

PROTECTION OF WOMEN AND GIRLS IN SPORTS ACT OF
2023

APRIL 10, 2023.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce,
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 734]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 734) to amend the Education Amendments of 1972 to provide that for purposes of determining compliance with title IX of such Act in athletics, sex shall be recognized based solely on a person's reproductive biology and genetics at birth, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protection of Women and Girls in Sports Act of 2023”.

SEC. 2. AMENDMENT.

Section 901 of the Education Amendments of 1972 (20 U.S.C. 1681) is amended by adding at the end the following:

“(d)(1) It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.

“(2) For the purposes of this subsection, sex shall be recognized based solely on a person's reproductive biology and genetics at birth.

“(3) Nothing in this subsection shall be construed to prohibit a recipient from permitting males to train or practice with an athletic program or activity that is des-

ignated for women or girls so long as no female is deprived of a roster spot on a team or sport, opportunity to participate in a practice or competition, scholarship, admission to an educational institution, or any other benefit that accompanies participating in the athletic program or activity.”.

PURPOSE

Girls deserve equal opportunity to compete and achieve in sports. The Biden administration’s reinterpretation of Title IX is a slap in the face to young women and girls, telling them their hard work, on-field achievements, and athletic futures do not matter. Title IX was designed to stop discrimination and ensure equal athletic opportunities for women. By allowing biological males to compete in girls’ sports the Biden administration will be reversing 50 years of progress for women. H.R. 734, the *Protection of Women and Girls in Sports Act of 2023* strengthens the law’s existing protections for women, ensures a level playing field for female athletes, and protects the law from the Biden administration’s radical regulatory scheme.

COMMITTEE ACTION

117TH CONGRESS

First Session—Hearings

On June 23, 2021, the Committee on Education and the Workforce held a hearing on “Examining the Policies and Priorities of the U.S. Department of Education.” The purpose of the hearing was to review the Fiscal Year 2022 budget priorities of the U.S. Department of Education. Testifying before the Committee was The Honorable Miguel Cardona, Secretary, U.S. Department of Education, Washington, D.C., including on the topic of the Biden administration’s interpretation of Title IX when biological males compete in women’s and girls’ sports.

Second Session—Hearings

On May 26, 2022, the Committee on Education and the Workforce held a hearing on “Examining the Policies and Priorities of the U.S. Department of Education.” The purpose of the hearing was to review the Fiscal Year 2023 budget priorities of the U.S. Department of Education. Testifying before the Committee was The Honorable Miguel Cardona, Secretary, U.S. Department of Education, Washington, D.C. At this hearing, concerns regarding Title IX were raised, such as the rewriting of Title IX regulations by the Biden administration that would seek to undermine protections for girls and women when biological males participate in women’s sports, the fairness for biological women participating in women’s sports with biological males, and the administration’s official view on biological males’ participation in women’s sports.

118TH CONGRESS

First Session—Hearings

On February 8, 2023, the Committee on Education and the Workforce held a hearing on “American Education in Crisis”. The purpose of the hearing was to examine the state of American education, including K–12 education, postsecondary education, and

workforce development. Testifying before the Committee was Ms. Virginia Gentles, Director, Education Freedom Center, Independent Women’s Forum, Arlington, VA; Dr. Monty Sullivan, President, Louisiana Community and Technical College System, Baton Rouge, LA; Mr. Scott Pulsipher, President, Western Governors University, Salt Lake City, UT; and Mr. Jared Polis, Governor, State of Colorado, Denver, CO. During this hearing, Ms. Gentles highlighted Title IX for women’s sports, urging members to support H.R. 734, the Protection of Women and Girls in Sports Act, in her oral testimony.

On March 9, 2023, the Education and the Workforce Committee voted to report two bills to help empower parents, students, and women: H.R. 734, the Protection of Women and Girls in Sports Act of 2023, and H.R. 5, the Parents Bill of Rights Act.

Legislative Action

On February 1, 2023, Rep. Greg Steube (R-FL) introduced H.R. 734, *Protection of Women and Girls in Sports Act of 2023* with Reps. Foxx, Mariannette Miller-Meeke (R-IA), Claudia Tenney (R-NY), Robert Wittman (R-VA), Daniel Webster (R-FL), Troy Balderson (R-OH), Ken Buck (R-CO), Ann Wagner (R-MO), Buddy Carter (R-GA), Matt Gaetz (R-FL), Jason Smith (R-MO), Jake Ellzey (R-TX), Morgan Griffith (R-VA), Doug LaMalfa (R-CA), Jerry Carl (R-AL) as original co-sponsors. The bill was referred solely to the Committee on Education and the Workforce. On March 8, 2023, the Committee considered H.R. 734 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 25–17. The Committee adopted the following amendments to H.R. 734:

1. Rep. Owens offered an Amendment in the Nature of a Substitute (ANS) that makes a technical change and amends section 901 of the Education Amendments of 1972 by adding at the end the following:

shall be a violation of subsection for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls. For the purposes of this subsection, sex shall be recognized based solely on a person’s reproductive biology and genetics at birth. Nothing in this subsection shall be construed to prohibit a recipient from permitting males to train or practice with an athletic program or activity that is designated for women or girls so long as no female is deprived of a roster spot on a team or sport, opportunity to participate in a practice or competition, scholarship, admission to an educational institution, or any other benefit that accompanies participating in the athletic program or activity.

COMMITTEE VIEWS

INTRODUCTION

Title IX of the *Education Amendments of 1972* (Title IX) prohibits any education program or activity receiving federal financial assistance from discriminating on the basis of sex. In practice, Title

IX applies to most elementary and secondary schools (including private elementary and secondary schools participating in the school meals programs) and to public and private colleges and universities. H.R. 734, the *Protection of Women and Girls in Sports Act of 2023*, amends Title IX to prohibit recipients of federal financial assistance that operate, sponsor, or facilitate athletic programs or activities from permitting males to participate in any of those activities that are designated for females. The bill also amends Title IX to require “sex,” in the context of athletic activities, to be recognized based solely on a person’s reproductive biology and genetics at birth. Finally, the bill clarifies that the bill’s provisions do not prohibit schools or institutions from permitting males to practice against women’s sports teams, protecting the long-standing practice of some women’s athletic programs of practicing or scrimmaging against males. H.R. 734 is important legislation that will protect equal athletic opportunities and ensure level playing fields for women and girls.

UNDERMINING ATHLETIC OPPORTUNITIES

Since Title IX was enacted 50 years ago, female participation in sports has increased 1,057 percent at the high school level and 614 percent at the postsecondary level.¹ Title IX was designed to combat discrimination against women, and it has worked.

