



# HOUSE BILL 358: Save Women's Sports Act.

2021-2022 General Assembly

<b>Committee:</b>	House Judiciary 1. If favorable, re-refer to Education - Universities. If favorable, re-refer to Education - K-12. If favorable, re-refer to Rules, Calendar, and Operations of the House	<b>Date:</b>	April 14, 2021
<b>Introduced by:</b>	Reps. Brody, McElraft, Wheatley, Dixon	<b>Prepared by:</b>	Brian Gwyn
<b>Analysis of:</b>	First Edition		Committee Co-Counsel

### OVERVIEW: House Bill 358 would do the following:

- Prohibit male students attending public school units (or nonpublic schools that are members of State-level athletic associations) from participating in or playing on middle or secondary school interscholastic or intramural sports or teams designated for females, women, or girls.
- Prohibit male students attending public and private institutions of higher education in North Carolina from participating in or playing intercollegiate or intramural sports or teams designated for females, women, or girls.
- Require a student's sex to only be recognized based on reproductive biology and genetics at birth for purposes of athletic participation.
- Prohibit governmental entities, licensing or accrediting organizations, or athletic associations or organizations from considering a complaint, opening an investigation, or taking adverse action against a school, public school unit, or institution of higher education, for maintaining separate teams or sports for female students.
- Create a civil cause of action for biological female students who are harmed as result of a violation of the bill, or who are retaliated against for reporting violations.
- Create a civil cause of action for public school units or institutions of higher education that suffer harm as a result of prohibiting a biological male student from participating on a female, girls', or women's athletic team.

### CURRENT LAW AND POLICY:

#### Middle and Secondary Interscholastic Athletics

While G.S. 115C-47(4) authorizes local boards of education to regulate extracurricular activities, that authority must be exercised in accordance with rules adopted by the State Board of Education (State Board).

G.S. 115C-12(23) authorizes the State Board to adopt rules governing interscholastic athletic activities conducted by local boards of education, including eligibility for student participation. At the high school level, the State Board may authorize a designated organization to apply and enforce the State Board's rules

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governing participation in interscholastic athletic activities. The State Board has designated the North Carolina High School Athletic Association (NCHSAA) for this purpose.

State Board Policy ATHL-001 establishes the State Board's rules for interscholastic athletics, including permitting local school administrative units (LEAs) to allow their schools to belong to NCHSAA, which has established as a minimum the rules adopted by the State Board.

For middle schools, the State Board has adopted the [Middle/Junior High School Athletic Manual](#), which prohibits boys from participating on "any girls' team, as defined by interpretation of the Office for Civil Rights interpretation of Title IX in 1994."

For high schools, NCHSAA prohibits men from participating on women's interscholastic athletic teams. In 2019, NCHSAA adopted Sec. 1.2.4 of the [NCHSAA handbook](#), which allows students to participate in interscholastic athletics based on (i) the gender noted on a student's birth certificate or (ii) a student's gender identity, if a Gender Identity Request Form (Request) is submitted and approved. This policy applies to any students playing for schools that are members of NCHSAA.

## Intercollegiate Athletics at Institutions of Higher Education

G.S. 116-11 generally empowers the Board of Governors of The University of North Carolina with regulating the affairs of its constituent institutions and authorizes delegation of its authority over constituent institutions to the board of trustees or the chancellor of the institution. The Board of Governors has delegated to the chancellors of constituent institutions the responsibility for establishing and supervising the constituent institutions' intercollegiate athletics programs, subject to policies prescribed by the Board of Governors and the board of trustees of the constituent institution.

Each constituent institution with a sanctioned sports program is a member of the National Collegiate Athletic Association (NCAA). The NCAA allows biological females and transgender females who have completed one calendar year of documented testosterone-suppression treatment or one-year post-surgical intervention to participate on women's teams without changing the team to mixed-team status.

## **BILL ANALYSIS:**

### Middle and Secondary Public School Units

**Section 2** of the bill would prohibit male students attending public school units from participating in or playing on middle or secondary school sports or teams designated for females, women, or girls. A student's sex would only be recognized based on a person's reproductive biology and genetics at birth.

Any governmental entity, licensing or accrediting organization, or athletic association or organization would be prohibited from considering a complaint, opening an investigation, or taking adverse action against a school or public school unit for maintaining separate teams or sports for female students.

This section would create a civil cause of action for the following:

- A biological female student would be able to sue for appropriate relief if she is (i) deprived of an athletic opportunity, (ii) suffers or is likely to suffer from any direct or indirect harm as a result of a violation, or is (iii) subjected to retaliation or other adverse action by a public school unit, athletic association, or other organization as a result of reporting a violation.

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- Public school units, their representatives, or their employees who suffer direct or indirect harm for prohibiting a biological male student from participating on a female, girls', or women's athletic team would be able to sue for appropriate relief.

Such appropriate relief could include injunctive relief, protective order, writ of mandamus or prohibition, declaratory relief, as well as actual damages, including psychological, emotional, or physical harm, reasonable attorney fees, and costs.

Civil actions would be required to be initiated within two years from the date the harm occurred.

## Secondary Nonpublic Schools

**Section 3** of the bill would apply the provisions of Section 2 of the bill to any nonpublic school that is a member of a State-level association, including the North Carolina High School Athletic Association (NCHSAA), that governs participation in interscholastic activities at the high school level.

## Public and Private Institutions of Higher Education

**Section 4** would apply the provisions of Section 2 of the bill to constituent institutions of The University of North Carolina, North Carolina community colleges, and private colleges or universities located in North Carolina.

## Severability Clause

**Section 5** of the bill provides that the validity of other sections or provisions of the act would not be affected if any section or provision of the act is declared unconstitutional or invalid by the courts.

**EFFECTIVE DATE:** The bill would be effective when it becomes law, and would apply beginning with the 2021-2022 school (K-12) and academic (higher education) years.

**BACKGROUND:** House Bill 358 may raise legal considerations under the U.S. Constitution and federal law:

## Equal Protection Clause of the 14th Amendment

- The Equal Protection Clause of the 14th Amendment to the U.S. Constitution requires equal treatment under the law for individuals who are similarly situated. *See Reed v. Reed*, 404 U.S. 71, 77 (1971). In *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the 4th Circuit (which applies to North Carolina), invalidated under the Equal Protection Clause a school district's policy that required students to use the bathroom based on the sex listed on their birth certificates. The 4th Circuit found that the policy was not substantially related to its stated goal of protecting student privacy. The U.S. Supreme Court is currently considering whether to review the 4th Circuit's decision.
- A law similar to House Bill 358 was passed in Idaho in 2020 ("Fairness in Women's Sports Act", Idaho Code Ann. § 33-6201-6206), and was preliminarily enjoined by a federal judge shortly thereafter. *See Hecox v. Little*, 479 F.Supp.3d 930 (D. Idaho 2020). In that case, the judge found that prohibiting transgender women from participating in women's sports would

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likely violate the Equal Protection Clause. The *Hecox* case is still in the trial phase, though the preliminary injunction has been appealed to the 9th Circuit.

## Title IX of the Education Amendments of 1972 (Title IX)

- Title IX states 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."
- In the *Grimm* case, cited above, in addition violating the Equal Protection Clause, the 4th Circuit also found the school district's bathroom policy to violate Title IX, in that Grimm's gender nonconformity made his sex the "but-for" cause of the school board's action.