Maine Human Rights Commission

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May 8, 2025

The Honorable Anne Carney, Senate Chair
The Honorable Amy Kuhn, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: LD Nos. 233, 868, 1002, 1134, 1337, and 1704 – Bills Prohibiting Transgender Women from Playing Sports on the Team Aligning with Their Gender Identity;
LD 1002 – An Act to Protect Children's Identification by Requiring Public Schools to Use the Name and Gender Specified on a Child's Birth Certificate;
and LD 1704 – An Act to Prohibit a School Administrative Unit from Adopting a Policy That Allows a Student to Use a Restroom Designated for Use by the Opposite Sex

Dear Senator Carney, Representative Kuhn, and Members of the Joint Standing Committee on Judiciary:

The Maine Human Rights Commission ("Commission") is Maine's quasi-independent, neutral, apolitical State agency[1] charged with enforcing our state anti-discrimination law, the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq.* ("MHRA" or the "Act"). The Act charges the Commission with investigating, conciliating, and at times litigating discrimination cases under the MHRA; promulgating rules and regulations to effectuate the MHRA; and making recommendations for further legislation or executive action concerning infringements on human rights in Maine. 5 M.R.S. § 4566(7), (11). Given these duties, the Commission provides this testimony against these bills.

Bills Prohibiting Transgender Women from Playing Sports on the Team Aligning with Their Gender Identity (LDs 233, 868, 1134, and 1337)

These Bills Would Violate the Letter and Spirit of the MHRA

This State made it unlawful to discriminate on the basis of sexual orientation, which included gender identity in its definition, in 2005.[2] Transgender students in Maine have had the explicit right to play sports on teams corresponding to their gender identity for 20 years. This is not a new issue, it's just a newly popular issue getting a lot of attention from news media and federal agencies. In 2005, when the Legislature voted to adopt sexual orientation as a protected class in the MHRA, the Maine Legislature explicitly considered the issue of participation in athletics and declared:

> It is unlawful education discrimination in violation of this Act, on the basis of sexual orientation, to:
> A. Exclude a person from participation in, deny a person the benefits of or subject a person to discrimination in any academic, extracurricular, research, occupational training or other program or activity;
> B. Deny a person equal opportunity in athletic programs;

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[1] The Commission itself is made up of five Commissioners, appointed by the Governor for staggered five-year terms. By statute, there can be no more than three Commissioners from any political party. 5 M.R.S. § 4561.

[2] Until 2023, the definition of "sexual orientation" included "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression". 5 M.R.S. § 4553(9-C). In 2019, the Legislature added a separate section defining "gender identity", and in 2023, removed "gender identity" from the definition of "sexual orientation".

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5 M.R.S. § 4602(4)(A, B).[3] Maine's protection of transgender students has not changed in two decades; transgender individuals have been playing sports in Maine for all of this time without controversy. The fact that this has recently been the subject of state and national news should not upset Maine's settled law: notably, there are likely no students in Maine's primary or secondary schools who were born before discrimination on the basis of sexual orientation or gender identity became unlawful in Maine. The MHRA explicitly bars most Maine schools[4] from making decisions about which students can participate in activities based solely on gender identity. Because these bills would require Maine schools to do exactly what the MHRA bars – exclude female students who are transgender from sports based solely on their gender identity – these proposals should be rejected.

Since 2005, the Commission has repeatedly held that schools and other providers must allow a person to access services and facilities that align with the person's consistently-held gender identity. In a Commission enforcement action arising out of a 2007 school dispute, the Maine Supreme Judicial Court, sitting as the Law Court, confirmed that Maine schools were required to allow a female student who was transgender to use services and facilities consistent with her gender identity. *Doe v Regional School Unit 26,* 2014 ME 11. In *Doe*, the Law Court recognized that implementing the MHRA's mandate could, at times, be complicated for Maine schools to accomplish, and admonished that "[d]ecisions about how to address students' legitimate gender identity issues are not to be taken lightly." *Id.* at ¶ 24. Both the Court's opinion in *Doe* and the Commission's decisions and guidance since then, have borne out the MHRA's requirement that schools make decisions about who can participate in activities based on discrete circumstances and actual facts at hand rather than excluding students based on stereotypes and fears.

These bills are not about sports, or safety. These bills are about fear, and about who is allowed in women's locker rooms and bathrooms. They presume that transgender women are dangerous to the women around them because they are "men" who must be "masquerading" as women in order to harm cisgender women in restrooms—or that they are mediocre athletes who are looking for an "easy" field of competitors so they can win a high school track event. These fears are irrational, are unsupported by any facts, and should not drive Maine lawmaking.

- If these bills were about sports and safety, they would address the potential for physical harm in contact sports, such as risks for transgender men playing football or ice hockey with cisgender men, but they do not. In fact, not one of these bills addresses the risk these athletes face when entering a space or a competition designed for cisgender men.
- If these bills were about sports and safety, they would identify the supposed risks faced by student athletes of differing size and stature, and take specific actions to prevent or mitigate those risks – perhaps dividing students into weight/strength divisions such as those already in place in boxing and wrestling, regardless of sex or gender – but they do not.
- If these bills were about sports and safety, they would address fairness and placement and scholarships and spots available on varsity teams, but they do not.
- If these bills were about sports and safety, they would address aspects of biology other than a student's reproductive system, like size and muscle mass, but they do not.

