

March 16th, 2021

Dear Chairwoman Larson and Members of the Senate Judiciary Committee: I write today as a founder of a health clinic who treats transgender individuals, professional trainer on LGBTQ+ topics, and a researcher into education and healthcare policy. Since the inception of this bill, I have spent over a hundred hours reviewing all the material available and I'm going to summarize that here for your benefit, followed by some comprehensive breakdown.

- Fairness in Sports: A Comprehensive Breakdown for ND Policy Makers
- Queer Youth: Understanding Outcomes in North Dakota
- House Committee: Summary of Original Testimony
- The Court Cost: This Legislation has Been Tested

After we look at the actual science, which debunks the notion this is about fairness in sports, we will look at what else is at stake. If we're being honest this entire legislation is solely intended to be an attack on the trans community as cultural blowback for the affirming direction the Biden Administration is heading in. This is not about fairness in sports, it is about the systematic exclusion of transgender individuals as a cultural attack made by anti-lgbtq+ organizations nationally and locally.

This is evident from the quote of the Mississippi governor, who said their anti-trans sports law was necessary because the president "encourages transgenderism." Not because of fairness in sports, but because too many trans people are being accepted. While I know individuals may have honest concerns, the engine that is driving these anti-trans legislations across dozens of states do not.

Data provided by the report [Fair Play](#) indicates this strategy is a scorched earth strategy that harms all youth, lowers participation of all females in sports, and costs the state millions in lawsuits.

If you vote "Do Pass" on this it should be solely with the acknowledgement that you're willing to spend millions on a lawsuit that will fail, to intentionally hurt a marginalized community that is struggling, and not in any way help female sports. It is your right to do so, but let us not pretend this is about something else. The real litmus test is asking yourself if you've ever cared about female sports before the issue also happened to deny trans people?

While politics has become extremely partisan, I am not a democrat. I'm someone who looks at research to make non-partisan suggestions that improve outcomes. I would not be successful in a predominantly red state if I were to try to sell folks on democrat leaning partisan position. If the science pointed to there being an advantage or to legislation like this being beneficial or needed, I would advocate for it. What I learned is from looking at female sporting leaders and organizations across our nation for their concerns and their positions. While you can find an individual or single study that will say anything, it is important to look at the community

consensus and not just what fits your agenda. The primary concerns are lack of funding and predatory coaches. If we simply doubled the funding for female sports and scholarship opportunities, this would solve the proposed problems without harming anyone. That or create better transparency and opportunity to report coaches for sexual misconduct.

I believe Donna Lopiano presents excellent centrist positions that acknowledges the need for fairness for cisgender females, without the exclusion of transgender females. A wealth of information from her can be found here: <https://womenssportspolicy.org/>.

### **Indisputable Facts**

Cisgender Males (Assigned male at birth and go through a testosterone dominate puberty) have an advantage over Cisgender Females (Assigned female at birth and go through an estrogen dominate puberty)

1. Nearly all of the research that we see established in favor of this bill is only in fact pointing out this known relationship.
2. Transgender females are individuals who are assigned male at birth, but may not have a testosterone dominate puberty or the associated advantages we see from it. They cannot be lumped in with biological males or cisgender males, because their development isn't necessarily going to be the same.
3. Transgender males are individuals who are assigned female at birth, but may have a testosterone dominate puberty and the associated advantages that go with it.
4. It is not the sex a person is assigned at birth that is responsible for performative advantage, it is the primary hormone they had during puberty. Ben Koppelman's study supports this.
5. Given that not all trans individuals may be advantaged or disadvantaged due to their sex assigned at birth, blanket bans provide undue discrimination, as trans girls may never have cis male levels of testosterone at any point in their life. Trans men conversely may have only had cis male typical levels of testosterone making their competing with cis girls unfair to the girls they play against. We see this with the trans male wrestler in Texas who won the girls championship twice. A reminder a trans male was assigned female at birth, but went through male typical puberty.

### **The Disputable**

If someone had gone through a testosterone dominant puberty, how much reduction of T would be required to remove the advantages they have due to that puberty?

1. We almost entirely focus all discussion on this, when not all trans women ever had male puberty.

2. Olympics and many other supporting organizations suggests a one year hormone therapy regimen before competing with a required T value being at a specific amount.
3. Some studies indicate trans women may still hold an advantage even after a year, but no study conducted on this has included more than 50 participants. While this shows we need to do more research, it would be a mistake to apply the findings of such limited studies on expansive, far reaching bans. Even with this taken in mind, no study suggests a total ban, the biggest restrictive suggestion is a 2 year regiment. All of these studies caution against making broad assumptions.
4. Since our data on this is very limited, we can look towards real life examples. While individuals focus on the very very few times transgender athletes win (less than 20 in the entire united states), this ignores the thousands of times this doesn't happen. If transgender individuals played at roughly a fair playing field with their cisgender counterparts, you would expect to see approximately 1.8% of trans youth represented as winners within given sports due to population distribution. Instead we see a fraction of a fraction of that, we see an incredible underrepresentation of trans athletes, even though they've been able to compete in the NCAA sporting leagues for 10 years. The speculation they have an advantage is only speculative. The real world results speak largely in this advantage not being there or not being significant.

