

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2734

BY DELEGATES CONLEY, MANDT, J. KELLY, REYNOLDS,
BARNHART, PINSON, MALLOW, BRUCE, LONGANACRE,
AND BURKHAMMER

[Introduced February 24, 2021; Referred to the Committee
on Education then the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
 2 designated §18-9A-27, relating to requiring, for an official or unofficial school-sanctioned
 3 athletic or sporting event, that each athlete’s participation in the athletic or sporting event
 4 be based on the athlete’s biological sex as indicated on the athlete’s original birth
 5 certificate issued at the time of birth; providing a revised designation for sporting events;
 6 and providing a means by which civil actions can be taken.

Be it enacted by the Legislature of West Virginia:

ARTICLE 9A. PUBLIC SCHOOL SUPPORT.

§18-9A-27. Clarifying Participation for Sports Events to Be Based on Biological Sex of the Athlete at Birth.

1 (a) Legislative findings. -

2 (1) The Legislature finds that there are “inherent differences between men and women,”
 3 and that these differences “remain cause for celebration, but not for denigration of the members
 4 of either sex or for artificial constraints on an individual's opportunity,” *United States v. Virginia,*
 5 518 U.S. 515, 533 (1996);

6 (2) These “inherent differences” range from chromosomal and hormonal differences to
 7 physiological differences;

8 (3) Men generally have “denser, stronger bones, tendons, and ligaments” and “larger
 9 hearts, greater lung volume per body mass, a higher red blood cell count, and higher hemoglobin.”
 10 Neel Burton, *The Battle of the Sexes*, Psychology Today (July 2, 2012);

11 (4) Men also have higher natural levels of testosterone, which affects traits such as
 12 hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development
 13 of type 2 muscle fibers, all of which result in men being able to generate higher speed and power
 14 during physical activity, Doriane Lambelet Coleman, *Sex in Sport*, Law and Contemporary
 15 Problems 63, 74 (2017) (quoting Gina Kolata, Men, Women and Speed. *2 Words: Got*
 16 *Testosterone?*, N.Y. Times (Aug. 21, 2008));

17 (5) The biological differences between females and males, especially as it relates to
18 natural levels of testosterone, “explain the male and female secondary sex characteristics which
19 develop during puberty and have lifelong effects, including those most important for success in
20 sport: categorically different strength, speed, and endurance,” Doriane Lambelet Coleman and
21 Wickliffe Shreve, “Comparing Athletic Performances: The Best Elite Women to Boys and Men,”
22 Duke Law Center for Sports Law and Policy;

23 (6) While classifications based on sex are generally disfavored, the Supreme Court has
24 recognized that “sex classifications may be used to compensate women for particular economic
25 disabilities [they have] suffered, to promote equal employment opportunity, [and] to advance full
26 development of the talent and capacities of our Nation's people,” *United States v. Virginia*, 518
27 U.S. 515, 533 (1996);

28 (7) One place where sex classifications allow for the “full development of the talent and
29 capacities of our Nation's people” is in the context of sports and athletics;

30 (8) Courts have recognized that the inherent, physiological differences between males
31 and females result in different athletic capabilities. See e.g. *Kleczek v. Rhode Island*
32 *Interscholastic League, Inc.*, 612 A.2d 13 734, 738 (R.I. 1992) (“Because of innate physiological
33 differences, boys and girls are not similarly situated as they enter athletic competition.”); *Petrie v.*
34 *Ill. High Sch. Ass’n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that “high school boys
35 [generally possess physiological advantages over] their girl counterparts” and that those
36 advantages give them an unfair lead over girls in some sports like “high school track”);

37 (9) A recent study of female and male Olympic performances since 1983 found that,
38 although athletes from both sexes improved over the time span, the “gender gap” between female
39 and male performances remained stable. “These suggest that women's performances at the high
40 level will never match those of men.” *Valerie Thibault et al., Women and men in sport*
41 performance: The gender gap has not evolved since 1983, *Journal of Sports Science and*
42 *Medicine* 214, 219 (2010);

