STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 25, 2020

TRANSMITTED VIA EMAIL

The Honorable Ilana Rubel
Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street, Room E329
Boise, ID 83702
irubel@house.idaho.gov

Re: Request for legislation review of H.B. 500 – Our File No. 20-68641

Dear Representative Rubel:

You requested an analysis of H.B. 500 that would amend Title 33, Idaho Code, with the addition of a new Chapter 62 to be known as the "Save Women's Sports Act." I have concerns about the defensibility of the proposed legislation, as detailed below.

I. OVERVIEW OF DRAFT LEGISLATION

The draft legislation would require all athletic teams or sports associated with Idaho public schools, including higher education institutions that are members of the NCAA, NAIA, or NJCCA, to be designated as male, female, or coed "based on biological sex," and prohibit "students of the male sex" from participating in any team or sport designated for females. The draft legislation does not define the term "biological sex," but states that sex may be "established" through a doctor's opinion that indicates the person's sex based on three factors: the student's "internal and external reproductive anatomy," the student's "normal endogenously produced levels of testosterone," and "an analysis of the student's genetic makeup."

The legislation would further prohibit any government entity, licensing or accrediting organization or athletic association from taking adverse action against a school for maintaining separate teams or sports for students of the female sex. It would also create a private cause of action for students and schools that that suffer "direct or indirect harm" from males and non-transgender females

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participating in women's sports, or any adverse actions from schools or athletic associations stemming from complying with or reporting a violation of the law. In essence, it would create a "whistleblower" provision.

The draft legislation includes a detailed statement of legislative findings and purpose, complete with citations to evidence supporting the athletic advantage males and transgender females have over non-transgender females.

Throughout this letter, the following terms will be used: "transgender" refers to someone who presents as a gender different than the sex assigned at birth, whether through medical interventions (such as operations or hormone therapy) or not; "transgender male" refers to a person assigned the female sex at birth who presents as male; and "transgender female" refers to a person assigned the male sex at birth who presents as female. "Gender identity" refers to an individual's concept of himself or herself as male or female. "Intersex" refers to someone born with a reproductive or sexual anatomy that does not fit the typical definitions of female or male.

II. ANALYSIS

A. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment requires that the government treat similarly situated individuals alike unless the government can show that a particular exception to this rule meets the relevant legal standard.[1] The applicable legal standard depends on the class of individuals that would be treated differently.[2]

Courts have found that governmental actions distinguishing between transgender and non-transgender individuals is a type of sex-based discrimination.[3] As such, the Ninth Circuit Court of Appeals has applied "heightened scrutiny" in equal protection cases when an individual is treated differently because of his or her status as transgender.[4]

In order to treat transgender individuals differently than non-transgender individuals without running afoul of the U.S. Constitution, "the government must advance an important governmental interest, the [law] must significantly further that interest, and the [law] must be necessary to further that interest" (i.e., a less restrictive law could not achieve the government's interest).[5]

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[1] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985).
[2] *See id.* at 439–41.
[3] *E.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 285–86 (W.D. Pa. 2017).
[4] *See* Karnoski v. Trump, 926 F.3d 1180, 1199–1202 (9th Cir. 2019); F.V. v. Barron, 286 F. Supp. 3d 1131, 1144–45 (D. Idaho 2018).
[5] Karnoski, 926 F.3d at 1200.

The draft legislation treats at least two groups differently than non-transgender female students: neither males nor transgender females may participate in women's sports.[6] This difference in treatment creates two separate potential equal protection concerns.

1. Men can be excluded from women's sports in certain circumstances.

Courts have already found that men may be excluded from women's sports where the evidence demonstrates a difference in athletic ability between men and women and that allowing men to participate in women's sports would significantly limit women's opportunities to compete.