## **Fairness in Sports: A Comprehensive Breakdown for ND Policy Makers**

### **Competitive Advantage and Fairness**

**The National Collegiate Athletic Association (NCAA)** released a [38 page report](#) on their rationale behind including trans athletes. This policy was crafted with a number of leading experts in sports policy who took the medical, ethical, legal, and social considerations into play before making an equitable decision.(1)

“Transgender girls who medically transition at an early age do not go through a male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that arise when transgender women transition after puberty. Transgender women display a great deal of physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women and men. Many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true. A male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize. The assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.

It is also important to know that any strength and endurance advantages a transgender woman arguably may have as a result of her prior testosterone levels dissipate after about one year of estrogen or testosterone-suppression therapy. According to medical experts on this issue, the

assumption that a transgender woman competing on a women's team would have a competitive advantage outside the range of performance and competitive advantage or disadvantage that already exists among female athletes is not supported by evidence.

Educators in collegiate athletics programs must develop thoughtful and informed practices that provide opportunities for all students, including transgender students, to participate in sports. These practices must be based on sound medical science, which shows that male-to-female transgender athletes do not have any automatic advantage over other women. These practices must also be based on the educational values of sport and the reasons why sport is included as a vital component of the educational environment: promoting the physical and psychological well-being of all students, and teaching students the values of equal opportunity, participation, inclusion, teamwork, discipline, and respect for diversity.”(2)

A systemic review of medical literature in 2017 found that “Currently, there is no direct or consistent research suggesting transgender female individuals (or male individuals) have an athletic advantage at any stage of their transition (e.g. cross-sex hormones, gender-confirming surgery) and, therefore, competitive sport policies that place restrictions on transgender people need to be considered and potentially revised.” (3)

The **International Olympic Committee (IOC)** has allowed transgender women to compete since 2004, but we've yet to see a single trans athlete qualify to compete.(4)

The **North Dakota American Academy of Pediatrics** stated in testimony agreement with the systematic review in 2017 above and further stated, “Any disingenuous attempt to defend this law by suggesting otherwise [that science supports exclusion] is flatly contradicted by research.” (5)

Dozens of medical professionals within North Dakota stated, “there is no categorical advantage being male has over being female in athletics. Spontaneous genetic mutations which result in an individual possessing unique traits that place them at an athletic advantage are not routinely screened for in athletics, and are felt to occur in the same number of individuals who identify as a gender that is not congruent with their gender assigned at birth. As written, this piece of legislation is based on the personal views of its authors rather than evidence. If any of the legislators who currently support this bill would like to learn more about the anatomy and medical science behind gender identity, we welcome an open discussion.”(6)

Dr. Luis Casas shared that “In a study published in Science in 2018, Joanna Harper's research found that a nonelite group of eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.” (7)

One study from the Karolinska Institutet shows adult trans women only losing 5% of muscle mass during 12 months on hormone therapy. This study only looked at 11 trans women and

said “It is important to note that we only examined a few selected performance markers and the participants were untrained. The magnitude of physical changes in elite athletes who undergo treatment while training for their sport is very difficult to speculate on as there are no such studies.” (8)

Regardless, Matt Fetsch, executive director of **North Dakota High School Activity Association** describes it as a non-issue in our state. According to research there are “Currently, 16 states plus Washington, D.C., have transgender-inclusive statewide guidance and policies that allow students to participate and compete on teams in accordance with their gender identity without requiring the athlete to have undergone medical transition—meaning hormone therapy and/or gender confirmation surgery—or legal transition, such as by changing one’s birth certificate or other legal documents, prior to competing. In supporting access to athletics based on gender identity, almost 42 percent of transgender high school-age youth nationwide—representing approximately 62,550 transgender students among more than 6.8 million high school-enrolled youth living in these states—have the same opportunity to participate in and benefit from sports as their cisgender peers”.(9)

Despite tens of thousands of trans athletes competing in states that allow inclusion, we don’t see these athletes dominating. A highly cited example of trans youth winning are Terry Miller and Andraya Yearwood in Connecticut. ESPN did a comprehensive breakdown of this story, showcasing that while both of these girls did win some competition, they also lost a number of times as well. (10) Their top times weren’t even close to the world record held by non trans female youth athletes either. (11) It would stand to reason that if transgender youth had an advantage, we would see an overrepresentation of trans youth winning tournament. What we see is far from that, we rarely see trans youth win, and when we do it is faced with harassment and extreme public scrutiny. (12) Miller and Yearwood are unlikely to continue competing in track due to these experiences.

What complicates these discussions is an inconsistency in arguments that require some baseline considerations. Biological male is not a useful classification when attempting to apply it to both cisgender males and transgender women as there is a marked difference in physiology, development, and hormones between these two groups.

