

## 2021 South Dakota Legislature

**House Bill 1217****AMENDMENT 1217A FOR THE INTRODUCED BILL**

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?, 11(1)~~  
8 ~~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, in~~  
11 ~~utero."~~

12 ~~Lucy Griffin, et al., Sex, gender and gender identity: a re-evaluation of the evidence, BJPsych~~  
13 ~~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 during~~  
16 ~~embryonic development."~~

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

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

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

4 ~~Emma Hilton, et al., Transgender Women in the Female Category of Sport: Perspectives on~~  
5 ~~Testosterone Suppression and Performance Advantage, Sports Med (2020);~~

6 ~~(5) There are "[i]nherent differences" between men and women . . . [and these]~~  
7 ~~"remain cause for celebration, but not for denigration of the members of either sex~~  
8 ~~or for artificial constraints on an individual's opportunity."~~  
9 ~~United States v. Virginia, 518 U.S. 515, 533 (1996);~~

10 ~~(6) In studies of large cohorts of children from 6 years old, "[b]oys typically scored~~  
11 ~~higher than girls on cardiovascular endurance, muscular strength, muscular~~  
12 ~~endurance, and speed/agility, but lower on flexibility."~~

13 ~~Konstantinos Tambalis, et al., Physical fitness normative values for 6-18 year old~~  
14 ~~Greek boys and girls, using the empirical distribution and the lambda, mu, and~~  
15 ~~sigma statistical method (2015) Eur J Sport Sci. Sep;16(6):736-46 at~~  
16 ~~<https://pubmed.ncbi.nlm.nih.gov/26402318>; see also, M.J. Catley, et al.,~~  
17 ~~Normative Health-related fitness values for children: analysis of 85347 test results~~  
18 ~~on 9-17 year old Australians since 1985 (2013) Br J Sports Med. Jan; 47(2) at~~  
19 ~~<https://pubmed.ncbi.nlm.nih.gov/22021354>;~~

20 ~~(7) Physiological differences between males and females relevant to sports~~  
21 ~~performance "include a larger body size with more skeletal muscle mass, a lower~~  
22 ~~percentage of body fat, as well as greater maximal delivery of anaerobic and~~  
23 ~~aerobic energy."~~

24 ~~O. Sandbakk, et al., Sex Differences in World-Record Performance: The Influence~~  
25 ~~of Sport Discipline and Competition Duration (2018) Int J Sports Physiol Perform,~~  
26 ~~Jan 1;13(1):2-8 at <https://pubmed.ncbi.nlm.nih.gov/28488921>;~~

27 ~~(8) Physiological differences between males and females include "those most~~  
28 ~~important for success in sport: categorically different strength, speed, and~~  
29 ~~endurance."~~

30 ~~Doriane Lambelet-Coleman, et al., Comparing Athletic Performances—The Best~~  
31 ~~Elite Women to Boys and Men, Duke Center for Sports Law and Policy, at~~  
32 ~~<https://web.law.duke.edu/sports/sex-sport/comparative-athletic-performance>;~~

