

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2021

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HOUSE BILL 358

Short Title: Save Women's Sports Act. (Public)

Sponsors: Representatives Brody, McElraft, Wheatley, and Dixon (Primary Sponsors).
For a complete list of sponsors, refer to the North Carolina General Assembly web site.

Referred to: Judiciary 1, if favorable, Education - Universities, if favorable, Education - K-12, if favorable, Rules, Calendar, and Operations of the House

March 23, 2021

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE SAVE WOMEN'S SPORTS ACT TO PROTECT THE
3 OPPORTUNITIES FOR WOMEN AND GIRLS IN ATHLETICS BY ENSURING
4 WOMEN ARE NOT FORCED TO COMPETE AGAINST MEN PLAYING ON WOMEN'S
5 SPORTS TEAMS.

6 Whereas, there are "[i]nherent differences" between men and women," and that these
7 differences "remain cause for celebration, but not for denigration of the members of either sex or
8 for artificial constraints on an individual's opportunity." *United States v. Virginia*, 518 U.S. 515,
9 533 (1996); and

10 Whereas, these "inherent differences" range from chromosomal and hormonal
11 differences to physiological differences; and

12 Whereas, men generally have "denser, stronger bones, tendons, and ligaments" and
13 "larger hearts, greater lung volume per body mass, a higher red blood cell count, and higher
14 hemoglobin." Neel Burton, *The Battle of the Sexes*, PSYCHOL. TODAY, (July 2, 2012),
15 <https://www.psychologytoday.com/us/blog/hide-and-seek/201207/the-battle-the-sexes>; and

16 Whereas, men also have higher natural levels of testosterone, which affects traits such
17 as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the
18 development of Type 2 muscle fibers, all of which result in men being able to generate higher
19 speed and power during physical activity. Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW &
20 CONTEMPORARY PROBLEMS 63, 74 (2017) (quoting Gina Kolata, *Men, Women and Speed*.
21 *2 Words: Got Testosterone?*, N.Y. TIMES, Aug. 21, 2008); and

22 Whereas, the biological differences between females and males, especially as they
23 relate to natural levels of testosterone, "explain the male and female secondary sex characteristics
24 which develop during puberty and have lifelong effects, including those most important for
25 success in sport: categorically different strength, speed, and endurance." Doriane Lambelet
26 Coleman & Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite Women to
27 Boys and Men," Duke Law Center for Sports Law and Policy,
28 <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance>; and

29 Whereas, while classifications based on sex are generally disfavored, the United
30 States Supreme Court has recognized that "[s]ex classifications may be used to compensate
31 women for particular economic disabilities [they have] suffered, to promote equal employment
32 opportunity, [and] to advance full development of the talent and capacities of our Nation's
33 people." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal citations and quotation
34 marks omitted); and



Whereas, one place where sex classifications allow for the "full development of the talent and capacities of our Nation's people" is in the context of sports and athletics; and

Whereas, courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. See, e.g., *Kleczek v. R.I. Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition."); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl counterparts" and that those advantages give them an unfair lead over girls in some sports like "high school track"); and

Whereas, a recent study of female and male Olympic performances since 1983 found that, although athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable. "These suggest that women's performances at the high level will never match those of men." Valerie Thibault, et al., *Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983*, 9 J. SPORTS SCI. & MED. 214, 219 (2010); and

Whereas, as Duke Law professor and all-American track athlete Doriane Coleman, tennis champion Martina Navratilova and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science." Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't Abandon Title IX*, WASHINGTON POST, (Apr. 29, 2019), <https://wapo.st/2VKINN1>; and

Whereas, the benefits that natural testosterone provides to male athletes are not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of such treatments found that policies like those of the International Olympic Committee that require biological males to undergo at least one year of testosterone suppression before competing in women's sports do not create a level playing field. "[T]he reduction in testosterone levels required by many sports federation transgender policies is insufficient to remove or reduce the male advantage by any meaningful degree." For example, "the muscle mass advantage males possess over females, and potentially the performance implications thereof, are not removed by 12 months of testosterone suppression." Instead, the study concluded that "The data presented here demonstrates that the male physical performance advantage over females, attributed to superior anthropometric and muscle mass/strength parameters achieved at puberty, is not removed by the current regimen of testosterone suppression permitting participation of transgender women in female sports categories. Rather, it appears that the male performance advantage is largely retained by transgender women and thus remains substantial." Hilton, E.N.; Lundberg, T.R. Transgender Women in The Female Category of Sport: Is the Male Performance Advantage Removed by Testosterone Suppression?. Preprints 2020, 2020050226 (doi: 10.20944/preprints202005.0226.v1); and

Whereas, having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors; Now, therefore,
The General Assembly of North Carolina enacts:

SECTION 1. This act shall be known as "The Save Women's Sports Act."

SECTION 2.(a) Chapter 115C of the General Statutes is amended by adding a new Article to read:

"Article 29E.

"Biological Sex-Specific Athletic Teams.

"§ 115C-407.40. Designation of athletic teams.

(a) All athletic teams for middle and secondary school students participating in interscholastic or intramural athletic activities conducted by a public school unit shall be expressly designated as one of the following based on biological sex:

(1) Males, men, or boys.

(2) Females, women, or girls.

(3) Coed or mixed.

(b) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

(c) Sex shall be recognized based solely on a person's reproductive biology and genetics at birth.

"§ 115C-407.41. Protection for schools.

