

SENATE, No. 589

STATE OF NEW JERSEY 220th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2022 SESSION

Sponsored by:

Senator MICHAEL L. TESTA, JR.

District 1 (Atlantic, Cape May and Cumberland)

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District 10 (Ocean)

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Senators Durr and Oroho

SYNOPSIS

“Fairness in Women’s Sports Act.”

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



(Sponsorship Updated As Of: 3/24/2022)

1 **AN ACT** concerning student participation in school-sanctioned
2 sporting events and supplementing chapter 11 of Title 18A of the
3 New Jersey Statutes.

4
5 **BE IT ENACTED** *by the Senate and General Assembly of the State*
6 *of New Jersey:*

7
8 1. The Legislature finds and declares that:

9 a. In *United States v. Virginia*, 518 U.S.515, 533 (1996), the
10 Supreme Court noted that there are “inherent differences between
11 men and women,” and these differences “remain cause for
12 celebration, but not for denigration of the members of either sex or
13 for artificial constraints on an individual's opportunity.”

14 b. These “inherent differences” range from chromosomal and
15 hormonal differences to physiological differences.

16 c. Men generally have denser and stronger bones, tendons, and
17 ligaments as well as larger hearts, greater lung volume per body
18 mass, a higher red blood cell count, and higher hemoglobin.

19 d. Men also have higher natural levels of testosterone, which
20 affects traits such as hemoglobin levels, body fat content, the
21 storage and use of carbohydrates, and the development of type 2
22 muscle fibers, all of which result in men being able to generate
23 higher speed and power during physical activity.

24 e. While classifications based on sex are generally disfavored,
25 the court in *United States v. Virginia* also recognized that “sex
26 classifications may be used to compensate women for particular
27 economic disabilities [they have] suffered, to promote equal
28 employment opportunity, [and] to advance full development of the
29 talent and capacities of our Nation's people.”

30 f. One place where sex classifications allow for the “full
31 development of the talent and capacities of our Nation's people” is
32 in the context of sports and athletics.

33 g. The biological differences between females and males,
34 especially as they relate to natural levels of testosterone, help to
35 explain the male and female secondary sex characteristics which
36 develop during puberty and have lifelong effects, including those
37 most important for success in sports such as strength, speed, and
38 endurance.

39 h. Courts have recognized that the inherent, physiological
40 differences between males and females result in different athletic
41 capabilities.

42 i. Specifically, the courts have noted that males and females
43 are not similarly situated in athletic competition due to innate
44 physiological differences and that males generally possess
45 physiological advantages over their female competitors.

46 j. A recent study of female and male Olympic performances
47 since 1983 found that, although athletes from both sexes improved
48 over the time span, the “gender gap” between female and male

1 performances remained stable. This suggests that women's
2 performances at the high level will never match those of men.

3 k. The benefits that natural testosterone provides to male
4 athletes is not diminished through the use of puberty blockers and
5 cross-sex hormones. A recent study on the impact of such
6 treatments found that even after 12 months of hormonal therapy, a
7 man who identifies as a woman and is taking cross-sex hormones
8 possesses a significant advantage over female athletes and will still
9 likely have performance benefits over women.

10 l. Having separate sex-specific teams furthers efforts to
11 promote sex equality. Sex-specific teams accomplish this by
12 providing opportunities for female athletes to demonstrate their
13 skill, strength, and athletic abilities while also providing them with
14 opportunities to obtain recognition and accolades, college
15 scholarships, and the numerous other long-term benefits that flow
16 from success in athletic endeavors.

17
18 2. a. Interscholastic, intercollegiate, intramural, or club
19 athletic teams or sports that are sponsored by a public or nonpublic
20 school that is a member of the New Jersey State Interscholastic
21 Athletic Association (NJSIAA), or a public institution of higher
22 education or any higher education institution that is a member of
23 the national collegiate athletic association (NCAA), national
24 association of intercollegiate athletics (NAIA), or national junior
25 college athletic association (NJCAA) shall be expressly designated
26 as one of the following based on biological sex:

- 27 (1) males, men, or boys;
28 (2) females, women, or girls; or
29 (3) coed or mixed.