Biden Administration Actions

Unfortunately, that progress is under threat today from the Biden administration, which is determined to roll back women’s progress. Last year, the Department of Education (Department) issued a Notice of Proposed Rulemaking (NPRM) to redefine the term “sex” under Title IX.² Later this year, the administration will finalize those regulations. In addition, the Department will soon release a separate NPRM specifically related to athletics.³

These regulatory actions will likely undermine the gains made by women over the last five decades. In addition, the Department has taken enforcement and litigation actions that make its intentions clear. First, under the current administration, the Department dismissed the prior administration’s pending enforcement action related to Connecticut’s failure to require segregated sports teams based on biological sex.⁴ Second, the Department and the Department of Justice filed a Statement of Interest in *B.P.J. v. West Virginia State Board of Education* arguing that Title IX does not allow West Virginia to exclude biological males who identify as females from participating in female sports.⁵

Committee Republicans believe the Department should reverse its interpretation of Title IX as expressed in the NPRM in full. However, if the Department insists on finalizing these policies that will undermine women’s athletic opportunities, the Department has an obligation to be transparent in its intentions and to subject its policies to proper notice and comment.

¹ Impact of Title IX on Women’s Sports | Billie Jean King.

² <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

³ <https://www.reginfo.gov/public/do/eoDetails?rrid=308363>.

⁴ OCR Case No. 01–19–4025, *Conn. Interscholastic Athletic Conf. et al.* (Aug. 31, 2020).

⁵ *B.P.J. v. West Virginia State Board of Education*, Statement of Interest, 454–475 (S.D. W.V. 2021), <https://www.justice.gov/crt/case-document/file/1405541/download>.

Impact on Women and Girls in Sports

The Department's subterfuge on this issue is not harmless. Currently, only 19 states have policies in place to protect the integrity of women's athletic competitions, and even those are under threat from the Department's regulatory action.⁶ Allowing men to compete in women's athletic activities undermines the progress made by women and girls since Title IX's enactment and uses a groundbreaking antidiscrimination statute to discriminate against the very people it was designed to protect.

Female athletes have spoken out against the damage being done. Olympic swimmer Reka Gyorgy missed out on the opportunity to compete in the collegiate women's 500-yard freestyle swimming final last March due to the presence of a biological male in the competition. She urged the National Collegiate Athletic Association (NCAA) to implement rules to protect the integrity of women's sports.⁷ Similarly, college track and field athlete Linnea Saltz has called out athletics administrators for depriving women of competitive honors, scholarships, and the opportunities that come with those achievements.⁸

Unfortunately, the pleas of these athletes and other female athletes have gone unheeded by the NCAA and other governing bodies. The NCAA's current policies assume that testosterone suppression will level the playing field for female athletes, but this assumption is not backed by science. Dr. Michael Joyner, a physiologist with the Mayo Clinic, stated, "There are social aspects to sport, but physiology and biology underpin it. Testosterone is the 800-pound gorilla."⁹ Another physiologist, Dr. Ross Tucker, has also said that testosterone reductions do not reverse the physical advantages biological males have in athletic competitions.¹⁰

Concern about athletic opportunities for women in sports should not be a partisan issue. Most Americans understand the threat to women's sports posed by the Biden administration's actions and the radical ideologies underlying them. A Washington Post-University of Maryland poll conducted last year found that only three in 10 Americans believed biological males should be allowed to compete in women's sports.¹¹

In addition, last year, the International Swimming Federation (FINA) approved a new policy to restrict most transgender athletes from competing in sanctioned events, with 71.5 percent of the international body's member federations approving of the policy.¹² The FINA president stated, "We have to protect the rights of our athletes to compete, but we also have to protect competitive fairness at our events, especially the women's category at FINA competitions." The international governing body for track and field re-

⁶ https://www.lgbtmap.org/equality-maps/sports_participation_bans.

⁷ <https://www.swimmingworldmagazine.com/news/reka-gyorgy-virginia-tech-swimmer-bumped-out-of-b-final-in-500-free-writes-critical-letter-to-ncaa/>.

⁸ <https://www.foxnews.com/opinion/ncaa-girls-women-compete-level-playing-field-linnea-saltz>.

⁹ <https://www.dailymail.co.uk/news/article-10868453/Mayo-Clinic-doctor-confirms-trans-swimmer-Lia-Thomas-given-unfair-advantage.html>.

¹⁰ *Id.*

¹¹ <https://www.washingtonpost.com/dc-md-va/2022/06/13/washington-post-umd-poll-most-americans-oppose-transgender-athletes-female-sports/>.

¹² <https://www.cnn.com/2022/06/19/us/fina-vote-transgender-athletes#:~:text=The%20new%20gender%20inclusion%20policy,on%20the%20puberty%20Tanner%20Scale>.

cently took similar steps.¹³ And yet, Democrats in Congress and the Biden administration are determined to ignore the emerging international consensus and the science in order to advance discriminatory policies against women.

H.R. 734, THE PROTECTION OF WOMEN AND GIRLS IN SPORTS
ACT OF 2023

The Committee on Education and the Workforce is advancing this legislation to protect Title IX and the integrity of women’s athletics. Women fought long and hard for equal athletic opportunity. Unfortunately, girls are losing trophies, podium spots, public recognition, opportunities to compete, and scholarship opportunities as incidents of males dominating girls’ athletic competitions when competing as females are increasing nationwide. Women and girls deserve the opportunity to comfortably experience the camaraderie of being part of a team, but allowing males to compete with girls disrupts the healthy competition and teamwork that allow teams to thrive.

Ignoring the biological differences between men and women is a catastrophe for women. It destroys a level playing field and makes women second class citizens in their own sports. This bill clarifies that protecting women from discrimination under Title IX means recognizing the term “sex” consistently with Congress’s intent. The bill further clarifies that forcing females to compete against males violates Title IX’s prohibition against sex discrimination. This bill should not be necessary. This was settled law for nearly 50 years. Yet now, fairness and women’s equal access to athletic opportunities are again threatened, and Committee Republicans are committed to reestablishing the protections guaranteed under Title IX.

CONCLUSION

To protect women’s and girls’ opportunity to compete athletically, H.R. 734, the *Protection of Women and Girls in Sports Act of 2023*, strengthens Title IX’s existing protections for women and ensures a level playing field for female athletes. Over the last 50 years, Title IX has paved the way for tremendous strides in access to education, scholarships, athletics, and more for millions of students across the country. The intent of Title IX, an education free from sex discrimination, remains as clear now as it was when it was first signed into law. However, the Biden administration’s proposed regulations and the radical left’s broader agenda are undermining athletic opportunities for women. This legislation is absolutely essential for restoring and upholding the intent of Title IX. Our women and girls deserve nothing less.