No governmental entity, licensing or accrediting organization, or athletic association or organization shall consider a complaint, open an investigation, or take an adverse action against a school or public school unit for maintaining separate athletic teams or sports for students of the female sex in accordance with this Article.

"§ 115C-407.42. Cause of action; remedies.

(a) A biological female student who is deprived of an athletic opportunity or suffers or is likely to suffer from any direct or indirect harm as a result of a violation of this Article may assert that violation as a cause of action for remedies provided for in subsection (d) of this section.

(b) A biological female student who is subjected to retaliation or other adverse action by a public school unit, athletic association, or other organization as a result of reporting a violation of this Article to an employee or representative of the public school unit, athletic association, or to any local, State, or federal agency with oversight of the public school unit shall have a cause of action for remedies provided for in subsection (d) of this section.

(c) Any public school unit or its representatives or employees who suffer any direct or indirect harm for prohibiting a biological male student from participating on a female, girls', or women's athletic team pursuant to the requirements of this Article shall have a cause of action for remedies provided for in subsection (d) of this section.

(d) Any person who brings a cause of action pursuant to this Article may obtain appropriate relief, including the following:

(1) Injunctive relief, protective order, writ of mandamus or prohibition, or declaratory relief to prevent any violation of this Article.

(2) Actual damages, including for psychological, emotional, or physical harm, reasonable attorney fees, and costs.

(e) All civil actions under this Article must be initiated within two years from the date that the harm occurred."

SECTION 2.(b) G.S. 115C-12(23) reads as rewritten:

"(23) Power to Adopt Eligibility Rules for Interscholastic Athletic Competition. – The State Board of Education shall adopt rules governing interscholastic athletic activities conducted by local boards of education, including eligibility for student ~~participation~~, participation and designation of teams consistent with the provisions of Article 29E of this Chapter. With regard to middle schools and high schools, the rules shall provide for the following:

...."

SECTION 2.(c) G.S. 115C-218.75 is amended by adding a new subsection to read:

"(i) Biological Sex-Specific Athletic Teams. – Article 29E of this Chapter shall apply to a charter school organizing athletic teams for middle or secondary school students to participate in interscholastic or intramural athletic activities."

SECTION 3. Article 39 of Chapter 115C of the General Statutes is amended by adding a new section to read:

"§ 115C-566.10. Biological sex-specific athletic teams.

Article 29E of this Chapter shall apply to any nonpublic school that is a member of a State-level association, including the North Carolina High School Athletic Association (NCHSAA), that governs participation in interscholastic athletic activities at the high school level."

SECTION 4. Chapter 116 of the General Statutes is amended by adding a new Article to read:

"Article 38.

"Biological Sex-Specific Athletic Teams.

"§ 116-400. Definitions.

The following definitions apply in this Article:

- (1) Institution of higher education. – A constituent institution of The University of North Carolina, a community college under the jurisdiction of the State Board of Community Colleges, or a private college or university located in North Carolina.
- (2) Intercollegiate athletic program. – A sport program played at the collegiate level for which eligibility requirements for participation by a student are established by a national association for the promotion or regulation of intercollegiate athletics, including the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA).
- (3) Intramural athletics. – Recreational sports organized by a constituent institution of The University of North Carolina or a community college under the jurisdiction of the State Board of Community Colleges.

"§ 116-401. Designation of athletic teams.

(a) All intramural athletic teams and teams that are part of an intercollegiate athletic program of an institution of higher education shall be expressly designated as one of the following based on biological sex:

- (1) Males, men, or boys.
- (2) Females, women, or girls.
- (3) Coed or mixed.

(b) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex.

(c) Sex shall be recognized based solely on a person's reproductive biology and genetics at birth.

"§ 116-402. Protection for institutions of higher education.

No governmental entity, licensing or accrediting organization, or athletic association or organization shall consider a complaint, open an investigation, or take an adverse action against an institution of higher education for maintaining separate athletic teams or sports for students of the female sex in accordance with this Article.

"§ 116-403. Cause of action; remedies.

(a) A biological female student who is deprived of an athletic opportunity or suffers or is likely to suffer from any direct or indirect harm as a result of a violation of this Article may assert that violation as a cause of action for remedies provided for in subsection (d) of this section.

(b) A biological female student who is subjected to retaliation or other adverse action by an institution of higher education, athletic association, or other organization as a result of reporting a violation of this Article to an employee or representative of the institution of higher education, athletic association, or to any local, State, or federal agency with oversight of the institution shall have a cause of action for remedies provided for in subsection (d) of this section.

(c) Any institution of higher education or its representatives or employees who suffer any direct or indirect harm for prohibiting a biological male student from participating on a female,

girls', or women's athletic team pursuant to the requirements of this Article shall have a cause of action for remedies provided for in subsection (d) of this section.

(d) Any person who brings a cause of action pursuant to this Article may obtain appropriate relief, including the following:

(1) Injunctive relief, protective order, writ of mandamus or prohibition, or declaratory relief to prevent any violation of this Article.

(2) Actual damages, including for psychological, emotional, or physical harm, reasonable attorney fees, and costs.

(e) All civil actions under this Article must be initiated within two years from the date that the harm occurred."

SECTION 5. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

SECTION 6. This act is effective when it becomes law. Sections 2 and 3 of this act apply beginning with the 2021-2022 school year. Section 4 of this act applies beginning with the 2021-2022 academic year.