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## Engrossed HB 1489

Senate Judiciary Committee

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Chair Larson and Senate Judiciary 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 Engrossed 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; and create an unenforceable step of vetting for all intramural and club sports on our campuses which would lead to unintended consequences, for which, we respectfully request an amendment.

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.<sup>1</sup> 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.

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<sup>1</sup> <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 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. Further, things get tricky when the state legislature intervenes on federal regulation that is a moving target. The Department of Education will release updates to Title IX regulations in May of this, after this body gavel out sine die. If the implications of this bill put us in further conflict with Title IX regulation, what are the campuses to do?

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 polices 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.

In the current language, 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. The sponsors of this bill stand on the platform that they want to maintain open access to athletics for women. If this bill were to pass with the current language encompassing intramurals, unintentionally, this bill would restrict access to athletics to women on our campuses. I'll walk you through it:

Intramural programs are handled differently on each of our campuses, but many of them operate very casually, as they are just that- casual, easy ways to have fun with your peers. This provision would require all campuses to verify the sex-assigned at birth for all participants. Since that is not logistically possible under our current operations, many campuses would have to designate all intramural teams as “open”, meaning anyone can sign up for any team to err on the side of caution in order to remain compliant with the language in the bill. This would guarantee that women would be forced to compete against men and we would definitely see a decline in participation from women in intramural activities. The leagues from basketball to rugby would be dominated with male enrollment; edging out female competitors and eventually, discouraging women from signing up for participation.

To make this a bit more real, here are some numbers. In the Fall of 2022, one of our institutions had 2361 students participate in 18 different intramural activities. 1700 men; 661 women. The four activities with the most students (1974 students or 84%; 1403 men and 571 women) were divided into men's, women's, Greek, and Coed leagues. The other 14 activities were open, meaning anyone could sign up and participate and no particular quotas or ratios needed to be met. The combined participation of those 14 activities was 387 students, and dominated by a male presence (297 men and 90 women). If this bill passes, campuses such as these would be forced to make all intramurals open. If the sponsors of this bill do not want women to be forced to compete against men, the unintended consequence of the bill's current language would actually force women to compete with men in intramural recreational leagues. Because of privacy limitations, record keeping, staffing, and simple

logistics, there would be no way for an institution to maintain separate leagues and guarantee that all participants are enrolled on teams that match their sex assigned at birth. If the intention of the bill is to expand female participation and access, the North Dakota University System Office strongly recommends the committee consider amending out any reference or inclusion to intramural athletic activities in order to allow men and women to compete in intramurals as they currently are. We have fielded no complaints from how intramurals are currently run and we ask that the committee take that to heart.

The simple reasons that this bill puts all federal funding for our students at risk, addresses a concern already handled by the athletic conferences that the campuses maintain membership, and creates mandatory tracking of individuals that we do not have the capacity to perform, the North Dakota University System Office respectfully requests a Do Not Pass on Engrossed HB 1489. The University System fully understands that other states have enacted similar legislation and have not felt negative consequences, but we ask this governing body to think critically about asking one of your state entities to knowingly violate federal regulation for a threat that does not exist and does not have a negative effect on our players, teams, or institutions. If you choose to pass the bill, we respectfully ask for your consideration of amending the language around intramurals and other sporting activities. I thank you for your consideration and your service to the state and I stand for your questions.