SUMMARY

H.R. 734 SECTION-BY-SECTION SUMMARY

Section 1. Short title

- This Act may be cited as the “Protection of Women and Girls in Sports Act of 2023”.

¹³ <https://www.nbcnews.com/nbc-out/out-news/track-governing-body-bans-transgender-women-athletes-rcna76432>.

Section 2. Amendment

- A substitute amendment that makes one technical change:
 - Adds a violation for a federal recipient of federal financial assistance to operate, sponsor, or facilitate athletic programs that permit a male to participate in such programs that are designated for women or girls.
 - Adds that sex in the subsection is recognized solely on a person's reproductive biology at birth.
 - Adds that the section does not prohibit males from participating in training with a women-designated program as long as a female is not deprived of a team roster spot.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 734 takes important steps to protect girls and women in athletic programs that are designated for girls or women.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 734 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: 3-8-2023

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD VOTE

Roll Call:1

Bill: H.R. 734

Amendment Number: 3

Disposition: Defeated by a Full Committee Roll Call Vote

Sponsor/Amendment: BONAMICI (H734ANS-AM_005)

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mr. GRIJALVA (AZ)			X
Mr. THOMPSON (PA)		X		Mr. COURNTEY (CT)	X		
Mr. WALBERG (MI)		X		Mr. SABLAN (MP)	X		
Mr. GROTHMAN (WI)		X		Ms. WILSON (FL)	X		
Ms. STEFANIK (NY)		X		Ms. BONAMICI (OR)	X		
Mr. ALLEN (GA)		X		Mr. TAKANO (CA)	X		
Mr. BANKS (IN)		X		Ms. ADAMS (NC)	X		
Mr. COMER (KY)		X		Mr. DESAULNIER (CA)	X		
Mr. SMUCKER (PA)		X		Mr. NORCROSS (NJ)	X		
Mr. OWENS (UT)		X		Ms. JAYAPAL (WA)	X		
Mr. GOOD (VA)		X		Ms. WILD (PA)	X		
Mrs. MCCLAIN (MI)		X		Mrs. MCBATH (GA)	X		
Mrs. MILLER (IL)		X		Mrs. HAYES (CT)	X		
Mrs. STEEL (CA)		X		Ms. OMAR (MN)			X
Mr. ESTES (KS)		X		Ms. STEVENS (MI)	X		
Mrs. LETLOW (LA)		X		Ms. LEGER FERNÁNDEZ (NM)			X
Mr. KILEY (CA)		X		Ms. MANNING (NC)	X		
Mr. BEAN (FL)		X		Mr. MRVAN (IN)	X		
Mr. BURLISON (MO)		X		Mr. BOWMAN (NY)	X		
Mrs. MORAN (TX)		X					
Mr. JAMES (MI)		X					
Mrs. CHAVEZ-DEREMER (OR)		X					
Mr. WILLIAMS (NY)		X					
Mrs. HOUCHIN (IN)		X					

TOTALS: Ayes: 17

Nos:25

Not Voting:3

Total:45 / Quorum: /

Report:(25 R - 20 D)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 3-8-2023

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD VOTE

Roll Call:2

Bill: H.R. 734

Amendment Number: 6

Disposition: Defeated by a Full Committee Roll Call Vote

Sponsor/Amendment: Jayapal (H734ANS-AM_0013)

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mr. GRIJALVA (AZ)			X
Mr. THOMPSON (PA)		X		Mr. COURNTEY (CT)	X		
Mr. WALBERG (MI)		X		Mr. SABLAN (MP)	X		
Mr. GROTHMAN (WI)		X		Ms. WILSON (FL)	X		
Ms. STEFANIK (NY)		X		Ms. BONAMICI (OR)	X		
Mr. ALLEN (GA)		X		Mr. TAKANO (CA)	X		
Mr. BANKS (IN)		X		Ms. ADAMS (NC)	X		
Mr. COMER (KY)		X		Mr. DESAULNIER (CA)	X		
Mr. SMUCKER (PA)		X		Mr. NORCROSS (NJ)	X		
Mr. OWENS (UT)		X		Ms. JAYAPAL (WA)	X		
Mr. GOOD (VA)		X		Ms. WILD (PA)	X		
Mrs. MCCLAIN (MI)		X		Mrs. MCBATH (GA)	X		
Mrs. MILLER (IL)		X		Mrs. HAYES (CT)	X		
Mrs. STEEL (CA)		X		Ms. OMAR (MN)			X
Mr. ESTES (KS)		X		Ms. STEVENS (MI)	X		
Mrs. LETLOW (LA)		X		Ms. LEGER FERNÁNDEZ (NM)			X
Mr. KILEY (CA)		X		Ms. MANNING (NC)	X		
Mr. BEAN (FL)		X		Mr. MRVAN (IN)	X		
Mr. BURLISON (MO)		X		Mr. BOWMAN (NY)	X		
Mrs. MORAN (TX)		X					
Mr. JAMES (MI)		X					
Mrs. CHAVEZ-DEREMER (OR)		X					
Mr. WILLIAMS (NY)		X					
Mrs. HOUCHIN (IN)		X					

TOTALS: Ayes: 17

Nos:25

Not Voting:3

Total:45 / Quorum: /

Report:(25 R - 20 D)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 3-8-2023

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD VOTE

Roll Call:3

Bill: H.R. 734

Amendment Number: Motion

Disposition:Agreed to by a Full Committee Roll Call Vote

Sponsor/Amendment: Bean Motion to report H.R. 734, as amended, favorably to the U.S. House of Representatives, agreed to by Roll Call Vote 25-17.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. GRIJALVA (AZ)			X
Mr. THOMPSON (PA)	X			Mr. COURNTEY (CT)		X	
Mr. WALBERG (MI)	X			Mr. SABLAN (MP)		X	
Mr. GROTHMAN (WI)	X			Ms. WILSON (FL)		X	
Ms. STEFANIK (NY)	X			Ms. BONAMICI (OR)		X	
Mr. ALLEN (GA)	X			Mr. TAKANO (CA)		X	
Mr. BANKS (IN)	X			Ms. ADAMS (NC)		X	
Mr. COMER (KY)	X			Mr. DESAULNIER (CA)		X	
Mr. SMUCKER (PA)	X			Mr. NORCROSS (NJ)		X	
Mr. OWENS (UT)	X			Ms. JAYAPAL (WA)		X	
Mr. GOOD (VA)	X			Ms. WILD (PA)		X	
Mrs. MCCLAIN (MI)	X			Mrs. MCBATH (GA)		X	
Mrs. MILLER (IL)	X			Mrs. HAYES (CT)		X	
Mrs. STEEL (CA)	X			Ms. OMAR (MN)			X
Mr. ESTES (KS)	X			Ms. STEVENS (MI)		X	
Mrs. LETLOW (LA)	X			Ms. LEGER FERNÁNDEZ (NM)			X
Mr. KILEY (CA)	X			Ms. MANNING (NC)		X	
Mr. BEAN (FL)	X			Mr. MRVAN (IN)		X	
Mr. BURLISON (MO)	X			Mr. BOWMAN (NY)		X	
Mrs. MORAN (TX)	X						
Mr. JAMES (MI)	X						
Mrs. CHAVEZ-DEREMER (OR)	X						
Mr. WILLIAMS (NY)	X						
Mrs. HOUCHIN (IN)	X						