The Ninth Circuit Court of Appeals discussed at length the interest of an Arizona sports authority in not allowing a boy to participate on a girls' volleyball team in the 1982 case Clark ex rel. Clark v. Arizona Interscholastic Association.[7] The court recognized the appropriateness of "taking into account actual differences between the sexes, including physical ones" so long as the policy does not rely on "archaic and overbroad generalizations" or "old notions."[8] The court further explained that the government has a legitimate and important interest in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."[9]

The court went on to decide whether excluding boys from girls' volleyball teams was substantially related to those important interests. The court considered the evidence presented to it and was persuaded "that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished."[10] The Court therefore found that the policy of excluding boys from competing on girls' volleyball teams was substantially related to "the goal of redressing past discrimination and providing equal opportunities for women."[11]

The court explained that "the exclusion of boys is not *necessary* to achieve the desired goal," and that there were other ways to more fully equalize athletic opportunities: "For example, participation could be limited on the basis of specific physical characteristics other than sex, a separate boys' team could be provided, a junior varsity squad might be added, or boys' participation could be allowed but only in limited numbers."[12] Nevertheless, given the evidence provided to the court regarding the impact integrating boys into the girls' team would have on the equality of athletic opportunity, the policy at issue was found to be constitutional.

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[6] Depending on how the requirements for establishing a student's sex are interpreted, transgender males may also be treated differently from non-transgender females. As discussed below, the lack of clarity in this legislation leaves it open to challenge.
[7] 695 F.2d 1126, 1127 (9th Cir. 1982).
[8] *Id.* at 1129.
[9] *Id.* at 1131.
[10] *Id.*
[11] *Id.*
[12] *Id.*

Based on Clark and the draft legislation's legislative findings and purpose, the draft legislation is likely constitutional with regard to excluding men from women's sports.

2. It is unclear whether transgender females may be excluded from women's sports.

The issue of a transgender female wishing to participate on a team with other women requires considerations beyond those considered in Clark and presents issues that courts have not yet resolved.

First, as observed in Clark, the government interest undergirding the separation of male and female sports is promoting equality of opportunity to participate in sports.[13] I have three noteworthy concerns regarding whether this legislation achieves that interest.

First, would transgender females have a meaningful opportunity to participate on men's or coed teams? The draft legislation does not specifically speak to how transgender females would be allowed participate in sports in Idaho, but it is assumed that they would be allowed to participate in men's or coed sports. In order to defend this legislation, we would need evidence showing that transgender women—who may undergo treatment to reduce testosterone and may consequently experience a change in athletic ability—would have a meaningful opportunity to participate on men's or coed teams. If they could not meaningfully play on men's teams, there would need to be meaningful coed teams, which are not common at the school level.

Second, are there sufficient transgender females desirous of playing women's sports to displace females to a "substantial extent?" The court in Clark was provided evidence of the physiological differences in average males and females that showed how males would displace females "to a substantial extent" if allowed to compete on female's teams. Although the ratio of males to females is roughly 1:1, transgender students are a very small minority of the population. In order to defend the draft legislation from an Equal Protection challenge, the State would need to provide convincing evidence that transgender female athletes displace non-transgender female athletes "to a substantial extent." That evidence would need to overcome courts' disapproval of "archaic and overbroad generalizations"[14] about the abilities of transgender and non-transgender females. While the draft legislation's findings include citations to evidence showing that transgender females tend to have an athletic advantage over non-transgender females from a theoretical standpoint, it would be helpful to supplement these with evidence showing that non-transgender female athletes are actually displaced by transgender female athletes to a substantial extent.

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[13] *Id.* at 1132.

[14] *Id.* at 1129. *See also* Haffer v. Temple Univ. of the Com. Sys. of Higher Educ., 678 F. Supp. 517, 524 (E.D. Pa. 1987), on reconsideration *sub nom.* Haffer v. Temple Univ. of Com. Sys. of Higher Educ., No. CIV.A. 80-1362, 1988 WL 3845 (E.D. Pa. Jan. 19, 1988) ("Although differential treatment, with respect to a particular sport, is permitted when the record reveals relevant physical differences . . . overbroad and unsupported generalizations regarding the relative athletic abilities of males and females will be rejected.").

Third, is separation by sex absolutely necessary to ensure competition? As the court in Clark observed, athletes could instead be required to compete with those with similar physical characteristics. Because of such alternatives, it would be helpful to have evidence that there is an "exceedingly persuasive justification" for a strict sex-based separation, such as evidence that other schools in other states who would compete with Idaho schools separate their teams by sex, and that athletic associations do not allow a men's team to compete against a team with women, for example.

Ultimately, there is uncertainty in the law as to whether such provisions would be upheld by a reviewing court. As discussed further below, the U.S. Supreme Court will soon be deciding a case regarding whether Title VII's prohibition on discrimination on the basis of sex, which may provide some degree of guidance on this issue. In any case, any lawsuit would be highly fact-intensive.

