

Fulfilling Title IX's Promise: Let Transgender and Intersex Students Play

Title IX was enacted to ensure that all students have equal access to educational opportunities, regardless of gender. This includes protecting the rights of transgender and intersex students to equally access school sports programs and facilities.¹ Playing school sports has been shown to increase test scores, decrease depression rates, and foster confidence for girls and women.² Increasing opportunities for participation in school sports is vital to ensuring that, consistent with Title IX's broad purpose, the full range of educational benefits is available to *all* girls and women. Unfortunately, 15 states passed laws between 2020 and 2022 that ban transgender and (in some cases) intersex students from participating in school sports. These attacks on already marginalized students stain decades of progress toward gender equity in sports.

This fact sheet explains the rights of transgender and intersex girls and women to participate in school sports under Title IX. It describes how laws seeking to ban these students undermine opportunities for *all* girls and women to play sports by enforcing gender stereotypes and policing girls' bodies. It also notes the disparate impact of these stereotypes on Black and brown girls and women, who are often subject to increased scrutiny for failing to conform to gender-based stereotypes of femininity. Finally, it explains how inclusive athletics policies do not harm anyone, are associated with increased sports participation by all girls and women, and are consistent with Title IX's broad mandate to ensure gender equity in education.

Title IX protects transgender and intersex students' rights to play on teams matching their gender identity.

Title IX prohibits sex discrimination, which includes discrimination on the basis of transgender or intersex status. In its 2020 ruling in *Bostock v. Clayton County*, an employment discrimination case, the Supreme Court affirmed that discrimination on the basis of a person's being transgender is "inherently" a form of sex discrimination.³ Federal courts have recognized that both Title IX and the U.S. Constitution afford transgender students, including athletes,⁴ protection against sex-based discrimination.⁵ Based on these legal precedents, the U.S. Departments of Justice and Education also interpret Title IX to prohibit such discrimination.⁶ Title IX overrides state laws that discriminate against transgender and intersex girls and women. As such, Title IX's bar on sex discrimination extends to protect the rights of transgender and intersex girls and women to play on school sports teams consistent with their gender identity.⁷

Laws and policies across the country have for years supported transgender and intersex girls in playing school sports alongside their peers.

While their numbers are small, transgender and intersex girls and women have been playing school sports for many years. Though many states have policies that impose restrictions on transgender and intersex girls and women participating in sports, over the last decade, inclusive policies have emerged in several states and the District of Columbia⁸ allowing these students to participate in school sports consistent with their gender identity.⁹ Transgender and intersex college athletes have also played under NCAA rules according to their gender identity for over a decade.¹⁰ In addition, 17 states and Washington, D.C., also have their own state laws that explicitly protect transgender students' rights to pursue an education free from discrimination, including playing school sports.¹¹

Natural body diversity is an inherent part of sports, and policing girls' and women's bodies leads to more stereotyping and discrimination.

Athletes come in all shapes and sizes. These differences may be advantageous or disadvantageous based on the scenario. For example, at 4 feet, 8 inches tall, professional gymnast Simone Biles is significantly smaller than the average American woman.¹² Meanwhile, at 6 feet, 9 inches and 6 feet 10, inches, professional basketball players Brittney Griner and Han Xu tower over their opponents on the court.¹³ All three women's statures are seen as positive and as a factor in their athletic success—which, for Biles and Griner, has included winning an Olympic Gold Medal.¹⁴

Transgender and intersex athletes are no exception. The assumption that transgender girls and women have categorical, overwhelming physical advantages compared to other girls and women is overly broad and not supported by evidence.¹⁵ This overbroad assumption fosters discrimination against these already marginalized students, particularly transgender and intersex girls and women of color, who already face some of the highest rates of discrimination and violence.¹⁶

Discriminating against transgender and intersex girls and women threatens equal opportunities for all girls and women.

Transgender and intersex girls are girls, and transgender and intersex women are women. Discrimination that denies any girl or woman—including those who are transgender or intersex—an opportunity puts the rights of all girls and women at risk.

Policing who is or isn't a "woman"—including through restrictive "sex verification" rules—is dangerous; it not only erects barriers for transgender and intersex athletes who want to compete consistent with their gender identity, but also cisgender women who may fall outside stereotypical notions of femininity. Under these laws, many students could be subjected to intrusive demands for medical tests or information. Especially tall women, very muscular women, or women who present in more masculine ways could be forced to undergo medical testing or be prevented from playing sports. Black and brown women and girls would be especially vulnerable to this sort of scrutiny given racist and sexist stereotypes,¹⁷ as they are already targeted for their nonconformity with society's ideals about white femininity.¹⁸ Discriminating against transgender and intersex girls and women in sports only perpetuates the very stereotypes that Title IX was enacted to combat.

