

As Amended by Senate Committee

Session of 2021

SENATE BILL No. 208

By Committee on Federal and State Affairs

2-10

1 AN ACT concerning education; relating to student athletes; creating the
2 fairness in women's sports act; restricting participation on women's
3 teams to female students; providing a cause of action for violations.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. The provisions of sections 1 through 6, and amendments
7 thereto, shall be known and may be cited as the fairness in women's sports
8 act.

9 Sec. 2. The legislature hereby finds:

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

14 (b) these "inherent differences" range from chromosomal and
15 hormonal differences to physiological differences;

16 (c) men generally have "denser, stronger bones, tendons, and
17 ligaments" and "larger hearts, greater lung volume per body mass, a higher
18 red blood cell count, and higher haemoglobin," Neel Burton, The Battle of
19 the Sexes, Psychology Today (July 2, 2012);

20 (d) men also have higher natural levels of testosterone, which affects
21 traits such as hemoglobin levels, body fat content, the storage and use of
22 carbohydrates, and the development of type 2 muscle fibers, all of which
23 result in men being able to generate higher speed and power during
24 physical activity, Doriane Lambelet Coleman, Sex in Sport, 80 Law and
25 Contemporary Problems 63, 74 (2017) (quoting Gina Kolata, Men,
26 Women and Speed. 2 Words: Got Testosterone?, N.Y. Times (Aug. 21,
27 2008));

28 (e) the biological differences between females and males, especially
29 as it relates to natural levels of testosterone, "explain the male and female
30 secondary sex characteristics which develop during puberty and have
31 lifelong effects, including those most important for success in sport:
32 categorically different strength, speed, and endurance," Doriane Lambelet
33 Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The
34 Best Elite Women to Boys and Men," Duke Law Center for Sports Law
35 and Policy;

36 (f) while classifications based on sex are generally disfavored, the

1 United States Supreme Court has recognized that "sex classifications may
2 be used to compensate women for particular economic disabilities [they
3 have] suffered, to promote equal employment opportunity, [and] to
4 advance full development of the talent and capacities of our Nation's
5 people," *United States v. Virginia*, 518 U.S. 515, 533 (1996);

6 (g) one place where sex classifications allow for the "full
7 development of the talent and capacities of our Nation's people" is in the
8 context of sports and athletics;

9 (h) courts have recognized that the inherent, physiological differences
10 between males and females result in different athletic capabilities. See e.g.
11 *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 13 734,
12 738 (R.I. 1992) ("Because of innate physiological differences, boys and
13 girls are not similarly situated as they enter athletic competition."); *Petrie*
14 *v. Ill. High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting
15 that "high school boys [generally possess physiological advantages over]
16 their girl counterparts" and that those advantages give them an unfair lead
17 over girls in some sports like "high school track");

18 (i) a recent study of female and male Olympic performances since
19 1983 found that, although athletes from both sexes improved over the time
20 span, the "gender gap" between female and male performances remained
21 stable. "These suggest that women's performances at the high level will
22 never match those of men." Valerie Thibault et al., *Women and men in*
23 *sport performance: The gender gap has not evolved since 1983*, 9 *Journal*
24 *of Sports Science and Medicine* 214, 219 (2010);

25 (j) as Duke law professor and All-American track athlete Doriane
26 Coleman, tennis champion Martina Navratilova, and Olympic track gold
27 medalist Sanya Richards-Ross recently wrote: "The evidence is
28 unequivocal that starting in puberty, in every sport except sailing,
29 shooting, and riding, there will always be significant numbers of boys and
30 men who would beat the best girls and women in head-to-head
31 competition. Claims to the contrary are simply a denial of science,"
32 Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But*
33 *Don't Abandon Title IX*, *Washington Post* (Apr. 29, 2019);

34 (k) the benefits that natural testosterone provides to male athletes is
35 not diminished through the use of puberty blockers and cross-sex
36 hormones. A recent study on the impact of such treatments found that even
37 "after 12 months of hormonal therapy," a man who identifies as a woman
38 and is taking cross-sex hormones "had an absolute advantage" over female
39 athletes and "will still likely have performance benefits" over women,
40 Tommy Lundberg et al., "Muscle strength, size and composition following
41 12 months of gender-affirming treatment in transgender individuals:
42 retained advantage for the transwomen," *Karolinksa Institutet* (Sept. 26,
43 2019); and

1 (1) having separate sex-specific teams furthers efforts to promote sex
2 equality. Sex-specific teams accomplish this by providing opportunities for
3 female athletes to demonstrate their skill, strength and athletic abilities
4 while also providing them with opportunities to obtain recognition and
5 accolades, college scholarships and the numerous other long-term benefits
6 that flow from success in athletic endeavors.

