



August 4, 2021

House Education Committee  
Pennsylvania General Assembly

Re: Public Hearing on HB 972

Dear members of the Pennsylvania House Education Committee,

The Women's Law Project urges you to oppose HB 972, which bans students from participating in women's interscholastic and intercollegiate sports based on a determination of "biological sex" by unspecified means. This discriminatory bill violates our state and federal laws and constitutions, promotes harmful gender stereotypes that are not supported by science, and purports to solve a problem that does not exist. There are many policies that this Committee could advance to encourage the provision of athletic opportunities for women who have been historically underrepresented in school athletic programs, but HB 972 is not one of them.

Founded in 1974, the Women's Law Project (WLP) is a nonprofit, legal advocacy organization that defends and advances the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. WLP engages in impact litigation, direct representation and assistance, public policy advocacy, and community education to challenge discrimination rooted in gender stereotypes.

In keeping with our commitment to fighting sex discrimination in education, our litigation includes the representation of women athletes who have been denied athletic opportunities at their schools in violation of Title IX, the Equal Rights Amendment of the Pennsylvania Constitution, and the Fourteenth Amendment of the U.S. Constitution. To increase the transparency of school athletic programs, we advocated for the Equity in Interscholastic Athletics Disclosure Act, which became law in 2012. In 2017, we created a website to give Pennsylvanians a tool to find out whether their public schools are providing disproportionately too few athletic opportunities to women, which is sex discrimination.<sup>1</sup>

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<sup>1</sup> FAIR:PLAY: Ensuring Equity in School Sports, <https://fairplay.womenslawproject.org/> (using data for each school year from 2012-13 to 2018-19, this website calculates the athletic gap by comparing the percentage of school-sponsored athletic opportunities provided to women athletes to the percentage of women enrolled as students at the school; WLP is in the process of updating the website with the most recent data).

The denial of athletic opportunities to women is long-standing and widespread in Pennsylvania, but the solution to this problem does not lie in a bill that promotes gender stereotypes that harm all women and discriminates against transgender, nonbinary, and intersex students in violation of our state and federal laws and constitutions.<sup>2</sup>

### HB 972 Promotes Gender Stereotypes that Harm All Women and Undermine Women’s Sports

The unsupported belief that transgender women have a “biological advantage” that will “displace” cisgender women athletes is based on, and reinforces, gender stereotypes that associate athletic success with masculinity, misperceive women as lesser athletes than men, and devalue women’s sports. Many schools and universities fail to provide women with equitable athletic opportunities, in violation of Title IX, based on these stereotypes.

Pennsylvania law requires secondary schools<sup>3</sup> to report athletic participation data by gender and race on an annual basis.<sup>4</sup> The data show that numerous school districts maintain presumptively illegal athletic participation gender gaps skewed heavily in favor of men’s sports. Indeed, several of these schools are in the legislative districts of HB 972’s sponsors.<sup>5</sup> Supporters call HB 972 the “Fairness in Women’s Sports Act,” yet it does nothing to fix the deep and persistent gender inequities in athletic programs that are right in the sponsors’ backyards.

### The Inclusion of Transgender Athletes in Women’s Sports Does Not Harm Cisgender Athletes

The underlying assumption of HB 972—that allowing transgender athletes to play women’s sports somehow harms cisgender athletes—is flawed. In Pennsylvania and across the country, transgender students have been permitted to play on teams consistent with their gender identities for years, and there is no evidence that their inclusion causes harm to anyone.<sup>6</sup>

Transgender athletes are like all athletes. Sometimes they win their competitions and sometimes they do not.<sup>7</sup> HB 972 is premised on the belief that transgender women have “biological advantages” that would result in the displacement of cisgender athletes from sports teams and winners’ podiums, but this assumption is not supported by evidence.

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<sup>2</sup> A note on the definitions of the terms used in this letter: “Transgender” refers to a person whose gender identity does not align with the sex that person was determined to have at birth; “Cisgender” is a term for individuals whose gender identity corresponds with their sex assigned at birth. See *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018).