There are real, longstanding barriers and real solutions for gender equity in sports—and they have nothing to do with banning some girls who are transgender or intersex.

Girls and women have far fewer opportunities to play sports than do boys and men in high school and college. This impact is felt disproportionately by girls of color, who receive even fewer chances to play on school sports teams than boys and white girls.¹⁹ Additionally, women's and girls' teams are often treated as second class by their schools with respect to equipment, facilities, and overall resources.²⁰ Women in sports also consistently report gender bias in pay and frequently being passed over for promotions in favor of men in their field.²¹ Finally, sexual abuse of student athletes of all ages by their teammates, coaches, and team doctors remains a rampant and persistent issue.²²

These barriers to gender equity in sports are well-documented and have persisted for years, and preventing women and girls who are transgender or intersex from playing sports does nothing to address them. In fact, allowing transgender athletes to participate in sports correlates with increased participation by all girls. A 2021 study showed that in states with inclusive policies, participation by girls in high school sports either remained constant or increased after those policies were implemented, while girls' participation in states with policies that excluded transgender girls decreased.²³

A wide array of women's rights organizations support inclusion of transgender and intersex girls and women in sports.

Wrapping discrimination against girls and women who are transgender or intersex in the cloak of "protecting girls' and women's sports" is unfounded and unhelpful and often is nothing more than an attempt to mask anti-trans sentiment.²⁴ Leading women's rights organizations have repeatedly voiced support for transgender and intersex girls and women to have equal opportunities to participate in sports,²⁵ along with hundreds of women athletes, including history-makers like Billie Jean King, Megan Rapinoe, and Candace Parker, who have spoken out against efforts to exclude trans and intersex youth from sports and affirmed the value of nondiscriminatory access to sport for young people.²⁶

Like their peers, transgender and intersex girls and women sometimes lose at sports, and sometimes they win. The small number of transgender and intersex girls and women athletes have not demonstrated any categorical "dominance" or overwhelming advantage.

Groups and states opposing participation by transgender and intersex girls and women in athletic competitions for women and girls have been unable to cite one example of transgender and intersex athletes consistently dominating their competition.²⁷

Take attacks on swimmer Lia Thomas, for example. When Thomas, swimming for the University of Pennsylvania, became the first transgender woman to win an NCAA swimming championship, she was met with fierce backlash under the pretext of "protect[ing] women's rights under Title IX."²⁸ Yet the day after winning the 500-yard freestyle race, Thomas finished fifth in the 200-yard freestyle—proving both that transgender women do not always win and that protecting their right to compete does not prevent cisgender women from excelling and succeeding.²⁹ Rather, affirming their right to compete is essential to protecting the rights of *all* girls and women to participate in school sports under Title IX.

Consider also Fischer Wells, a 12-year-old girl and the only openly transgender girl playing K-12 sports in the state, who recruited girls in her class to kickstart her school's girls' field hockey team. When Kentucky sought to ban her from playing, Wells testified how "detrimental for [her] mental health" it would be if she could not play with the many friends she made since starting the team.³⁰ Despite proclaiming that the bill was needed to "preserv[e] the integrity of women's sports,"³¹ proponents were unable to cite to a single example of Kentucky students being harmed by allowing Fischer or any other transgender student to play sports.³² Rather, the bill's immediate effect was solely to target and ban one child, Fischer Wells.³³ Similarly, representatives in both South Carolina and Tennessee conceded that they knew of no other transgender athletes seeking to participate in the state and that their state bans were "proactive" in seeking to prevent any future opportunities for these students.³⁴



If lawmakers actually want to help achieve gender equity in sports, then they must let transgender and intersex athletes play. Banning transgender and intersex athletes from competing only perpetuates inequity and sex-based discrimination in violation of Title IX by targeting transgender and intersex students, who already face horrific amounts of hatred, violence, and discrimination simply for being who they are.