B. The provision in the draft legislation regarding how a student's sex may be established is likely vulnerable to court challenge.

The draft legislation divides high school and collegiate sports teams by sex (in addition to coed), and provides that males are excluded from women's sports "based on biological sex." The draft legislation does not define the term "biological sex." This term likely has an ordinary meaning with relation to reproductive organs and genetic makeup. However, the lack of a definition combined with a provision setting specific criteria for "establishing" one's sex seems to suggest that sex is not defined under the act, but rather is established in the way the legislation provides. This suggests that the team an athlete belongs to is determined by how that athlete establishes his or her sex. There are concerns with the process that would be created by this proposed legislation.

1. The "dispute" process is unclear.

The legislation provides that if a student's sex is "disputed," the student "may establish his or her sex" through a physician's statement based on specific criteria. The draft legislation does not provide who may dispute a student's sex, what it means for a student's sex to be "disputed," or to whose satisfaction the student's sex must be "established." Given the risk that the "dispute" process could subject student athletes to invasive examination and require them to provide highly intimate information on demand, I recommend that the legislation define the term "biological sex" and clarify the "dispute" process.

These concerns are compounded by the provision in the draft legislation granting a student a private right of action against a retaliating school or organization that takes adverse action against the student for reporting a violation of the act. For example, the legislation theoretically allows a student to claim in bad faith that a female athlete is actually a male participating in women's sports, thereby "disputing" the athlete's sex and requiring that athlete to undergo invasive testing to establish her sex. A school official could know that the student is making the claim for no other reason than to harass the athlete, but the school would be prohibited from taking action to punish

or discourage such behavior because the student could be interpreted as reporting a violation of the rule that males are not allowed to participate in women's sports.

2. Requiring gender identification for some, but not all, is constitutionally problematic.

The draft legislation requires some, but not all, student athletes to "establish" their sex. As this is not a universal requirement for all student athletes, it appears that this requirement to "establish" one's sex is targeted toward transgender and intersex athletes. It is much more likely that a transgender or intersex athlete's sex will be "disputed" than a non-transgender athlete. Therefore, it is much more likely that a transgender or intersex athlete could be subject to harassment and invasive procedures to establish their sex than others.

This disparate treatment, which has a likely disparate impact, raises equal protection concerns that would require an exceedingly persuasive justification to overcome. The government's interest in ensuring competition and opportunities for women to compete in sports would almost certainly fail to justify this disparate treatment and impact because requiring every athlete to "establish" his or her sex would substantially advance the same interest without impacting transgender individuals more than others. One alternative could be to require physicals of all athletes that include a designation of sex by the reviewing medical practitioner. In this way, no athlete would be singled out for specific scrutiny.

3. The factors that are mandated to establish a student's sex raise concerns.

The draft legislation requires a physician to determine sex based on factors that are not supported in the legislative findings as linked to unfair advantage in competition. The legislative findings include evidence that testosterone levels are linked to athletic ability, and, therefore, affect equality of athletic opportunity. However, these findings do not support the idea that reproductive anatomy or an athlete's genetic makeup give athlete athletic advantage. It would be helpful to include findings that support all of the criteria mandated for determining sex.

C. Title IX case law in this area is unsettled, but clarification may be forthcoming.

This draft legislation raises Title IX concerns. Title IX provides: "No person in the United States shall, on the basis of 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"[15] Many federal courts have held that discrimination against transgender individuals

[15] 20 U.S.C. § 1681(a).

constitutes discrimination on the basis of sex, reasoning based on Title VII cases that it is a kind of "gender stereotyping" that Title IX prevents.[16]

The U. S. Supreme Court is currently deciding whether discriminatory conduct against individuals based on their transgender status is discrimination based on sex and thus prohibited by Title VII. Oral argument before the Court was held on October 8, 2019.[17] The Idaho Attorney General submitted an amicus brief, with 14 other states, arguing that the language of Title VII prohibiting discrimination on the basis of sex does not extend protection to transgender individuals, and that to interpret Title VII to extend that protection usurps the role of Congress. Because courts interpret the word "sex" in Title IX by looking to how it is interpreted under Title VII, the Supreme Court's upcoming ruling in the Title VII cases could determine whether Title IX prohibits discrimination on the basis of transgender status.

