



TESTIMONY OF MICHAEL J. NORTON
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Regarding House Bill 15-1265 concerning the issuance of a New Birth Certificate
With a Gender Designation that Differs from the Gender Designated on the Person's
Original Birth Certificate before the
Colorado Senate State, Veterans & Military Affairs Committee

April 15, 2015

My name is Michael J. Norton. I am an attorney with Alliance Defending Freedom (ADF), an alliance-building, non-profit legal organization that promotes religious liberty, sanctity of life, and marriage and the family. I have also had the privilege of serving as the United States Attorney for Colorado.

ADF itself does not engage in lobbying; but ADF is able to explain the legal impact of a legislative proposal and how, in this case, it will hurt the people of Colorado.

I also represent Colorado Family Action (CFA) today and CFA urges the defeat of this proposal.

The mission of CFA is to strengthen families by applying founding principles and faith to policy and culture. CFA seeks to establish through citizen advocacy and enactment of Colorado law a safe, prosperous and wholesome climate for families. CFA's public policy decisions are based on the principles of life, marriage, parental authority, constitutional government, and religious liberty.

Most of my work with ADF is to advocate for the right of people to freely live out their faith. I am currently involved in a number of lawsuits in federal and state courts concerning religious liberties and the conscience rights of private business owners and religious organizations to be free from being required by the government to violate their sincerely held

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religious beliefs by providing contraceptives and abortifacients as part of their employee health insurance plans.

House Bill 15-1265 proposes to add a new section at C.R.S. § 25-2-113.8 to require authorities to issue new birth certificates “following a change in gender designation.” This new section would require a new birth certificate to be issued when the one requesting the new certificate presents an affidavit from a licensed health care provider “that the person has undergone surgical, hormonal, or other treatment appropriate” for “gender transition.” It also provides that the new birth certificate shall reflect any legal name change the individual seeking the certificate has obtained. House Bill 15-1265 states that no additional information or records shall be required to affect the birth certificate change, other than the single affidavit from a single health care professional. And it forbids marking the new birth certificate in any way to indicate it has been amended. House Bill 15-1265 also deletes current section 25-2-115 which relates to changing the birth certificate of an individual who has undergone sexual reassignment surgery.

There are at least three concerns with House Bill 15-1265:

- I. House Bill 15-1265 can lead to frauds being perpetrated upon the people of Colorado.
- II. House Bill 15-1265 may make the State of Colorado complicit in the perpetration of such frauds.
- III. House Bill 15-1265 may raise Title IX concerns.

I. House Bill 15-1265 Can Lead to Frauds Being Perpetrated Upon the People of Colorado.

House Bill 15-1265 will allow anyone who secures an affidavit from a single licensed health care provider to change his or her birth certificate to reflect a different sex than that listed on the person’s birth certificate at birth. And House Bill 15-1265 forbids any identification of the certificate as having been amended. This could lead to unintended frauds upon the people of Colorado.

For example, one who was born male might change his birth certificate to state that he is now female, and then induce a man to propose to him without informing the man of his history. Something similar happened in Texas, and is now being litigated. *See In re Estate of Araguz*, 443 S.W.3d 233 (Tex. App. 2014), *reh’g overruled* (Apr. 15, 2014). *Araguz* concerns the estate of a male volunteer firefighter who died after allegedly being tricked into marrying a biological male. “Nikki” was born in 1975 with male sex organs. *Id.* at 236. His original birth certificate indicated that his name was Justin Graham Purdue and that his sex was male. *Id.* As Justin grew up, he identified as

female. *Id.* Justin ultimately filed a petition in Texas to have his name changed to Nikki, which a court granted. *Id.* He then filed an application in California to have his birth certificate changed to reflect his new name, and California issued a new birth certificate. *Id.* He then obtained a driver's license identifying him as female, and used that to obtain a license to marry Thomas Araguz. *Id.*

Two months before Thomas died, he gave a deposition during a custody dispute with his ex-wife. *Id.* at 237. He was asked whether he was aware that Nikki had been born male. *Id.* Thomas testified that he was *not* aware that Nikki had been born male or was not a natural born female. *Id.* He testified he was not aware that Nikki had undergone "gender surgery." *Id.* Rather, Thomas testified that Nikki had always represented to him that Nikki was female. *Id.* at 237.¹

In re Estate of Araguz is illustrative of what may happen when changes are allowed to easily be made to birth certificates. But it is not just fraudulent inducement to marry that may be more likely to occur if House Bill 15-1265 is enacted. Other frauds may occur as well. For example, a student who believes he will not qualify for an athletic scholarship as a male might seek to change his sex designation to female in order to gain a competitive advantage. Male students seeking admission to academic programs that favor female applicants because women have been historically under-represented, might likewise seek to change their sex designation. The easier it is to change one's sex designation, the more likely it is that fraudulent activity will occur.

