

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1475 Sex-specific Student Athletic Teams or Sports

SPONSOR(S): Secondary Education & Career Development Subcommittee, Tuck and others

TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Secondary Education & Career Development Subcommittee	13 Y, 4 N, As CS	Kiner	Sanchez
2) Education & Employment Committee	15 Y, 6 N	Kiner	Hassell

SUMMARY ANALYSIS

To maintain opportunities for female athletes to demonstrate their skill, strength, and athletic abilities and achieve recognition, accolades, college scholarships, and the numerous other long-term benefits that result from success in athletic endeavors and to promote sex equality, the 'Fairness in Women's Sports Act' (Act) requires the designation of separate sex-specific athletics teams or sports at the primary, secondary, and collegiate levels.

The Act requires separate sex-specific interscholastic, intercollegiate, intramural, or club athletics teams or sports if the team or sport is sponsored by a public primary or secondary school, a public postsecondary institution or any school or institution whose students or teams compete against such public schools or institutions.

While the Act allows coed teams, it specifically reserves female teams for biological women and girls. The Act facilitates the handling of disputes involving a student's biological sex and provides a safe harbor for a school or public postsecondary institution for maintaining separate interscholastic, intercollegiate, intramural, or club athletic teams or sports for female students.

The Act provides private causes of action for injunctive relief, damages, and any other relief available under law for students, schools, and public postsecondary institutions harmed by a violation of the Act's provisions. All such civil actions must be brought within two years after the alleged harm occurred.

The bill's fiscal impact is indeterminate.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Supreme Court of the United States (SCOTUS), has recognized that there are inherent differences between men and women and these differences remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.¹

Title IX

Title IX was enacted in 1972, nearly 50 years ago, and has been credited with facilitating the increase of girls' and women's participation in athletics. Research shows participation in sports has both immediate and long-term benefits.² For example, female athletes do better in school, are more likely to graduate high school and go to college, are less likely to engage in risky behavior, less likely to get pregnant or take drugs, and benefit from reduced risk of developing illnesses such as obesity, heart disease, osteoporosis, and breast cancer.³ In other words, increased opportunities and participation in sports for women and girls have wide impacts that go beyond sports.⁴

According to an article in *USA Today* written on the 45th anniversary of Title IX, the "number of girls playing high school sports has swelled from fewer than 300,000 in 1974 to more than 3.1 million in 2012."⁵ According to the NCAA, 221,886 females participated in athletics at the collegiate level in 2020.⁶ The number of females participating in athletics at the collegiate level in 1990 was 88,206.⁷ In 1982, the number was 64,390.⁸

Despite the increased rates of participation among female athletes at the collegiate level, more male athletes participate in athletics at the collegiate level overall. According to the NCAA, 282,411 male athletes participated in athletics at the collegiate level in 2020.⁹

Title IX regulations require institutions that receive federal education funds to provide equal opportunities in athletics for both sexes.¹⁰ Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes is considered when determining whether an institution has provided equal opportunities for both sexes.¹¹ With respect to scholarships, Title IX regulations require educational institutions that award athletic scholarships or grants-in-aid to provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.¹²

¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

² The National Coalition for Women and Girls in Education, *Title IX and Athletics: Proven Benefits, Unfounded Objections*, <https://www.ncwge.org/TitleIX40/Athletics.pdf> (last visited March 14, 2021).

³ *Id.*

⁴ *Id.*

⁵ Haley Samsel, *Title IX Turns 45 Today. It's Impact Goes Beyond Women Playing Sports*, *USA Today*, June 23, 2017, available at: <https://www.usatoday.com/story/college/2017/06/23/title-ix-turns-45-today-its-impact-goes-beyond-women-playing-sports/37433427/> (last visited March 14, 2021).

⁶ See NCAA Sports Sponsorship and Participation Rates Database. Available at: <https://www.ncaa.org/about/resources/research/ncaa-sports-sponsorship-and-participation-rates-database> (last visited March 14, 2021).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See U.S. Department of Education, Office of Civil Rights, Title IX – Athletics at: <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html> (last visited March 14, 2021).

¹¹ 34 C.F.R. § 106.41(c).

¹² 34 C.F.R. § 106.37(c).

Title IX regulations also specifically authorize educational institutions to sponsor separate athletics teams for members of each sex.

