



2021 South Dakota Legislature

House Bill 1217

Introduced by: **Representative Milstead**

1 **An Act to promote continued fairness in women's sports.**

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 **Section 1.** That a NEW SECTION be added:

4 **LEGISLATIVE FINDINGS.**

5 The Legislature finds that:

6 (1) "With respect to biological sex, one is either male or female."

7 Arnold De Loof, Only Two Sex Forms but Multiple Gender Variants: How to Explain?,

8 11(1) Communicative & Integrative Biology, (2018), at

9 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5824932>;

10 (2) A person's "sex is determined at fertilization and revealed at birth or, increasingly,
11 in utero."

12 Lucy Griffin, et al., Sex, gender and gender identity: a re-evaluation of the
13 evidence, BJPsych Bulletin July 21; 1-9. (2020) at

14 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6677266>;

15 (3) "[B]iological differences between males and females are determined genetically
16 during embryonic development."

17 Stefanie Eggers, et al., Mammalian sex determination-insights from humans and
18 mice (2012) Chromosome Research 20(1): 215-238 (2012) at

19 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3279640>;

20 (4) "Secondary sex characteristics that develop during puberty . . . generate
21 anatomical divergence beyond the reproductive system, leading to adult body
22 types that are measurably different between sexes."

23 Emma Hilton, et al., Transgender Women in the Female Category of Sport:

24 Perspectives on Testosterone Suppression and Performance Advantage, Sports

25 Med (2020);

- 1 (5) There are "[i]nherent differences" between men and women . . . [and these]
2 "remain cause for celebration, but not for denigration of the members of either sex
3 or for artificial constraints on an individual's opportunity."
4 United States v. Virginia, 518 U.S. 515, 533 (1996);
- 5 (6) In studies of large cohorts of children from 6 years old, "[b]oys typically scored
6 higher than girls on cardiovascular endurance, muscular strength, muscular
7 endurance, and speed/agility, but lower on flexibility."
8 Konstantinos Tambalis, et al., Physical fitness normative values for 6-18-year-old
9 Greek boys and girls, using the empirical distribution and the lambda, mu, and
10 sigma statistical method (2015) Eur J Sport Sci. Sep;16(6):736-46 at
11 <https://pubmed.ncbi.nlm.nih.gov/26402318>; see also, M.J. Catley, et al.,
12 Normative Health-related fitness values for children: analysis of 85347 test results
13 on 9-17 year old Australians since 1985 (2013) Br J Sports Med. Jan; 47(2) at
14 <https://pubmed.ncbi.nlm.nih.gov/22021354>;
- 15 (7) Physiological differences between males and females relevant to sports
16 performance "include a larger body size with more skeletal muscle mass, a lower
17 percentage of body fat, as well as greater maximal delivery of anaerobic and
18 aerobic energy."
19 O. Sandbakk, et al., Sex Differences in World-Record Performance: The Influence
20 of Sport Discipline and Competition Duration (2018) Int J Sports Physiol Perform,
21 Jan 1;13(1):2-8 at <https://pubmed.ncbi.nlm.nih.gov/28488921>;
- 22 (8) Physiological differences between males and females include "those most
23 important for success in sport: categorically different strength, speed, and
24 endurance."
25 Doriane Lambelet Coleman, et al., Comparing Athletic Performances – The Best
26 Elite Women to Boys and Men, Duke Center for Sports Law and Policy, at
27 <https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance>;
- 28 (9) Physiological differences between men and women provide competitive sports
29 advantage for men, permitting, among other advantages, "males [being] able to
30 generate higher speed and power during physical activity."
31 Doriane Lambelet Coleman, Sex in Sport, 80 Law and Contemporary Problems 63
32 (2017) at
33 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4849&context=lcp>;

- 1 (10) There is a sports performance gap between males and females, such that "the
2 physiological advantages conferred by biological sex appear, on assessment of
3 performance data, insurmountable."
4 Emma Hilton, et al., Transgender Women in the Female Category of Sport:
5 Perspectives on Testosterone Suppression and Performance Advantage, Sports
6 Med (2020);
- 7 (11) While classifications based on sex are generally disfavored, the United States
8 Supreme Court has recognized that "[s]ex classifications may be used to
9 compensate women "for particular economic disabilities [they have] suffered" . . .
10 " to promot[e] equal employment opportunities, [and] to advance full development
11 of the talent and capacities of our Nation's people "
12 United States v. Virginia, 518 U.S. 515, 533 (1996);
- 13 (12) One place where sex classifications allow for the full development of the talent and
14 capacities of our Nation's people is in the context of sports and athletics;
- 15 (13) Courts have recognized that the inherent, physiological differences between males
16 and females result in different athletic capabilities and have stated that "because
17 of innate physiological differences, boys and girls are not similarly situated as they
18 enter athletic competition"
19 Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 13 734, 738 (R.I.
20 1992);
- 21 (14) The benefits that natural testosterone provides to male athletes is not diminished
22 through the use of testosterone suppression. A recent study on the impact of such
23 treatments found that policies like those of the International Olympic Committee
24 requiring biological males to undergo at least one year of testosterone suppression
25 before competing in women's sports do not create a level playing field. "[T]he
26 reduction in testosterone levels required by [policies like those of the International
27 Olympic Committee] is insufficient to remove or reduce the male advantage, in
28 terms of muscle mass and strength, by any meaningful degree." The study
29 concluded that "[t]he data presented here demonstrate that superior
30 anthropometric, muscle mass and strength parameters achieved by males at
31 puberty, and underpinning a consideration portion of the male performance
32 advantage over females, are not removed by the current regimen of testosterone
33 suppression" permitted by the International Olympic Committee and other sports
34 organizations. Rather, the study found that male performance advantage over
35 females "remains substantial."

