

SENATE BILL 435<sup>1</sup>: SAVE GIRLS' SPORTS ACT

**First Signature:** Senator Marty Harbin (16<sup>th</sup>)

**Co-Sponsors:** Senator Butch Miller (49<sup>th</sup>), Senator Bo Hatchett (50<sup>th</sup>), Senator Randall Robertson (29<sup>th</sup>), Senator Jeffrey Mullis (53<sup>rd</sup>)

**Summary:** “A BILL to be entitled an Act to amend Title 20 of the Official Code of Georgia Annotated, relating to education, so as to provide that it shall be unlawful for Georgia public schools or participating private schools whose students or teams compete against a Georgia public school to operate, sponsor, or facilitate athletic programs or activities that permit a person of one gender to participate in an athletic program or activity that is designated for persons of the opposite gender; to provide for exceptions; to provide for private rights of action and awards of attorney fees; to provide for legislative findings and intent; to provide for definitions; to provide for a short title; to provide for related matters; to repeal conflicting laws; and for other purposes”<sup>2</sup>.

**Status:** House Second Readers.

TEXT OF SENATE BILL 435<sup>3</sup>

**SECTION 1.**

The General Assembly recognizes there are inherent physical differences between males and females. The General Assembly further recognizes that decisions regarding the regulation of sports should be based on promoting integrity and safety. The General Assembly finds that protecting females from harm and preserving the fairness of sports are important state

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<sup>1</sup> S.B. 435, 156th Gen. Assemb., 2nd Sess. (Ga 2022), available at <https://www.legis.ga.gov/api/legislation/document/20212022/207607> (last visited Nov. 7, 2022).

<sup>2</sup> 2021-2022 Regular Session -SB 435, Education; Shall be Unlawful for Ga Public School Students or Teams to Compete Against a Ga Public School That Permits a Person of One Gender to Participate in an Athletic Program That is Designated for Persons of Opposite Gender; Provide, GA. GEN. ASSEMB., <https://www.legis.ga.gov/legislation/61642> (last visited Nov. 7, 2022) [hereinafter S.B. 435 Status Sheet].

<sup>3</sup> *Id.*

interests. It is the intent of the General Assembly to ensure that females have equal and safe opportunities to succeed in sports.

**SECTION 2.**

This Act shall be known and may be cited as the "Save Girls' Sports Act."

**SECTION 3.**

Title 20 of the Official Code of Georgia Annotated, relating to education, is amended in Code Section 20-2-315, relating to gender discrimination prohibited, authorized separate gender teams, equal athletic opportunity, physical education classes, employee designated to monitor compliance, grievance procedures, and reporting requirements, by adding a new subsection to read as follows:

"(k)(1) As used in this subsection, the term:

(A) 'Gender' means a person's biological sex which shall be recognized solely based on a person's reproductive biology and genetics at birth. For purposes of this subsection, a statement of a student's biological sex on the student's official birth certificate shall be deemed to have correctly stated the student's biological sex at birth if the statement was included on such birth certificate at or near the time of the student's birth.

(B) 'Participating private school' means a private school in this state whose students or teams compete against a local public school or local public school system in this state.

(2)(A) No local public school system, local public school, or participating private school in this state shall operate, sponsor, or facilitate interscholastic or intramural athletics that permit a person whose gender is male to participate in any interscholastic or intramural athletics that are designated for females, unless there is not an equivalent interscholastic or intramural athletic program for males.

(B) No local public school system, local public school, or participating private school

in this state shall operate, sponsor, or facilitate interscholastic or intramural athletics that permit a person whose gender is female to participate in any interscholastic or intramural athletics that are designated for males, unless there is not an equivalent interscholastic or intramural athletic program for females.

(3) A student who is aggrieved by an alleged violation or anticipated violation of this subsection or his or her parent or guardian shall have a right to file a grievance complaint with the employee designated in subsection (g) of this Code section for an immediate determination of whether a violation of this subsection exists or is about to occur. If a violation or anticipated violation is determined to exist or about to occur, the employee designated in subsection (g) of this Code section shall issue a decision immediately and may direct that such activity be terminated or adjusted to prevent further violations. If such grievance is rejected, such complaining party shall have the right of an immediate appeal to the local board of education for relief.