TOTALS: Ayes: 25

Nos:17

Not Voting: 3

Total: 45 / Quorum: /

Report:(25 R - 20 D)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 734 is to protect athletic opportunities for girls and women.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 734 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

REQUIRED COMMITTEE HEARING AND RELATED HEARINGS

In compliance with clause 3(c)(6) of rule XIII the following hearing held during the 118th Congress was used to develop or consider H.R. 734: “American Education in Crisis”.

The following related hearings were held: “Examining the Policies and Priorities of the U.S. Department of Education (2021)” and “Examining the Policies and Priorities of the U.S. Department of Education” (2022).

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.R. 734 from the Director of the Congressional Budget Office:

H.R. 734, Protection of Women and Girls in Sports Act of 2023			
As ordered reported by the House Committee on Education and the Workforce on March 9, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	a	a	a
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	a	a	a
Spending Subject to Appropriation (Outlays)	a	a	a
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
a. CBO has no basis for estimating a reduction in direct spending or a reduction in discretionary authorizations.			

H.R. 734 would amend Title IX of the Education Amendments of 1972, which prohibits discrimination based on sex in education programs or activities that receive federal financial assistance. As a condition of federal funding, H.R. 734 would require such institutions to prohibit a person whose biological sex at birth was male from participating in an athletic program or activity that is designated for women or girls, unless such participation does not deny a female of an opportunity or benefit to participate.

Title IX applies to local education agencies, elementary and secondary schools, post-secondary institutions, libraries, and other educational institutions that receive federal funds. The primary means of enforcing compliance with Title IX is through voluntary agreements between institutions and the enforcing agency, and termination of federal funds is a last resort.

Spending subject to appropriation: Enacting H.R. 734 could result in a decrease in estimated authorizations for programs administered by several agencies, including the Department of Education. This would result from institutions failing to comply with, or choosing to forgo federal funding by not complying with, the requirements in the bill. CBO has no basis to estimate whether or how many institutions would do so. CBO estimates that, on average, K–12 schools receive \$275,000 each year in federal funds from programs under title I of the Elementary and Secondary Education Act.

Direct spending: The requirement set forth in H.R. 734 also would apply to federal student aid at postsecondary institutions and funding for child nutrition programs at K–12 schools.

Students who enroll in programs at institutions of higher education that meet certain criteria may receive federal student aid in the form of Pell grants or student loans that can be used to cover expenses at such eligible institutions. According to data from the office of Federal Student Aid, in year 2021–2022, higher education institutions received \$108 billion in federal grant and loans, including Pell grants and federal direct student loans. (About 20 percent of that total was provided for Pell grants in the annual appropriation act and is thus classified as discretionary spending.)

Under the National School Lunch Program (NSLP), the School Breakfast Program (SBP), the Child and Adult Care Food Program, the Summer Food Service Program, and the Special Milk Program, the government provides commodities and cash payments to reimburse participating schools and institutions for at least part of the cost of each meal served. CBO estimates that the average school that participates in the NSLP and SBP will receive about \$121,800 in 2024 under those programs.

Enacting H.R. 734 could result in a reduction in direct spending through a similar mechanism as spending subject to appropriations, but CBO has no basis to predict whether, or how many, K–12 schools and postsecondary institutions would not comply with the requirement. As a result, CBO cannot estimate the savings related to schools not complying with that requirement.

The CBO staff contact for this estimate is Garrett Quenneville. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 734. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in *italics* and existing law in which no change is proposed is shown in roman):

EDUCATION AMENDMENTS OF 1972

* * * * *

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of

changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference, or

(ii) the selection of students to attend any such conference;

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment

of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other non-discrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(d)(1) It shall be a violation of subsection (a) for a recipient of Federal financial assistance who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.

(2) For the purposes of this subsection, sex shall be recognized based solely on a person's reproductive biology and genetics at birth.

(3) Nothing in this subsection shall be construed to prohibit a recipient from permitting males to train or practice with an athletic program or activity that is designated for women or girls so long as no female is deprived of a roster spot on a team or sport, opportunity to participate in a practice or competition, scholarship, admission to an educational institution, or any other benefit that accompanies participating in the athletic program or activity.

* * * * *

MINORITY VIEWS

INTRODUCTION

Title IX of the *Education Amendments of 1972* (Title IX) states in part, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹ The question as to whether “sex” in the context of Title IX includes sexual orientation and/or gender identity has been the subject of court cases, federal legislation, and administrative regulation. In 2020, the Supreme Court held in *Bostock v. Clayton County* that under a plain language interpretation of Title VII of the *Civil Rights Act of 1964* (Title VII) discrimination based on an employee’s sexual orientation or gender identity is indeed discrimination based on sex.² This holding has since been applied to Title IX, which has been recognized to prevent discrimination on the basis of sexual orientation or gender identity.³ Courts across the country have held that Title IX requires schools to treat transgender students consistent with their gender identity.⁴

H.R. 734, the *Protection of Women and Girls in Sports Act of 2023* would undo the holding of *Bostock* as it relates to women’s athletics in education programs or activities that receive federal assistance. H.R. 734 weaponizes a landmark civil rights law against transgender youth, a critically marginalized population that federal courts have recognized should be protected under the law, not discriminated against with it.

TITLE IX AND EQUAL RIGHTS

The *Bostock* decision had immediate repercussions for Title IX. Although distinct statutes, federal courts have recognized that Title VII jurisprudence informs Title IX.⁵ As such, multiple Federal Courts of Appeal have post-*Bostock* held that discrimination “on the basis of sex” as defined by Title IX also includes discrimination based on sexual orientation or gender identity.⁶ The Departments of Justice and Education have both issued similar determinations.⁷ When the Department of Education (Department) issued a Notice

¹ 20 U.S.C. § 1681.

² *Bostock v. Clayton County*, 570 U.S. ___, 140 S. Ct. 1731 (2020).

³ *E.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (“After the Supreme Court’s recent decision in *Bostock v. Clayton County*, we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex.’ Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX.” (citations omitted)).