- Cisgender male: Someone who was assigned male at birth, had testosterone based puberty, and continues to have testosterone as a primary hormone their entire life
- Transgender female: Someone who was assigned male at birth, may or may not have a testosterone based puberty, may or may not have testosterone as a primary hormone, and may have only had testosterone as a primary hormone for months or years, rather than decades.

The important factor for athletic advantage is not “being born male”, but having an androgenized puberty and continual testosterone. (13)

**Fact:** Cisgender males as a group have a statistical advantage due to a testosterone based puberty and continuing to have testosterone as a primary hormone.

**Fact:** Transgender females who have a testosterone based puberty and are still on testosterone for primary hormone likely have a statistical advantage similar to cisgender males.

**Fact:** Transgender females who do not have a testosterone based puberty or testosterone as a primary hormone have no conceivable advantage in women's sports.

**Debate:** How long does it take to remove the advantage of a testosterone based puberty with hormone therapy and how low must testosterone be kept.

Before we continue it is worth noting the debate mentioned above is entirely focused around adults and for the highest level of competition for largely private organizations. Schools have and should consider a number of additional factors for why they host and encourage sports participation within their school districts that will be discussed in subsequent sections.

This debate does not contradict the policy suggestions put forward by the IOC or NCAA, as the systematic review of literature has concluded this is a non-issue. The recent studies making way that trans adult women may hold onto some competitive advantage if they've gone through testosterone based puberty and development are not conclusive and feature sample sizes of less than 30 trans women. (14) This is not statistically relevant and with numbers these low no conclusions can be made.

I agree that more research can and should be done in interest of fairness, but it would be a mistake to focus on these studies as conclusive hard proof, when even within the studies themselves they declare the data as only a suggestion to look at further. Also statistical advantage does not translate to individual advantage as NCAA warns to not over generalize. With all of this taken into account, the policy suggested in HB 1298 is not promoting fairness.

2. For purposes of this section, sex means an individual's biological sex and is based solely on an individual's reproductive biology and genetics at birth.

This is not how biological sex is understood by science or law. (15) (16) More importantly, neither reproductive biology or genetics at birth are necessarily nor guaranteed to convey a biological advantage. None of this takes into account intersex athletes or Hyperandrogenism in female athletes either. This bill is intended to be about fairness and this section does not relate to the intent or goal of this bill. In fact, this bill creates distinct undisputable disadvantage for cisgender female athletes.

- Cisgender female: Someone who was assigned female at birth, had estrogen based puberty, and continues to have estrogen as a primary hormone their entire life
- Transgender male: Someone who was assigned female at birth, may or may not have an estrogen based puberty, may or may not have estrogen as a primary hormone, and may have only had estrogen as a primary hormone for months or years, rather than decades.

A cisgender female and a transgender male are both assigned female at birth. According to Section 2 of HB 1298, a transgender male would be considered biologically female. This transgender male may have a testosterone based puberty and may be on testosterone as their primary hormone. A study with a small sample size does suggest “prior to gender affirming hormones, transmen performed 43% fewer push-ups and ran 1.5 miles 15% slower than their male counterparts. After 1 year of taking masculinising hormones, there was no longer a difference in push-ups or run times, and the number of sit-ups performed in 1 min by transmen exceeded the average performance of their male counterparts. (17)

There is no fairness to be found in HB 1298. The NDHSAA already has a fair policy for transgender inclusion. (18) This policy equitably deals with the reality of advantage being based on hormones. There is no debate on where advantage may come from. The notion it comes from your reproductive organs or genetics without regard to hormones is not consistent with any sports literature. I cannot stress this enough, there was no mention of reproductive organs or genetics being a factor in every single organization, policy, or research study on the topics of transgender people in sports. If one was truly concerned they could change the recommended policy to require two years of hormone therapy or an estrogen based puberty for trans girls. This is not remotely needed or supported by data or empirical evidence, but would represent the most extreme restrictions that still flirt with sound science.

1. [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf)
2. On Transgendered Athletes, Fairness and Doping: An International Challenge,” Sport in Society: cultures, commerce, media, Politics, 1743-0445, Volume 9, Issue 2 (2006) Pages 227 – 251.
3. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259/>
4. [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf)
5. [https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2497-A-SYVERSON\\_GRANT.pdf](https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2497-A-SYVERSON_GRANT.pdf)
  - a. Signed by Grant Syverson, MD Luis Casas, MD David Newman, MD Kathy Anderson, MD Brenda Thurlow, MD Tracie Newman, MD, MPH Sarah Paur, CPNP Jagila Minso, MD Chris Tiongson, MD Barbara Bentz, MD Maria Weller, MD Gabriela Balf, MD, MPH Bonnie Kvistad, MD Rebecca Preussler, PsyD Justin Horner, MD Alex Thompson, MD Brandon Meyer, MD Stephanie Antony, MD Vanessa Nelson, MD Jenifer Jones-Dees, MD Stephen Tinguely, MD Julie Erpelding-Kenien, MD Kurt Kooyer, MD Rebecca Schreier, MD Natalie Dvorak, MD Amy Oksa, MD Rebecca Bakke, MD
6. <https://www.grandforksherald.com/opinion/letters/6860158-Letter-HB-1298-is-an-archaic-piece-of-legislation-discriminates-against-North-Dakota-youth>
  - a. Signed by Heidi Selzler-Echola, WHNP-BC; Whitney Fear PMHNP-BC; Dr. Kayla Moorer, PhD, LP; Dr. Luis Casas, MD; Dr. David Newman, MD; Naomi Tabassum, LPCC; Jessica Deckert, LPCC; Megan Degenstein, LPCC; Jessica Danielson, PhD, LPCC-S, NCC; Faryn Helm, LPCC, RPT; Molly Secor-Turner, PhD, RN, FSAHM; Mykell Barnacle, DNP, FNP-BC; Danial S. Sturgill, Ph.D.;

