

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 3293

BY DELEGATES HANNA, BRIDGES, CLARK, ELLINGTON,
HORST, JENNINGS, LONGANACRE, MAZZOCCHI, TULLY,

PHILLIPS AND BURKHAMMER

[Passed April 9, 2021; in effect ninety days from
passage.]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §18-2-25d, relating to designation of athletic teams or sports sponsored by
3 any public secondary school or state institution of higher education according to biological
4 sex; providing legislative findings; defining “biological sex”, “female”, and “male”; providing
5 for designation of athletic teams as “males, men, or boys”, “females, women, or girls”, or
6 “coed or mixed”; prohibiting biological males from participating on athletic teams or sports
7 designated for biological females where competitive skill or contact is involved; clarifying
8 that eligibility of any student to participate on athletic teams or sports designated for
9 biological males is not restricted; providing cause of action for student aggrieved by
10 violation of this section; requiring identity of minor student related to such action to remain
11 anonymous; requiring promulgation of rules by the State Board of Education; and requiring
12 proposal of legislative rules by the Higher Education Policy Commission and Council for
13 Community and Technical College Education.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. STATE BOARD OF EDUCATION.

§18-2-25d. Clarifying participation for sports events to be based on biological sex of the athlete at birth.

1 (a) The Legislature hereby finds:

2 (1) There are inherent differences between biological males and biological females, and
3 that these differences are cause for celebration, as determined by the Supreme Court of the
4 United States in *United States v. Virginia* (1996);

5 (2) These inherent differences are not a valid justification for sex-based classifications that
6 make overbroad generalizations or perpetuate the legal, social, and economic inferiority of either
7 sex. Rather, these inherent differences are a valid justification for sex-based classifications when
8 they realistically reflect the fact that the sexes are not similarly situated in certain circumstances,
9 as recognized by the Supreme Court of the United States in *Michael M. v. Sonoma County*,

10 *Superior Court* (1981) and the Supreme Court of Appeals of West Virginia in *Israel v. Secondary*
11 *Schools Act. Com'n* (1989);

12 (3) In the context of sports involving competitive skill or contact, biological males and
13 biological females are not in fact similarly situated. Biological males would displace females to a
14 substantial extent if permitted to compete on teams designated for biological females, as
15 recognized in *Clark v. Ariz. Interscholastic Ass'n* (9th Cir. 1982);

16 (4) Although necessarily related, as concluded by the United States Supreme Court in
17 *Bostock v. Clayton County* (2020), gender identity is separate and distinct from biological sex to
18 the extent that an individual's biological sex is not determinative or indicative of the individual's
19 gender identity. Classifications based on gender identity serve no legitimate relationship to the
20 State of West Virginia's interest in promoting equal athletic opportunities for the female sex; and

21 (5) Classification of teams according to biological sex is necessary to promote equal
22 athletic opportunities for the female sex.

23 (b) Definitions. - As used in this section, the following words have the meanings ascribed
24 to them unless the context clearly implies a different meaning:

25 (1) "Biological sex" means an individual's physical form as a male or female based solely
26 on the individual's reproductive biology and genetics at birth.

27 (2) "Female" means an individual whose biological sex determined at birth is female. As
28 used in this section, "women" or "girls" refers to biological females.

29 (3) "Male" means an individual whose biological sex determined at birth is male. As used
30 in this section, "men" or "boys" refers to biological males.

31 (c) Designation of Athletic Teams. —

32 (1) Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are
33 sponsored by any public secondary school or a state institution of higher education, including a
34 state institution that is a member of the National Collegiate Athletic Association (NCAA), National

35 Association of Intercollegiate Athletics (NAIA), or National Junior College Athletic Association
36 (NJCAA), shall be expressly designated as one of the following based on biological sex:

37 (A) Males, men, or boys;

38 (B) Females, women, or girls; or

39 (C) Coed or mixed.

40 (2) Athletic teams or sports designated for females, women, or girls shall not be open to
41 students of the male sex where selection for such teams is based upon competitive skill or the
42 activity involved is a contact sport.

43 (3) Nothing in this section shall be construed to restrict the eligibility of any student to
44 participate in any interscholastic, intercollegiate, or intramural athletic teams or sports designated
45 as “males,” “men,” or “boys” or designated as “coed” or “mixed”: *Provided*, That selection for a
46 team may still be based on those who try out and possess the requisite skill to make the team.

47 (d) Cause of Action. —

48 (1) Any student aggrieved by a violation of this section may bring an action against a
49 county board of education or state institution of higher education alleged to be responsible for the
50 alleged violation. The aggrieved student may seek injunctive relief and actual damages, as well
51 as reasonable attorney’s fee and court costs, if the student substantially prevails.

52 (2) In any private action brought pursuant to this section, the identity of a minor student
53 shall remain private and anonymous.

54 (e) The State Board of Education shall promulgate rules, including emergency rules,
55 pursuant to §29A-3B-1 *et. seq.* of this code to implement the provisions of this section. The Higher
56 Education Policy Commission and the Council for Community and Technical College Education
57 shall promulgate emergency rules and propose rules for legislative approval pursuant to §29A-
58 3A-1 *et. seq.* of this code to implement the provisions of this section.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, House Committee

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Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2021.

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Governor