



**Kansas House Committee on Education
House Bill 2238**

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Alliance Defending Freedom is the nation's leading nonprofit legal organization that advocates for religious liberty, free speech, life, and marriage and the family. We regularly analyze proposed laws and their effect on constitutional freedoms. ADF also currently represents female athletes in West Virginia, Connecticut, Idaho, and other states in federal court who have personally lost out on championships and other athletic opportunities to biological males who were permitted to compete in female sports.

Women deserve to compete on a level playing field. Allowing males to compete in women's sports destroys fair competition and women's athletic opportunities.

HB 2238 protects opportunities for young women in athletics by ensuring they are not forced to compete against men playing on women's sports teams. The bill simply requires that all collegiate sports teams be designated as either male, female, or co-ed based on biological sex and makes clear that males are not eligible to compete on female teams. It also protects a college that follows the law from any adverse action by a government entity, accrediting or licensing organization, or any athletic association.

Biological sex is the biggest driver of athletic advantage. Males have a 10-50% performance advantage (depending on the sport) over females. Having separate teams for men and women is the time-tested way to ensure that women have the opportunity to showcase their talents and become champions. The science shows that comparably fit and trained males will always have physical advantages over women. Even the world's best female Olympic athletes would lose to thousands of boys and men on any given day. That's the reason we have women's sports as a separate category.

Unfortunately, across the country, we are seeing a growing number of instances in which biological males have taken away championships, records, and countless athletic opportunities from female athletes. For example:

- In Connecticut, two biological males captured 15 girls' high school state championship titles, set 17 new individual meet records, and took over 80 opportunities to advance in competition in the 2017-19 seasons alone that rightfully belonged to females. One of the males competed for three seasons in the male category and never qualified for a championship, and then switched just a couple of weeks later to begin competing in the girls' category and dominated girls' track events. That hurt female athletes like Chelsea Mitchell and Alanna Smith that my firm represents in a challenge to Connecticut's policy.
- In 2019, CeCe Telfer, a biological male who identifies as female, dominated the NCAA Division II National Championship in the 400m Hurdles. Telfer actually *improved* in several track and field events after a year of testosterone suppression.
- June Eastwood, who competed on the University of Montana men's track team before switching to the female team, easily beat the female competitors to win the women's mile at the Big Sky Indoor Track & Field Championship in 2019. It was one of several times when female athletes in the Big Sky Conference lost opportunities because of Eastwood.
- University of Pennsylvania swimmer Lia Thomas, a male who identifies as female, won several women's titles and broke several records, including three new records at the Ivy League Championship and an NCAA Championship last spring. Thomas jumped from #462 in the male division to #1 in the female rankings. In a letter, sixteen of Thomas's teammates spoke out about the unfairness of Thomas competing on the women's team. "Lia's inclusion with unfair biological advantages means that we have lost competitive opportunities. Some of us have lost records.... To be sidelined or beaten by someone competing with the strength, height, and lung capacity advantages that can only come with male puberty has been exceedingly difficult."

Women are already losing out. We shouldn't make them pay the price while we wait to protect their opportunities to compete on a fair playing field.

Scientific research continues to point to the necessity of policies that protect women's athletic opportunities by ensuring girls and women are not forced to compete against men. Evidence confirms that suppression of testosterone in a male after puberty does not substantially eliminate the male athletic advantage. One recent scientific study found that "superior anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a considerable portion of the male performance advantage over females, are not removed by the current regimen of testosterone suppression" permitted by the

International Olympic Committee and other sports organizations. *See* <https://doi.org/10.1007/s40279-020-01389-3>.

Another study of the physical fitness of Air Force personnel reached a similar conclusion: “[T]he pretreatment differences between transgender and [biological] women persist beyond the 12 month time requirement currently being proposed for athletic competition by the World Athletics and the IOC.” *See* <https://bjism.bmj.com/content/early/2020/11/06/bjsports-2020-102329>.

