

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
DAYTON P. REED, ISB #10775
SCOTT ZANZIG, ISB #9361
CORY M. CARONE, ISB #11422
Deputy Attorneys General
954 W Jefferson, 2nd Floor
P. O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
steven.olsen@ag.idaho.gov
dayton.reed@ag.idaho.gov
scott.zanzig@ag.idaho.gov
cory.carone@ag.idaho.gov

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

LINDSAY HECOX, and JANE DOE with
her next friends JEAN DOE and JOHN
DOE,

Plaintiffs,

v.

BRADLEY LITTLE, in his official
capacity as Governor of the State of Idaho,
et al.

Defendants,

and

MADISON KENYON, et al.,

Intervenors.

Case No. 1:20-cv-00184-DCN

Hon. David C. Nye

**STIPULATED FACTS IN RESPONSE
TO NINTH CIRCUIT ORDER DATED
JUNE 24, 2021**

In September 2020, Defendants and Intervenors appealed the preliminary injunction entered in this case. During briefing on appeal, Plaintiffs informed the Ninth Circuit of relevant

developments since Defendants and Intervenors noticed their appeals: namely, that, “[w]ith H.B. 500 enjoined, Lindsay [Hecox] was permitted to try out for BSU’s women’s cross country and track teams in fall 2020, but did not make the team,” and had “subsequently taken a temporary leave of absence from BSU.” Ninth Circuit Dkt. 65 at 17 n.4. Members of the Ninth Circuit panel asked questions during oral argument about whether Lindsay’s claim is moot because she¹ is not currently enrolled at Boise State, and afterwards ordered supplemental briefing to address the same. Determining that the supplemental briefing “failed to resolve the issue, and served only to raise further questions,” ECF 79 at p. 3, the Ninth Circuit ordered this Court to “determin[e] whether Lindsay Hecox’s claim is moot in light of her changed enrollment status at Boise State University.” *Id.* at p. 1. The Ninth Circuit identified several questions to aid the mootness analysis:

- (1) “Is Hecox still an admitted student who can re-enroll at BSU whenever she desires, or are there barriers to re-enrollment?”
- (2) “Does she have evidence of savings, discussions with administrators, or anything else that shows a concrete plan to re-enroll?”
- (3) What was “the Fall 2020 deadline for dropping classes[,] and the penalty for dropping out after that deadline”?
- (4) Would Hecox “be eligible to play for BSU if she re-enrolled and made the team”?
- (5) “[D]oes the fact that she withdrew from classes before the deadline to drop classes impact her status for NCAA eligibility purposes?”

¹ Defendants and Intervenors do not concede or imply that Lindsay Hecox is female for purposes of eligibility to participate on women’s teams under House Bill 500.

- (6) Has “the NCAA created any COVID-related exceptions to its requirements that apply to Hecox?”
- (7) “[I]f Hecox is not eligible to play on the NCAA teams or does not make those teams, are there BSU women’s club teams that she plans to join instead?”

To help the Court answer the Ninth Circuit’s questions, the parties stipulate to the following facts:²

Barriers to Re-Enrollment

1. Lindsay Hecox’s withdrawal from classes during the Fall 2020 semester does not pose a barrier to her enrolling in classes at Boise State in the Spring 2022 semester. Registration for continuing students for Spring 2022 opens on November 1, 2021, open enrollment begins on December 13, 2021, and the deadline to register for regular session classes is January 24, 2022. Classes begin on January 10, 2022. Lindsay can enroll for the Spring 2022 semester once registration begins.

Evidence of Savings, Discussions with Administrators, Concrete Plans to Re-Enroll

2. Lindsay Hecox’s tuition rate including fees for the Fall 2020 semester was \$12,612.00. She was personally responsible for \$2,994, as she received \$6,445 from the Western Undergraduate Exchange Scholarship and \$3,173 in federal Pell Grants. When she withdrew, Lindsay Hecox did not receive a tuition refund and had to repay \$793 of her Pell Grant.

3. If Lindsay Hecox qualifies for in-state tuition, her tuition rate including fees for the Spring 2022 semester is estimated to be about \$4,030. If she does not qualify for in-state

² Defendants and Intervenors stipulate to these facts solely for purposes of resolving the question of mootness in this litigation, as presented in the Ninth Circuit’s order date June 24, 2021.

tuition, her tuition rate including fees for the Spring 2022 semester is estimated to be about \$12,490.