- 1 *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Apr. 25, 2022).
- 2 Nat'l Coal. for Women and Girls in Educ., *Title IX at 45: Advancing Opportunity through Equity in Education* 41-42 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.
- 3 *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
- 4 Federal courts have also addressed athletics policies related to transgender and intersex student athletes, holding that barring them from competing on sports teams that correspond with their gender identity constitutes sex-based discrimination in violation of the Equal Protection Clause and Title IX. See, e.g., *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (the district court granted a preliminary injunction against an Idaho law that barred transgender women from competing on women's school sports teams based on the plaintiff's likelihood of success in demonstrating that the law was unconstitutional sex-based discrimination against transgender students under the Equal Protection Clause); *Soule v. Connecticut Ass'n of Schools, Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *9 (D. Conn. Apr. 25, 2021) (in dismissing a group of students' claim that a state athletic association's policy affirming transgender students' right to compete on school sports teams matching their gender identity was a violation of Title IX because it was moot, the district court referenced the Department of Education's acknowledgement that "transgender students...are protected from sex-based discrimination under Title IX" and as such, "transgender students must be allowed to participate in [sports]...consistent with their gender identity.");
- 5 See, e.g., *Grimm v. Gloucester Cty. School Bd.*, 972 F.3d 586 (4th Cir. 2020) (where the Fourth Circuit applied *Bostock* to hold that a policy barring transgender students from using bathrooms in accordance with their gender identity constituted impermissible sex discrimination under Title IX); *Adams v. School Board of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020) (in which the Eleventh Circuit applied *Bostock* to hold that a policy preventing transgender students from using bathrooms matching their gender identity was sex-based discrimination because it "single[d] out transgender students for differential treatment because they are transgender."). See also *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (holding that discriminating against someone on the basis of their transgender status constitutes discrimination on the basis of sex under the Equal Protection Clause of the Constitution).
- 6 U.S. DEP'T OF EDUC., *Supporting Intersex Students* (Oct. 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>; U.S. DEP'T OF JUSTICE, *Title IX Legal Manual* (updated Aug. 2021), <https://www.justice.gov/crt/title-ix#Bostock>; Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021), available at <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendments-of-1972-with-respect-to-discrimination-based-on>.
- 7 The Department of Education's Office for Civil Rights and the Department of Justice's Civil Rights Division (CRT) issued a joint fact sheet on LGBTQI+ discrimination in schools, in which they affirmed that "discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law." The fact sheet went on to present examples of the various kinds of incidents of sex discrimination OCR and CRT could investigate, one of them describing a transgender high school girl who joins her friends to try out for the girls' cheerleading team, but is turned away by the coach solely because she is transgender. See U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *Confronting Anti-LGBTQI+ Harassment in Schools* (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.
- 8 For an overview of: all policies by state athletic associations and state laws that enable transgender and intersex athletes to participate on teams consistent with their gender identity; state laws that ban transgender and intersex athletes entirely from participating on teams consistent with their gender identity; and state laws that effectively ban transgender and intersex athletes by, for example, keeping transgender athletes off the field until they complete a period of hormone therapy, see Chris Mosier, *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Apr. 22, 2022). This resource also outlines how state laws banning transgender and intersex athletes from school sports interact with trans-inclusive policies by state athletic associations.