- 1 ~~(9) Physiological differences between men and women provide competitive sports~~  
2 ~~advantage for men, permitting, among other advantages, "males [being] able to~~  
3 ~~generate higher speed and power during physical activity."~~  
4 ~~Doriane Lambelet-Coleman, Sex in Sport, 80 Law and Contemporary Problems 63~~  
5 ~~(2017) at~~  
6 ~~<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4849&context=lcp;>~~  
7 ~~(10) There is a sports performance gap between males and females, such that "the~~  
8 ~~physiological advantages conferred by biological sex appear, on assessment of~~  
9 ~~performance data, insurmountable."~~  
10 ~~Emma Hilton, et al., Transgender Women in the Female Category of Sport:~~  
11 ~~Perspectives on Testosterone Suppression and Performance Advantage, Sports~~  
12 ~~Med (2020);~~  
13 ~~(11) While classifications based on sex are generally disfavored, the United States~~  
14 ~~Supreme Court has recognized that "[s]ex classifications may be used to~~  
15 ~~compensate women "for particular economic disabilities [they have] suffered" . . .~~  
16 ~~" to promot[e] equal employment opportunities, [and] to advance full development~~  
17 ~~of the talent and capacities of our Nation's people . . . ."~~  
18 ~~United States v. Virginia, 518 U.S. 515, 533 (1996);~~  
19 ~~(12) One place where sex classifications allow for the full development of the talent and~~  
20 ~~capacities of our Nation's people is in the context of sports and athletics;~~  
21 ~~(13) Courts have recognized that the inherent, physiological differences between males~~  
22 ~~and females result in different athletic capabilities and have stated that "because~~  
23 ~~of innate physiological differences, boys and girls are not similarly situated as they~~  
24 ~~enter athletic competition . . . ."~~  
25 ~~Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 13 734, 738 (R.I.~~  
26 ~~1992);~~  
27 ~~(14) The benefits that natural testosterone provides to male athletes is not diminished~~  
28 ~~through the use of testosterone suppression. A recent study on the impact of such~~  
29 ~~treatments found that policies like those of the International Olympic Committee~~  
30 ~~requiring biological males to undergo at least one year of testosterone suppression~~  
31 ~~before competing in women's sports do not create a level playing field. "[T]he~~  
32 ~~reduction in testosterone levels required by [policies like those of the International~~  
33 ~~Olympic Committee] is insufficient to remove or reduce the male advantage, in~~  
34 ~~terms of muscle mass and strength, by any meaningful degree." The study~~  
35 ~~concluded that "[t]he data presented here demonstrate that superior~~

~~anthropometric, muscle mass and strength parameters achieved by males at puberty, and underpinning a consideration 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. Rather, the study found that male performance advantage over females "remains substantial."~~

~~Emma Hilton, et al., Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, Sports Med (2020); and~~

~~(15) Having separate sex specific teams furthers the promotion of sex equality by providing opportunities for female athletes to demonstrate their skills, strengths, and athletic abilities, while also providing them with opportunities to obtain accolades, recognition, college scholarships, and numerous other long term benefits associated with successful athletic endeavors.~~

**Section 21.** That a NEW SECTION be added:

~~13-67-2~~ **13-67-1. Athletic teams and sports--Designation by sex--**

**Participation.**

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

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

A team or sport designated as being female is available only to participants who are female, based on their biological sex, as verified in accordance with § ~~13-67-3~~ ~~13-67-2~~.

**Section 32.** That a NEW SECTION be added:

~~13-67-3~~ **13-67-2. Annual statement--False statement as cause for removal.**

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

- (1) The student's age;

1 (2) The student's biological sex, as ascertained at or before birth in accordance with  
 2 the student's genetics and reproductive biology; and

3 (3) That the student is not taking and has not taken, during the preceding twelve  
 4 months, any performance enhancing drugs, including anabolic steroids.

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

7 If a sponsoring or sanctioning entity has reasonable cause to believe that any  
 8 information provided in accordance with this section is false or misleading, the entity may  
 9 remove the student from, and prohibit further participation in, any sport or on any athletic  
 10 team for the duration of the school year.

11 **Section 43.** That a NEW SECTION be added:

12 ~~13-67-4~~ **13-67-3. Complaint--Investigation--Adverse action.**

13 A governmental entity, licensing or accrediting organization, or athletic association  
 14 or organization may not entertain a complaint, open an investigation, or take any adverse  
 15 action against a school, a school district, or an institution of higher education, or against  
 16 any person employed by, or a governing board member of, such a school, school district,  
 17 or institution, for maintaining athletic teams or sports in accordance with § ~~13-67-2~~ 13-  
 18 ~~67-1.~~

19 **Section 54.** That a NEW SECTION be added:

20 ~~13-67-5~~ **13-67-4. Cause of Action.**

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

25 If a student is subjected to retaliation or other adverse action, as a result of  
 26 reporting a violation of this Act to an employee or representative of a school, school  
 27 district, institution of higher education, athletic association or organization, or to a state  
 28 or federal governmental entity having oversight authority, that student has a private cause  
 29 of action for injunctive relief, damages, and any other relief available under law, against  
 30 the school, school district, institution of higher education, or athletic association or  
 31 organization.

32 If a school, school district, or institution of higher education suffers any direct or  
 33 indirect harm, as a result of this Act being violated, that school, school district, or

1 institution of higher education has a private cause of action for injunctive relief, damages,  
2 and any other relief available under law, against the governmental entity, licensing or  
3 accrediting organization, or athletic association or organization.

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

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