

HB 1298

House Human Services

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Katie Fitzsimmons, NDUS Director of Student Affairs
701-328-4109 | katie.fitzsimmons@ndus.edu

Chair Weisz and Committee Members: My name is Katie Fitzsimmons and I serve as the Director of Student Affairs at the North Dakota University System. I am representing the System Office, but not the State Board of Higher Education, which has not met since this bill was introduced, in opposition to HB 1298. The bill, if enacted, could require NDUS colleges and universities to violate federal Title VII and Title IX federal regulations and guidance, take a position that contradicts athletic conference guidelines, and add to the institutions' administrative burden by requiring the collection of birth certificates as part of the admission process for our 45,000 students. It may also be impossible to enforce. More on that in a moment.

What we call Title IX today was enacted as part of the Education Amendments of 1972, which was a follow-up to the Civil Rights Act of 1964. The relevant part of Title IX provides that: "No person in the United States shall, based on 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." Title IX regulations have evolved over the last 49 years, including a major overhaul last August. However, the most recent change occurred last week.

On January 20, 2021, President Joe Biden signed the "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." The Order is based on the 2020 Supreme Court case *Bostock v. Clayton County*, which held that Title VII's prohibition on discrimination "because of sex" covers discrimination on the basis of gender identity and sexual orientation. The Executive Order extends that reasoning to most laws and regulations that prohibit sex discrimination, expressly including Title IX, to apply to discrimination based on gender identity or sexual orientation. As a result, the NDUS is bound by the Executive Order for at least the next four years, unless it is withdrawn.

In short, if a campus were to require an athlete to participate on an athletic team that corresponds with the athlete's sex assigned at birth if that differed from their gender identity – even if they have legally had their gender changed - the athlete could file a complaint with the federal Department of Education's Office of Civil Rights (OCR) and maybe even sue the institution. The possible cost of these proceedings is impossible to estimate, but the

attorneys' fees alone could represent a substantial cost to the University System and North Dakota's taxpayers.

In addition, each NDUS institution is a member of an athletic association, each of which has adopted its own rules and guidelines about the treatment of transgender individuals in athletics. Bismarck State College, Dakota College at Bottineau, Lake Region State College, and Williston State College are members of the National Junior College Athletic Association (NJCAA). Section 5 of the NJCAA's bylaws, which bind all member schools, include a detailed set of rules regarding when transgender athletes may participate, and requires a medical exemption. Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA), while Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). The NAIA and NCAA have issued policies for athletic competition by transgender student athletes, including applying for a medical exemption, and have bylaws governing the nature of men's, women's, and mixed sports teams.

As a side note, all three athletic conferences specifically permit female athletes to participate on men's scholarship athletic teams without changing the designation of the team to a "mixed" team, and the female athlete then counts as a male athlete for Title IX equity calculation purposes. This bylaw is what allowed Sarah Fuller to score the first points by a female player on a NCAA Division I FBS college football team in her role as a backup kicker for the Vanderbilt University Commodores during the 2020 season. Would these policies result in men's teams violating HB 1298 – whether or not any female athletes actually participate – due to rules permitting female student athletes to participate on men's teams without changing the designation of the team to "mixed?" Based on the text of the bill, it is impossible to know.

These large athletic associations also use their influence in other ways. In 2016, the NCAA pulled seven planned championship events from the state of North Carolina, after that state passed HB2, a law limiting civil rights protections for LGBTQ individuals (also known as the "Bathroom Bill"), stating "NCAA championships and events must promote an inclusive atmosphere for all college athletes, coaches, administrators, and fans. Current North Carolina state laws make it challenging to guarantee that host communities can help deliver on that commitment if NCAA events remained in the state." In 2017, North Carolina repealed the most objectionable parts of the law and the NCAA resumed tournament play in the state.

A more recent case may be instructive. In 2020, Idaho passed HB 500, also known as the Fairness in Women's Sports Act, the first of its kind in the nation. It states: "athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex."

Currently, the law has been blocked in federal court, and the NCAA has stated that it is considering moving 2021 March Madness tournament games out of Boise because of the legislation. If HB 1298 were to pass, we can expect that the NCAA may target the Frozen Four regionals currently scheduled to take place at Scheels Arena in Fargo in March 2021, 2023, or 2025 – with UND as the host school – or a potential NDSU football playoff or championship game.

Though the University System recognizes that the possible threat of losing tournament hosting opportunities – and the accompanying economic benefits – may not itself constitute a reason to pass or reject this legislation, the impact bears discussion. We are incredibly fortunate as a state university system to recruit and retain talented student athletes under the direction of dedicated coaches and trainers. If those teams suffered the loss of hosting a tournament because of a state law, that could impact the experience for all of the system’s student athletes, coaches, communities, and fans.

Additionally, it will likely be impossible to enforce HB 1298 on NDUS campuses. The bill states that an individual’s birth sex may be proven by examining the “sex indicated on the individual’s original birth certificate issued at the time of birth.” However, the NDUS does not currently require student athletes, let alone all students, to provide copies of their original birth certificate to prove their assigned sex at birth for the purpose of athletics. Moreover, many NDUS students attend from out of state – including over half of both NDSU and UND students. Every state has a procedure for changing an individual’s birth certificate to reflect a gender transition, including North Dakota, and different rules for obtaining a copy of the original birth certificate. However, some states do not indicate on a birth certificate that a change to the sex was made, and several states make the original birth certificate confidential upon amendment, including North Dakota, which could make it difficult or impossible for students to prove the sex that was indicated on their original birth certificate.

Finally, whatever the intent of the drafters of the bill, the text broadly applies the restriction to all athletic activities sponsored by the state, and to any use of “an athletic facility, stadium, field, structure, or other property owned by or under the control of the state, political subdivision, or entity.” Therefore, it stands to reason that all intramural sporting activities (which often have different leagues divided by sex) or any of a wide range of athletic activities that are often divided by sex, including community leagues which might use NDUS or state facilities, would also be required to verify all participants’ assigned sex at birth using the individuals’ original birth certificates. To administer this requirement, NDUS campuses would be required to maintain original birth certificate records of all 45,000+ students which could result in additional administrative burden or cost and impose barriers for access for students who are unable to provide the required original birth certificate. It would also require campuses to police the rules and participants of every outside school or league that uses

NDUS facilities. It could transform a simple flag football sign-up sheet into a legal and logistical nightmare.

As stated earlier, the North Dakota State Board of Higher Education has not yet reviewed this bill and has not taken a position at this time. That notwithstanding, the North Dakota University System Office respectfully requests a do not pass on HB 1298, or for the committee to amend the bill to carve out the North Dakota University System so that its institutions may remain in compliance with current federal regulations, avoid unnecessary financial risk, remain congruent with athletic association guidelines, and avoid creating barriers to athletic competition participation. I thank you for your consideration and I stand for your questions.