Melissa L. Johnson, MSIV; Emily Coler Hanson, LMFT; Mary L. Rymanowski, MSW, LICSW; Mark C. Daniels, PhD; Shauna Erickson, MS LMFT; Rebecca Preussler, PsyD; Sara Vedvei, MS, LMFT; Barb Stanton, PhD, LPCC, LMFT; Will Pearson, LMFT ; Carrie Nostrant, MEd, NCC, Kathryn Tidd, LICSW; Denage Sauve, LPCC; Ashley Limesand, Mental Health Therapist Intern; Madison Schill, Clinical Counseling Master's Student; Tyrza Hoines, Clinical Counseling Master's Student; Courtney Quist, Clinical Counseling and School Counseling Master's Student; Amy Tichy, RDT, Clinical Counseling Master's Student; Holly DeVries, Clinical Counseling Master's Student; Marion Harris, graduate student, Clinical Mental Health; Katrina Stollenwerk, Mental Health Therapist Intern and Clinical counseling Master's Student; Anika Mundal, Clinical Counseling and School Counseling Master's Student; Amanda Jensen, Clinical Counseling Master's Student

7. [https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2420-A-CASAS\\_LUIS.pdf](https://www.legis.nd.gov/assembly/67-2021/testimony/HHUMSER-1298-20210125-2420-A-CASAS_LUIS.pdf)
8. <https://academic.oup.com/jcem/article-abstract/105/3/e805/5651219?redirectedFrom=fulltext>
9. <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/#fn-495502-38>
10. [https://www.espn.com/espnw/story/\\_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate](https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate)
11. <https://www.runnersworld.com/news/a28147914/briana-williams-national-high-school-record-100-meters/>
12. <https://www.theguardian.com/sport/2015/feb/16/fallon-fox-trans-mma-athlete-interview>
13. <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance/>
14. <https://www.bmj.com/company/newsroom/current-treatment-period-may-be-too-short-to-remove-competitive-advantage-of-transgender-athletes/>
15. <https://www.forbes.com/sites/kimelsesser/2020/06/15/the-myth-of-biological-sex/?sh=2cf1879e76b9>
16. <https://www.oyez.org/cases/2019/17-1618>
17. <https://bjsm.bmj.com/content/early/2020/11/06/bjsports-2020-102329>
18. [https://ndhsaa.com/files/2015\\_16\\_Board\\_and\\_Committees/NDHSAA\\_Transgender\\_Student\\_Board\\_Regulation.pdf](https://ndhsaa.com/files/2015_16_Board_and_Committees/NDHSAA_Transgender_Student_Board_Regulation.pdf)

### **Queer Youth: Outcomes in North Dakota**

Queer youth are 4 times more likely to attempt suicide in North Dakota. 1 in 3 queer youth will attempt to kill themselves in North Dakota. We hear from some of the individuals who propose this legislation that even though there is a legislative risk of lawsuit that could cost the state money, maybe that cost is worth it for doing the moral thing. Even if trans youth had some innate advantage, which is either patently false for those who've medically transitioned during puberty or unlikely for those who have, this legislation will have negative repercussions for these youth that will increase anxiety, depression, and suicidality. I can't believe the moral thing involves actions that will lead to youth being so hopeless they kill themselves.

I can't stress enough that this isn't being an alarmist, we have a wealth of local data from the Youth Risk Behavior Survey that show the struggle already. GLSEN compiled a good deal of national data looking at impacts of sports for these youth and by extension the consequence for being unable to participate and gain the benefits sports gives youth beyond this hyperfocus on top performance or scholarships that relatively few students even have access to.