Title IX provides that:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹³

According to the USDOE, Title IX applies to state and local education agencies, including, “approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.”¹⁴

There are, however, exemptions and exceptions. For example, Title IX does not apply to the following entities in the following contexts:

- **Private Schools Controlled by Religious Organizations:** Title IX does not apply to an educational institution that is controlled by a religious organization if the application of Title IX would be inconsistent with the religious tenets of the religious organization.¹⁵ Title IX’s prohibition on discrimination in admissions also does not apply to private undergraduate higher education institutions.¹⁶
- **Private Undergraduate Institutions of Higher Education:** Title IX’s prohibition on discrimination in admissions does not apply to private institutions of undergraduate higher education.¹⁷
- **Public Elementary and Secondary Schools:** Title IX’s prohibition on discrimination in admissions does not apply to public elementary and secondary schools.¹⁸
- **Schools Training Individuals for Military Services or Merchant Marine:** Title IX does not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States or the merchant marine.¹⁹

According to the National Collegiate Athletic Association (NCAA), there are three areas where Title IX applies to athletics²⁰:

- **Participation:** Title IX does not require institutions to offer identical sports but an equal opportunity to play.
- **Scholarships:** Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation; and
- **Other benefits:** Title IX also requires equal treatment of female and male athletes in the following: equipment and supplies; scheduling of games and practice times; travel and daily allowance and *per diem*; access to tutoring; coaching; locker rooms, practice and competitive

¹³ 20 U.S.C. § 1681. State law incorporates Title IX in s. 1000.05, F.S. Additionally, s. 1006.71, F.S., provides a process for enforcing Title IX at the collegiate level.

¹⁴ *Id.*

¹⁵ 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

¹⁶ 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15.

¹⁷ 20 U.S.C. § 1681(a)(1); 34 C.F.R. § 106.15.

¹⁸ *Id.*

¹⁹ 20 U.S.C. § 1681(a)(4); 34 C.F.R. § 106.13.

²⁰ See the NCAA’s website on ‘Title IX Frequently Asked Questions’ at: <https://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#how> (last visited March 14, 2021).

facilities; medical and training facilities and services; housing and dining facilities and services; publicity and promotions; support services; and recruitment of student-athletes.²¹

Federal regulations allow institutions to maintain separate athletic teams based on sex. Specifically, the Code of Federal Regulations provides the following:

“[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily injury contact.”²²

According to Doriane Lambelet Coleman, a Duke Law Professor and All-American and National Indoor Track Champion, and Wickliffe Shreve, in sports, “there is an average 10-12% performance gap between elite males and elite females.”²³ Professor Coleman and Mr. Shreve further attest “biological differences between females and males explain the male and female secondary sex characteristics which develop during puberty and have life-long effects, including those most important for success in sports: categorically different strength, speed, and endurance.”²⁴

Professor Coleman has further written “men also have higher natural levels of testosterone, which affects traits such as hemoglobin levels, body fat content, the storage and use of carbohydrates, and the development of type 2 muscle fibers, all of which result in men being able to generate higher speed and power during physical activity.”²⁵

Three female high school athletes have sued the Connecticut Association of Schools-Connecticut Interscholastic Athletic Conference (Association) arguing that the Association’s policy that allows biological males to compete against biological females has deprived them of track titles and scholarship opportunities.²⁶ From 2017-2019, two biological males competing against biological females won 15 female state indoor or outdoor championships.²⁷

Federal Legislation

117th Congress (2021 – 2022)

During the 117th Congress, the following bills were introduced (most recent first) with respect to separate sex-specific athletics teams or sports:

²¹ *Id.*

²² 34 C.F.R. § 106.41(b).

²³ Doriane Lambelet Coleman and Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, Duke Law Center for Sports Law and Policy.

²⁴ *Id.*

²⁵ Doriane Lambelet Coleman, *Sex in Sport*, 80 *Law and Contemporary Problems* 63, 74 (2017) (quoting Gina Kolata, *Men, Women and Speed. 2 Words: Got Testosterone?*, *N.Y. Times* (Aug. 21, 2008)).

²⁶ *Soule et al v. Connecticut Association of Schools, Inc. et al*, 3:20-CV-00201. See also Pat Eaton-Robb, *Girls Sue to Block Participation of Transgender Athletes*, AP News, February 12, 2020, available at:

<https://apnews.com/article/8fd300537131153cc44e0cf2ade3244b> (last visited March 14, 2021).