(4) In addition to any other rights or remedies otherwise provided by law, any aggrieved student and any such student's parent or guardian shall have a private right of action to enforce the provisions of this subsection through injunctive or declaratory relief in the superior court of the county in which such local public school or school system or participating private school is located. If an aggrieved student or such student's parent or guardian is the prevailing party in such action, the student or student's parent or guardian shall be entitled to an award of reasonable attorney fees, court costs, and expenses of litigation, but shall not be entitled to any monetary damages.

(5) Nothing in this Code section shall override any requirements or protections prescribed in the federal Americans with Disabilities Act, 42 U.S.C. Section 12101, et seq.”

#### **SECTION 4.**

All laws and parts of laws in conflict with this Act are repealed.

## SPONSOR'S RATIONALE

Senator Marty Harbin of the 16<sup>th</sup> (“Senator Harbin”) introduced Senate Bill 435 to preserve fairness in sports and allow female athletes to compete against same-sex rivals.<sup>4</sup> The purpose of Senate Bill 435 is to guarantee fairness as Senator Harbin believes that it is not fair for a young woman to compete against a man and risk time and opportunities that otherwise would have been obtained.<sup>5</sup> He considers that athletic competition is a chance for character-building accomplishment that could be undermined if schools allow transgender students to participate in a program that is designed for persons of the opposite gender.<sup>6</sup> Although the Georgia High School Association can pass regulations regarding associated athletic programs, Senate Bill 435 is looking to place a statewide mandate prohibiting schools from competing against transgender athletes.<sup>7</sup> Regarding Senate Bill 435, one of its sponsors, Senator Brass, says that women’s sport is one of the best tools to preserve gender equality, and Senate Bill 435 guarantees gender equality by allowing a level playing field to female athletes.<sup>8</sup> Senator Harbin shares the same need for gender equality through Senate Bill 435 and adds that the legislation will protect females from harm due to the inherent physical differences between males and females.<sup>9</sup> There is undisputed evidence showing that puberty in males gives them with physical advantages that persist even after testosterone levels are suppressed.<sup>10</sup> Some of those advantages

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<sup>4</sup> S.B. 435.

<sup>5</sup> *Senator Marty Harbin reintroduces Save Girls’ Sports Act*, THE CITIZEN (Feb. 8, 2022), <https://thecitizen.com/2022/02/08/senator-marty-harbin-reintroduces-save-girls-sports-act/>.

<sup>6</sup> *Id.*

<sup>7</sup> Jeff Amy, *Georgia High School Athletic Group Bans Transgender Athletes*, AP NEWS (May. 4, 2022), <https://apnews.com/article/sports-education-georgia-atlanta-gender-identity-d0432fa7530b9bd6e4e1d7380114e6c2>.

<sup>8</sup> Sarah Kallis, *Lawmakers: Transgender Athletes Ban Brings Tears to the Senate Floor on Day 20*, GPB (Feb. 24, 2022), <https://www.gpb.org/news/2022/02/24/lawmakers-transgender-athletes-ban-brings-tears-the-senate-floor-on-day-20>.

<sup>9</sup> S.B. 435.

<sup>10</sup> Jeré Longman, *Sport is Again Divided Over Inclusiveness and a Level Playing Field*, THE NEW YORK TIMES (Jun. 22, 2022),

are broader shoulders, bigger hands, longer torsos, denser muscles, and greater heart and lung capacity.<sup>11</sup>

Senate Bill 435 also finds support in Governor Brian Kemp.<sup>12</sup> Governor Kemp believes that Senate Bill 435 will protect fairness in school sports, he says, “As parents of three daughters, Marty [Kemp] and I want every young girl in this state to have every opportunity to succeed in the sport they love, and that is not controversial.”<sup>13</sup> Sympathizing with other states that have already passed laws banning transgender athletes from competing in school programs. Among those states are Texas, West Virginia, Tennessee, Florida, Arkansas, Alabama, Mississippi, Montana, Idaho, and South Dakota.<sup>14</sup> The legislation passed by several states follows a nationwide campaign supporting this type of Bill.<sup>15</sup>

Additionally, the Family Policy Alliance mobilizes the community to support Save Girls’ Sports Act across the country.<sup>16</sup> Their support is based on the “unfair advantage” men have when competing with women due to their higher cardiovascular capacity, greater bone density, and greater muscle mass.<sup>17</sup> Likewise, Steve Figueroa, spokesperson for the Georgia High School Association, supports the unfair advantage argument saying that biologically born females could be denied a place on the teams or the podium if they play against transgender girls.<sup>18</sup>

All in all, the support for Senate Bill 435 centers around having a level playing field for women and recognizing the unfair advantage girls face when playing against transgender girls due to their physical differences.

