Maine Human Rights Commission

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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 2239, An Act to Designate School Sports Participation and Facilities by 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, nonpartisan State agency 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 the bill.

In the history of the MHRA, neither this body nor the electorate has ever narrowed the scope of the Act. In 2005, by vote of the legislature and the people, this State made it unlawful to discriminate on the basis of sexual orientation, which included gender identity in its definition.[1] Transgender students in Maine have had the explicit right to an education free from discrimination based on their gender identity for 21 years. In 2005, when the Legislature voted to adopt sexual orientation as a protected class in the MHRA, the Maine Legislature 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;
> ...

5 M.R.S. § 4602(4)(A, B).[2] Maine's protection of transgender students has not changed in more than two decades; transgender individuals have been playing sports and using facilities corresponding with their gender identity in Maine

[1] 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". The Act defines "gender identity" as the "gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." 5 M.R.S. § 4553(5-C).

[2] 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* 5M.R.S. § 4602(1)(B).

for all of this time without controversy. There are likely no students currently in Maine's primary or secondary schools who were born before this legislature made gender identity discrimination unlawful. The fact that transgender girls' participation in sports has recently been the subject of state and national news should not upset Maine's settled law. The MHRA explicitly bars most Maine schools[3] from making decisions about which students can participate in activities based solely on gender identity. Because this bill would require Maine schools to do exactly what the MHRA bars – override existing laws and exclude students who are transgender from sports and sex-segregated facilities based solely on their gender identity – it 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*, a transgender girl was required to use the single-stall, unisex staff bathroom, instead of the communal girls' bathroom. She was the only student instructed to do so. The Law Court interpreted the MHRA 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. The Law Court further 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 broadly excluding an entire class of students.

Those who believe that transgender girls should have to play sports on boys' 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 <u>actually</u> has an unfair advantage in a given sport should be considered <u>based on individualized facts</u>, in the context of whether their individual participation poses an unreasonable risk to student safety.

In many ways, the MHRA is a level-setting statute. It says, these are our values as a community. Beyond the legal protections it offers, that public statement has implications for what behavior people feel is allowable. When those guardrails are perceived to be weakened, threats against members of a protected class may increase. I have had a school board member report to me that parents at a public meeting threatened to bring a gun to school sporting events, to drive their truck into the school if a trans girl was using the girls' locker room, to pull girls' pants down on the field if they did not conform to what a girl "should" look like, to hire a nurse to do a genital inspection if a girl was over six feet tall. After the town of St. George held a public meeting (at which the Commission was asked by the town to participate) about whether or not a 9-year-old transgender girl could play basketball on the town's recreational basketball team, I received an email from someone stating they hoped she died in a fire with her parents. The implications of this bill go beyond sports and bathrooms. The threat to the physical and psychological safety of transgender and nonconforming students is very real.

If this bill were truly about fairness and safety, it would consider the safety of all students. There is a process already contemplated by the MHRA and memorialized in a 2016 Counsel Memo allowing for an individualized assessment that balances a significant risk of physical harm with athletic opportunity for all students. It isn't a ban; it provides a path to participate as long as fairness and safety of competition are preserved. That same memo also

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[3] 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).

allows for private spaces within locker rooms and making single-stall bathrooms available for all students. Under Maine law as it stands, every child gets to go to school and, with some guardrails, have the same opportunity as any other child. This bill would end that. So, I urge this committee not to pass it.

Proposed Paragraph 6 of New Section 4017 of Title 20-A

This section of the bill usurps the authority of Maine's court system by declaring – without consideration of more than 20 years of precedent, including the Law Court's decision in *Doe* that schools must permit students to use restrooms that correspond to their gender identity – that the MHRA "may not be construed" to conflict with this bill. As courts and legislatures have recognized since 1803, "[i]t is the power and the duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each." *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). If this Legislature wishes to overturn *Doe* and strip transgender individuals of their human rights, it must do so directly, not by hamstringing the courts' authority.

This section is problematic for several other reasons. First, by referring to the entire MHRA, rather than subchapter 5-B, which addresses education discrimination specifically, this bill attempts to reach more than student athletics. This law would require schools to police the use of bathrooms whenever a public event occurs in a school, even if that event is put on by an outside group renting out the school as a place of public accommodation. Second, the bill applies only to public schools, not private schools, even if those private schools are approved for tuition purposes and are covered by the MHRA. *See* 5 M.R.S. § 4553(2-A). This creates an income-based disparity: transgender students whose parents can afford private school can play sports on the team matching their gender identity, but public school students cannot.

Conclusion

Thank you for this opportunity to provide testimony against this bill, which the Commission opposes because it violates both the letter and spirit of the MHRA. 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