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SENATE BILL NO. 723

Offered January 19, 2024

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.

Patron—Mulchi

Referred to Committee on Education and Health

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. If the biological sex of any student seeking to participate on such an expressly designated team is disputed, such student may establish biological sex by presenting to the school administration or such other authority designated by the school for such purpose a signed physician's statement that shall attest to the student's biological sex based solely on:

1. The student's internal and external reproductive anatomy;
2. The student's normal endogenously produced levels of testosterone; and
3. An analysis of the student's genetic makeup.

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

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

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

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

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

A. Each intercollegiate, intramural, and club athletic team or sport that is sponsored by a public institution of higher education or any institution of higher education that is a member of the National Collegiate Athletic Association (NCAA), National Association of Intercollegiate Athletics (NAIA), or National Junior College Athletic Association (NJCAA) shall be expressly designated as one of the

59 following based on the biological sex of the students who participate on the team or in the sport:

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

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

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

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

67 C. If the biological sex of any such student seeking to participate on such an expressly designated
68 team is disputed, such student may establish biological sex by presenting to the administration of the
69 institution, or such other authority designated by such institution for such purpose, a signed physician's
70 statement that shall attest to the student's biological sex based solely on:

71 1. The student's internal and external reproductive anatomy;

72 2. The student's normal endogenously produced levels of testosterone; and

73 3. An analysis of the student's genetic makeup.

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

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

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

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

95 2. That the General Assembly finds that (i) there are "inherent differences between men and
96 women," and that these differences "remain cause for celebration, but not for denigration of the
97 members of either sex or artificial constraints on an individual's opportunity" (*United States v.*
98 *Virginia* 518 U.S. 515, 533 (1996)), and these "inherent differences" range from chromosomal and
99 hormonal differences to physiological differences, including men generally have "denser, stronger
100 bones, tendons, and ligaments," "larger hearts, greater lung volume per body mass, a higher red
101 blood cell count, and higher hemoglobin" (Neel Burton, "The Battle of the Sexes," *Psychology*
102 *Today* (July 2, 2012)), higher natural levels of testosterone, which affects traits such as body fat
103 content, the storage and use of carbohydrates, and the development of type two muscle fibers, all
104 of which result in men being able to generate higher speed and power during physical activity
105 (Doriane Lambelet Coleman, "Sex in Sport," *Law and Contemporary Problems* 63, 74 (2017)); (ii)
106 that these biological differences between men and women "explain the male and female secondary
107 sex characteristics which develop during puberty and have lifelong effects, including those most
108 important for success in sport: categorically different strength, speed and endurance" (Doriane
109 Lambelet Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite
110 Women to Boys and Men," Duke Law Center for Sports Law and Policy), and that while
111 classifications based on sex are generally disfavored, the Supreme Court has recognized that "sex
112 classifications may be used to compensate women for particular economic disabilities [they have]
113 suffered, to promote equal employment opportunity, [and] to advance full development of the
114 talent and capacities of our Nation's people" (*United States v. Virginia*, 518 U.S. 515, 533 (1996));
115 (iii) that one place in which sex classifications allow for the "full development of the talent and
116 capacities of our Nation's people" is in the context of sports and athletics (*Id.*); (iv) that courts
117 have recognized that the inherent, physiological differences between males and females result in
118 different athletic capabilities, as seen in *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612
119 A.2d 734, 738 (R.I. 1992): "Because of innate physiological differences, boys and girls are not
120 similarly situated as they enter athletic competition." and in *Petrie v. Illinois High Sch. Ass'n*, 394

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