#### OPPOSITION’S RATIONALE

In opposition to Senate Bill 435, Dewayne Johnson, Georgia State Director of Human Rights Campaign, says “There is no basis for the legislation, and transgender kids are not creating problems by participating in school sports. Singling them out for discriminatory treatment serves no one except those who

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<https://www.nytimes.com/2022/06/22/sports/olympics/transgender-athletes-fina.html>.

<sup>11</sup> *Id.*

<sup>12</sup> *Gov. Brian Kemp Signing Educational Bills Into Laws*, YOUTUBE (Apr. 28, 2022), <https://www.youtube.com/watch?v=nZIZ-8p9IFg>.

<sup>13</sup> *Id.*

<sup>14</sup> Amy, *supra* note 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Girls Deserve Fair Play*, FAM. POL. ALL. (last visited Oct. 24, 2022), <https://familypolicyalliance.com/savegirlssports/>.

<sup>17</sup> *Id.*

<sup>18</sup> Amy, *supra* note 8. Even though only one transgender athlete has won an Olympic medal in a women’s competition, the Canadian soccer player Quinn, who was assigned female at birth and identified as nonbinary.

want fearmonger and further divide Georgians.<sup>19</sup> Democratic senators and third-party organizations are concerned that Senate Bill 435, will have a negative impact on transgender kids and their mental health.<sup>20</sup> Senator Au emphasized that legislators need to prioritize the mental health of all Georgians, and Senate Bill 435 is doing the opposite for transgender youth.<sup>21</sup> Recent studies from The Trevor Project show that 45% of LGBTQ youth seriously considered attempting suicide in the past year.<sup>22</sup> The same survey revealed that LGBTQ youth who live in a community that is accepting of LGBTQ people reported significantly lower rates of attempting suicide than those who do not.<sup>23</sup> Senator Parent, who is herself a mother of a transgender kid, criticized Senate Bill 435 because it does not solve any issues and deviates from the sole purpose of sportsmanship which is to create empathy between players.<sup>24</sup> She indicates that sports allow a safe space for transgender kids who are often discriminated against in different scenarios and preventing them from participating in athletic programs will further outcast them from society.<sup>25</sup> Other issues raised by Senate Bill 435 are the procedural requirements for student- athletes, Senate Bill 435 suggests a birth certificate rule to confirm that the student is participating in the athletic program assigned with his/her sex, taking a binary view on sex designation.<sup>26</sup> Senator Jackson says there will be confusion for intersex children who are not assigned a “male” or “female” category at birth or children who were issued a birth certificate long after birth.<sup>27</sup> The birth certificate requirement also raises privacy issues and violates federal law, as Michael Shutt, southern regional director of Lambda Legal mentioned.<sup>28</sup> The opposition states that Senate Bill 435 will

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<sup>19</sup> Delphine Luneau, *Georgic Gov. Brian Kemp Signs Unnecessary, Harmful Legislation Allowing Discrimination Against Transgender Kids Playing School Sports*, HUMAN RIGHTS CAMPAIGN (Apr. 28, 2022), <https://www.hrc.org/press-releases/georgia-gov-brian-kemp-signs-unnecessary-harmful-legislation-allowing-discrimination-against-transgender-kids-playing-school-sports>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *2022 National Survey on LGBTQ Youth Mental Health*, THE TREVOR PROJECT <https://www.thetrevorproject.org/survey-2022/> (last visited Oct. 26, 2022).

<sup>23</sup> *Id.*

<sup>24</sup> Kallis, *supra* note 8.

<sup>25</sup> *Id.*

<sup>26</sup> S.B. 435.

<sup>27</sup> Kallis, *supra* note 8.