⁴ See Jamie Schultz, *Title IX at 50: A Critical Celebration*, 30 Women in Sport & Physical Activity J., 97, 101–02 (2022).

⁵ *E.g.*, U.S. Dep’t of Justice, Title IX Legal Manual, Addendum post-*Bostock*: Editors Note, Updated Aug. 12, 2021, <https://www.justice.gov/crt/title-ix#Bostock>.

⁶ *Id.*

⁷ *Id.*

of Proposed Rulemaking (NPRM) on Title IX in 2022, it incorporated the *Bostock* holding throughout the proposed rule, including in the definitions of sex discrimination and sex based harassment.⁸ It is worth noting the 2022 Title IX NPRM purposefully did not address the participation of transgender students in athletics, with the Department announcing it would issue a proposed rule specifically on that subject sometime in the first half of 2023.⁹ Instead of waiting for the issuance of that rule, which the Department acknowledged would recognize the “unique circumstances of particular sports”¹⁰ but in a manner consistent with *Bostock*, Committee Republicans marked up H.R. 734, a bill designed to circumvent *Bostock* altogether as it pertains to transgender student participation in sports. The Department has since announced a draft rule¹¹ that would, in direct contrast to H.R. 734 but consistent with the law, “establish that policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity just because of who they are.”¹² Additionally, the draft rule notes that “there are some instances, particularly in competitive high school and college athletic environments, some schools may adopt policies that limit transgender students’ participation.”¹³ However, the proposed rule is clear that the adoption of such policies must still “protect[] students from being denied equal athletic opportunity” but provides schools with the ability to create their own participation policies.¹⁴

School-based sports and physical education play an important role in youth development and can contribute to physical, social, and intellectual health. However, the majority of LGBTQ youth experience harassment in school athletics, which increases the risks of mental health concerns and discourages physical activity.¹⁵ Large scale studies have found that as high as 82% of LGB athletes experience serious harassment and discrimination in a sports context.¹⁶ It is thus unsurprising that roughly two-thirds or 68% of LGBTQ identified youth have never taken part in any school or

⁸U.S. Dep’t. of Educ., Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking, <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>.

⁹81 Fed. Reg. 41,390, 41,537, Jul. 12, 2022 (“The Department does not propose any particular changes to §106.41 at this time. The Department instead plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend §106.41 in the context of sex-separate athletics, pursuant to the special authority Congress has conferred upon the Secretary to promulgate reasonable regulations with respect to the unique circumstances of particular sports.”).

¹⁰*Id.*

¹¹“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams,” Proposed Rule, Docket ID ED-2022-OCR-0143, [Fed. Reg. Vol. __, No. __, April __, 2023], available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf> (note: as of the drafting of these Minority views, the proposed rule had been sent to the Federal Register, but not yet published).

¹²U.S. Dep’t of Educ., FACT SHEET: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams (April 6, 2023), <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

¹³*Id.*

¹⁴*Id.*

¹⁵Scott B. Greenspan, et al., *LGBTQ Youths’ School Athletic Experiences: A 40-year Content Analysis in Nine Flagship Journals*, 11 J. of LGBT Issues in Counseling 190, 191 (2017).

¹⁶Erik Denison, et al., *Reviewing evidence of LGBTQ+ discrimination and exclusion in sport*, 24 Sport Management Rev. 389, 393 (2021).

community sports.¹⁷ This is a much higher rate of non-participation than their peers. LGBTQ youth who do participate in school sports report feeling less safe in athletic spaces due to bullying and harassment.¹⁸ LGBTQ youth also often experience bathrooms and locker rooms as sites of social vulnerability and violence.¹⁹

Transgender students experience even more fear and harassment than LGB students and research supports that anti-discrimination policies can reduce the harassment and encourage sport participation.²⁰ The American Medical Society for Sports Medicine issued a position statement in 2020 on the need to address LGBTQ discrimination in sport.²¹ It is shameful that H.R. 734, a bill that furthers such discrimination, was the first bill that this Committee marked up in the 118th Congress. To add insult to injury, the bill uses the aegis of protecting girls and women in sports, an admirable policy goal that is worthy of consideration by the Committee, to then do nothing other than discriminate against trans athletes.

TITLE IX AND WOMEN'S SPORTS

It is hard to overstate the transformational effect Title IX has had on American society. In its 50-year history, Title IX has created opportunities for millions of women and girls to participate in sports at the high school and college levels. By 2016, two in every five girls in the United States played sports.²² This has in turn helped create and sustain women's professional athletic leagues and associations.²³ The pursuit of equality of opportunity for girls and women in sports has had attendant effects on the pursuit of women's rights in America generally. The skills, traits and other lessons that flow from sports participation have helped women athletes succeed not only in professional sports arenas, but in workplaces, boardrooms, and legislative chambers.²⁴

Further, while the public may recognize the law's impact on sports primarily, Title IX prohibits sex discrimination in all vestiges of education; it has helped secure advancements for women in academic and career fields traditionally dominated by men and provided procedural and substantive rights for victims of

¹⁷ Dawn Ennis, *Why Are LGBTQ Youth Avoiding Sports In School? Fear Of Discrimination, Research Shows*, Forbes (Sept. 15, 2021), <https://www.forbes.com/sites/dawnstaceyennis/2021/09/15/why-are-lgbtq-youth-avoiding-sports-in-school-fear-of-discrimination-research-shows/?sh=495e97e34195>.

¹⁸ Alex Kulick, et al., *Three strikes and you're out: Culture, facilities, and participation among LGBTQ youth in sports*, 24 Sport, Education & Society 939, 949 (2018).

¹⁹ *Id.* at 942.

²⁰ *Id.* at 940, 947–49.

²¹ Denison, *supra* note 12, at 394.

²² Women's Sport Foundation, *Title IX and the Rise of Female Athletes in America*, (Sept. 2, 2016) <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>.

²³ *E.g.*, Sarah Pruitt, *How Title IX Transformed Women's Sports*, History.com (June 23, 2022) <https://www.history.com/news/title-nine-womens-sports>.