30 b. Athletic teams or sports designated for females, women, or
31 girls shall not be open to students of the male sex. If a student's sex
32 is disputed, a student shall establish sex by presenting a signed
33 physician's statement that shall indicate the student's sex based
34 solely on:

- 35 (1) the student's internal and external reproductive anatomy;
36 (2) the student's normal endogenously produced levels of
37 testosterone; and
38 (3) an analysis of the student's genetic makeup.

39
40 3. A government entity, any licensing or accrediting
41 organization, or any athletic association or organization shall not
42 entertain a complaint, open an investigation, or take any other
43 adverse action against a school or an institution of higher education
44 for maintaining separate interscholastic, intercollegiate, intramural,
45 or club athletic teams or sports for students of the female sex.

46
47 4. a. Any student who is deprived of an athletic opportunity or
48 suffers any direct or indirect harm as a result of a violation of this

1 chapter shall have a private cause of action for injunctive relief,
2 damages, and any other relief available under law against the school
3 or institution of higher education.

4 b. Any student who is subject to retaliation or other adverse
5 action by a school, institution of higher education, or athletic
6 association or organization as a result of reporting a violation of this
7 chapter to an employee or representative of the school, institution,
8 or athletic association or organization, or to any State or federal
9 agency with oversight of schools or institutions of higher education
10 in the State, shall have a private cause of action for injunctive relief,
11 damages, and any other relief available under law against the
12 school, institution, or athletic association or organization.

13 c. Any school or institution of higher education that suffers any
14 direct or indirect harm as a result of a violation of this chapter shall
15 have a private cause of action for injunctive relief, damages, and
16 any other relief available under law against the government entity,
17 licensing or accrediting organization, or athletic association or
18 organization.

19 d. All civil actions permitted under this section shall be
20 initiated within two years after the harm occurred. Persons or
21 organizations who prevail on a claim brought pursuant to this
22 section shall be entitled to monetary damages, including for any
23 psychological, emotional, and physical harm suffered, reasonable
24 attorney's fees and costs, and any other appropriate relief.

25
26 5. This act shall take effect immediately.
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28

29 STATEMENT

30
31 This bill requires that participation in school-sanctioned sports
32 be based on biological sex at birth. It provides that public and
33 nonpublic schools, as well as institutions of higher education,
34 designate athletic or sports teams on the basis of biological sex.
35 The bill also prohibits any athletic teams or sports designated for
36 females, women, or girls from being open to males. In the event the
37 sex of a student is disputed, the student will establish sex by
38 presenting a signed physician's statement that indicates the
39 student's sex based solely on (1) the student's internal and external
40 reproductive anatomy; (2) the student's normal endogenously
41 produced levels of testosterone; and (3) an analysis of the student's
42 genetic makeup. A school or institution of higher education would
43 not be subject to investigation or any adverse action for maintaining
44 separate athletic teams or sports for students of the female sex.

45 Students who are deprived of athletic opportunities or suffer any
46 harm as a result of a violation of the provisions of this bill would
47 have a private cause of action for injunctive relief, damages, or
48 other legal remedy permitted by law against the school or institution

1 of higher education. A student subject to retaliation or any adverse
2 action by his or her school, institution of higher education, or
3 athletic association or organization for reporting a violation of the
4 bill would also have a private right of action against the school,
5 institution of higher education, or athletic association or
6 organization. A school or institution of higher education that
7 suffers any harm as a result of a violation of this bill would likewise
8 have a private cause of action for injunctive relief, damages, or
9 other legal remedy permitted by law. Any student, school, or
10 institution of higher education able to bring suit under this bill
11 would be required to bring their claims within two years after the
12 harm occurred. Students or organizations that prevail on any claim
13 brought pursuant to this bill would be entitled to monetary damages,
14 including damages for any psychological, emotional, and physical
15 harm suffered, reasonable attorney's fees and costs, and any other
16 appropriate relief.