

January 25, 2021

Dear Chairman Weisz and Members of the House Human Services Committee:

The ACLU of North Dakota strongly opposes House Bill 1298, legislation that is deeply harmful to transgender young people in North Dakota who deserve to be treated fairly by their government and to live free from discrimination on the same terms as their peers.

We oppose HB 1298 for four main reasons:

1) It's unconstitutional.

A similar bill to HB 1298 passed in Idaho in 2020. It was the first of its kind in the country. As promised during debate of the bill, civil rights organizations quickly challenged the law's constitutionality in the case *Hecox v. Little*. After months of litigation, a federal judge sided with Ms. Hecox, a transgender athlete, and held that the law was unconstitutional.

The ruling was grounded in the Equal Protection Clause of the Fourteenth Amendment — the idea that all similarly situated people be treated alike. The court determined the Idaho law treated transgender young people differently than other young people solely because they were transgender. Specifically, it allowed cisgender athletes to compete on athletic teams consistent with their gender identity but prohibited transgender athletes from doing the same.

If passed, HB 1298 will face the same fate: immediate and expensive litigation paid for by taxpayers, only to be struck down. And this has occurred on previous occasions to laws passed by this body in recent years. But it need not be this way. Instead of continuing down the same risky path, this committee should reconsider its approach, defeat this bill, and focus instead on the many more important issues facing our state.

2) It violates federal law.

Even if HB 1298 is somehow found to be constitutional, it still violates federal law. First, the Department of Education has used its Title IX authority to investigate schools alleged to be illegally discriminating based on sex. Since HB 1298 does just that, an investigation is all but certain if it passes.

Second, a recent executive order directs federal agencies to be on the lookout for the exact discrimination created by HB 1298. It specifically clarifies: "children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports." Passing HB 1298 would thus be in direct violation of the order.



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This is bad for North Dakota because violation of federal law could cause the state to lose its federal funds for education, which in 2019 was more than \$141 million. And this is not some empty threat. In 2016, the Department of Justice sued North Carolina over a bill similar to HB 1298 and threatened to pull federal funding because of the law's targeting of transgender youth in schools.

The same risk will be present if HB 1298 passes.

3) It will hurt North Dakota collegiate athletics.

The broadness of HB 1298 will also cause issues with the NCAA. This is because the NCAA specifically allows and encourages transgender athletes to participate on teams that align with their gender identity. Thus, if HB 1298 becomes law, it will set up a scenario North Dakotans are all too familiar with — a possible showdown with the NCAA.

The last time this happened, the University of North Dakota founds itself on the losing side of a battle over its mascot and nickname. If history has taught our state anything, it's that picking a fight with the NCAA is an expensive mistake. And so it begs the question of every person on this committee: do you want to do this at the risk of jeopardizing UND hockey or NDSU football? The answer is obviously no.

4) It will hurt North Dakota's economy.

Besides threats of adverse action by the federal government, passing HB 1298 will also trigger negative responses from the business community. Examples of such backlash are present across the country.

In Indiana, a bill that discriminated against LGBTQ people cost the state millions of dollars in lost revenues after businesses boycotted the state. Similarly, in North Carolina a bill that targeted transgender people's ability to use the bathroom of their choosing cost the state over \$3.75 billion from boycotts. Finally, in South Dakota bills like HB 1298 have consistently been rejected out of fear of their effect on the state's financial services industry.

The message from these examples is clear — passing HB 1298 *will* be harmful to North Dakota. First, it may cause companies to stop doing business in the state. But second, and more important, it may cause companies thinking about doing business in the state to reconsider. Given our state's current fragile economy, North Dakotans can afford neither.

For so many reasons, HB 1298 is bad for North Dakota. We urge a do not pass.

Sincerely,

Dane DeKrey
ACLU of North Dakota