- 9 See *id.*
- 10 While protections have existed for years paving the way for participation by transgender, intersex, and non-binary college athletes, in January 2022, the NCAA released a new, regressive policy overturning its longstanding rule that allowed transgender athletes with one year of hormone suppression to play on teams consistent with their gender identity. This new policy requires transgender athletes to satisfy the guidelines of national governing bodies for each sport, or, in the absence of such guidelines, the guidelines of international governing bodies for that sport. See *Transgender Student-Athlete Participation Policy*, NCAA, <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx> (last visited May 23, 2022). In doing so, the NCAA shirked its responsibility to craft its own policy clearly protecting transgender, intersex, and non-binary athletes from discrimination across all sports, ultimately creating barriers to them having equal opportunities to play. See, e.g., 25 Organizations Join WSF Letter to NCAA Regarding Transgender Athlete Participation Policy, Women's Sports Foundation (Mar. 22, 2022), <https://www.womenssportsfoundation.org/advocacy/25-organizations-join-wsf-letter-to-ncaa-regarding-transgender-athlete-participation-policy/>; *Dear NCAA, It's Not Too Late to Let Trans & Intersex Students Play!*, NATIONAL WOMEN'S LAW CENTER (Jan. 27, 2022), <https://nwlc.org/dear-ncaa-its-not-too-late-to-let-trans-intersex-students-play/>.
- 11 These states are California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Virginia, and Washington. See *Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination (last visited Apr. 25, 2022).
- 12 *Simone Byles*, U.S. OLYMPIC COMM., <https://www.teamusa.org/usa-gymnastics/athletes/Simone-Biles> (last visited Apr. 25, 2022).
- 13 *Brittney Griner*, WOMEN'S NAT'L BASKETBALL ASS'N, <https://www.wnba.com/player/brittney-griner/> (last visited Apr. 25, 2022); *Han Xu*, WOMEN'S NAT'L BASKETBALL ASS'N, <https://www.wnba.com/player/han-xu/> (last visited May 11, 2022).
- 14 See, e.g., *Simone Byles*, *supra* note 12; *Brittney Griner*, *supra* note 13.
- 15 See, e.g., Samuel Crankshaw, *Statement on Veto of SB83, Ban on Trans Girls in Girls' Sports*, ACLU KENTUCKY (Apr. 6, 2022), <https://www.aclu-ky.org/en/press-releases/statement-veto-sb83-ban-trans-girls-girls-sports> (proponents of Kentucky's ban on transgender and intersex athletes were unable to cite even one example of Kentucky students being harmed by allowing their transgender peers to play); David Cray & Lindsay Whitehurst, *Lawmakers can't cite local examples of trans girls in sports*, AP (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> (explaining that proponents of sports bans across the country cannot cite examples of transgender student athletes either dominating their competition or creating issues for their cisgender peers). See also Shayna Medley & Galen Sherwin, *Banning Trans Girls from School Sports is Neither Feminist Nor Legal*, ACLU BLOG (Mar. 12, 2019), <https://www.aclu.org/blog/lgbtq-rights/transgender-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal> (proponents of Kentucky's ban on transgender and intersex athletes were unable to cite even one example of Kentucky students being harmed by allowing their transgender peers to play).
- 16 See generally Sandy E. James Et Al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 Transgender Survey* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf?msckid=60eeba8ec4bf11eca6af68a19bd15f1e>.
- 17 Ctr. for the Stud. of Social Pol'y, *Fight for Our Girls: Applying and Intersectional Lens to Girls of Color Facing Status Offenses* 5 (2018), <http://cssp.org/wp-content/uploads/2018/08/fight-for-our-girls-intersectionality.pdf>.