"For all students, having the opportunity to participate in sports results in positive outcomes, including physical development,<sup>1</sup> social skills,<sup>2</sup> and psychological well-being. The psychological benefits of sports specifically include improved emotional regulation,<sup>3</sup> decreased hopelessness and suicidality,<sup>4</sup> fewer depressive symptoms,<sup>5</sup> and higher self-esteem.<sup>6</sup> Research has also found that sports participation is related to greater feelings of school belonging and pro-school behaviors.<sup>7</sup> GLSEN's research has shown that on a 4.0 scale, LGBTQ+ student athletes have a GPA that is 0.2 points higher than students who did not participate in athletics. LGTBQ+ team leaders have a GPA that is 0.4 points higher than their peers who did not participate in athletics. Further, 56% of LGBTQ+ team members and 66% of LGBTQ+ team leaders competing in high school sports report feeling a positive sense of belonging at school.<sup>8</sup>"

<sup>1</sup> Biddle, S. J. H., & Asare, M. (2011). Physical activity and mental health in children and adolescents: A review of reviews. *British Journal of Sports Medicine*, 45(11), 886-895; Snyder, A., Martinez, J., Bay, R., Parsons, J., Sauers, E., & McLeod, T. (2010). Health-related quality of life differs between adolescent athletes and adolescents nonathletes. *Journal of Sport Rehabilitation*, 19, 237-248.

<sup>2</sup> Bailey, R. (2006). Physical education and sport in schools: A Review of benefits and outcomes. *Journal of School Health*, 76(8), 397-401; Eime, R. M., Young, J. A., Harvey, J. T., Charity, M. J., & Payne, W. R. (2013). A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport. *International Journal of Behavioral Nutrition and Physical Activity*, 10(98).

<sup>3</sup> Eime, R. M., et al (2013); Hansen, D. M., Larson, R. W., & Dworkin, J. B. (2003). What adolescents learn in organized youth activities: A survey of self-reported developmental experiences. *Journal of Research on Adolescence*, 13(1), 25-55.

<sup>4</sup> Taliaferro, L. A., Rienzo, B. A., Pigg, R. M., Miller, M. D., & Dodd, V. J. (2009). Associations between physical activity and reduced rates of hopelessness, depression, and suicidal behavior among college students. *Journal of American College Health*, 57(4), 427-436; Taliaferro, L. A., Eisenberg, M. E., Johnson, K. E., Nelson, T. F., Neumark-Sztainer, D. (2011). Sport participation during adolescence and suicide ideation and attempts. *International Journal of Adolescent Medicine and Health*, 23 (1), 3-10.

<sup>5</sup> Boone, E., & Leadbeater, B. (2006). Game on: Diminishing risks for depressive symptoms in early adolescence through positive involvement in team sports. *Journal of Research on Adolescence*, 16(1), 79-90; Eime, R. M., et al (2013).

<sup>6</sup> Adachi, P. J. C., & Willoughby, T. (2014). It's not how much you play, but how much you enjoy the game: The longitudinal associations between adolescents' self-esteem and the frequency versus enjoyment of involvement in sports. *Journal of Youth and Adolescence*, 43(1), 137-145; Bailey, R.

(2006); Eime, R. M., et al (2013); Slutzky, C. B., & Simpkins, S. D. (2009). The link between children's sport participation and self-esteem: Exploring the mediating role of sport self-concept. *Psychology of Sport and Exercise*, 10(3), 381-389.

<sup>7</sup> Bailey, R. (2006); Eime, R. M., et al (2013).

<sup>8</sup> MAP, GLSEN, NCTE, and NEA (2017). *Transgender Youth in America's Schools*. Available at [https://www.glsen.org/sites/default/files/2019-11/Separation\\_and\\_Stigma\\_2017.pdf](https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf)

### **House Committee: Summary of Testimony**

I compiled all of the testimony in opposition to this bill from the original house committee hearing. What we found is individuals involved in sports, education, and healthcare pretty much unanimously voted in opposite to this bill. Since then, we've learned many school districts oppose it, including the North Dakota High School Activity Association. Even Rob Port wrote that he wouldn't vote for this.

The folks in favor are largely from a very religious background, opposing the existence of transgender individuals on religious grounds. While they have the right to their opinion, faith, and practice, we should not be using the government to enforce an extreme religious position. North Dakota's values are very much about freedom. We're about local control. We shouldn't be imposing such strict government oversight over the local coaches, sporting experts, and schools to meet the ideology of special interest groups that diametrically oppose queer people. Especially considering the blowback, financial cost, and harm it will have.

When the Obama administration gave protections for queer students our state opposed on the grounds of not wanting government oversight and allowing each school the power to self determine the policy that makes sense. Why are we now bowing to national political pressure to put the same far reaching legislation we once fought so hard against?