<sup>3</sup> The school entities that are required to disclose athletic participation data under this law include: “A school of a school district, joint school district, area career and technical school or charter school that provides interscholastic athletic opportunities for secondary school students.” A “Secondary school student” is “a student who attends a school entity in grades 7 through 12.” 24 Pa. Stat. § 16-1602-C (2019).

<sup>4</sup> 24 Pa. Stat. § 16-1603-C (2012).

<sup>5</sup> Data on file with WLP.

<sup>6</sup> See Pennsylvania Interscholastic Athletic Association, By-Laws, Sec. 2 (D)(4) <https://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20I%20-%20Constitution%20and%20By-laws.pdf>

<sup>7</sup> See *Hecox v. Little*, 479 F. Supp.3d 930 (D. Idaho 2020) (noting examples of transgender athletes in competition).

While it may feel like common-sense to classify all people as “male” or “female,” as this bill does, people do not fall neatly into these two categories.<sup>8</sup> A person’s assigned sex does not always align with their gender identity, which is the person’s deeply felt sense of self, and neither gender identity nor sex is binary. Sex is influenced by many factors, including, but not limited to, chromosomes, hormones, and genitalia. There is wide variation in the “biology” of people within the same perceived biological sex, and there is wide variation in the physical characteristics of athletes who share the same perceived biology. Generalized assumptions about biological differences between “males” and “females” mean nothing about an individual athlete.<sup>9</sup>

Policing the bodies of transgender and other gender-non-conforming athletes will reinforce stereotypes about what it means to be “masculine” or “feminine,” resulting in discrimination. If enacted, HB 972 will exacerbate the stigma many transgender youth already face because they do not conform to society’s stereotypes about men and women. It will also deny transgender students the benefits of athletic participation, including learning teamwork and problem-solving skills, reducing stress, improving physical health, and having fun.<sup>10</sup>

### HB 972 Harms Transgender Students in Violation of State and Federal Laws

Instead of supporting transgender students, who face disproportionately high levels of harassment in school, HB 972 subjects them to further harassment and discrimination by prohibiting their participation in sports based on an arbitrary determination of “biological sex.” This discrimination violates Title IX, which applies to educational programs that receive federal funds. It also violates the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act, which apply to all educational institutions in the Commonwealth.

As the Office for Civil Rights of the U.S. Department of Education has confirmed, Title IX prohibits discrimination based on sexual orientation and gender identity.<sup>11</sup> Courts rely on interpretations of Title VII of the Civil Rights Act of 1964 to inform interpretations of Title IX. The United States Supreme Court has interpreted Title VII to prohibit discrimination on the basis of sexual orientation and gender identity.<sup>12</sup> Further, the Pennsylvania Human Relations Commission has interpreted the PHRA to prohibit discrimination on the basis of sexual orientation

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<sup>8</sup> See, e.g., Katrina Karkazis, *The Misuses of “Biological Sex,”* *Lancet*. 394, 1898–1899 (2019).

<sup>9</sup> See *Beattie v. Line Mountain Sch. Dist.*, 992 F.Supp.2d 384 (M.D. Pa. 2014) (in finding that a student athlete was likely to succeed on her equal protection and Pennsylvania Equal Rights Amendment claims against a school district that had prohibited her from wrestling on a team designated for boys, the Court noted that the district’s policy was “underinclusive because [it allowed] boys, some of whom may be weaker than some girls when considered on an individual rather than abstract level [to wrestle]... and overinclusive [] because it prevent[ed] females...from wrestling when they may be equally as strong or stronger than some boys on an individual basis.”).

<sup>10</sup> See, e.g., Rochelle M. 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*, *International J. of Behavioral Nutrition & Physical Activity* (2013), <https://ijbnpa.biomedcentral.com/articles/10.1186/1479-5868-10-98>

<sup>11</sup>Office for Civil Rights, Dep’t of Education, Notice of Interpretation 4 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> [hereinafter “Notice of Interpretation”]

<sup>12</sup> *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

and gender identity.<sup>13</sup> These interpretations are consistent with the purpose behind these laws of ensuring equal opportunity and preventing harms caused by sex discrimination.

