

1 State of Arkansas
2 93rd General Assembly
3 Regular Session, 2021
4

As Engrossed: S3/9/21

A Bill

SENATE BILL 354

5 By: Senators Irvin, Beckham, Bledsoe, A. Clark, B. Davis, J. English, T. Garner, Gilmore, K. Hammer,
6 Hester, B. Johnson, M. Johnson, Rapert, G. Stubblefield, D. Wallace, *J. Dismang, Hill*
7 By: Representatives Barker, Bentley, S. Berry, Brown, Cavanaugh, Cloud, C. Cooper, Cozart, Crawford,
8 Dalby, C. Fite, Furman, Gonzales, M. Gray, Haak, Ladyman, Lundstrum, J. Mayberry, McGrew,
9 McKenzie, Milligan, Payton, Pilkington, Ray, Richmond, B. Smith, Speaks, Vaught, Watson, Womack,
10 *Penzo, Tosh, Wing*
11

For An Act To Be Entitled

12 AN ACT TO CREATE THE FAIRNESS IN WOMEN’S SPORTS ACT;
13 AND FOR OTHER PURPOSES.
14

Subtitle

15 TO CREATE THE FAIRNESS IN WOMEN’S SPORTS
16 ACT.
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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20 SECTION 1. DO NOT CODIFY. Legislative findings and intent.
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22 (a) The General Assembly finds that:

23 (1) According to the United States Supreme Court in United
24 States v. Virginia, 518 U.S. 515, 533 (1996), there are "inherent differences
25 between men and women," and these differences "remain cause for celebration,
26 but not for denigration of the members of either sex or for artificial
27 constraints on an individual’s opportunity";
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29 (2) These "inherent differences" range from chromosomal and
30 hormonal differences to physiological differences;
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32 (3) According to Neel Burton, "The Battle of the Sexes,"
33 Psychology Today (July 2, 2012), men generally have "denser, stronger bones,
34 tendons, and ligaments" and "larger hearts, greater lung volume per body
35 mass, a higher red blood cell count, and higher hemoglobin";
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1 (4) According to Doriane Lambelet Coleman, "Sex in Sport", 80
2 Law and Contemporary Problems 63-126 (2017) (quoting Gina Kolata, "Men, Women
3 and Speed. 2 Words: Got Testosterone?", N.Y. Times (Aug. 21, 2008)), men
4 also have higher natural levels of testosterone, which affects traits such as
5 hemoglobin levels, body fat content, the storage and use of carbohydrates,
6 and the development of type 2 muscle fibers, all of which result in men being
7 able to generate higher speed and power during physical activity;

8 (5) The biological differences between men and women, especially
9 related to natural levels of testosterone, "explain the male and female
10 secondary sex characteristics which develop during puberty and have life-long
11 effects, including those most important for success in sport: categorically
12 different strength, speed, and endurance," according to Doriane Lambelet
13 Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best
14 Elite Women to Boys and Men," Duke Law Center for Sports Law and Policy;

15 (6) While classifications based on sex are generally disfavored,
16 the United States Supreme Court in United States v. Virginia, 518 U.S. 515,
17 533 (1996), has recognized that "sex classifications may be used to
18 compensate women for particular economic disabilities [they have] suffered,
19 promote equal employment opportunity, [and] to advance full development of
20 the talent and capacities of our Nation's people";

21 (7) One place where sex classifications allow for the "full
22 development of the talent and capacities of our Nation's people" is in the
23 context of sports and athletics;

24 (8) Courts have recognized that the inherent, physiological
25 differences between males and females result in different athletic
26 capabilities. See, for example, Kleczek v. Rhode Island Interscholastic
27 League, Inc., 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological
28 differences, boys and girls are not similarly situated as they enter athletic
29 competition."); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill.
30 App. Ct. 1979) (noting that "high school boys [generally possess
31 physiological advantages over] their girl counterparts" and that those
32 advantages give them an unfair lead over girls in some sports like "high
33 school track");

34 (9) A recent study of female and male Olympic performances since
35 1983 by Valerie Thibault, et al., "Women and Men in Sport Performance: The
36 Gender Gap Has Not Evolved Since 1983," Journal of Sports Science & Medicine,

1 Vol. 9, No.2 (2010), found that although athletes from both sexes improved
2 over the time span, the "gender gap" between female and male performances
3 remained stable, which suggests that "women's performances at the high level
4 will never match those of men";