7 Sec. 3. (a) Interscholastic, intercollegiate, intramural or club athletic
8 teams or sports that are sponsored by a public elementary or secondary
9 school, a postsecondary educational institution, as such term is defined in
10 K.S.A. 74-3201b, and amendments thereto, or any school or other
11 postsecondary educational institution whose students or teams compete
12 against a public school or postsecondary educational institution shall be
13 expressly designated as one of the following based on biological sex:

- 14 (1) Males, men or boys;
- 15 (2) females, women or girls; or
- 16 (3) coed or mixed.

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

19 (c) ~~(1) A dispute regarding a student's sex shall be resolved by the~~
20 ~~school or postsecondary educational institution where such student attends~~
21 ~~by requesting that the student provide such student's health examination~~
22 ~~and consent form or other statement signed by such student's personal~~
23 ~~healthcare provider that shall verify the student's biological sex. A~~
24 ~~student's pre-participation physical evaluation form may be submitted,~~
25 ~~provided such form verifies the student's biological sex.~~

26 ~~(2) The healthcare provider may verify the student's biological sex as~~
27 ~~part of a routine sports physical examination relying only on one or more~~
28 ~~of the following:~~

- 29 ~~(A) The student's reproductive anatomy;~~
- 30 ~~(B) genetic makeup; or~~
- 31 ~~(C) normal endogenously produced testosterone levels.~~

32 ~~(d) (1) The Kansas state high school activities association shall adopt~~
33 ~~rules and regulations for its member schools for the implementation of this~~
34 ~~section and the timely resolution of any disputes.~~

35 (2) The state board of regents and the governing body for each
36 municipal university, community college and technical college shall adopt
37 rules and regulations for the postsecondary educational institutions
38 governed by each such entity, respectively, for the implementation of this
39 section ~~and the timely resolution of any disputes.~~

40 Sec. 4. No governmental entity, licensing or accrediting organization
41 or athletic association or organization shall entertain a complaint, open an
42 investigation or take any other adverse action against a school or
43 postsecondary educational institution for maintaining separate

1 interscholastic, intercollegiate, intramural or club athletic teams or sports
2 for students of the female sex.

3 Sec. 5. (a) Any student who is deprived of an athletic opportunity or
4 suffers any direct or indirect harm as a result of a violation of section 3,
5 and amendments thereto, shall have a private cause of action for injunctive
6 relief, damages and any other relief available under law against the school
7 or postsecondary educational institution.

8 (b) Any student who is subject to retaliation or other adverse action
9 by a school, postsecondary educational institution or athletic association or
10 organization as a result of reporting a violation of section 3, and
11 amendments thereto, to an employee or representative of such school,
12 postsecondary educational institution or athletic association or
13 organization, or to any state or federal agency with oversight of schools or
14 postsecondary educational institutions in this state, shall have a private
15 cause of action for injunctive relief, damages and any other relief available
16 under law against the school, institution or athletic association or
17 organization.

18 (c) Any school or postsecondary educational institution that suffers
19 any direct or indirect harm as a result of a violation of section 3 or 4, and
20 amendments thereto, shall have a private cause of action for injunctive
21 relief, damages and any other relief available under law against the
22 governmental entity, licensing or accrediting organization or athletic
23 association or organization.

24 (d) All civil actions must be initiated within two years after the harm
25 occurred. Persons or organizations who prevail on a claim brought
26 pursuant to this section shall be entitled to monetary damages, including
27 for any psychological, emotional and physical harm suffered, reasonable
28 attorney fees and costs and any other appropriate relief.

29 Sec. 6. The provisions of sections 1 through 5, and amendments
30 thereto, are hereby declared to be severable. If any provision of sections 1
31 through 5, and amendments thereto, or the application thereof to any
32 person or circumstance is held invalid, the invalidity shall not affect other
33 provisions or applications of sections 1 through 5, and amendments
34 thereto, that can be given effect without the invalid provision or
35 application.

36 Sec. 7. This act shall take effect and be in force from and after its
37 publication in the statute book.