School policies and practices that treat transgender students differently from cisgender students cause harm. Numerous courts have recognized these harms, which include injuries to the emotional and physical health of transgender students due to unequal treatment, and have held that policies and practices which harm transgender students violate the law.<sup>14</sup> Studies have also found that transgender students experience high levels of harassment at school.<sup>15</sup>

To prevent these harms, municipalities across the Commonwealth have enacted ordinances to protect transgender people.<sup>16</sup> However, HB 972 purports to preempt these local laws by prohibiting government entities from “entertain[ing] a complaint, open[ing] an investigation or tak[ing] any other adverse action against a school or institution of higher education” that prohibits a transgender, nonbinary, or intersex person from participating in women’s sports.

### HB 972 Harms Transgender Students in Violation of the Pennsylvania and U.S. Constitutions

Pennsylvania’s Equal Rights Amendment and equal protection provisions and the U.S. Constitution’s Fourteenth Amendment protect transgender and other gender-non-conforming students from discriminatory government action like HB 972.

Article 1, Section 1 of the Pennsylvania Constitution provides that all people are “equally free and independent” and have the right to pursue their own happiness. Article 1, Section 26 of the Pennsylvania Constitution provides that the “Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil rights.” Article 1, Section 28 provides that “Equality of rights under the law shall not be denied or abridged... because of the sex of the individual.” Under the United States Constitution, the Fourteenth Amendment guarantees individual dignity and autonomy and equal protection of the laws.

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<sup>13</sup> Pennsylvania Human Relations Commission Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act at 3 (“The prohibitions contained in the PHRA and related case law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected class, prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression”), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.

<sup>14</sup> See Notice for Interpretation at 9-10, citing *Grimm v. Gloucester County. Sch. Bd.*, 972 F.3d 586, 617-18 (4th Cir. 2020), as amended (Aug. 28, 2020), *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1306-07 (11th Cir. 2020), *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-46, 1049-50 (7th Cir. 2017), and *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016).

<sup>15</sup> See, e.g., 2015 U.S. Transgender Survey: Pennsylvania State Report. (2017).

<sup>16</sup> See Pennsylvania Youth Congress, Local Nondiscrimination, <https://payouthcongress.org/localnondiscrimination/> (last visited Aug. 1, 2021).

Courts applying these constitutional provisions apply heightened scrutiny<sup>17</sup> to laws that target people on the basis of sex—including gender identity—that requires, at a minimum, that the law advances an important governmental interest using means that are substantially related to that interest.<sup>18</sup> There is no evidence to support HB 972. It is based on stereotypes and fear, and it is unsurprising that courts have already ruled that similar laws passed in other states are unconstitutional.<sup>19</sup>

## Conclusion

As a federal court recently stated in its opinion preliminarily enjoining a similar law: “A fear of the unknown and discomfort with the unfamiliar have motivated many of the most malignant harms committed by our country’s governments on their own citizens.”<sup>20</sup> The Women’s Law Project implores the members of the Education Committee not to harm Pennsylvanians based on unfounded fears. We urge you to oppose HB 972.

To truly “protect women’s sports,” this Legislature must address the athletic participation gaps in their own backyards and improve the enforcement of equity provisions in the law. In addition, while districts are under an obligation to fund educational opportunities in an equitable way, regardless of how much funding they have, this Committee should ensure increased funding for public schools so that they are better able to provide educational opportunities of all types, including athletic opportunities for women.

Respectfully,

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<sup>17</sup> As interpreted by the Pennsylvania Supreme Court, the Pennsylvania Equal Rights Amendment is an almost absolute ban on sex discrimination. See *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (“The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities.”)

<sup>18</sup> *Hecox*, 479 F. Supp. 3d at 979 (“Heightened scrutiny requires that a law solves an actual problem and that the ‘justification must be genuine, not hypothesized,’” citing *United States v. Virginia*, 518 U.S. 515, 533 (1996).)

<sup>19</sup> *Hecox*, 479 F. Supp. 3d at 989; *B.P.J., et al. v. West Virginia State Board of Education*, 2021 WL 3081883 (S.D. W. Va., July 21, 2021).

<sup>20</sup> *B.P.J.*, 2021 WL 3081883 at \*1.