#### **The testimony as shared below has five key points**

1. This is unconstitutional
2. Medical communities band together to say there is no advantage for trans youth
3. It harms cisgender girls
4. It harms transgender girls
5. It harms the state

#### **North Dakota law and federal law prohibit discrimination based upon sex.**

1-4 Testimony from Debra L. Hoffarth

1. The North Dakota Human Rights Act prohibits discrimination based upon sex
  - a. NDCC 14-02.4-01
2. Title VII of the Civil Rights Act prohibits discrimination based upon sex, this includes gender identity.
  - a. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

3. The State of Idaho passed the Fairness in Women's Sports Act. The United States District Court of Idaho stayed the implementation of the law, as the Act is likely unconstitutional.
  - a. Hecox v. Little, No. 1:20-CV-00184-DCN (D. Idaho Aug. 17, 2020)
  - b. <https://law.justia.com/cases/federal/district-courts/idaho/iddce/1:2020cv00184/45676/63/>
4. Executive order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation which states "all persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."
  - a. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/execute-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>
5. Policies like this are no different from policies that excluded groups or treated groups differently based on race - they are rooted in discrimination, have no scientific basis, and will ultimately negatively effect the health, development, and safety of children within our state.
  - a. Testimony from Kathy Anderson, President of the North Dakota American Academy of Pediatrics
6. The bill, if enacted, could require NDUS colleges and universities violate federal Title VII and Title IX federal regulations and guidance, take a position that contradicts athletic conference guidelines, and add to the institutions' administrative burden by requiring the collection of birth certificates as part of the admission process for our 45,000 students. It may also be impossible to enforce.
  - a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
7. This bill will suffer the same fate as Idaho's H.B. 500: immediate challenge in court. The preliminary injunction granted by the District Court is currently on appeal to 9th Circuit. The District Court decisively rejected the arguments by the state - which are emulated in the justifications for this bill - concluding that "the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho."
  - a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign

### **Trans Youth Do Not have a Competitive Advantage for being Transgender**

1. Dr. Joshua D. Safer who contributed to the policies and standards set by the NCAA states that "a person's genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance" and "that there is no inherent reason why their physiological characteristics related to athletic performance should be treated differently from the physiological characteristics of a non-gender woman". In a study published in Science in 2018, Joanna Harper's research found that a nonelite group of

eight transgender distance runners were no more competitive as women than as men. Her findings suggested that a performance advantage was not always maintained over cisgender women as transgender women faced a reduction in speed, strength, endurance and oxygen-carrying capacity.

a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist

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

a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia

3. Testosterone levels vary considerably amongst non transgender males and non transgender females, and we don't routinely screen for common medical conditions that increase testosterone amongst cisgender female athletes, such as polycystic ovarian syndrome.

a. Testimony from David Newman MD

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

a. Testimony from ND American Academy of Pediatricians, Grant Syverson, MD Luis Casas, MD David Newman, MD Kathy Anderson, MD Brenda Thurlow, MD Tracie Newman, MD, MPH Sarah Paur, CPNP Jagila Minso, MD Chris Tiongson, MD, Barbara Bentz, MD Maria Weller, MD Gabriela Balf, MD, MPH Bonnie Kvistad, MD Rebecca Preussler, PsyD Justin Horner, MD Alex Thompson, MD Brandon Meyer, MD Stephanie Antony, MD, Vanessa Nelson, MD Jenifer Jones-Dees, MD Stephen Tinguely, MD Julie Erpelding-Kenien, MD Kurt Kooyer, MD Rebecca Schreier, MD Natalie Dvorak, MD Amy Oksa, MD Rebecca Bakke, MD

5. As a 13-year old I was a 6 ft. tall, 190 lb. forward on my JV team who could palm a boys' regulation basketball. Because I was bigger and stronger than the typical 7th-grade girl, should I have not been allowed to play? I am a cisgender female, and would those physical stats have mattered any differently had I been a transgender girl? People come in all shapes and sizes, especially during the school-age years. To blame size/strength discrepancies on transgender athletes is dishonest.

a. Testimony from Marla Fogderud

6. In fact, based on my research, I couldn't find a single case of transgender athletes gaining an unfair advantage over competitors in the state of North Dakota. What I could

find, though, are athletic organizations like the NCAA (National Collegiate Athletic Association), IOC (International Olympic Committee) and USA Gymnastics implementing inclusive trans athlete policies at the highest levels of competition.

- a. Testimony by Jacob Thomas
  - b. [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf)
  - c. <https://www.outsports.com/2016/1/21/10812404/transgender-ioc-policy-new-olympics>
  - d. [https://www.usagym.org/PDFs/About%20USA%20Gymnastics/transgender\\_policy.pdf](https://www.usagym.org/PDFs/About%20USA%20Gymnastics/transgender_policy.pdf)
7. Many are rightly protective of the legacy of women's sports in this country. Importantly, advocates for women and girls in sports – such as the National Women's Law Center, the Women's Sports Foundation, Women Leaders in College Sports, and others – support transinclusive policies and oppose efforts to exclude transgender students from participating in sports. That's because while there are real issues facing women's sports, including a lack of resources devoted to supporting them, transgender participation in athletics is not one of them.
- a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign
8. The District Court also notes that "Professor Dorianne Lambelet Coleman, whose work was cited in the H.B. 500 legislative findings, urged Governor Little to veto the bill, explaining her research was misused and that "there is no legitimate reason to seek to bar all trans girls and women from girls' and women's sport, or to require students whose sex is challenged to prove their eligibility in such intrusive detail."
- a. Testimony from Cathryn Oakley State Legislative Director and Senior Counsel Human Rights Campaign

