

Written Only Testimony in Support of S.B. 255

Brittany Jones

Senate Education Committee

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Chair Baumgardner and members of the committee, my name is Brittany Jones. I am an attorney and the Director of Policy and Engagement for Kansas Family Voice. We represent thousands of members in Kansas who are concerned about their ongoing ability to ensure their children’s safety both physically and mentally when they travel for school trips. We support S.B.255 because it simply ensures that schools will continue to respect single sex designations for school trips.

S.B. 255 is supported by years of caselaw as well as Title IX. S.B. 255 is both good law and just common-sense policy.

I. S.B 255 is consistent with Supreme Court caselaw

S.B. 255 is consistent with both the sex discrimination as analyzed under the Equal Protection Clause and Title IX. Title IX and the Equal Protection clause as it pertains to sex discrimination are very unique areas of constitutional law, and it is important to understand why they are different from other areas of law.

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹ And it is well settled that sex-based classifications must satisfy intermediate scrutiny.² Intermediate scrutiny requires the government to show that the classification serves important governmental objectives and that the government action is substantially related to the achievement of those objectives.³

At its core the Equal Protection clause in sex discrimination cases asks whether the distinctions in sex created by the governmental action substantially matter. The separation can’t just be for stereotypical or compensatory purposes, but it has to be to serve an important government interest.⁴

Gender-based classifications that favor one sex can be justified if they intentionally and directly assist members of the sex that is disproportionately burdened.⁵ Even Ruth Bader Ginsburg said as a professor, “[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.”⁶ There are spaces where having separate spaces matters.

¹ U.S. Const. amend. XIV, § 1.

² See *United States v. Virginia*, 518 U.S. 515 (1996).

³ *Id.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁴ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁵ See *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

⁶ *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21.

The Court has consistently pointed out that the “two sexes are not fungible.”⁷ It is important to remember, “Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.”⁸ It should be noted that this is a different legal lens and therefore requires different analysis than in racial discrimination lawsuits that require a strict scrutiny analysis, the highest level of scrutiny.⁹

II. S.B. 255 is consistent with Title IX.

Title IX was signed into law 1972 to ensure opportunities for women who had few educational opportunities up to that point.¹⁰ The language states, “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.”¹¹ It impacts any educational arena that receives federal funding. This includes sexual assault on educational campuses, equal access to educational opportunities, athletic opportunities, and protects women from retaliation when utilizing the reporting structure just to name a few of the areas that are impacted by Title IX.¹²

When it comes to Title IX, the regulations for years have allowed for separate living facilities,¹³ separate toilets, locker rooms, and showers.¹⁴ And as has already been mentioned, it allows for separate athletic teams for men and women.¹⁵ Title IX has always been understood to protect the disadvantaged class. Courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts.¹⁶

A federal court judge enjoined President Biden’s proposed rules that would have reversed this historic understanding of Title IX.¹⁷ Recently, the Eleventh Circuit issued a ruling upholding a school bathroom policy that required students to use the bathrooms that complied with their biological sex. The Court held that this did not violate the Equal Protection Clause or Title IX.¹⁸ In that instance, after considering many different options and the complexity of the questions around this issue, the School Board decided to maintain its bathroom policy that separates bathrooms on the basis of biological sex while providing an accommodation by offering sex-neutral bathrooms.¹⁹ The Court looked at the original definition of “sex” in Title IX and concluded that separating bathrooms in this manner did not violate Title IX.

⁷ *Ballard v. United States*, 329 U.S. 187 (1946).

⁸ *United States v. Virginia*, 518 U.S. 515 (1996)

⁹ See *Johnson v. California*, 543 U.S. 499 (2005); *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2015).

¹⁰ Dep’t of Justice, Equal Access to Education: Forty Years of Title IX (June 23, 2012)

¹¹ Dep’t of Justice, Title IX, <https://www.justice.gov/crt/title-ix#C.%C2%A0%20Covered%20Education%20Program%20or%20Activity>.

¹² *Id.*

¹³ 20 U.S.C. § 1686

¹⁴ 34 C.F.R. § 106.33

¹⁵ 34 C.F.R. § 106.41

¹⁶ *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993)

¹⁷ *Tennessee v. United States Dep’t of Educ.*, 2022 U.S. Dist. LEXIS 125684 (E.D. Tenn. 2022).

¹⁸ *Adams v. Sch. Bd. of St. Johns Cnty.*, 2022 U.S. App. LEXIS 35962 (11th Cir., 2022).

¹⁹ *Id.*

This bill isn't merely speculating about encroachments into women's spaces. We have already seen instances in Kansas where women's spaces have been violated. In Eudora, a biological female was forced to share a room with a biological male on a school trip.²⁰

Title IX was written to respond to real problems that real women faced and still face today. It provides the legal framework necessary to ensure space for women in our society. There are ongoing legal debates that are attempting to change these original words into something that would be unrecognizable to the drafters. We need to reaffirm the importance of Title IX and the long term benefits it has provided to women all across our country.

S.B. 255 affirms what we all know to be true & what the courts have affirmed, some spaces need to be kept separate for privacy purposes. This protects both sexes in the most intimate & private spaces. This is the very least our kids deserve!

I ask that you pass out S.B. 255 favorably for passage. Thank you!

²⁰ Patrick Richardson, Eudora girl forced to share a bed with biological male on school-sponsored overseas trip, The Heartlander, May 17, 2022, <https://heartlandernews.com/2022/05/17/eudora-girl-forced-to-share-a-bed-with-biological-male-on-school-sponsored-overseas-trip/>.