²⁴ *See, e.g.*, Women's Sports Foundation, *50 Years of Title IX: We're Not Done Yet* 15, 2021 <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2.pdf> ("Girls' retention in sports greatly impacts their future growth outside of sports. Explicitly, girls build personal quality traits like team leadership, collaboration, and self confidence through sports participation and learn pertinent professional skills that lead to their success in careers after college as well as support their personal growth throughout life . . . In a survey of 400 women executives, 94% reported having competed as athletes. Among women C-suite executives, 52% played college sports while 39% of the women working at the management level played college sports"); Shia Kapos, *Athletes in Congress talk women and sports*, Politico, July 16, 2021., <https://www.politico.com/newsletters/women-rule/2021/07/16/sharice-davids-cheri-bustos-lori-trahan-athletes-politics-493615>.

sex discrimination, sex harassment and sexual assault in educational settings, irrespective of their gender.²⁵

Despite the progress made under Title IX, there are still numerous obstacles to true equality for girls and women in educational settings, especially high school and college sports. While girls' participation in sport has increased 1000% since Title IX, their participation numbers have still not reached that of boys' 50 years ago.²⁶ At its half-century mark, approximately 90% of all educational institutions are not in compliance with Title IX.²⁷ Many top athletic programs spend 40-50% more in support of their men's teams than their comparable women's teams.²⁸ Schools across the country apply the law selectively, sometimes inflating numbers to give the illusion of equity where it does not exist.²⁹ Additionally, a lack of enforcement, particularly on issues of sexual abuse and bigotry, has obstructed IX's potential to normalize equal treatment across sex and gender in education.³⁰

Female athletes and their advocates continue to campaign for equal access to participation opportunities in sports and, once they are participants, equitable treatment compared to their male counterparts.³¹ Whether it is the four-time World Champion U.S. Women's National Soccer Team filing a successful pay discrimination complaint against U.S. Soccer with the Equal Employment Opportunity Commission (EEOC),³² or student athletes in the NCAA Women's Basketball National Tournament taking to social media to document the inequitable training facilities they were offered,³³ women athletes continue to experience inequitable treatment in sports and too often must take it upon themselves to fight discrimination. It is for these reasons that Committee Democrats offered several amendments to H.R. 734, to attempt to live up to the aims of the bill's title—namely the protection of women and girls in sports.

The first was the Democratic substitute, offered by Rep. Alma Adams (D-NC), modeled after her bill the Fair Play for Women Act.³⁴ The Adams amendment expanded reporting requirements for K-12 and college athletics data, and made all information easily

²⁵ *50 Years of Title IX*, *supra* note 20, at 7 ("Pathways once closed or significantly inaccessible to women have opened as Title IX created greater access to academic pursuits leading to careers in an array of occupations for women, including but not limited to astronauts, athletes, carpenters, chief executive officers, construction workers, doctors, engineers, entrepreneurs, farmers, filmmakers, firefighters, football coaches, investors, journalists, lawyers, musicians, police officers, military personnel, rock stars, Supreme Court justices, and television news anchors."); U.S. Dept of Justice, Title IX Legal Manual D. Sexual Harassment, Updated Aug. 12, 2021, <https://www.justice.gov/crt/title-ix#D.%C2%A0%20Sexual%20Harassment>.

²⁶ Nat'l. Ctr. for Educ. Stats., Fast Facts: Title IX, <https://nces.ed.gov/fastfacts/display.asp?id=93>.

²⁷ Schultz, *supra* note 4, at 97.

²⁸ *Id.*

²⁹ Zara Abrams, Title IX: 50 Years Later, Am. Psych. Ass'n. News & Advocacy (June 28, 2022), <https://www.apa.org/news/apa/2022/title-ix-landmark>.

³⁰ Anne Blaschke, *Title IX has been spectacularly successful and disturbingly unfulfilled*, Wash. Post, June 23, 2022, <https://www.washingtonpost.com/outlook/2022/06/23/title-ix-has-been-spectacularly-successful-disturbingly-unfulfilled/>.

³¹ *50 Years of Title IX*, *supra* note 20, at 28.

³² Rachel Triesman, *The U.S. national women's soccer team wins \$24 million in equal pay settlement*, NPR, Feb. 22, 2022, <https://www.npr.org/2022/02/22/1082272202/women-soccer-contracts-equal-pay-settlement-uswnt>.

³³ Emine Yucel, *Men's And Women's NCAA March Madness Facilities, Separate And Unequal, Spark Uproar*, NPR, Mar. 29, 2021, <https://www.npr.org/2021/03/19/979395795/mens-and-womens-ncaa-march-madness-facilities-separate-and-unequal-spark-uproar>.

³⁴ H.R. 9615, 117th Cong. (2022).

accessible to the public, so students and parents could see how schools are claiming Title IX compliance with the hopes that such sunlight would expose athletic programs that are using fuzzy math to appear Title IX compliant. Further the amendment would make athletic associations like the National College Collegiate Association (NCAA) explicitly liable under Title IX as we know some of the more famous examples of disparities in women's and men's athletics have come to light during NCAA events. The Adams amendment provided a private right of action for athletes to push for change at their schools, and also empowered the Department to levy fines on colleges it found non-compliant with Title IX. And perhaps most importantly, the bill would have required annual Title IX training for athletes, and athletic department and athletic association staff, so that all coaches, trainers, and other personnel would know their responsibilities under Title IX, fostering a culture of compliance. The Chair ruled that the Adams amendment was not germane to the fundamental purpose of the underlying bill, preventing trans girls and women from participating in girls' and women's sports.

Rep. Mark Takano (D-CA) offered two amendments designed to build upon the protections of Title IX for women and girls. The first amendment codified the existing regulations related to athletics promulgated under Title IX.³⁵ While these regulations are long standing, they are often the very regulations that schools are not in compliance with, sustaining the disparities between men's and women's athletic programs. Female athletes and their advocates continue to campaign for equal access to participation opportunities in sports and, once they are participants, equitable treatment compared to their male counterparts.³⁶ Whether it is the four-time World Champion U.S. Women's National Soccer Team filing a successful pay discrimination complaint against U.S. Soccer with the Equal Employment Opportunity Commission (EEOC),³⁷ or student athletes in the NCAA Women's Basketball National Tournament taking to social media to document the inequitable training facilities they were offered,³⁸ women athletes continue to experience inequitable treatment in sports and too often must take it upon themselves to fight discrimination.

Recognizing the numerous instances where educational programs may fall short of the mark protecting the rights of athletes, in early 2023 the Department issued resource documents for schools and colleges to help them "evaluate whether a school is meeting its legal duty to provide equal athletic opportunity based on sex consistent with Title IX."³⁹ The documents provide an extensive overview of the benefits, opportunities, and treatment men's and women's teams may receive and offer examples and queries to help determine whether a school is meeting its Title IX obligations. It pro-

³⁵ Athletics, 34 C.F.R. § 106.41.

³⁶ 50 Years of Title IX, *supra* note 20, at 28.

³⁷ Rachel Triesman, *The U.S. national women's soccer team wins \$24 million in equal pay settlement*, NPR, Feb. 22, 2022, <https://www.npr.org/2022/02/22/1082272202/women-soccer-contracts-equal-pay-settlement-uswnt>.