²⁷ *Id.*

- S.251 (Senator Mike Lee, UT)/H.R. 426 (Representative Greg Steube, FL) – ‘Protection of Women and Girls in Sports Act of 2021’: The bill makes it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.²⁸ The bill specifies that sex shall be recognized based solely on a person’s reproductive biology and genetics at birth.²⁹

116th Congress (2019 – 2020)

During the 116th Congress, the following bills were introduced (most recent first) with respect to separate sex-specific athletics teams or sports:

- H.R. 8932 (Representative Tulsi Gabbard, HI) – ‘Protect Women’s Sports Act of 2020’: The bill makes it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose biological sex at birth is male to participate in an athletic program or activity that is designated for women or girls.³⁰
- S.4649 (Senator Kelly Loeffler, GA) – ‘Protection of Women and Girls in Sports Act of 2020’: The bill makes it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.³¹ The bill specifies that sex shall be recognized based solely on a person's reproductive biology and genetics at birth.³²
- H.R. 5702 (Representative Greg Steube, FL) – ‘Protection of Women and Girls in Sports Act of 2020’: This bill makes it a violation of federal law for a recipient of federal funds who operates, sponsors, or facilitates athletic programs or activities to permit a person whose sex is male to participate in an athletic program or activity that is designated for women or girls.³³

National Collegiate Athletic Association (NCAA) Participation Policy

The NCAA has a policy that prohibits a biological male from competing on a team reserved for biological females, unless the biological male has completed one calendar year of testosterone suppression treatment related to gender transition.³⁴ Such biological male may also continue to compete on a men’s team.³⁵

Florida High School Athletic Association (FHSAA) Participation Policy

The Florida High School Athletic Association (FHSAA) is designated by law as the governing nonprofit organization of athletics in Florida public schools.³⁶ The FHSAA is not a state agency, but performs similar functions.³⁷ The FHSAA is required to adopt bylaws regulating student eligibility, student residency and transfer, recruiting, health and safety, including bylaws that require all students participating in interscholastic athletic competition or who are candidates for an interscholastic athletic team to satisfactorily pass a medical evaluation each year before participating in interscholastic athletic

²⁸ See H.R. 426 bill summary prepared by the Congressional Research Service at: <https://www.congress.gov/bill/117th-congress/house-bill/426?s=7&r=54> (last visited March 14, 2021).

²⁹ *Id.*

³⁰ See H.R. 8932 bill summary prepared by the Congressional Research Service at: <https://www.congress.gov/bill/116th-congress/house-bill/8932?s=3&r=7> (last visited March 14, 2021).

³¹ See S.4649 bill summary prepared by the Congressional Research Service at: <https://www.congress.gov/bill/116th-congress/senate-bill/4649> (last visited March 14, 2021).

³² *Id.*

³³ See H.R. 5702 bill summary prepared by the Congressional Research Service at: <https://www.congress.gov/bill/116th-congress/house-bill/5702> (last visited March 14, 2021).

³⁴ See NCAA Inclusion of Transgender Student Athletes, pg. 13. Available at: https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf (last visited March 14, 2021).

³⁵ *Id.*

³⁶ Section 1006.20(1), F.S.

³⁷ *Id.*

competition or engaging in any practice, tryout, workout, conditioning, or other physical activity associated with the student's candidacy for an interscholastic athletic team, and investigations and sanctions.³⁸ The bylaws of the FHSAA govern high school athletic programs in its member schools, unless otherwise specifically provided by statute.³⁹

FHSAA's bylaws state FHSAA "will not discriminate in its governance policies, programs and employment practices on the basis of age, color, disability, gender, national origin, race, religion, creed, sexual orientation or educational choice."⁴⁰ FHSAA bylaws further state the FHSAA will conduct its activities in a manner free of gender bias and will adopt rules that enhance schools' efforts to comply with applicable gender-equity laws.⁴¹

FHSAA bylaws⁴² on participation by gender state the following:

- **Girls on Boys' Teams.** Girls may play on a boys' team in a sport if the school does not sponsor a girls' team in that sport.
- **Boys on Girls' Teams.** Team sports that have both boys and girls are required to compete in the boys division in that sport.
- **Mixed Gender Teams.** Team sports that have both boys and girls are required to compete in the boys division in that sport.
- **Florida High School State Championship Series.** In an individual sport, girls may not participate on boys' teams in the Florida High School State Championship Series when a sport is offered in the Florida High School State Championship Series for girls.