What these bills do instead is bar any nuanced decision-making at all if a female student who was assigned the male sex at birth wants to play sports. This Committee should reject these bills because they are deliberately discriminatory, single out an especially vulnerable minority, and directly violate the MHRA in their aim to exclude students from school activities based solely on their gender identity.

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[3] The education provisions of the MHRA have been amended since 2005 to restructure and expand their coverage. However, the prohibition on discrimination in athletics on the basis of gender identity has remained the same. *See* 5 M.R.S. § 4602(1)(B).

[4] The MHRA includes an exception to its coverage of sexual orientation and gender identity for schools operated by religious organizations that do not receive public funds. 5 M.R.S. § 4602(5)(C).

The MHRA's Protections Do Not Violate Title IX

While the Commission has no doubt that some bills seeking to limit rights of transgender individuals would have been submitted in any Legislative session – as they have been for years – the flurry of bills this session suggests that events on the national stage are influencing Maine lawmakers. The current administration has focused on eliminating rights for transgender individuals, including through an Executive Order (the "EO") barring "men" from participation in women's sports. When Maine refused to follow the EO and, instead, continued to follow the law as delineated by the MHRA and court decisions applying Title IX and other civil rights laws to include transgender individuals under the umbrella of "sex" discrimination,[5] the administration withheld federal funding. The administration attempted to justify that action under the falsehood that Maine was in conflict with Title IX, an interpretation which has not been adopted by the courts.

The MHRA and Title IX are not in conflict. Title IX provides that "[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", with several exceptions not relevant here. Maine too prohibits discrimination in education programs and activities based on sex, in addition to many other protected classes. So does federal law, and not just Title IX: Title IV of the Civil Rights Act of 1964 prohibits education discrimination on the basis of race, color, sex, religion, and national origin, while the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 prohibit discrimination on the basis of disability. With regard to athletics, the federal Office of Civil Rights ("OCR") has promulgated rules providing that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against" in athletic programs offered by a recipient of federal funds.

Continuing to allow transgender women to participate in women's sports does not violate these regulations. First, court decisions to date have interpreted "sex" to include gender identity. Accordingly, all women, regardless of their assigned sex at birth, are protected from discrimination under Title IX, just as they are under the MHRA. Second, even if "sex" is interpreted narrowly in Title IX – which is contrary to canons of statutory construction requiring nondiscrimination laws to be interpreted broadly in favor of coverage[6] – allowing transgender women to compete against other women does not violate Title IX. *See Doe*, 2014 ME 11 at ¶ 21 (determination that student consistently identified as a girl meant the school "provided her with the same access to public facilities that it provided other girls" when it allowed her to use the girls' bathroom).

Those who believe that transgender women should have to play sports on men's teams argue that girls who are transgender or nonbinary will have an unfair advantage in girls' sports (faster, stronger, etc.) that would unreasonably deprive cisgender girls of the benefits and opportunities of athletics that took so long to achieve. This argument fails to acknowledge that no student is entitled to win or to insulate herself from competition at an athletic event, and students will always be competing with others who are faster or stronger or better at an event than they are. Individual students have all sorts of advantages that give them a leg up in competition, and one student's transgender status should not automatically exclude them from competition with their cisgender peers. Whether a female student who is transgender actually has an unfair advantage in a given sport can be considered based on facts, in the context of whether their participation poses an unreasonable risk to student safety, while setting aside rhetoric and fear based solely on generalizations and stereotypes. These bills should be rejected because they are unnecessary and would adopt an approach to student sports that is based on *precisely* the stereotyping and "fear of the other" that the MHRA was enacted to counter.

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[5] *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

[6] *See Vance v. Speakman*, 409 A.2d 1307, 1310 n.2 (Me. 1979); *Wells v. Franklin Broadcasting Corp.*, 403 A.2d 771, 773 (Me. 1979); *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d 369, 378 (Me. 1978).

Bills Prohibiting Transgender Students from Using Facilities Aligned with Their Gender Identity (LDs 868 and 1704)

As discussed above, it is settled law in Maine that the MHRA prohibits discrimination in sex-segregated facilities on the basis of gender identity. The 2005 amendment to the MHRA which added sexual orientation and gender identity was interpreted by the Supreme Judicial Court in 2014 to require places of public accommodation, including schools, to provide transgender individuals with the same access to public facilities as cisgender individuals. *Doe* at ¶ 21.

A further note about LD 868. Paragraph 5(E) provides a covered entity, private school, or private postsecondary institution which experiences "any direct or indirect adverse action by a government entity...as a result of complying 30 with this section" with a private right of action against that government entity, which would certainly have a chilling effect on the Commission's ability to investigate allegations of discrimination against educational institutions in the state, to say nothing of established principles of immunity for government entities and staff performing their statutory duties.

LD 1002 - An Act to Protect Children's Identification by Requiring Public Schools to Use the Name and Gender Specified on a Child's Birth Certificate

The Commission does not address any First Amendment implications of this bill. We simply point out that creating a hostile education environment by mandating that school staff use a student's deadname and/or consistently, intentionally misgendering trans and nonbinary students, is a violation of the MHRA's education provisions.

Conclusion

Thank you for this opportunity to provide testimony against these Bills, which the Commission opposes because they violate the letter and spirit of the MHRA by requiring Maine schools to adopt a "practice[] infringing on the basic human right to a life with dignity" and explicitly mandate discrimination in education based on gender identity.

The Commission would be pleased to discuss these issues with you at your convenience, including at the work session on this matter.

Sincerely,

Kit Thomson Crossman, Executive Director
Barbara Archer Hirsch, Commission Counsel