#### **This Bill Creates Negative Outcomes for Transgender Youth**

1. Current research shows that people who do not feel supported to express themselves as they identify are more likely to suffer from depression, substance use, and experience suicidal thoughts and engage in suicidal behavior. (Gabriela Balf Testimony)
  - a. Signed by these psychiatrists of North Dakota and ND Psychiatric Society:  
Stephanie Jallen, MD Laura Schield, MD Andrew J. McLean, MD, MPH Lisa Schock, MD Ahmad Khan, MD Lori Esprit, MD
2. It is a fact that student participation in sports has positive mental health effects in addition to the obvious effects it has on overall health and wellbeing. Excluding trans youth from participating in school sports will have significant mental health consequences in a group that already has the highest risk for attempted suicide and levels of depression.
  - a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist

#### **This Bill Creates Negative Outcomes for Cisgender Youth**

1. The policy proposed could subject any girl or woman to accusations and invasive tests because of concerns of being "too masculine" or "too good" for their sport to really be a ciswoman or cis-girl. As a pediatric endocrinologist, I have evaluated healthy young girls

who come to me because they are too tall and measure well over two standard deviations above the normal for age and ultimately become tall women (often measuring six feet or taller). One could argue that they too could be discriminated against because they exceed the expected body type that could in theory advantage them in female sports.

- a. Testimony from Dr. Luis Cacas, Pediatric Endocrinologist
  - b. <https://www.nytimes.com/2019/05/01/sports/caster-semenya-loses.html>
2. Female-athletes that live in rural areas will be among those most affected. It is not uncommon for a female to compete on male athletic team if there is no female option available to them. While almost every high school may have a men's and women's basketball team, the same cannot be said for sports like soccer.
- a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia
3. HB 1298 does nothing to protect women and girls in sport and has the potential to violate Title IX. Leading national women's organizations including The Women's Sports Foundation and high profile female professional, Olympic, and Paralympic athletes have consistently expressed opposition to bills like HB 1298 for this reason . Female athletes and women's organizations want lawmakers to focus on the real issues facing women and girls in sports -- like lack of resources for girls' teams, a dearth of female leadership in sports coaching and administration, and sexual harassment and assault toward girls and women in sports -- having a transgender teammate is not among the well-documented threats facing female athletes. Further, Title IX makes allowances for women to play on men's team in circumstances where there is not a women's team established or there are significant hurdles to doing so. HB1298 would not allow this to happen, meaning any institution that makes allowances to rectify the issues for women in sports could lose federal funding for noncompliance with Title IX . In addition, HB 10 1298's additional emphasis on athletic venues would make North Dakota ineligible to host NCAA events, just as HB2 in North Carolina prompted the NCAA to move championships out of the state.
- a. Anne Lieberman Director of Policy & Programs, Athlete Ally
  - b. [https://www.womenssportsfoundation.org/press\\_release/billie-jean-king-megan-rapinoe-and-candace-parker-join-nearly-200-athletes-supporting-trans-youth-participation-in-sports/](https://www.womenssportsfoundation.org/press_release/billie-jean-king-megan-rapinoe-and-candace-parker-join-nearly-200-athletes-supporting-trans-youth-participation-in-sports/)
  - c. <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>

### **This Bill Creates Negative Outcomes for the State and State Institutes**

1. A more recent case may be instructive. In 2020, Idaho passed HB 500, also known as the Fairness in Women's Sports Act, the first of its kind in the nation. It states: "athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." Currently, the law has been blocked in federal court, and the NCAA has stated that it is considering moving 2021 March Madness tournament games out of Boise because of the legislation. If HB 1298 were to pass, we can expect that the NCAA may target the Frozen Four regionals currently scheduled to take place at Scheels Arena

in Fargo in March 2021, 2023, or 2025 – with UND as the host school – or a potential NDSU football playoff or championship game.