4. Lindsay Hecox can qualify for in-state tuition if she is considered an “independent student” under Idaho Code § 33-3717B(1)(b). An independent student receives less than 50% of their financial support from a parent or guardian and “has continuously resided and maintained a bona fide domicile in the state of Idaho primarily for purposes other than educational for twelve (12) months preceding the opening day of the term for which the student matriculates.” Idaho Code § 33-3717B(1)(b). Lindsay says that she receives less than 50% of her financial support from her parents. An individual can establish domicile by proving at least five of the following criteria for 12 months before the term for which residency is sought: (1) ownership or leasing of a residence in Idaho; (2) registration and payment of Idaho taxes or fees, other than sales tax; (3) registration to vote in Idaho; (4) holding an Idaho driver’s license or ID card; (5) evidence of abandonment of previous domicile; (6) establishment of accounts with Idaho financial institutions; (7) other similar factors such as enrollment of dependent children in Idaho elementary or secondary schools, acceptance of permanent employment in Idaho, documentation of need to care for relative in Idaho, utility statements, and employment documentation. Idaho State Board of Education, *Fact Sheet: Pathways for Proving Idaho Residency* (Mar. 25, 2020), <https://boardofed.idaho.gov/wp-content/uploads/2017/03/Pathways-word-03.25.2020.pdf>.

Lindsay Hecox has:

- (1) leased a residence in Boise, Idaho since August 2020;
- (2) been paying Idaho state income taxes since she began working full-time in Idaho in December 2020;
- (3) been registered to vote in Idaho since September 2019;

- (4) held an Idaho ID card since January 2020;
- (5) said that she abandoned her previous domicile in California when she relocated her personal possessions to Idaho in August 2019; and
- (6) the ability to provide employment documentation such as work schedules and pay stubs reflecting her full-time employment in Idaho since December 2020.

For the Spring 2022 semester, Lindsay Hecox must satisfy the residency requirements by the opening day of the term, and she must submit the requisite supporting paperwork to the Boise State Registrar's Office by January 24, 2022. If Lindsay establishes in-state residency, she will no longer receive the Western Undergraduate Exchange scholarship.

5. Joshua Wilkins, Senior Coordinator of Customer Service and Residency at Boise State, informed Lindsay via email on November 18, 2020 that she could also establish Idaho residency by proving she had worked full-time in Idaho for 12 months and filing an Idaho state tax return. Lindsay has been working full-time in Idaho since December 2020. She previously filed an Idaho state tax return and plans to file an Idaho state tax return in 2022.

6. As of October 2020, Lindsay Hecox had \$15,231.80 that was available for tuition, textbooks, living expenses, and other costs associated with attending Boise State in her checking and savings accounts. As of September 23, 2021, Lindsay Hecox had \$23,949.27 that is available for tuition, textbooks, living expenses, and other costs associated with attending Boise State in her checking and savings accounts. She saved that additional money by working full-time since December 2020. Lindsay says that she expects to receive some financial support from her grandmother and father and plans to apply for the Pride Foundation Scholarship. Lindsay says that she has started the Free Application for Federal Student Aid, or FAFSA. Lindsay Hecox has not

yet received a financial aid package for the Spring 2022 semester, so she does not know whether she will receive less financial aid than when she withdrew from Boise State in Fall 2020.

7. Lindsay has said that she plans to register for classes for the Spring 2022 semester once registration for continuing students begins on November 1, 2021.

8. Lindsay Hecox met with Joshua Wilkins in Boise State's registrar's office in October 2020 to discuss her plan to establish in-state residency before returning to Boise State. She has not met with other administrators since then. There is no requirement that Lindsay meet with Boise State administrators to register for the Spring 2022 semester. Lindsay has said that she informed her employer that she will be leaving her job in mid-December to prepare for her return to school in the Spring 2022 semester.

Fall 2020 Deadline for Dropping Classes and Associated Penalties

9. There were two relevant deadlines for withdrawing from classes in the Fall 2020 semester at Boise State.

10. The first deadline was September 4, 2020. Students who withdrew from classes by that deadline would have nothing recorded on their transcript related to the withdrawal and would receive a tuition refund.

