

Engrossed HB 1298

House Human Services

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Chair Larson 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 North Dakota University System in opposition to Engrossed HB 1298. The bill could possibly require our campuses to contradict Title VII and Title IX federal regulations, align incongruently with NCAA, NAIA, and NJCAA guidelines, create an unenforceable step of vetting for all intramural and club sports on our campuses, and possibly lose significant revenues earned through summer camps and conferences.

Title IX was enacted as a follow-up to the Civil Rights Act of 1964 and its original text, as written and signed into law by President Nixon in 1972 stated: “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 and sustained a major shift in May 2020. However, the most recent change occurred in January.

On January 20, 2021, President Joe Biden signed an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.¹ The Order cites the 2020 Supreme Court case of *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. Under this case’s reasoning, all laws that prohibit sex discrimination, including Title IX, prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary. The NDUS and its institutions are bound by this Executive Order, as it will guide federal regulators in their interpretation of Title IX.

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 the gender with which they identify, the athlete would have solid footing for a complaint with the Office of Civil Rights (OCR) and further litigation – a proposition that has been backed up by a number

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

of court decisions from the last year. The possible costs of time and money, in the forms of OCR fines and litigation fees and settlements, could span years and could amount to a substantial cost to the University System and North Dakota’s taxpayers. As an example, in 2020, Idaho passed HB 500, also known as the Fairness in Women’s Sports Act, which has a similar goal as Engrossed HB 1298. The law has since been halted by a federal court, and the parties have estimated that the total cost to litigate the constitutionality of the law could reach as high as \$10 million.

The NDUS appreciates that the bill sponsor attempted to address its concerns through an amendment. However, the amendment does not come close to resolving the legal and logistical hurdles the NDUS faces if the engrossed bill becomes law. Though the current version of the bill limits its applications to athletes who are “under eighteen years of age or who is enrolled in high school,” that does not exempt all NDUS students. On any given year, there are roughly 4,000 NDUS students who are not yet eighteen years old, which is no exemption at all. It is our understanding that the amendment intended to carve out higher education, but it fell short. The North Dakota University System respectfully requests clarification on this amended language.

In case the committee is unsure if it would like these rules to apply to college and university athletes, I would like to refer you to the guidelines and policies that direct their current practices. 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). Dickinson State University, Mayville State University, and Valley City State University are members of the National Association of Intercollegiate Athletics (NAIA). Minot State University, North Dakota State University, and the University of North Dakota are members of the National Collegiate Athletic Association (NCAA). Each of these three athletic associations have guidelines in place regarding participation of transgender student athletes. The NJCAA outlines their policies in Section 5 of their constitution and by-laws, which all member schools endorse. The NAIA and NCAA outline guidelines for their member schools to consider adopting. Each group requires transgender student athletes to obtain a medical exception from the corresponding association. The policies and guidelines established by these three athletic associations are currently working well and provide clear guidance to our athletic programs.

These large athletic associations 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 HB 2, a law limiting civil rights protections for LGBTQ individuals (also known as the “Bathroom Bill”). The press release stated, “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 law to a certain degree and the NCAA resumed tournament play in the state. Similarly, the NCAA moved its 2021 March Madness tournament games from Boise, likely based on some combination of its version of this legislation and COVID-19 concerns. The NDUS faces similar potential consequences for UND Hockey or NDSU Football. If those teams suffered the loss of hosting a tournament due to this state law, that would be a truly unfortunate circumstance for all of the athletes, coaches, communities, and fans.

Additionally, the language in the bill does not specify the extent of the activities that would need to have monitored participation, but it does specify that 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” would apply to this bill. Therefore, it stands to reason that all intramural sporting activities, or any wide range of athletic activities that are divided by sex, would apply to the intentions of this bill. For any campus to make these determinations would be a legal and logistical nightmare – one which the engrossed bill does not explain how to resolve. Again, a full carve-out of higher education institutions would help us avoid this unenforceable portion of the bill.

Finally, the language in the bill places the campuses in an unusual predicament. All of our campuses host camps and athletic groups during the summer months. Some of these camps are sponsored by the NDUS institution and for others, the outside groups rent the space from the campuses. Would NDUS campuses have to verify the sex assigned at birth for all participants of all camps, conferences, and workshops that use NDUS facilities in the summer months? What about camps that are not institution-sponsored? Placing this herculean task onto our limited summer conference staff would make managing a camp schedule with thousands of participants nearly impossible.

As stated earlier, the North Dakota State Board of Higher Education has not yet reviewed this bill and does not have a position at this time. That standing, the North Dakota University System Office respectfully requests a Do Not Pass on Engrossed HB 1298, or for the committee to consider amendments to fully exempt the campuses in order to remain in compliance with current federal regulations, avoid unnecessary financial risk, meet the requirements of athletic association guidelines, and avoid creating barriers to athletic competition participation for all student athletes. I thank you for your consideration and I stand for your questions.