³⁸ Emine Yucel, *Men's And Women's NCAA March Madness Facilities, Separate And Unequal, Spark Uproar*, NPR, Mar. 29, 2021, <https://www.npr.org/2021/03/19/979395795/mens-and-womens-ncaa-march-madness-facilities-separate-and-unequal-spark-uproar>.

³⁹ U.S. Dept. of Educ., Off. for Civ. Rts., Title IX and Athletic Opportunities in K-12 Schools, Feb. 2023 <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-k12>.

vides worksheets to analyze whether a school is meeting obligations related to athletic scholarships and financial assistance, and meeting the interests and abilities of student athletes.⁴⁰ These documents, while illustrative and helpful, do not carry the force of law.

By codifying the existing Title IX athletic regulations into law, the Committee could signal that we were prepared to build upon the 50 years of progress under Title IX, with the expectation that the Department could provide more clarity to schools in a new round of regulation of how they can work to ensure equity in athletics, protecting women and girls in sports. The Chair ruled that the Takano amendment was not germane to the fundamental purpose of the underlying bill, preventing trans girls and women from participating in girls' and women's sports.

The second Takano amendment simply expressed a sense of Congress that all people should have the right to participate in sports free from discrimination, and that student athletes have particular rights to train and play in safe environments, be treated with dignity and respect, retain a right to privacy over their bodies, and that all students, including transgender students, should be protected. Again, the Chair ruled that this language was non-germane to the underlying bill.

Rep. Suzanne Bonamici (D-OR) offered an amendment that both protected women and spoke to the practicality of H.R. 734—in a world where H.R. 734 became law, how would schools determine whether an athlete's "sex is male"?⁴¹ As the bill defines sex as based "solely on a person's reproductive biology and genetics at birth",⁴² supporters of H.R. 734 would suggest that simply providing the sex assigned at birth on a birth certificate would be sufficient proof. But we know of the approximately 3.6 million births in the U.S. every year, a considerable number of children are born either intersex or with ambiguous genitalia.⁴³ This does not include children born with chromosomal variations other than XX and XY which may only present themselves later in life. This would suggest before even considering trans athletes, birth certificates will not accurately reflect the "biological" or "genetic" sex of all children. Recognizing this, enforcement of H.R. 734 will likely require female student athletes to either subject themselves to genital examination or to disclose their menstruation data—both enforcement mechanisms that have been proposed as part of trans sports

⁴⁰ *Id.*

⁴¹ H.R. 734 § 2, 118th Cong. (2023).

⁴² *Id.* When not directly quoting bill text, this report will use the terminology "sex assigned at birth" a term the medical community has determined is more inclusive of the variety of sex and gender possibilities we realize are possible. University of Washington Medicine, LGBTQ+ Inclusion: Glossary, (2023) <https://www.uwmedicine.org/practitioner-resource/lgbtq/lgbtq-inclusion-glossary>.

⁴³ Based on statistics for the number of live births in the US in 2021, and rates of birth of intersex children and children with ambiguous genitalia, there are approximately 2,600 to 6,000 births each year in the U.S. where a child's genitalia may not correspond with either a male or female assigned sex. Cleveland Clinic, Atypical Genitalia (Formerly Known as Ambiguous Genitalia), Mar. 29, 2022, <https://my.clevelandclinic.org/health/diseases/22470-atypical-genitalia-formerly-known-as-ambiguous-genitalia> ("Atypical genitalia occurs in about 1 out of every 1,000 to 4,500 births"); Intersex Society of North America, How common is Intersex, (2008) <https://isna.org/faq/frequency/> ("If you ask experts at medical centers how often a child is born so noticeably atypical in terms of genitalia that a specialist in sex differentiation is called in, the number comes out to about 1 in 1500 to 1 in 2000 births.").

bans at the state level.⁴⁴ Rep. Bonamici’s amendment would have foreclosed on the latter, but it was defeated.

HR 734 IS NOT ABOUT PROTECTING WOMEN’S SPORTS

THE FAULTY ASSUMPTIONS OF H.R. 734

Unfortunately, the theory behind H.R. 734 is that the participation of trans women in girls’ and women’s sports is the policy issue from which these sports need the most urgent “protection”.

Further this need to protect sports justifies the decision to make the bill the first to be marked up in the 118th Congress. Putting aside the blatant offensiveness of such a policy argument for the moment, it is important to note multiple points.

First, transgender youth are a tiny fraction of the youth population in this country (roughly 1.8%), and an even smaller fraction of that already small population are involved in athletics.⁴⁵ It appears there are only 35 documented instances of out trans athletes competing at the collegiate level.⁴⁶ To suggest that the participation of 35 women athletes among the approximately 110,000 women athletes that compete yearly in college sports somehow justifies congressional action at this time is ludicrous. Experts in the field of genetics, science, and sport have stated that discrimination against transgender student athletes is not based on science.⁴⁷ Additionally, participation in sports has significant benefits for transgender students including higher academic performance and lower rates of depression and suicidality.⁴⁸ Many regional and national athletic associations are establishing or revisiting policies on gender equity and non-discrimination in athletic participation at this time.⁴⁹ This is an important step in the development of policy and there is no urgency that suggests Congress need involve itself at this time.

This is especially true as we know transgender youth are currently experiencing challenges to nothing less than their right to exist. H.R. 734 is just one of many proposals that collectively aim to ostracize trans youth and trans individuals from the public

⁴⁴ See, e.g., Philip Marcelo, *Florida weighs mandating menstrual cycle details for female athletes*, Associated Press, Feb. 3, 2023; Aleks Phillips, *Kansas GOP Bill Authorizes Genital Exams of Schoolchildren, Critics Say*, Newsweek, Apr. 6, 2023.

⁴⁵ Based on questionnaire data collected by the Centers for Disease Control and Prevention as part of the 2017 Youth Risk Behavior Survey conducted in 10 U.S. states and 9 large urban school districts. The survey defined “transgender” individuals as those whose gender identity does not align with their sex. “Across the 19 sites, 94.4% (range = 94.0%–94.8%) of students responded “No, I am not transgender”; 1.8% (range = 1.0%–3.3%) responded “Yes, I am transgender”; 1.6% (range = 0.9%–2.5%) responded “I am not sure if I am transgender”; and 2.1% (range = 1.5%–4.7%) responded “I do not know what this question is asking.” Ctrs. for Disease Control & Prevention, *Morbidity and Mortality Weekly Report: Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

⁴⁶ Cyd Zeigler & Karleigh Webb, *These 35 trans athletes have competed openly in college*, Outsports, Mar. 29, 2023, <https://www.outsports.com/trans/2022/1/7/22850789/trans-athletes-college-ncaa-lia-thomas> (“Outsports knows there are countless other trans athletes who have competed at the collegiate level who have not been publicly out or out to teammates.”)

