



HB 1489

House Human Services Committee

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Chair Weisz and House Human Services 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 and its eleven institutions in opposition to HB 1489. The bill would open campuses to an unlimited liability to litigation by aggrieved parties; require our campuses to contradict Title VII and Title IX federal regulations which could result in a loss of federal funding and financial aid; align incongruently with NCAA, NAIA, and NJCAA guidelines; create an unenforceable step of vetting for all intramural and club sports on our campuses; and 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 50+ years, sustained a major shift in May 2020, and will see a new update in May of 2023. However, the most recent change occurred in January of 2021.

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.

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/>

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 of court decisions from the last few years. The possible costs of time and money from 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.

Litigation could be the least of the University System's concerns. If campuses do not comply with Title IX regulations as this bill directs, the campuses are in violation of federal law. As such, all financial aid, scholarships, research grants, and other federal support could be wholly jeopardized. The spirit of this bill aims to remove athletic competition from a population that currently does not exist on our collegiate teams, but if this bill were to pass, the North Dakota State Legislature could be responsible for stripping profound financial support to all students and institutions.

At a glance, annually, the North Dakota University System receives 20% of its funding from the state; 31% from tuition; 17% from grants and contracts (federal money); and 32% is covered through auxiliary funds, for a total of \$1.4 billion dollars. More acutely, according to the numbers from 2021-2022, over 20,600 North Dakota University System students received \$196.1 million in federal grants and loans. Statewide, if you count the private and tribal institutions, that figure increases to \$227.8 million. The North Dakota University System respectfully requests the committee consider the wide-reaching impacts this bill could have on the finances of our students, if financial aid programs were compromised.

I would like to refer you to the guidelines and policies that direct 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. The NCAA released a new set of guidelines on transgender students' participation in January that borrowed many of the rules from the United States Olympic and Paralympic

Committees. The organization adopted its first set of guidelines around transgender students' involvement in sports in 2011, a time when virtually no colleges had adopted policies on the matter. Under the new guidance, which will be fully implemented by August 2023, transgender athletes at NCAA member colleges will have to regularly report their testosterone levels and provide additional documentation that they meet specific standards depending on their competitive sport.

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 bill does not explain how to resolve.

Finally, the language in section two of the bill places the campuses in an unusual predicament. All NDUS campuses host camps and athletic groups during the summer months and throughout the year. 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 on a short-term contract? 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, some from out of state, nearly impossible.

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 simple reason that this bill puts all federal funding for our students at risk, creates mandatory tracking of individuals that we do not have the capacity to perform, and this bill addresses a concern already handled by the athletic conferences that the campuses maintain membership, the North Dakota University System Office respectfully requests a Do Not Pass on HB 1489. I thank you for your consideration and I stand for your questions.