- 18 Take Serena Williams, for example, who has been subjected to excessive drug-testing and transphobic comments, such as statements that “[s]he is built like a man” and that “[she] was born a guy, all because of [her] arms, or because [she’s] strong.” See, e.g., *Serena Williams, drug tested more than other top players this year*, cites “discrimination”, CBS NEWS (July 25, 2018), <https://cbsn.ws/3pbOG3I>; Gina Vivinetto, *Serena Williams on how she struggles with cruel remarks about her body*, TODAY (Sept. 7, 2017), <https://on.today.com/3rfwDLQ>; Jason Pham, *Serena Williams shut down body critics: ‘I am strong and muscular — and beautiful’*, BUSINESS INSIDER (May 31, 2018), <https://bitly/34vzEOA>.
- 19 Women Sports Foundation, *50 Years of Title IX: We’re Not Done Yet 52* (May 2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/50-Years-of-Title-IX-Final-for-Website.pdf>. See also National Women’s Law Center, *Finishing Last: Girls of Color and School Sports Opportunities 1* (2015), https://nwlc.org/wp-content/uploads/2022/03/final_nwlc_girlsfinishinglast_report.pdf.
- 20 Emine Yucel, *Men’s and Women’s NCAA March Madness Facilities, Separate and Unequal*, Spark Uproar, NPR (Mar. 19, 2021), <https://www.npr.org/2021/03/19/979395795/mens-and-womens-ncaa-march-madness-facilities-separate-and-unequal-spark-uproar?msclid=4c2d5287c7221ecabb415adf300Ocdc>.
- 21 Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women 29* (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf> (women college coaches reported facing significant gender bias in the workplace, where 75% of women reported men were better able to negotiate salary increases, 54% of women reported men were more likely to be promoted, and 53% of women reported men were more likely to be compensated with salary increases for successful job performance).
- 22 See, e.g., Aaron Slone Jeckell et al., *The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective*, 10 SPORTS HEALTH 558, 560 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6204631> (estimating that up to 48% of athletes experience some form of sexual mistreatment); Julie Mack & Emily Lawler, *MSU doctor’s alleged victims talked for 20 years. Was anyone listening?*, MLIVE (Feb. 8, 2017), https://www.mlive.com/news/index.ssf/page/msu_doctor_alleged_sexual_assault.html.
- 23 Ctr. for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth 14-17* (Feb. 8, 2021), https://americanprogress.org/wp-content/uploads/2021/02/Fair-Play-correction2.pdf?_ga=2.1589237.597445779.1650638300-292562780.1650638300.
- 24 Some states have also sought to discriminate against transgender students by preventing them from using locker rooms and bathrooms matching their gender identity. Like athletics ban, these bathroom and locker bans have been proposed under the guise of “protecting women and girls,” when they actually hinder gender equity in schools, as they are based on antiquated and harmful gender stereotypes and increase harassment and discrimination against trans and intersex students. Just as preventing transgender and intersex girls and women from playing sports goes against the purpose of Title IX, so to do locker room and bathroom bans preventing them from using these facilities in accordance with their gender identity—and federal courts have accordingly rejected these bans. See, e.g., *Grimm v. Gloucester Cty. School Bd.*, 972 F.3d 586 (4th Cir. 2020); *Adams v. School Board of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020).
- 25 Statement of Women’s Rights and Gender Justice Organizations in Support of the Equality Act (Mar. 16, 2021); Nat’l Coalition for Women and Girls in Educ., *NCWGE Supports Transgender and Nonbinary Students’ Full and Equal Participation in All Education Programs and Activities* (Feb. 12, 2021), <https://www.ncwge.org/activities.html>; Statement of Women’s Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People (Apr. 9, 2019), <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>.
- 26 Lambda Legal, *Billie Jean King, Megan Rapinoe, and Candace Parker Join Nearly 200 Athletes Supporting Trans Youth Participation in Sports* (Dec. 21, 2020), https://www.lambdalegal.org/news/id_20201221_billie-jean-king-megan-rapinoe-and-candace-parker.
- 27 See Ctr. for American Progress, *supra* note 23, at 14 (explaining that “there is no evidence to support the claim that allowing transgender athletes to participate will reduce or harm participation in girls’ sports. Though anti-transgender groups focus on the very few, cherry-picked examples of competitions where a transgender athlete outperformed a cisgender athlete, evidence suggests that inclusion of transgender athletes has had no impact on sports participation or women’s athletic achievements.”). See also David Cray & Lindsay Whitehurst, *supra* note 15.
- 28 Letter to Sec’y Catherine E. Lhamon, Concerned Women for America (Mar. 17, 2022), <https://concernedwomen.org/wp-content/uploads/2022/03/CWA-UPENN-Title-IX-Complaint.pdf>. See also Bianca Quilantan, *Conservative group files Title IX complaint against U. Penn over transgender swimmer*, POLITICO PRO (Mar. 17, 2022), <https://subscriber.politicopro.com/article/2022/03/conservative-group-files-title-ix-complaint-against-u-penn-over-transgender-swimmer-00018117?source=email>. See also Bianca Quilantan, *Conservative group files Title IX complaint against U. Penn over transgender swimmer*, POLITICO PRO (Mar. 17, 2022), <https://subscriber.politicopro.com/article/2022/03/conservative-group-files-title-ix-complaint-against-u-penn-over-transgender-swimmer-00018117?source=email>.
- 29 Dawn Ennis, *Lia Thomas just proved Transgender athletes don’t always win*, LOS ANGELES BLADE (Mar. 18, 2022), <https://www.losangelesblade.com/2022/03/18/lia-thomas-just-proved-transgender-athletes-dont-always-win/?msclid=6be0dbd9c7d911ecab75a6a48e2659b2>.
- 30 Bruce Schreiner, *Kentucky Senate panel advances ban on transgender athletes*, AP (Feb. 10, 2022), <https://apnews.com/article/sports-kentucky-lifestyle-gender-identity-90a4575d41439fc68f40d7195a717e0e>.
- 31 Nico Lang, *Kentucky banned trans kids from sports to keep this 12-year-old girl from playing hockey*, XTRA (Apr. 14, 2022), <https://xtramagazine.com/power/politics/kentucky-trans-kids-sports-ban-221391>.
- 32 Samuel Crankshaw, *supra* note 15.
- 33 Nico Lang, *supra* note 31.
- 34 David Cray & Lindsay Whitehurst, *supra* note 15.