regulatory process today, in 1975 Congress had authority to decide whether agency-proposed regulations reflected the statutory intent of Title IX. Thus, following HEW's release of the proposed rule in 1974 and during the Congressional review period that took issue broadly with Title IX affording equal opportunity in school sports, several bills and resolutions were introduced in Congress that specifically sought to exempt revenue generating intercollegiate athletics, including NCAA sports, under Title IX. These and similar efforts to exempt or otherwise privilege competition in elite sports over students' equal opportunities to participate were rejected. See, e.g., A bill to amend Title IX of the Education Amendments of 1972, S. 2106, 94th Cong. (1975); A bill to amend title IX of the Education Amendments of 1972, H.R. 8394, 94th Cong. (1975); Concurrent resolution to disapprove certain sections of the Department of Health, Education, and Welfare regulations relating to nondiscrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance applicable to athletic programs and grants, H.R. 311, 94th Cong. (1975); Concurrent resolution disapproving certain regulations of the Department of Health, Education, and Welfare, S. 52, 94th Cong. (1975); Women's Sports Foundation, *History of Title IX* (Aug. 13, 2019) <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>; Brake, *supra* note 2 at 70–74 (2023) (citing Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S. 11) (“explaining that some supporters of sex separation emphasized the structural inequities that have deprived girls and women from fully developing their athletic talents, such that lumping girls and women into competition with male athletes would exacerbate an already unequal playing field.”).

¹² Brake, *supra* note 2, at 70–74 (citing Erin Buzuvis, *Title IX: Separate but Equal for Girls and Women in Athletics*, OXFORD HANDBOOK OF FEMINISM & L. IN THE U.S. 23). (“Similar to the case for women-only discussion groups, the concern was that male players might hog the playing field, refusing to fully engage with women as teammates or opponents, creating negative sport experiences that would further suppress girls’ and women’s interests and abilities.”).

¹³ *Id.* at 86 (citing Susan Cahn, *Coming on Strong: Gender and Sexuality in Twentieth Century Women’s Sport* 4 (1994)) (“Women were long protected out of sports due to beliefs about the frailty of ‘the fairer sex’ and a purported threat to women’s fertility...[and] the belief that women are naturally inferior to men in sports competition.”).

¹⁴ Women’s Sports Foundation, *50 Years of Title IX: We’re Not Done Yet* 7–8 (2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf> [hereinafter “WSF: 50 Years of Title IX”].

¹⁵ See Brake, *supra* note 2 at 85, 88.

¹⁶ See, e.g., Emine Yucel, *Men’s And Women’s NCAA March Madness Facilities, Separate and Unequal, Spark Uproar*, NPR (Mar. 19, 2021), <https://www.npr.org/2021/03/19/979395795/mens-and-womens-ncaa-marchmadness-facilities-separate-and-unequal-spark-uproar>; Nat’l Collegiate Athletic Assoc., *The State of Women in College Sports* 31 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf (noting that among the largest U.S. universities, the “spending for men’s athletics is almost three times more than what is reported for women’s athletics”)

¹⁷ WSF: 50 Years of Title IX, *supra* note 14, at 31.

¹⁸ See Nat’l Coal. for Women and Girls in Educ., *Title IX at 50: A Report by The National Coalition for Women and Girls in Education* (2022), <https://nwc.org/resource/title-ix-at-50/>.

¹⁹ Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* 44 (Jan. 15, 2020) [hereinafter “WSF Report: Chasing Equity”], <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

²⁰ U.S. Department of Education (2019), *Equity in Athletics Disclosure Act Data Analysis Cutting Tool*, <https://ope.ed.gov/athletics>.

²¹ WSF Report: Chasing Equity, *supra* note 19, at 49.

²² *Id.* at 49.

²³ *Id.* at 29 (women college coaches reported facing significant gender bias in the workplace, where 75% of women reported men were better able to negotiate salary increases, 54% of women reported men were more likely to be promoted, and 53% of women reported men were more likely to be compensated with salary increases for successful job performance).

²⁴ 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 form 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/page/msu_doctor_alleged_sexual_assault.html.

²⁵ Nat’l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41, 42 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>; 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); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397-401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents:*

Informing development of a conceptual model of health through sport, 10 INT’L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

²⁶ GLSEN, *The Experiences of LGBT Students in School Athletics* (2013), <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>; The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* (Aug. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/08/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf>.

²⁷ See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

²⁸ The Trevor Project, *Mental Health of Black Transgender and Nonbinary Young People*, (Feb. 28, 2023), <https://www.thetrevorproject.org/research-briefs/mental-health-of-black-transgender-and-nonbinary-young-people-feb-2023/> (last visited May 15, 2023).