5 (10) As Duke University School of Law professor and All-American
6 track athlete Doriane Coleman, tennis champion Martina Navratilova, and
7 Olympic track gold medalist Sanya Richards-Ross recently wrote, "[T]he
8 evidence is unequivocal that starting in puberty, in every sport except
9 sailing, shooting, and riding, there will always be significant numbers of
10 boys and men who would beat the best girls and women in head-to-head
11 competition. Claims to the contrary are simply a denial of science."
12 (Doriane Coleman, Martina Navratilova, et al., "Pass the Equality Act, But
13 Don't Abandon Title IX," Washington Post (Apr. 29, 2019));

14 (11) The benefits that natural testosterone provide to male
15 athletes are not diminished through the use of puberty blockers and cross-sex
16 hormones. A recent study on the impact of treatments regarding puberty
17 blockers and cross-sex hormones found that even "after 12 months of hormonal
18 therapy," a man who identifies as a woman and is taking cross-sex hormones
19 "had an absolute advantage" over female athletes and "will still likely have
20 performance benefits" over women. (Wilk, Anna, et al., "Muscle Strength,
21 Size and Composition Following 12 Months of Gender-Affirming Treatment in
22 Transgender Individuals," The Journal of Clinical Endocrinology & Metabolism,
23 Vol. 105, No. 3 (2019)); and

24 (12) Having separate sex-specific teams furthers efforts to
25 promote sex equality and accomplishes this aim by providing opportunities for
26 female athletes to demonstrate their skill, strength, and athletic abilities
27 while also providing them with opportunities to obtain recognition and
28 accolades, college scholarships, and the numerous other long-term benefits
29 that flow from success in athletic endeavors.

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31 SECTION 2. Arkansas Code Title 6, Chapter 1, Subchapter 1, is amended
32 to add an additional section to read as follows:

33 6-1-107. Fairness in Women's Sports Act.

34 (a) This section shall be known and may be cited as the "Fairness in
35 Women's Sports Act".

36 (b)(1) As used in this section, "school" means:

1 (A) A public elementary or secondary school;
2 (B) An open-enrollment public charter school; and
3 (C) A public two-year or four-year institution of higher
4 education.

5 (2) "School" includes a private educational institution whose
6 interscholastic, intercollegiate, intramural, or club athletic teams or
7 sports compete against a public school.

8 (c) Interscholastic, intercollegiate, intramural, or club athletic
9 teams or sports that are sponsored by a school shall be expressly designated
10 as one (1) of the following based on biological sex:

11 (1) "Male", "men's", or "boys;

12 (2)(A) "Female", "women's", or "girls".

13 (B) An interscholastic, intercollegiate, intramural, or
14 club athletic team or sport that is expressly designated for females, women,
15 or girls shall not be open to students of the male sex; or

16 (3) "Coed" or "mixed".

17 (d) A state government entity, licensing or accrediting organization,
18 or athletic association or organization shall not undertake any of the
19 following with respect to a school that maintains separate interscholastic,
20 intercollegiate, intramural, or club athletic teams or sports for students of
21 the female sex:

22 (1) Accept a complaint concerning gender bias;

23 (2) Open an investigation; or

24 (3) Take any other adverse action against the school.

25 (e) A student who is:

26 (1) Deprived of an athletic opportunity or suffers a direct or
27 indirect harm as a result of a violation of this section shall have a private
28 cause of action against the school for:

29 (A) Injunctive relief;

30 (B) Damages, including without limitation:

31 (i) Monetary damages for any psychological,
32 emotional, or physical harm; and

33 (ii) Reasonable attorney's fees and costs; and

34 (C) Any other relief available under the law; or

35 (2) Subject to retaliation or other adverse action by a school
36 or athletic association or organization as a result of reporting a violation

1 of this section to an employee or representative of the school or athletic
2 association or organization, or to a state or federal agency with oversight
3 of schools, shall have a private cause of action against the school or
4 athletic association or organization for:

5 (A) Injunctive relief;

6 (B) Damages, including without limitation:

7 (i) Monetary damages for any psychological,
8 emotional, or physical harm; and

9 (ii) Reasonable attorney's fees and costs; and

10 (C) Any other relief available under law.

11 (f) A school that suffers a direct or indirect harm as a result of a
12 violation of this section shall have a private cause of action against the
13 state government entity, licensing or accrediting organization, or athletic
14 association or organization for:

15 (1) Injunctive relief;

16 (2) Damages, including without limitation:

17 (A) Monetary damages for any psychological, emotional, or
18 physical harm; and

19 (B) Reasonable attorney's fees and costs; and

20 (3) Any other relief available under the law.

21 (g) A civil action initiated under subsection (e) or subsection (f) of
22 this section shall be commenced within two (2) years after the harm occurred.

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25 */s/ Irvin*
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