House Bill 15-1265 makes such sex designation changes easier. Current law requires that those seeking to change their sex designation on their birth certificate first undergo a "surgical procedure" to "change[]" his or her sex. C.R.S. § 25-2-115. Then, the person must get a court order indicating that the person's sex has been altered through surgery. *Id.* But House Bill 15-1265 deletes that section and, in its place, allows the one seeking to change his or her sex designation to do so with a single affidavit from a single health care provider.

In addition, House Bill 15-1265 expressly provides that "[t]he State Registrar shall not request any additional information or records" beyond this single affidavit. Thus, on the basis of one affidavit from one health care professional, birth certificates will be able to be changed virtually at will to reflect a different sex designation. Significantly, it is not clear from House Bill 15-1265 that the individual seeking to change his or her birth certificate sex designation must take any affirmative steps, such as surgery or even hormone therapy, to have the person's physical body more closely correspond with the opposite sex. House Bill 15-1265 provides that the health care professional shall provide an affidavit "that the person has undergone surgical, hormonal,

¹ Thomas died two months after giving this deposition, and Thomas's mother and his ex-wife sued to have Thomas's marriage to Nikki declared void under Texas law prohibiting same-sex unions. *In re Estate of Araguz*, 444 S.W. 3d at 237. The district court granted summary judgment, ruling as a matter of law that Nikki was a man at the time of his wedding to Thomas. *Id.* at 241. The appellate court ruled that whether Nikki was male at the time of the wedding was a question of fact, *id.* at 248, and remanded for further proceedings, *id.* at 250.

or other treatment appropriate for that person for the purpose of gender transition.” Such “other treatment” is presumably counseling; but, whatever it is, it does not involve changes to the physical body, since it is not surgical or hormonal.²

By making it so easy to change one’s sex designation on birth certificates, and by preventing any notation that a certificate has been amended, House Bill 15-1265 will make it more likely that fraud may occur.

II. House Bill 15-1265 May Make the State of Colorado Complicit in the Perpetration of Such Frauds.

As explained in the preceding section, House Bill 15-1265 may lead to frauds being perpetrated upon the people of Colorado. Regardless of whether the State of Colorado might be legally liable for such fraud—and we are doubtful that it would be—the State of Colorado will have created the framework by which frauds can be perpetrated. In its rush to satisfy the insatiable demands of the LGBT community, the members of the General Assembly have the duty to serve the best interests of all of the people of Colorado, not make it more likely that they will be subject to fraudulent activity.

III. House Bill 15-1265 May Raise Title IX Concerns.

Title IX, codified at 20 U.S.C. §§ 1681-88, forbids sex discrimination by schools, and extends to all programs schools offer. The implementing regulations promulgated by the U.S. Department of Education require that schools provide “equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41. One of the factors considered in determining whether a school complies with Title IX is whether “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments[.]” *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 854 (9th Cir. 2014) (quoting 44 Fed. Reg. 71,413 (Dec. 11, 1979)).

By allowing male athletes to change their sex designation to female, House Bill 15-1265 may implicate Title IX concerns by upsetting the balance of male to female students participating in sporting programs. It certainly will lead to a violation of the spirit of Title IX, which exists to provide equal opportunities for women. For every biological male who takes a spot on a women’s or girl’s team, a female is excluded. And females forced to compete against biological males may experience a competitive

² The LGBT advocacy organization, Human Rights Campaign, explains that *transitioning*: is the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This may or may not include hormone therapy, sex reassignment surgery and other medical procedures. Human Rights Campaign, “Transgender FAQ,” available at <http://www.hrc.org/resources/entry/transgender-faq#4> (last visited March 9, 2015).

disadvantage because of differences in muscular and skeletal structure.³ This result will be inconsistent with the purpose of Title IX which is to provide female students equal opportunities.

Conclusion

As explained above, House Bill 15-1265 opens the door for unintended, harmful consequences. It may lead to fraud being perpetrated upon the people of Colorado, and in so doing may make the State complicit in the fraud. It also may implicate Title IX concerns.

Colorado Family Action opposes House Bill 15-1265 and asks that you vote against it.

³ See, e.g., Perry Chiramonte, "California's transgender law allows male high schooler to make girls' softball team," Fox News, February 14, 2014, *available at* <http://www.foxnews.com/us/2014/02/14/california-transgender-law-allows-male-high-schooler-to-make-girls-softball/print#> (last visited March 4, 2015) (noting that some object to having the boy play against girls gives him a competitive advantage); The Daily Caller, "California 2014: Strapping senior calling himself female to play on girls' high school softball team," February 15, 2014, *available at* <http://dailycaller.com/2014/02/15/california-2014-strapping-senior-calling-himself-female-to-play-on-girls-high-school-softball-team/> (last visited March 4, 2015) (noting that the male athlete competing with females has not undergone any procedures or treatments that would alter him physically).

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Sincerely,

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