

LEGAL REVIEW NOTE

LC#: HB 112 Introduced Copy, as of
January 7, 2021

Short Title: Require interscholastic athletes
to participate under sex assigned at
birth

Attorney Reviewer: Todd Everts
Laura Sankey Keip

Date: January 7, 2021

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

HB 112, as drafted, may raise potential constitutional concerns associated with Article X, section 9(2)(a), of the Montana Constitution. Section 9(2)(a) provides that “The government and control of the Montana university system is vested in a board of regents of higher education which shall have *full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system* and shall supervise and coordinate other public educational institutions assigned by law.” (Emphasis added).

According to the Montana Supreme Court, this constitutional provision grants a high degree of independence and autonomy to the Board of Regents, subject only to the Legislature's power of appropriation. *Board of Regents v. Judge*, 168 Mont. 433 (1975). The Court in *Judge* further noted that "Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education." *Id.* at 454. In that case, the Court evaluated a number of statutory restrictions imposed on the university system, including a provision that limited salary increases for certain university officials. The Court held that this statute "specifically [denied] the Regents the power to function effectively by setting its own personnel policies and determining its own priorities" and held that limitation to be unconstitutional. *Id.*

As drafted, section 2(1) of HB 112 directs public and certain private elementary, high school, and postsecondary institutions, including units of the Montana university system, to expressly designate their interscholastic, intercollegiate, intramural, and club athletic teams as male, female, or coed. Additionally, section 2(2) prohibits male students from participating on athletic teams or in sports designated for female students. These provisions in HB 112 may raise potential questions about whether this bill conforms with Article X, section (9)(2)(a), of the Montana Constitution.

Requester Comments:

It is my opinion that the legal review stating that only the Board of Regents has jurisdiction over this subject is in error. It is my belief that Title IX of the 1972 Federal Education Amendments is being violated by the practice of transgender men participating in women's sports thus violating the equal opportunity athletic access that Title IX intends. Consequently, it is the Legislature's Constitutional duty to rectify this egregious violation of Federal law by a State bureaucracy.