⁴⁷ Tinbete Ermyas & Kira Wakeham, *Wave of Bills to Block trans Athletes Has No Basis In Science, Researcher Says*, NPR, Mar. 18, 2021, <https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s>.

⁴⁸ Schultz, *supra* note 4, at 101.

⁴⁹ E.g., Press Release, NCAA, Board of Governors updates transgender participation policy, Jan. 19, 2022, <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>.

arena.⁵⁰ Research shows that due to stigma, trans youth experience depression and suicidal ideation at disproportionate rates compared to their peers.⁵¹ Recent data from the CDC show that transgender youth are 10 times more likely to experience homelessness.⁵² Transgender students are also more likely to feel unsafe at school, to experience bullying and other forms of violence including being threatened with a weapon at school, and social isolation. Experiences of a hostile school climate, potentially compounded by an unstable living situation, lead to disproportionate drop out rates for these students.⁵³ Barriers to attaining school success have not inspired our Republican colleagues to create policies to improve outcomes for this group of students. Rather, around the country we see organized attacks against these students. In the first three months of 2023, more than 380 anti-transgender state bills have been introduced, including a bill in Florida that would remove transgender children from their homes if their parents support and affirm them.⁵⁴

Bills targeting curriculum inclusion, often referenced as “Don’t Say Gay” bills, censor teacher’s speech by prohibiting mention of LGBTQ people or gender diversity in their classrooms. The American Library Association reports that attempts to ban books in schools are up four-fold with the top three most banned books addressing themes of transgender identity or gender non-conformity.⁵⁵ Twenty states now prohibit transgender students from participating in school sports aligned with their gender.⁵⁶ The focus of these coordinated attacks was made all the more clear in early March 2023, when a speaker announced from the Conservative Political Action Conference stage that “transgenderism must be eradicated from public life entirely.”⁵⁷ This bill is an attempt to draw the federal government into the on-going GOP attacks on transgender people. Discriminating against a specific minority group with whom the Majority disagrees cannot be a legitimate governmental interest. For all these reasons, Rep. Pramila Jayapal

⁵⁰ A Congress.gov search of “biological sex”, a term known not to be inclusive of the LGBTQ+ community was used in least eight bills introduced in the 117th Congress, including H.R. 8731, *Protect Children’s Innocence Act*, H.R. 8171, *Protect Minors from Medical Malpractice Act of 2022*, and H.R. 1926 *Protecting Children From Experimentation Act of 2021*. <https://www.congress.gov/quick-search/legislation?wordsPhrases=%22biological+sex%22&wordVariants=on&congressGroups%5B%5D=0&congresses%5B%5D=117&legislationNumbers=&legislativeAction=&sponsor=on&representative=&senator=>

⁵¹ Brooke Migdon, *Transgender Children Are More Likely to Face Mental Health Challenges, Study Says*, The Hill, Jul. 22, 2022, <https://thehill.com/changing-america/well-being/mental-health/3570956-transgender-children-are-more-likely-to-face-mental-health-challenges-study-says/>.

⁵² Carolyn Jones, *Transgender Youth Almost 10 Times More Likely to be Homeless as Their Peers, Data Shows*, EDSOURCE, June 7, 2021, <https://edsources.org/updates/transgender-youth-almost-10-times-more-likely-to-be-homeless-as-their-peers-data-shows>.

⁵³ U.S. Dep’t. of Health and Hum. Svcs., Off. of Disease Prevention and Health Promotion, *Social Determinants of Health Summaries: Graduation*, <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/high-school-graduation>.

⁵⁴ James Factora, *Florida Lawmakers Proposed Allowing Trans Kids to be Removed from Supportive Parents*, THEM, Mar. 8, 2023, <https://www.them.us/story/florida-bill-trans-kids-supportive-parents>.

⁵⁵ Miranda Mazariegos & Meghan Collins Sullivan, *Efforts to Ban Books Jumped an ‘Unprecedented’ Four-fold in 2021, ALA Report Says*, NPR, Apr. 4, 2022, <https://www.npr.org/2022/04/04/1090067026/efforts-to-ban-books-jumped-an-unprecedented-four-fold-in-2021-ala-report-says>.

⁵⁶ Movement Advancement Project, *Bans on Transgender Youth Participation on Sports*, <https://www.lgbtmap.org/equality-maps/sports-participation-bans>, (last visited, April 7, 2023).

⁵⁷ Diana Goetsch, Opinion: *What the CPAC Speaker Meant When He Said ‘Transgenderism Must Be Eradicated’*, L.A. Times, Mar. 8, 2023, <https://www.latimes.com/opinion/story/2023-03-08/transgender-cpac-michael-knowles-rolling-stone-ron-desantis>.

(D-WA) offered the last Democratic amendment to rename the bill the *Stigmatizing Vulnerable Children Act of 2023*. The amendment was defeated.

Last but not most important to the stated policy goal of H.R. 734, the majority of women athletes and their advocates do not consider the participation of transgender youth in women's sports an existential threat to their survival.⁵⁸ To the contrary, many women's groups have recognized that inclusion of trans youth is an opportunity to share the attendant benefits of sports participation with all women regardless of their gender identity.

DEMOCRATIC AMENDMENTS OFFERED DURING MARKUP OF H.R. 734

Committee Democrats offered five amendments to improve the bill. These amendments would have refocused the bill on issues that Women athletes have actually advocated for to protect their sports. Committee Republicans rejected two of the five amendments, and ruled the others out of order. Ranking Member Scott noted during consideration of H.R. 734 that simply because an amendment was not germane, that did not require the Chair to rule it as such, and if it improved the bill, it should get an up or down vote on its inclusion. The Chair was not willing to do that. These are the Democratic amendments that were considered:

Amendment	Offered By	Description	Action Taken
2	Ms. Adams	Democratic Substitute	Ruled non-germane
3	Ms. Bonamici	Protection of student athlete menstrual data.	Defeated
4	Mr. Takano	Codification of existing Title IX Athletic equity regulations.	Ruled non-germane
5	Mr. Takano	Student Athletes Bill of Rights ...	Ruled non-germane
6	Ms. Jayapal	Re-titled the bill	Defeated

CONCLUSION

For the reasons stated above, Committee Democrats unanimously opposed H.R. 734 when the Committee on Education and the Workforce considered it on March 8, 2023. We urge the House of Representatives to do the same.



⁵⁸ *E.g.*, Women's Sports Foundation, Participation of Transgender Athletes in Women's Sports, <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/participation-of-transgender-athletes-in-womens-sports-the-foundation-position.pdf>.