At this time there is no controlling law to determine definitively whether the draft legislation would implicate Title IX. The U.S. Supreme Court's decision in the referenced Title VII cases will hopefully better allow this office to analyze the defensibility of the proposed legislation against a Title IX challenge. For this reason, it may be advisable to hold this proposed legislation until the next legislative session.

D. It is unclear whether the State's interests in ensuring fair competition justify the intrusion of privacy.

In some contexts, courts have found that a person has a legitimate expectation of privacy in being free from an unwanted medical examination at the insistence of the government, and this interest is protected by the Fourth Amendment.[18] Medical examinations that are not conducted as part of a criminal investigation are subject to a balancing test, in which the court weighs the individual's privacy interests against the government's interest in requiring the examination.[19]

Applying the balancing test requires a factual, context-specific inquiry.[20] Consequently, it is difficult to predict the outcome in a novel situation such as a required examination under H.B. 500. A court would likely look to factors that would show the nature and the strength of the State's interest in requiring a student to prove their sex through medical opinion. This would be balanced against the specific circumstances of the particular student, taking into account factors that would show the degree of the student's expectation of privacy in personal medical details, such as the

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[16] *E.g.*, Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046–50 (7th Cir. 2017); Grimm v. Gloucester Cty. Sch. Bd., No. 4:15CV54, 2019 WL 3774118, at *4 n.4 (E.D. Va. Aug. 9, 2019); Prescott v. Rady Children's Hosp.-San Diego, 265 F. Supp. 3d 1090, 1099–100 (S.D. Cal. 2017).

[17] The three cases on the issue are called Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda, and R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.

[18] Yin v. State of Cal., 95 F.3d 864, 869–71 (9th Cir. 1996).

[19] Id. at 869–70.

[20] Eastop v. Bennion, No. 1:18-CV-00342-BLW, 2019 WL 5764672, at *11 (D. Idaho Nov. 4, 2019).

precise nature of the student's internal and external sexual anatomy, hormone levels, and DNA. It is unclear whether it would be an unconstitutional invasion of privacy to require a student to establish his or her sex through a medical examination when sex is disputed, as a requirement for participating in school sports, in order to protect an interest in providing non-transgender women the opportunity to compete.

E. Regulating NCAA and other national sports associations' activities raises a potential Constitutional concern under the Commerce Clause.

By requiring the NCAA and other national sports associations to allow Idaho to determine who is eligible for participation on a women's sports team, H.B. 500 would regulate the way the associations conduct investigations, as we well as how they regulate fair competition. This regulation of nationwide organizations could have an impact on their operations outside Idaho, and therefore could raise concerns under the Commerce Clause.

In NCAA v. Miller, the NCAA successfully argued that a Nevada statute requiring certain additional due process protections when investigating Nevada athletes and institutions violated the Commerce Clause. The Ninth Circuit Court of Appeals explained that because the NCAA's purpose was to apply rules evenly to ensure fair competition among numerous institutions in over 40 states, in order to comply with Nevada's law it would have to extend the same additional due process procedures in all cases, including those with no connection to the State of Nevada. Because the statute would have a regulatory effect over conduct that affected interstate commerce and occurred wholly outside the State of Nevada, this statute exceeded the limits of Nevada's authority and ran afoul of the Commerce Clause.[21]

The NCAA, or other athletic associations, could argue that H.B. 500 is unconstitutional because in order to fairly regulate sports across the country, it would need to apply Idaho's rules of eligibility to all women's teams across the country. It could argue that it would need to apply Idaho's regulations to conduct outside of the State of Idaho—like the unconstitutional statute in Miller. This raises the potential that if an institution attempted to bring an action to protect itself from an investigation by an athletic association, the athletic association could attempt to have the statute declared unconstitutional under the Commerce Clause.

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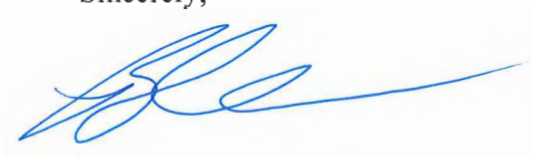
[21] Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1993).

I hope you find this analysis helpful. Please contact me if you have any additional questions.

Sincerely,



BRIAN KANE
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BK:kw