HB 2238 has become more urgent than ever—especially for collegiate athletes—after the NCAA declined to adopt a policy that ensures fairness for women. Instead, the NCAA punted to a patchwork of unaccountable national and international organizations—some of which allow males to compete on women’s teams with no preconditions, and others of which have no policy at all. It is vital for states to step up and set a clear, fair, and scientifically based policy to guide schools and colleges throughout the state and to guarantee equal opportunities for our daughters and granddaughters to participate and win.

Indeed, 18 states have already acted to protect fairness in women’s sports. These states want to attract and retain the best women athletes to their colleges and universities with a guarantee that they will never lose their spot on a team to a male competitor. And none of them has experienced any economic consequences for doing so: no lost NCAA tournaments or events; no boycotts; and no businesses pulling out of their states. This should be unsurprising because poll after poll shows that Americans believe that women and girls should not lose medals or opportunities to male athletes.

But this isn’t just about losing medals or championships. Allowing males on girls’ teams means that a young woman will also lose the many benefits that flow from participating in sports—learning teamwork, how to overcome adversity, and leadership skills. In fact, a recent survey of women business leaders from Inc.com found that 94% of these leaders participated in sports. They described how vital those athletic experiences were to their professional development. Every girl in Kansas—many of whom will grow up one day to be business and community leaders—should have to the same athletic opportunities available to her.

Finally, HB 2238 aligns with both the U.S. Constitution and federal law, including Title IX. Federal courts have long recognized that it is constitutional to provide separate programs based on biological sex—including sports teams, locker rooms, or even single-sex schools.

In the Supreme Court’s decision in the Virginia Military Institute (VMI) case in which the court ruled that women must be permitted to attend VMI, Justice Ginsburg wrote that once women were admitted to VMI, female students would

“undoubtedly require” separate physical fitness standards, precisely because of the “physiological differences between male and female individuals.” *United States v. Virginia*, 518 U.S. 515, 533, 550 n. 19 (1996). It is for just this same reason that men and women “undoubtedly require” separate physical competitions.

The 9th Circuit Court of Appeals upheld an Arizona policy that, like HB 2238, merely said that males are not eligible to compete on female team. The court found that it is a “physiological fact” that “males would have an undue advantage competing against women,” and the evidence was clear that “due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions” on the women’s team. *Clark v. Ariz. Interscholastic Ass’n.*, 695 F.2d 1126, 1131 (9th Cir. 1982). The result would be that “athletic opportunities for women would be diminished.” *Id.*

And in January of this year, a federal court in West Virginia upheld a nearly identical women’s sports law that protected fairness for women and young girls alike, concluding that the law did not violate the Constitution or Title IX. The court recognized that “biological males generally outperform females athletically,” and thus “[t]he state is permitted to legislate sports rules on this basis because sex, and the physical characteristics that flow from it, are substantially related to athletic performance and fairness in sports.” *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2023 WL 111875, at *8 (S.D.W. Va. Jan. 5, 2023).

Finally, although the Biden Administration has pushed a new interpretation of Title IX that redefines “sex” to include gender identity, a federal court recently stopped the U.S. Department of Education from forcing 20 states—including Kansas—to comply with its unlawful interpretation. In *Tennessee v. United States Dep’t of Educ.*, the court enjoined the Title IX guidance and held that the Department failed to follow necessary procedures when making this change and its interpretation conflicted with Supreme Court precedent. 2022 WL 2791450 (E.D. Tenn. July 15, 2022). The court found that the states’ sovereignty and ability to enforce their laws would be irreparably harmed without an injunction. The court also held that the Department “ignore[d] the limited reach of *Bostock*” which “only addressed sex discrimination under Title VII” and “does not require [the Department’s] interpretations of Title VII and IX.” The court concluded that none of the 20 states that joined the lawsuit need to follow the Department’s new guidance redefining the term “sex,” and the Department cannot enforce the guidance against them. *Id.* at *16.

In sports, biology is what matters. When we ignore science and biological reality, women pay the price. Allowing males to compete in girls’ sports reverses nearly 50 years of advances for women. That’s neither fair nor equal. The solution is HB 2238, which ensures that all female athletes have a level playing field to compete and win.