

SENATE BILL NO. 723

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Education and Health
on February 8, 2024)

(Patron Prior to Substitute--Senator Mulchi)

A BILL to amend the Code of Virginia by adding sections numbered 22.1-271.9 and 23.1-408.2, relating to K-12 schools and institutions of higher education; student participation in women's sports; civil cause of action.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding sections numbered 22.1-271.9 and 23.1-408.2 as follows:

§ 22.1-271.9. Interscholastic, intramural, and club athletic teams and sports; designation of teams; student participation.

A. Each interscholastic, intramural, or club athletic team or sport sponsored by a public school or any other school that is a member of the Virginia High School League shall be expressly designated as one of the following based on the biological sex of the students who participate on the team or in the sport:

1. For "males," "men," or "boys";

2. For "females," "women," or "girls"; or

3. For "coed" or "mixed" if participation on such team or in such sport is open to both (i) males, men, or boys and (ii) females, women, or girls.

B. Each interscholastic, intramural, or club athletic team or sport sponsored by a public school or any other school that is a member of the Virginia High School League that is expressly designated for "females," "women," or "girls," pursuant to subsection A shall not be open to any student of the male sex.

C. The biological sex of any student seeking to participate on such an expressly designated team shall be affirmed by a signed physician's statement.

26 D. No government entity, licensing or accrediting organization, or athletic association or
27 organization shall entertain a complaint, open an investigation, or take any other adverse action against a
28 school for explicitly designating or maintaining separate interscholastic, intramural, or club athletic teams
29 or sports for "females," "women," or "girls" pursuant to subsections A, B, and C. Any school that suffers
30 any direct or indirect harm as a result of a violation of this section shall have a private cause of action for
31 injunctive relief, damages, and any other relief available under law against such government entity,
32 licensing or accrediting organization, or athletic association or organization.

33 E. Any student who is (i) deprived of an athletic opportunity or suffers any direct or indirect harm
34 as a result of a school knowingly violating this section or (ii) subject to retaliation or other adverse action
35 by a school, athletic association, or organization as a result of reporting a violation of this section to an
36 employee or representative of such school, athletic association, or organization, or to any state or federal
37 agency with oversight of such school in the Commonwealth, shall have a private cause of action for
38 injunctive relief, damages, and any other relief available under law against such school, athletic
39 association, or organization.

40 F. The provisions of subsections D and E shall constitute a waiver of sovereign immunity.

41 G. All civil actions brought pursuant to subsection D or E must be initiated within two years after
42 the harm occurred. Any person who prevails on a claim brought pursuant to this section shall be entitled
43 to monetary damages, including for any psychological, emotional, or physical harm suffered, reasonable
44 attorney fees and costs, and any other appropriate relief.

45 **§ 23.1-408.2. Intercollegiate, intramural, and club athletic teams and sports; designation of**
46 **teams; student participation.**

47 A. Each intercollegiate, intramural, and club athletic team or sport that is sponsored by a public
48 institution of higher education or any institution of higher education that is a member of the National
49 Collegiate Athletic Association (NCAA), National Association of Intercollegiate Athletics (NAIA), or
50 National Junior College Athletic Association (NJCAA) shall be expressly designated as one of the
51 following based on the biological sex of the students who participate on the team or in the sport:

52 1. For "males," "men," or "boys":

53 2. For "females," "women," or "girls"; or
54 3. For "coed" or "mixed," if participation on such team or sport is open to both (i) males, men, or
55 boys and (ii) females, women, or girls.

56 B. Each intercollegiate, intramural, or club athletic team or sport that is sponsored by any such
57 institution of higher education and that is expressly designated for "females," "women," or "girls" pursuant
58 to subsection A shall not be open to any student of the male sex.

59 C. The biological sex of any such student seeking to participate on such an expressly designated
60 team shall be affirmed by a signed physician's statement.

61 D. No government entity, licensing or accrediting organization, or athletic association or
62 organization shall entertain a complaint, open an investigation, or take any other adverse action against an
63 institution of higher education for explicitly designating or maintaining separate intercollegiate,
64 intramural, or club athletic teams or sports for "females," "women," or "girls" pursuant to subsections A,
65 B, and C. Any institution of higher education that suffers any direct or indirect harm as a result of a
66 violation of this section shall have a private cause of action for injunctive relief, damages, and any other
67 relief available under law against such government entity, licensing or accrediting organization, or athletic
68 association or organization.

69 E. Any student who is (i) deprived of an athletic opportunity or suffers any direct or indirect harm
70 as a result of a knowing violation of this section by any such institution of higher education or (ii) subject
71 to retaliation or other adverse action by an institution of higher education, athletic association, or
72 organization as a result of reporting a violation of this section to an employee or representative of such
73 institution, athletic association, or organization, or to any state or federal agency with oversight of such
74 institution in the Commonwealth, shall have a private cause of action for injunctive relief, damages, and
75 any other relief available under law against such institution, athletic association, or organization.