11. The second deadline was October 30, 2020. Students who withdrew from classes by that deadline would have a "W" marked on their transcript for the classes that had been dropped and would not receive a tuition refund. Students who withdrew from classes after that deadline would have an "F" marked on their transcript for the dropped classes. A "W" does not affect a student's GPA, but an "F" does affect a student's GPA.

12. Lindsay Hecox withdrew from some of her classes on October 26, 2020, and withdrew from the remainder of her classes on October 28, 2020. She received "W"s on her

transcript, but withdrew early enough to avoid having “F”s on her transcript. She did not receive a tuition refund, and she had to repay \$793 of her Pell Grant.

NCAA Eligibility

13. At Boise State, athletes who wish to be on a team but were not recruited are referred to as “walk-on” athletes. Tryouts for walk-on athletes for the women’s track and cross country teams occur once a year during the fall semester. To try out, a walk-on athlete needs to be a fully enrolled student, pass a physical, and complete some paperwork. If Lindsay Hecox does those three things, the next opportunity for her to try out for the women’s track and cross country teams will be in the Fall 2022 semester. Boise State evaluates a walk-on athlete’s NCAA eligibility after the student-athlete makes the team.

14. If Lindsay Hecox attends classes in the Spring 2022 semester, then in the Fall 2022 semester she will be considered a third-year student for purposes of NCAA eligibility because she will have attended classes in four previous semesters (Fall 2019, Spring 2020, Fall 2020, and Spring 2022). NCAA Bylaw 14.4.3.2 requires a student-athlete to complete 40% of the requirements for her degree program by the start of the student-athlete’s third year of collegiate enrollment. In Fall 2020, Lindsay Hecox selected psychology as her degree program. A psychology major at Boise State requires completion of 120 credits. To satisfy the minimum number of credits to complete 40% of the degree, she would need to earn a total of 48 credits that count towards her degree by the end of the Spring 2022 semester. Lindsay Hecox has earned 24 credits at Boise State, and she received 18 credits based on her SAT and AP test scores in high school. She thus has earned 42 credits so far, and so needs to complete six additional credits that count towards her degree by the end of the Spring 2022 semester to complete 40% of her degree program’s requirements by the start of her third year. Lindsay has stated that she plans to enroll as

a full-time student in the Spring 2022 Semester, which dictates a minimum credit-load of 12 credits.

15. NCAA Bylaw 14.01.2.1 requires a student-athlete to be in good academic standing. An undergraduate student at Boise State is deemed to be in good academic standing if they have earned a minimum of a 1.75 cumulative grade point average while earning between 0 to 25 academic credits or a minimum of a 2.00 cumulative grade point average while earning 26 or more academic credits. Lindsay Hecox to date has earned a 3.38 cumulative grade point average and so is currently in good academic standing.

16. NCAA Bylaw 14.4.3.1(c) requires a student-athlete to complete six credit hours during the semester preceding competition. Lindsay Hecox has stated that she plans to complete at least 12 credit hours during the Spring 2022 semester.

17. NCAA Bylaw 14.4.3.1(b) requires a student-athlete to complete eighteen credit hours since the beginning of the previous fall term or since the beginning of Boise State's preceding two semesters.

18. NCAA Bylaw 14.4.3.6(a) provides a student-athlete "may" qualify for a one-time exception to NCAA Bylaw 14.4.3.1(b) that allows a student-athlete who has withdrawn from school to complete a prorated requirement of nine credits per term of actual attendance. If Lindsay Hecox attends Boise State during the Spring 2022 semester and successfully invokes this exception after making the team in the Fall 2022 semester, then Lindsay Hecox will be responsible for completing 36 credit hours at Boise State. Lindsay Hecox has completed 24 credits at Boise State.

19. NCAA Bylaw 14.4.3.6(b) provides that a student-athlete "may" qualify for an exception to NCAA Bylaws 14.4.3.1(c) and 14.4.3.1(b) if the student-athlete was not recruited, did not receive athletically related financial assistance, has never practiced or participated in

intercollegiate athletics, and is otherwise eligible under all institutional, conference, and NCAA rules. Lindsay was not recruited, has not received athletically related financial assistance, and has never practiced or participated in intercollegiate athletics.