<sup>28</sup> “If this bill is enacted, it would stigmatize and discriminate against transgender students, create serious privacy and harassment risks for

violate Title IX if implemented.<sup>29</sup> Prohibiting discrimination based on sexual orientation and gender identity to those recipient institutions of federal financial assistance like public schools in Georgia.<sup>30</sup> Recent caselaw shows that other states have challenged the validity of bills that ban transgender athletes at court. In *A.M. v. Indianapolis Pub. Sch.*<sup>31</sup> A.M. is a 10-year old transgender girl who was born male; she transitioned at the age of 4 and has been diagnosed with gender dysphoria, receives medical treatment and a puberty blocker.<sup>32</sup> She was banned from playing softball at school by the Indianapolis Public Schools because of Indiana Code § 20-33-13-4 that bans transgender student athletes from participating in sports.<sup>33</sup> The trial court established that § 20-33-13-4 violates Title IX; currently the case is on appeal.<sup>34</sup> Recipient institutions are obligated to keep nondiscriminatory policies for activities such as recruitment and athletics.<sup>35</sup> All in all, opponents believe that the Bill will have a detrimental impact on transgender youth's mental health, the procedural requirements raise issues themselves, and there are possible federal violations under Senate Bill 435.

#### IMPLICATIONS IN GEORGIA

Senate Bill 435 is one of the many attempts by Georgia legislators to ban school programs that allow transgender athletes in their programs.<sup>36</sup> This Bill will align with the increasing advocacy for anti-trans legislation across the country, even there are polls showing opposition to anti-trans legislation.<sup>37</sup> Senate Bill 435 focuses on achieving competitive fairness, a level playing field where young female athletes have all the same opportunities against competitors.<sup>38</sup> There

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student athletes, and invite no-win litigation against school districts.” Ross Williams & Jill Nolin, *Georgia Senate Passes Ban on Transgender Sports Despite Personal Testimony*, GA. R. (Feb. 24, 2022), <https://georgiarecorder.com/2022/02/24/georgia-senate-passes-ban-on-transgender-sports-despite-personal-testimony/>.

<sup>29</sup> 20 U.S.C. §1681 (1972)

<sup>30</sup> *Id.*

<sup>31</sup> *A.M. v. Indianapolis Pub. Sch.*, 2022WL2951430 (S.D. Ind. Jul. 26, 2022)

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Kallis, *supra* note 8.

<sup>37</sup> Ola Adebayo, *The Contagion Sweeping the Nation: Anti-trans Legislation*, CENTER FOR COMMUNITY HEALTH PARTNERSHIP & RESEARCH (Apr. 25, 2022), <https://publichealth.wustl.edu/the-contagion-sweeping-the-nation-anti-trans-legislation/>.

<sup>38</sup> S.B. 435.

are undisputed physical differences between females and males, yet inclusiveness plays a significant role in sports.<sup>39</sup>

Senate Bill 435 will still allow transgender athletes to compete in athletic programs if passed. Yet, it will invalidate their beliefs and preferences by forcing them to compete according to their sex assigned at birth. It is unclear how Senate Bill 435 will impact transgender participation since some athletic programs are only offered for one sex.<sup>40</sup> Reasoned arguments are made on both sides, and the debate is far from over, not only in Georgia but across the nation. Senate Bill 435 also raises constitutional challenges since it creates gender discrimination.

Currently, private, and public schools decide whether transgender students can participate in school sports.<sup>41</sup> However, the Georgia High School Association has the power to implement a similar regulation and ban schools that compete against other schools with transgender athletes.<sup>42</sup> Supporters of the Bill addressed that it guarantees fairness in sports, protecting young female athletes.<sup>43</sup> However, the opposition highlights the impact that Senate Bill 435 will have on transgender kids by undermining their core identity as a girl/boy and their social transition with their peers.<sup>44</sup>

#### LEGISLATIVE GENEALOGY

Senate Bill 435 was introduced on February 2<sup>nd</sup>, 2022, the Senate passed the Bill on February 24<sup>th</sup> 2022.<sup>45</sup> It had its first reading in the House on February 28<sup>th</sup>.<sup>46</sup> On March 1<sup>st</sup>, 2022, the House second readers took place.<sup>47</sup>

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<sup>39</sup> Longman, *supra* note 10.

<sup>40</sup> *Id.*

<sup>41</sup> Amy, *supra* note 6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *A.M.*, 2022WL2951430 at 10.

<sup>45</sup> S.B. 435 Status Sheet, *supra* note 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*