76 F. The provisions of subsections D and E shall constitute a waiver of sovereign immunity.

77 G. All civil actions brought pursuant to subsection D or E must be initiated within two years after
78 the harm occurred. Any person who prevails on a claim brought pursuant to this section shall be entitled

79 to monetary damages, including for any psychological, emotional, and physical harm suffered, reasonable
80 attorney fees and costs, and any other appropriate relief.

81 **2. That the General Assembly finds that (i) there are "inherent differences between men and**
82 **women," and that these differences "remain cause for celebration, but not for denigration of the**
83 **members of either sex or artificial constraints on an individual's opportunity" (United States v.**
84 **Virginia 518 U.S. 515, 533 (1996)), and these "inherent differences" range from chromosomal and**
85 **hormonal differences to physiological differences, including men generally have "denser, stronger**
86 **bones, tendons, and ligaments," "larger hearts, greater lung volume per body mass, a higher red**
87 **blood cell count, and higher hemoglobin" (Neel Burton, "The Battle of the Sexes," Psychology**
88 **Today (July 2, 2012)), higher natural levels of testosterone, which affects traits such as body fat**
89 **content, the storage and use of carbohydrates, and the development of type two muscle fibers, all of**
90 **which result in men being able to generate higher speed and power during physical activity (Doriane**
91 **Lambelet Coleman, "Sex in Sport," Law and Contemporary Problems 63, 74 (2017)); (ii) that these**
92 **biological differences between men and women "explain the male and female secondary sex**
93 **characteristics which develop during puberty and have lifelong effects, including those most**
94 **important for success in sport: categorically different strength, speed and endurance" (Doriane**
95 **Lambelet Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite**
96 **Women to Boys and Men," Duke Law Center for Sports Law and Policy), and that while**
97 **classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex**
98 **classifications may be used to compensate women for particular economic disabilities [they have]**
99 **suffered, to promote equal employment opportunity, [and] to advance full development of the talent**
100 **and capacities of our Nation's people" (United States v. Virginia, 518 U.S. 515, 533 (1996)); (iii) that**
101 **one place in which sex classifications allow for the "full development of the talent and capacities of**
102 **our Nation's people" is in the context of sports and athletics (Id.); (iv) that courts have recognized**
103 **that the inherent, physiological differences between males and females result in different athletic**
104 **capabilities, as seen in Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 738 (R.I.**
105 **1992):"Because of innate physiological differences, boys and girls are not similarly situated as they**

106 enter athletic competition." and in Petrie v. Illinois High Sch. Ass'n, 394 N.E. 2d 855, 861 (Ill. Ct.
107 App. 1979): finding that "high school boys [generally possess physiological advantages over] their
108 girl counterparts" and that those advantages give them an unfair lead over girls in some sports like
109 "high school track"; (v) that a recent study of female and male Olympic performances dating back
110 to 1983 found that, although athletes of both sexes improved over the time span, the "gender gap"
111 between female and male performances remains stable and "[t]h[is] suggest[s] that women's
112 performances at the high level will never match those of men" (Valerie Thibault et al., "Women
113 and Men in Sport Performance: The Gender Gap Has Not Evolved since 1983," Journal of Sports
114 Science & Medicine 214, 291 (2010)); (vi) that, as Duke Law professor and All-American track
115 athlete Doriane Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist
116 Sanya Richards-Ross wrote, "[t]he evidence is unequivocal that starting in puberty, in every sport
117 except sailing, shooting, and riding, there will always be significant numbers of boys and men who
118 would beat the best girls and women in head-to-head competition. Claims to the contrary are simply
119 a denial of science." (Doriane Coleman, Martina Navratilova, et al., "Pass the Equality Act, But
120 Don't Abandon Title IX," Washington Post (Apr. 29, 2019)); and (vii) that the benefits that natural
121 testosterone provides to male athletes is not diminished through the use of puberty blockers and
122 cross-sex hormones. A recent study on the impact of such treatments found that even "after 12
123 months of hormonal therapy" a man who identifies as a woman and is taking cross-sex hormones
124 "had an absolute advantage" over female athletes and "will still likely have performance benefits"
125 over women (Tommy Lundberg, et al., "Muscle strength, size and composition following months of
126 gender-affirming treatment of transgender individuals: retained advantage for the transwomen,"
127 Karolinska Institute (Sept. 26, 2019)); and that the General Assembly finds that having sex-specific
128 teams provide opportunities for female athletes to demonstrate their skill, strength, and athletic
129 abilities while also providing them with opportunities to obtain recognition and accolades, college
130 scholarships, and the numerous other long-term benefits that flow from success in athletic
131 endeavors, and that, therefore, maintaining separate sex-specific teams is imperative to promoting

132 sex equality and necessary to ensuring female athletes equal protection under the law and equal
133 treatment and opportunity in public school and higher education athletics.

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