The FHSAA has a policy that allows a student to participate in interscholastic athletics in a manner consistent with their gender identity and expression.⁴³ In order to do so, a student and the student's parent(s) or guardian(s) may work through the FHSAA procedures to seek a determination on the student's eligibility.⁴⁴ The multi-step process begins with notice to the student's school of the student's intent, along with a current transcript and registration information, birth certificate, proof of residency, participation forms, a written statement from the student, accompanied by documentation from other individuals, affirming the student's consistent identity and expression, a complete list of the student's prescribed, non-prescribed or over the counter, treatments or medications, written verification from an appropriate health-care professional (doctor, psychiatrist, or psychologist) of the student's consistent gender identification and expression, and any other pertinent documentation or information with the student or parent(s), legal guardian(s) believe are relevant and appropriate.⁴⁵

Once the student and student's parent(s) or guardian(s) have notified the student's school and submitted the required paperwork, the student's school will contact the FHSAA, which will assign a facilitator who will assist the school and student through the FHSAA's eligibility review process.⁴⁶ The first level of review consists of a review hearing before a committee which will provide a written determination of the student's eligibility.⁴⁷ If the student is deemed ineligible, the student's school, on behalf of the student, may file notice with the FHSAA executive director for a second level review.⁴⁸

³⁸ Section 1006.20(2), F.S.

³⁹ Section 1006.20(1), F.S.

⁴⁰ FHSAA Bylaw 2.7 – Nondiscrimination And Diversity. 2020-2021 FHSAA Handbook. The FHSAA Handbook may be viewed at: https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292 (last visited March 14, 2021).

⁴¹ FHSAA Bylaw 2.4 – Gender Equity. 2020-2021 FHSAA Handbook. The FHSAA Handbook may be viewed at: https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292 (last visited March 14, 2021).

⁴² FHSAA Bylaw 8.6 – Participation By Gender. 2020-2021 FHSAA Handbook. The FHSAA Handbook may be viewed at: https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292 (last visited March 14, 2021).

⁴³ FHSAA Bylaw 16.8 – Gender Identity Participation. 2020-2021 FHSAA Handbook. The FHSAA Handbook may be viewed at: https://fhsaa.com/documents/2020/10/1//2021_handbook_website_1001.pdf?id=292 (last visited March 14, 2021).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Effect of Proposed Changes

To maintain opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that result from success in athletic endeavors, the 'Fairness in Women's Sports Act' requires the designation of separate sex-specific athletics teams and sports at the primary, secondary, and collegiate levels.

The Act specifically designates athletic teams and sports sponsored by a public primary or secondary school, a public postsecondary institution or any school or institution whose students or teams compete against such schools or institutions, as the following based on biological sex:

- Females, women, or girls;
- Males, men, or boys; or
- Coed or mixed.

To ensure that females are not displaced in interscholastic athletic competitions, the Act expressly prohibits athletic teams or sports designated for females, women, or girls from being open to students of the male sex, but does not prohibit females from participating on male athletic teams.

The Act requires a dispute regarding a student's sex to be resolved by the student's school or institution by requesting the student submit certain information to verify the student's sex, such as a health examination and consent form or other statement provided by the student's health care provider. The Act allows the health care provider to verify the student's sex as part of a routine sports physical and rely on one or more of the following:

- The student's reproductive anatomy;
- The student's genetic makeup; or
- The student's normal endogenously produced testosterone levels.

The Act provides a safe harbor for a school or public postsecondary institution for maintaining separate interscholastic, intercollegiate, intramural, or club athletic teams or sports for female students.

The Act provides private causes of action for injunctive relief, damages, and any other relief available under law for students, schools, and public postsecondary institutions harmed by a violation of the Act's provisions. All such civil actions must be brought within two years after the alleged harm occurred.

The bill's fiscal impact is indeterminate.

The bill has an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1. Creates s. 1006.205, F.S., to be titled the, "Fairness in Women's Sports Act."

Section 2. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

A similar separate sex-specific athletics policy has been upheld by the United States Court of Appeals for the Ninth Circuit. In *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*⁴⁹, an interscholastic association policy restricting interscholastic volleyball competition to single-sex teams was found to not deprive biological male plaintiffs of equal protection as the court found the policy would prevent females from being displaced in interscholastic competition and promoted equality of athletic opportunity between the sexes. Similar legislation is currently on appeal before the Ninth Circuit.⁵⁰

B. RULE-MAKING AUTHORITY:

The bill requires the State Board of Education to adopt rules regarding the receipt and timely resolution of disputes by schools and institutions as specified by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2021, the Secondary Education & Career Development Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarifies the intent of the bill, which is to “maintain” opportunities for female athletes.

The bill analysis is drafted to the committee substitute adopted by the Secondary Education & Career Development Subcommittee.

⁴⁹ *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 886 F.2d 1191 (1989).

⁵⁰ *Lindsay Hecox, Et al v. Bradley Little*, Case: 20-35813, 20-35815. (granting preliminary injunction in favor of plaintiffs).