20. Per NCAA Bylaw 14.02.5, Boise State will apply an exception if it determines that there is “evidence that the conditions on which the exception is authorized have been met.”

21. NCAA policy requires Lindsay Hecox to complete at least 12 months of testosterone suppression treatment leading up to the Fall 2022 semester to compete on the women’s track and cross country teams. Lindsay Hecox contends, and Defendants do not dispute for purposes of this stipulation, that she has continuously undergone testosterone suppression treatment from September 2019 until the present.

Impact of Withdrawal on NCAA Eligibility

22. Because Lindsay Hecox attended classes during the Fall 2020 semester, the semester counts as an attempted semester for NCAA eligibility purposes even though she ultimately withdrew. For example, the Fall 2020 semester counts in determining whether Lindsay Hecox will be a third-year student in the Fall 2022 semester for purposes of NCAA Bylaw 14.4.3.2 and how many credits she is required to have completed for purposes of NCAA Bylaw 14.4.3.6(a).

23. If Lindsay Hecox makes the team in Fall 2022 but is not eligible under one or more NCAA bylaws, either because the Bylaws do not provide for an exception or she does not qualify for an exception, Boise State can submit a waiver request to the NCAA. Boise State does not submit waiver requests to the NCAA until after a student athlete has made a team, and its general practice is to submit waiver requests when there is a reasonable and good-faith justification for the request. Boise State would treat Lindsay Hecox the same as all other student athletes and submit a waiver request if it determined that there was a reasonable and good-faith justification for doing

so. The NCAA decides whether to grant waivers, and the NCAA's waiver guidelines provide that waivers can be granted for unforeseeable hardships.

COVID-19 Waivers

24. The NCAA has not implemented COVID-19 waivers that would apply to Lindsay Hecox if she made the women's track and cross country team in the Fall 2022 semester.

Lindsay Hecox's Plans to Play on Other Teams

25. Lindsay Hecox has said that she intends to continue playing sports and have sports be a part of her college experience. If Lindsay does not make the women's track and cross country teams during the Fall 2022 try out, she has said that she intends to try out for the women's track and cross country teams again her senior year. She has also said that earlier, in Spring 2022, while she waits for the Fall 2022 women's track and cross country try out, she plans to try to join the women's club soccer team. She says that she has browsed the women's club soccer team's webpage and, for the last six months, that she has been playing soccer almost weekly in a Boise indoor soccer league.

DATED this 15th day of October, 2021.

By: /s/ Richard Eppink
RICHARD EPPINK
Counsel for Plaintiffs

By: /s/ W. Scott Zanzig
W. SCOTT ZANZIG
Deputy Attorney General
Counsel for Defendants

By: /s/ Roger E. Brooks
ROGER E. BROOKS
Counsel for Intervenors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 15, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Richard Eppink
Aadika Jaspal Singh
AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION
REppink@acluidaho.org
asingh@acluidaho.org

James Esseks
Chase Strangio
AMERICAN CIVIL LIBERTIES FOUNDATION
garkles@aclu.org
jesseks@aclu.org
cstrangio@aclu.org

Catherine Ann West
LEGAL VOICE
cwest@legalvoice.org

Kathleen Hartnett
Andrew Barr
Julie Veroff
Elizabeth Reinhardt
Katelyn Kang
COOLEY LLP
khartnett@cooley.com
abarr@cooley.com
jveroff@cooley.com
ereinhardt@cooley.com
kkang@cooley.com

Attorneys for Plaintiffs

Matthew K. Wilde
BOISE STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
mattwilde@boisestae.edu

*Attorney for Defendants Boise State University
and Marlene Tromp*

Roger G. Brooks
Kristen K. Waggoner
Jeffrey A. Shafer
Christiana M. Holcomb
ALLIANCE DEFENDING FREEDOM
rbrooks@ADFlegal.org
kwaggoner@ADFlegal.org
jshafer@ADFlegal.org
cholcomb@ADFlegal.org

Bruce D. Skaug
Raul R. Labrador
SKAUG LAW
bruce@skauglaw.com
raul@skauglaw.com

Attorneys for Intervenors

/s/ W. Scott Zanzig _____
W. SCOTT ZANZIG
Deputy Attorney General