²⁹ *The 2021 National School Climate Survey*, *supra* note 27, at 19.

³⁰ *Id.* at 19, 34.

³¹ *Id.* at 84. Notably, there is an absence of data about intersex students’ experiences with in-school harassment and discrimination. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny and discrimination. See Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, WASHINGTON POST (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

³² Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

³³ Movement Advancement Project, *Bans on Transgender Youth Participation in Sports*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last updated May 1, 2023).

³⁴ Recent data from the CDC shows 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. Ctr. for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth 14-17* (2021), <https://www.americanprogress.org/wp-content/uploads/sites/2/2021/02/Fair-Play-correction2.pdf>. See also David Cray & Lindsay Whitehurst, *Lawmakers Can’t Cite Local Examples of Trans Girls in Sports*, AP (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7>.

³⁵ None of these state sports ban laws address actual gender inequities in sports. Women and girls still lack significant opportunities to play sports as compared to men and boys, with Black and brown women and girls being disproportionately denied opportunities to play; schools still prioritize funding and resourcing men’s and boys’ teams while giving women’s and girls’ teams second-class treatment; and sexual harassment and abuse of student athletes still persists. WSF Athletics Report: *Chasing Equity*, *supra* note 19; Nat’l Women’s Law Ctr., *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>; Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, BEST COLLEGES (Nov. 10, 2021), <https://www.bestcolleges.com/news/2021/07/01/gender-equality-remains-elusive-in-college-sports/>.

³⁶ Ctr. for American Progress, *supra* note 34, at 14–17.

³⁷ Brake, *supra* note 2, at 72–73, 92.

³⁸ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

³⁹ *Id.*

⁴⁰ One such way a recipient can minimize risk of injury without preventing trans, nonbinary, and intersex students from playing is to ensure student athletes are effectively coached on the rules of each sport. For example, in rugby, a contact sport, players must be trained to tackle their opponents properly to comply with the rules of the sport and play safely. Both USA Rugby and World Rugby—the national and international governing bodies for the sport, respectively—instruct that players must tackle using their arms and shoulders, aiming to make contact with their opponent’s hips to safely complete the tackle and reduce the risk of injury to the player and their opponent. Effective coaching on the rules of rugby can help players avoid dangerous tackling techniques, such as “high tackling,” which involves tackling above their opponents’ shoulders, and can result in a penalty, as it substantially increases the risk of injury to all players. See USA Rugby, *Rugby 101*, <https://usa.rugby/rugby101>; World Rugby, *Laws by Number: Foul Play*, <https://www.world.rugby/the-game/laws/law/9>.

⁴¹ 2022 Proposed Rule at 22874.

⁴² Brake, *supra* note 2, at 91 (citing Joanna L. Grossman & Saraswati Rathod, *Trashing the Playing Field: State Legislators Misguided Move to Ban Transgender Women and Girls from Competing in Women’s Sports*, JUSTICIA: VERDICT (Apr. 27, 2021), <https://perma.cc/V6HB-J3LH>) (noting that there are over 200 genetic differences other than sex that affect athletic ability, including “height, blood flow, muscle mass, pain threshold, and respiratory and cardiac functions”)