1 Emma Hilton, et al., Transgender Women in the Female Category of Sport:
2 Perspectives on Testosterone Suppression and Performance Advantage, Sports
3 Med (2020); and
4 (15) Having separate sex-specific teams furthers the promotion of sex equality by
5 providing opportunities for female athletes to demonstrate their skills, strengths,
6 and athletic abilities, while also providing them with opportunities to obtain
7 accolades, recognition, college scholarships, and numerous other long-term
8 benefits associated with successful athletic endeavors.

9 **Section 2.** That a NEW SECTION be added:

10 **13-67-2. Athletic teams and sports--Designation by sex--Participation.**

11 Any athletic team or sport that is sponsored or sanctioned by a public school, a
12 school district, an association meeting the requirements of § 13-36-4, or an institution of
13 higher education under the control of the Board of Regents or the South Dakota Board of
14 Technical Education must be expressly designated as being:

- 15 (1) A male team or sport;
16 (2) A female team or sport; or
17 (3) A coeducational team or sport.

18 A team or sport designated as being female is available only to participants who
19 are female, based on their biological sex, as verified in accordance with § 13-67-3.

20 **Section 3.** That a NEW SECTION be added:

21 **13-67-3. Annual statement--False statement as cause for removal.**

22 Once each school year and before permitting a student to participate on an athletic
23 team or in a sport, the sponsoring or sanctioning entity shall obtain a written statement
24 verifying:

- 25 (1) The student's age;
26 (2) The student's biological sex, as ascertained at or before birth in accordance with
27 the student's genetics and reproductive biology; and
28 (3) That the student is not taking and has not taken, during the preceding twelve
29 months, any performance enhancing drugs, including anabolic steroids.

30 The statement must be signed by the student's parent, if the student is under
31 eighteen years of age or by the student, if the student is eighteen years of age or older.

32 If a sponsoring or sanctioning entity has reasonable cause to believe that any
33 information provided in accordance with this section is false or misleading, the entity may

1 remove the student from, and prohibit further participation in, any sport or on any athletic
2 team for the duration of the school year.

3 **Section 4.** That a NEW SECTION be added:

4 **13-67-4. Complaint--Investigation--Adverse action.**

5 A governmental entity, licensing or accrediting organization, or athletic association
6 or organization may not entertain a complaint, open an investigation, or take any adverse
7 action against a school, a school district, or an institution of higher education, or against
8 any person employed by, or a governing board member of, such a school, school district,
9 or institution, for maintaining athletic teams or sports in accordance with § 13-67-2.

10 **Section 5.** That a NEW SECTION be added:

11 **13-67-5. Cause of Action.**

12 If a student is deprived of an athletic opportunity or if a student suffers direct or
13 indirect harm, as a result of this Act being violated, that student has a private cause of
14 action for injunctive relief, damages, and any other relief available under law, against the
15 violating entity.

16 If a student is subjected to retaliation or other adverse action, as a result of
17 reporting a violation of this Act to an employee or representative of a school, school
18 district, institution of higher education, athletic association or organization, or to a state
19 or federal governmental entity having oversight authority, that student has a private cause
20 of action for injunctive relief, damages, and any other relief available under law, against
21 the school, school district, institution of higher education, or athletic association or
22 organization.

23 If a school, school district, or institution of higher education suffers any direct or
24 indirect harm, as a result of this Act being violated, that school, school district, or
25 institution of higher education has a private cause of action for injunctive relief, damages,
26 and any other relief available under law, against the governmental entity, licensing or
27 accrediting organization, or athletic association or organization.

28 A civil action under this section must be initiated within two years from the date
29 the harm occurred.

30 Any person prevailing on a claim brought under this section is entitled to monetary
31 damages, including for psychological, emotional, and physical harm suffered, reasonable
32 attorney's fees and costs, and any other appropriate relief.