- a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
2. To administer this requirement, NDUS campuses would be required to maintain original birth certificate records of all 45,000+ students which could result in additional administrative burden or cost and impose barriers for access for students who are unable to provide the required original birth certificate. It would also require campuses to police the rules and participants of every outside school or league that uses. It could transform a simple flag football sign-up sheet into a legal and logistical nightmare.
  - a. Testimony from Katie Fitzsimmons, NDUS Director of Student Affairs
3. If passed, HB 1298 will face the same fate [as Idaho's Bill]: immediate and expensive litigation paid for by taxpayers, only to be struck down
  - a. Testimony from Dane DeKrey ACLU
4. In Indiana, a bill that discriminated against LGBTQ people cost the state millions of dollars in lost revenues after businesses boycotted the state. Similarly, in North Carolina a bill that targeted transgender people's ability to use the bathroom of their choosing cost the state over \$3.75 billion from boycotts. Finally, in South Dakota bills like HB 1298 have consistently been rejected out of fear of their effect on the state's financial services industry.
  - a. Testimony from Dane Dekrey ACLU
5. I would like to add that this bill and others like it affect the overall perception of North Dakota and its relationship to minorities. Personally, this bill as well as other anti-LGBT legislation has encouraged me to live in Minnesota despite cheaper taxes, lower house prices and better commerce in Fargo. I recently bought a house in Minnesota with my wife, Chelsea. I am sad to say that while we considered buying a home in North Dakota, ultimately we felt that our rights as an LGBT couple would be better protected in the state of Minnesota.
  - a. Testimony from Rebecca Quimby, Head Women's Soccer Coach of Concordia
6. We're troubled by these anti-LGBTQ bills that could hurt our workforce and their families. We need our workers and their families – including any transgender members of their families – to feel welcome in the state where we operate. Discriminatory legislation like HB 1298 negatively impacts our ability to recruit and retain the best and brightest employees, and discourages local investment. We recognize the work North Dakota has done to help the technology sector grow and be competitive in a national and global economy, and we caution legislators from doing anything that would make it more challenging to compete for the talented and highly educated workers many of our companies are looking to hire.
  - a. Testimony from Samantha Kersul Executive Director, Washington and the Northwest TechNet

### **The Court Cost: This Legislation has Been Tested**

I will keep this section brief as all of the information can be found here:

<https://www.aclu.org/cases/hecox-v-little>. A good deal of this was also shared within the ACLU's testimony against this legislation.

It has to be understood that this legislation, regardless of how it attempts to frame its issues, is discriminatory. If you want to attempt to discriminate against transgender individuals than it is in your best interest to vote "Do Pass". This may be a benefit to your voter base, it may be in your interest to harm marginalized community members, but this is the only reason to try to pass this legislation. If you care about sports, if you care about having actual conversations looking to find solutions to these issues, then vote no.

These are conversations we should have, I don't think anyone disagrees with that, but are we having conversations here or are we being told what to do? These issues are complicated and nuanced and have been studied and weighed by sports experts for decades. Do our legislators possess that same background? Are they able to look over all of this data impartially in just a few hours and make a reasonable determination weighing the issues at hand and the outcomes we're likely to see?

We should spend more time studying this, more time discussing it, and more time looking for equitable solutions for all North Dakodans. Until then, we should leave it up to the people who actually run sports in our state, whether that be coaches or schools. Let's give them discretion on a case by case basis. Let's give opportunity to all parents and children depending on their preference to find areas that will work for them. Namely, let's keep doing what we have been doing, because no problem has arisen yet from it and don't fix what isn't broken.

## **Final Thoughts**

This document is far too large to ever be read, but I often feel I'm not heard when I speak to legislators in this state anyway. My previous piece was short, with big text, that just pointed to the very major issues. I didn't get into as much as I knew then, because of this loss of hope that my voice, experience, or work matter. If I even take on a position that is meant to help or understand trans folks I seem to get boxed as a radical leftist. My background is healthcare, my concern is from empathy and my approach from policy and data on outcomes.

I think it's fair to say that I'm the most aware of the struggles of queer youth in this state. I've extensively researched the outcomes through our Youth Risk Behavior Survey and even advocated for question changes to better understand this landscape. I always work with a non-partisan agenda, that invites people in, without forcing them or calling them out. I just want queer folks in this state to have hope, because right now they don't.

I'm completely sure this committee will vote 'Do Pass' and the senate will vote to put this into legislation regardless of what I or the many other organizations and individuals of this state say. There is no amount of evidence or appeal that exists that will change the mind of someone who's already made it up.

I've seen legislators sit there during testimony, never asking questions of the many policy experts who devote their time for education. I don't see many legislators trying to understand. I see them waiting until it's over to vote how they would've voted anyways. If I knew a way to

convince you, I would do it. If begging helped, I would do it. If you asked me to donate all my money to nonprofits to help queer youth, I would if it meant a statewide effort to improve these outcomes. I care about this. This isn't politics to me or football, where I walk away after the game is over saying "oh well". This is knowing this legislation will have severely negative outcomes on queer youth without comparable benefits to cis youth and I have to do so much more to try to help them survive.

I get that for many people being trans is new and sometimes scary, but we just need to have better conversations and grow as a culture to understand what this means. As I've said many times, blanket bans aren't the answer. We need to keep talking about this, while determining things on a case by case basis until we can all grasp these issues better. Ultimately, let's keep talking about this legislation, let's introduce it in our next legislative cycle, when we've had more time to sit with the information and discover what would be best for our state. If you still feel a ban would be necessary then, I wouldn't have room to complain.

I would rather stick to conversations around data without appeals to emotion, but here is my everything in hopes to get some traction. I've done my best, I really have. Regardless of what happens here, I will keep working towards improving outcome for queer youth. If you do believe this is solely about fairness in sports, after everything written here, please also do something to help these queer youth who are struggling.

Thank you for your time,  
Faye