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- ⁴³ Athletes come in all shapes and sizes. For example, gymnast Simone Biles' height of 4'8" and basketball player Brittney Griner's height of 6'9" are celebrated and seen as positive factors in their athletic success—as they should be.
- ⁴⁴ Canadian Center for Ethics in Sports, *Transgender Women Athletes and Elite Sports: A Scientific Review*, 6 (2022), https://www.cces.ca/sites/default/files/content/docs/pdf/transgenderwomenathletesandelitesport-ascientificreview-executivesummary-e_0.pdf.
- ⁴⁵ Human Rights Watch, *"They're Chasing Us Away from Sport:" Human Rights Violations in Sex Testing of Elite Women Athletes* (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#6040>.
- ⁴⁶ Marjorie Cortez, *After a girl beat their daughters in sports, Utah parents triggered investigation into whether she was transgender*, DESERT NEWS (Aug. 17, 2022), <https://www.deseret.com/utah/2022/8/17/23310668/school-investigates-female-athlete-transgender-complaint>.
- ⁴⁷ 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"); Anna North, *I Am a Woman and I Am Fast: What Caster Semenya's Story Says about Gender and Race In Sports*, VOX (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>; Dawn Ennis, *IAAF Called Caster Semenya Biologically Male*, OUTSPORTS (June 19, 2019), <https://www.outsports.com/2019/6/19/18691210/iaaf-caster-semenya-biologically-male-testosterone-olympics-southafrica-athlete> (outlining how Caster Semenya, a Black woman and a sprinter, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete, for the purpose of determining whether she was "feminine enough" to continue competing with women); Human Rights Watch, *supra* note 45 (explaining the scrutiny Dutee Chand, an Indian woman sprinter, faced from fellow athletes who accused her "stride and musculature" of being too "masculine," which resulted in her being ordered by an international sporting body to undergo invasive medical exams).
- ⁴⁸ Milton Kent et al., *Beating Opponents, Battling Belittlement: How African-American Female Athletes Use Community to Navigate Negative Images*, Sch. of Glob. Journalism & Comm'n's, Morgan State Univ. 9, <https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-in-Sports2.html#document/> (last visited May 12, 2023). See also Yelena Dzhanova, *The Olympics has a race problem. Athletes everywhere are calling out the sporting body for a history of banning Black women.*, INSIDER (July 13, 2021), <https://www.businessinsider.com/the-olympics-history-of-racism-sexism-black-women-2021-7> ("Since the 1930s, sports commentators have described Black women in racist terms, referring to them as "dancing monkey"...[and] [i]n the 1950s and 1960s, renowned Black sprinter Wilma Rudolph was called the "Black Gazelle"...adding to the commentary that isolated her femaleness and Blackness.").
- ⁴⁹ Marjorie Cortez, *supra* note 46.
- ⁵⁰ Gina Vivinotto, *Serena Williams on How She Struggles with Cruel Remarks About Her Body*, TODAY (Sept. 7, 2017), <https://www.today.com/style/serena-williams-body-shamers-i-don-t-let-anything-break-t116063>; Jason Pham, *Serena Williams Shut Down Body Critics: 'I Am Strong and Muscular — and Beautiful,'* BUSINESS INSIDER (May 31, 2018), <https://www.businessinsider.com/serena-williams-shut-down-body-critics-who-said-she-was-born-a-guy-2018-5>.
- ⁵¹ Anna North, *supra* note 47; Dawn Ennis, *supra* note 47.
- ⁵² See Human Rights Watch, *supra* note 45. That Chand was later successful in her challenge of the regulations prohibiting her from competing due to her higher natural levels of testosterone at the Court of Arbitration for Sport does not take away from the intense humiliation and stigma she was subjected to. *Id.*
- ⁵³ *United States v. Virginia*, 518 U.S. 515, 516 (1996).
- ⁵⁴ Brake, *supra* note 2, at 71.
- ⁵⁵ Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People (Apr. 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>; Letter to President Joseph Biden by the National Women's Law Center and Women's Sports Foundation (Aug. 2022), <https://nwlc.org/wp-content/uploads/2022/08/WSF-Letter-8.10-final-version.pdf>.
- ⁵⁶ Shiwali Patel, *Gender Justice in Sports Cannot Succeed Without Trans Women and Girls*, NWLC BLOG (Mar. 31, 2023), <https://nwlc.org/gender-justice-in-sports-cannot-succeed-without-trans-women-and-girls/>. See also Becky Sauerbrunn, *Let Missouri trans girls and women play*, SPRINGFIELD NEWS-LEADER (Feb. 5, 2023), <https://www.news-leader.com/story/opinion/2023/02/05/bills-targeting-transgenders-athletes-are-cruel-and-pointless/69866434007/>; Billie Jean King, *Megan Rapinoe and Candace Parker Support Brief Against Idaho Anti-Transgender Law*, SPORTS ILLUSTRATED (Dec. 21, 2020), <https://www.si.com/more-sports/2020/12/21/idaho-anti-transgender-law-briefs>.
- ⁵⁷ Anya Zoledziowski, *How 2022 Became the Year Trans Hate Went Mainstream*, VICE NEWS (Dec. 21, 2022), <https://www.vice.com/en/article/5d383z/anti-trans-violence-2022> ("[W]e've seen anti-trans discourse go from 'trans people are potentially a danger to women's athletics somehow' to 'they are absolutely a danger to all children' [said Gillian Branstetter of the ACLU] 'manifesting policies that are seeking to... label us [trans people] as inherently obscene, and functionally erase us

from public life.' ... a number of US hospitals that offer gender-affirming care had doctors threatened with 'execution,' received bomb threats, and [were] forced to take information off their websites specifically because of rhetoric from LibsofTiktok's Raichik and *Daily Wire's* Walsh.").