SENATE BILL No. 208
By Committee on Federal and State Affairs

AN ACT concerning education; relating to student athletes; creating the fairness in women's sports act; restricting participation on women's teams to female students; providing a cause of action for violations.

Be it enacted by the Legislature of the State of Kansas:

Section 1. The provisions of sections 1 through 6, and amendments thereto, shall be known and may be cited as the fairness in women's sports act.

Sec. 2. The legislature hereby finds:
   (a) There are "inherent differences between men and women," and that 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," United States v. Virginia, 518 U.S. 515, 533 (1996);
   (b) these "inherent differences" range from chromosomal and hormonal differences to physiological differences;
   (c) men generally have "denser, stronger bones, tendons, and ligaments" and "larger hearts, greater lung volume per body mass, a higher red blood cell count, and higher haemoglobin," Neel Burton, The Battle of the Sexes, Psychology Today (July 2, 2012);
   (d) 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, 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));
   (e) the biological differences between females and males, especially as it relates to natural levels of testosterone, "explain the male and female secondary sex characteristics which develop during puberty and have lifelong effects, including those most important for success in sport: categorically different strength, speed, and endurance," 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;
   (f) while classifications based on sex are generally disfavored, the
United States Supreme Court has recognized that "sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promote equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people," United States v. Virginia, 518 U.S. 515, 533 (1996);

(g) one place where sex classifications allow for the "full development of the talent and capacities of our Nation's people" is in the context of sports and athletics;

(h) courts have recognized that the inherent, physiological differences between males and females result in different athletic capabilities. See e.g. Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 13 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition."); Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that "high school boys [generally possess physiological advantages over] their girl counterparts" and that those advantages give them an unfair lead over girls in some sports like "high school track");

(i) a recent study of female and male Olympic performances since 1983 found that, although athletes from both sexes improved over the time span, the "gender gap" between female and male performances remained stable. "These suggest that women's performances at the high level will never match those of men." Valerie Thibault et al., Women and men in sport performance: The gender gap has not evolved since 1983, 9 Journal of Sports Science and Medicine 214, 219 (2010);

(j) as Duke law professor and All-American track athlete Doriane Coleman, tennis champion Martina Navratilova, and Olympic track gold medalist Sanya Richards-Ross recently wrote: "The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting, and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science," Doriane Coleman, Martina Navratilova, et al., Pass the Equality Act, But Don't Abandon Title IX, Washington Post (Apr. 29, 2019);

(k) the benefits that natural testosterone provides to male athletes is not diminished through the use of puberty blockers and cross-sex hormones. A recent study on the impact of such treatments found that even "after 12 months of hormonal therapy," a man who identifies as a woman and is taking cross-sex hormones "had an absolute advantage" over female athletes and "will still likely have performance benefits" over women, Tommy Lundberg et al., "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals: retained advantage for the transwomen," Karolinska Institutet (Sept. 26, 2019); and
having separate sex-specific teams furthers efforts to promote sex equality. Sex-specific teams accomplish this by providing 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 flow from success in athletic endeavors.

Sec. 3. (a) Interscholastic, intercollegiate, intramural or club athletic teams or sports that are sponsored by a public elementary or secondary school, a postsecondary educational institution, as such term is defined in K.S.A. 74-3201b, and amendments thereto, or any school or other postsecondary educational institution whose students or teams compete against a public school or postsecondary educational institution shall be expressly designated as one of the following based on biological sex:

1. Males, men or boys;
2. females, women or girls; or
3. coed or mixed.

(b) Athletic teams or sports designated for females, women or girls shall not be open to students of the male sex.

(c) (1) A dispute regarding a student's sex shall be resolved by the school or postsecondary educational institution where such student attends by requesting that the student provide such student's health examination and consent form or other statement signed by such student's personal healthcare provider that shall verify the student's biological sex. A student's pre-participation physical evaluation form may be submitted, provided such form verifies the student's biological sex.

(2) The healthcare provider may verify the student's biological sex as part of a routine sports physical examination relying only on one or more of the following:

(A) The student's reproductive anatomy;
(B) genetic makeup; or
(C) normal endogenously produced testosterone levels.

(d) (1) The Kansas state high school activities association shall adopt rules and regulations for its member schools for the implementation of this section and the timely resolution of any disputes.

(2) The state board of regents and the governing body for each municipal university, community college and technical college shall adopt rules and regulations for the postsecondary educational institutions governed by each such entity, respectively, for the implementation of this section and the timely resolution of any disputes.

Sec. 4. No governmental entity, licensing or accrediting organization or athletic association or organization shall entertain a complaint, open an investigation or take any other adverse action against a school or postsecondary educational institution for maintaining separate
interscholastic, intercollegiate, intramural or club athletic teams or sports
for students of the female sex.

Sec. 5. (a) Any student who is deprived of an athletic opportunity or
suffers any direct or indirect harm as a result of a violation of section 3,
and amendments thereto, shall have a private cause of action for injunctive
relief, damages and any other relief available under law against the school
or postsecondary educational institution.

(b) Any student who is subject to retaliation or other adverse action
by a school, postsecondary educational institution or athletic association or
organization as a result of reporting a violation of section 3, and
amendments thereto, to an employee or representative of such school,
postsecondary educational institution or athletic association or
organization, or to any state or federal agency with oversight of schools or
postsecondary educational institutions in this state, shall have a private
cause of action for injunctive relief, damages and any other relief available
under law against the school, institution or athletic association or
organization.

(c) Any school or postsecondary educational institution that suffers
any direct or indirect harm as a result of a violation of section 3 or 4, and
amendments thereto, shall have a private cause of action for injunctive
relief, damages and any other relief available under law against the
governmental entity, licensing or accrediting organization or athletic
association or organization.

(d) All civil actions must be initiated within two years after the harm
occurred. Persons or organizations who prevail on a claim brought
pursuant to this section shall be entitled to monetary damages, including
for any psychological, emotional and physical harm suffered, reasonable
attorney fees and costs and any other appropriate relief.

Sec. 6. The provisions of sections 1 through 5, and amendments
thereto, are hereby declared to be severable. If any provision of sections 1
through 5, and amendments thereto, or the application thereof to any
person or circumstance is held invalid, the invalidity shall not affect other
provisions or applications of sections 1 through 5, and amendments
thereto, that can be given effect without the invalid provision or
application.

Sec. 7. This act shall take effect and be in force from and after its
publication in the statute book.