43 (10) As Duke Law professor and All-American track athlete Doriane Coleman, tennis
44 champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently
45 wrote: “The evidence is unequivocal that starting in puberty, in every sport except sailing,
46 shooting, and riding, there will always be significant numbers of boys and men who would beat
47 the best girls and women in head-to-head competition. Claims to the contrary are simply a denial
48 of science,” Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But Don't*
49 *Abandon Title IX*, Washington Post (Apr. 29, 2019);

50 (11) The benefits that natural testosterone provides to male athletes is not diminished
51 through the use of puberty blockers and cross-sex hormones. A recent study on the impact of
52 such treatments found that even “after 12 months of hormonal therapy,” a man who identifies as
53 a woman and is taking cross-sex hormones “had an absolute advantage” over female athletes
54 and “will still likely have performance benefits” over women, Tommy Lundberg et al., “Muscle
55 strength, size and composition following months of gender-affirming treatment in transgender
56 individuals: retained advantage for the transwomen,” Karolinksa Institute (Sept. 26, 2019); and

57 (12) Having separate sex-specific teams furthers efforts to promote sex equality. Sex-
58 specific teams accomplish this by providing opportunities for female athletes to demonstrate their
59 skill, strength, and athletic abilities while also providing them with opportunities to obtain
60 recognition and accolades, college scholarships, and the numerous other long-term benefits that
61 flow from success in athletic endeavors.

62 (b) *Designation of Athletic Teams.* --

63 (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are
64 sponsored by a public school or any school that is a member of the West Virginia high school
65 activities association or a public institution of higher education or any higher education institution
66 that is a member of the national collegiate athletic association (NCAA), national association of
67 intercollegiate athletics (NAIA), or national junior college athletic association (NJCAA) shall be
68 expressly designated as one (1) of the following based on biological ex:

69 (A) Males, men, or boys;

70 (B) Females, women, or girls; or

71 (C) Coed or mixed.

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

74 (3) If disputed, a student may establish sex by presenting a signed physician's statement
75 that shall indicate the student's sex based solely on:

76 (A) The student's internal and external reproductive anatomy;

77 (B) The student's normal endogenously produced levels of testosterone;

78 (C) An analysis of the student's genetic makeup.

79 (d) *Protection for Educational Institutions.* --

80 A government entity, any licensing or accrediting organization, or any athletic association
81 or organization shall not entertain a complaint, open an investigation, or take any other adverse
82 action against a school or an institution of higher education for maintaining separate
83 interscholastic, intercollegiate, intramural, or club athletic teams or sports for students of the
84 female sex.

85 (e) *Cause of Action.* --

86 (1) Any student who is deprived of an athletic opportunity or suffers any direct or indirect
87 harm as a result of a violation of this chapter shall have a private cause of action for injunctive
88 relief, damages, and any other relief available under law against the school or institution of higher
89 education.

90 (2) Any student who is subject to retaliation or other adverse action by a school, institution
91 of higher education, or athletic association or organization as a result of reporting a violation of
92 this chapter to an employee or representative of the school, institution, or athletic association or
93 organization, or to any state or federal agency with oversight of schools or institutions of higher
94 education in the state, shall have a private cause of action for injunctive relief, damages, and any

95 other relief available under law against the school, institution, or athletic association or
96 organization.

97 (3) Any school or institution of higher education that suffers any direct or indirect harm as
98 a result of a violation of this chapter shall have a private cause of action for injunctive relief,
99 damages, and any other relief available under law against the government entity, licensing or
100 accrediting organization, or athletic association or organization.

101 (4) All civil actions must be initiated within two years after the harm occurred. Persons or
102 organizations who prevail on a claim brought pursuant to this section shall be entitled to monetary
103 damages, including for any psychological, emotional, and physical harm suffered, reasonable
104 attorney's fees and costs, and any other appropriate relief.

NOTE: The purpose of this bill is to require that each athlete's participation in the athletic or sporting event be based on the athlete's biological sex as indicated on the athlete's original birth certificate issued at the time of birth.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.