

# **TALKING POINTS FOR STATE LEGISLATURE TESTIMONY**

## **INTRODUCTION**

- My name is Ray Hacke, and I'm an attorney with the Pacific Justice Institute's Center for Public Policy
- I stand before the committee today in my capacity as a constitutional law attorney to explain why House Bill 1298, if enacted, would survive a legal challenge

## **EQUAL PROTECTION CLAUSE**

- The U.S. Constitution's Equal Protection Clause applies whenever a state, or one of its agencies, treats distinct classes of similarly situated persons differently
  - Such agencies include high school athletic associations
- Actual girls, and boys who say they're girls, are **NOT** similarly situated
  - Males who self-identify as female have a different biological makeup than actual females – in that regard, they are the same as males who don't identify as female
  - Those males thus have distinct physiological advantages over actual females – and one need only look at the sport of track and field to see this:
    - In Connecticut, two male sprinters have rewritten the state high school record books: 17 of the fastest times in girls' track history now belong to boys
    - Here in North Dakota, a look at the state records for boys and girls shows that:
      - The top boys' times in the 100- and 200-meter dashes are nearly two to three full seconds faster than the top girls' times – and these are races where victory is decided by tenths of a second
      - The boys' high jump record is 6 feet, 10¼ inches – no girl has ever cleared 5-9¼. That's a difference of more than a full foot.
      - The boys' shot put record is nearly 16 feet longer than the girls' – and that's with girls throwing a lighter shot (8 pounds, compared to 12 for boys)
      - The boys' discus record is more than 20 feet longer than the girls' – again, with the girls throwing a lighter discus (roughly 4 pounds for boys, 2 for girls)
- On a national level:
  - The NCAA crowned its first biologically male women's hurdles champion in 2019; in 2017, when competing against fellow males, this runner barely cracked the top 400 in NCAA Division II
  - The University of Montana's Jonathan Eastwood – who now goes by June – earned a Big Sky Conference Athlete of the Week award after beating all but one of his female competitors at a cross country meet in 2019
    - This is a guy whose best finish at the Big Sky championships, when competing against other males, was 24<sup>th</sup>
  - In tennis, Serena and Venus Williams – arguably the two top female players of all time – once bragged they could beat any male player not ranked in the top 200
    - The player ranked No. 203 took them up on the challenge – and beat them handily

- Neither Venus nor Serena won more than two sets against him
- Furthermore, *The Journal of Medical Ethics* published a study in 2019 demonstrating that even males who undergo hormone treatments to “transition” do not lose much in the way of muscle mass or power and can easily rebuild those things through training
- It is called the “Equal Protection Clause,” not the “Special Protection Clause” – states need not treat that which is different in fact as though it is the same in law
  - It is an undeniable scientific fact that a boy who says he’s a girl is quite different from an actual girl
  - Gender-based classifications are permissible under the Equal Protection Clause when they serve important governmental objectives, are substantially related to those objectives, and reflect reasoned judgments rather than prejudice
    - Remedying past discrimination against women in educational settings, including interscholastic sports, is an important governmental objective
    - Given the biological advantages males have over women, House Bill 112 is substantially related to the objective of giving girls and women a meaningful opportunity to not only participate, but be competitive – if not victorious – in interscholastic athletics
- The state would thus do no wrong in protecting girls’ sports via House Bill 112

## **TITLE IX**

- Title IX – which will celebrate its 50<sup>th</sup> birthday next year – was enacted specifically to advance opportunities for biological women
  - To an overwhelming degree, it has accomplished this
  - Before Title IX, approximately 3 percent of girls in the United States participated in sports; since its enactment, that number has increased to 40 percent – two in five girls
    - The number of girls competing in college has increased 600%
    - At the high school level, the number is 900%
- I’d like to call this committee’s attention to two court cases involving Title IX:
  - *Mansourian v. Regents of the Univ. of Calif., Univ. of Calif. at Davis*
    - In that case, there were four female wrestlers at the University of California at Davis – an NCAA Division I school near Sacramento – who were cut from the school’s wrestling team
    - The women were then given the opportunity to win back their spots, assuming that they could defeat men in their respective weight classes using men’s collegiate rules
    - The U.S. Court of Appeals for the Ninth Circuit held that by requiring female wrestlers to compete against and prevail against men, UC Davis changed the conditions under which they could participate in college wrestling; this violated Title IX
    - Allowing transgender males to compete as females fundamentally changes the circumstances under which women can compete – it relegates the overwhelming majority of women to second-class status as runners-up, cheerleaders, benchwarmers, and spectators in their own sports

- *O'Connor v. Bd. of Educ. of Sch. Dist. 23*
  - The U.S. Supreme Court held that “without a gender-based classification in competitive contact sports, there would be a **substantial risk** that boys participating in the girls’ programs would dominate those programs and deny girls an equal opportunity to participate in interscholastic events”
  - “Substantial risk” – This means letting boys compete in girls’ sports will all but certainly relegate girls to second-class status in their own sports
    - The overwhelming majority of girls will have to settle for runner-up status at best or being benchwarmers, spectators, or cheerleaders at worst
- Allowing biological males to compete against girls and women would thus completely undermine the advancement of opportunity that Congress enacted Title IX to create

## **CONCLUSION**

- One final note: Transgender athletes are NOT being denied the opportunity to compete
  - They are demanding to be able **dictate the terms** on which they can compete
  - Essentially, they’re asking the legislature to ignore biological realities in order to placate their feelings
- A male who says he’s female is not, in fact, female – he might not want to face that fact, but that doesn’t make it any less true
  - A heavyweight wrestler who self-identifies as being 100 pounds lighter doesn’t get to move down several weight classes because there is scientific evidence that he doesn’t belong in that classification
  - The same applies to transgender athletes: The state should not overlook biological realities to placate their feelings – as harsh as that might sound
- If it’s privacy you’re concerned about, athletes already forfeit a measure of privacy by choosing to compete
  - They have to take physical exams as a condition of competing
  - They have to shower and change alongside teammates in locker rooms
  - Occasionally, they may have to take drug tests
  - No privacy interest is thus invaded
- Transgender advocates would have you believe psychology matters more than biology. Nothing could be further from the truth. The line has already been drawn in the right place: Segregating sports by sex protects the right of girls and women to meaningfully compete in interscholastic athletics. This body should make sure that line isn’t redrawn by enacting House Bill 1298. Thank you.