



Women's Sports Policy Working Group

INCLUSION OF TRANSGENDER GIRLS AND WOMEN IN GIRLS' AND WOMEN'S SPORTS

MODEL STATE STATUTE Revised as of April 15, 2021

The Goal

The goal is to provide an alternative to categorical bans that doesn't ignore (1) the biological facts that justify separate sex sport, (2) the invaluable policy commitment to girls' and women's sports, or (3) the separate commitment to inclusivity in educational settings. As applied, this third commitment is to including all transgender girls and women in girls' and women's sport.

The Structure

Its structure is simple, i.e., the rule, followed by the exceptions, and then a provision for non-exclusive competitive opportunities. Within the exceptions, the breakdown is (A) exceptions pertaining to boys' teams and events, and (B) exceptions pertaining to girls' teams and events.

Legend

The language in **bold regular font** would affirm existing law and/or practice. *The italicized language* would codify new exceptions for children who are transgender.

Comments and Explanations

Comments and explanations are provided in the endnotes. The model statute can be tailored to the needs and preferences of a particular jurisdiction using the material in the comments and explanations in the endnotes.

Terminology

The model statute uses the term "biological sex" in lieu of the standard "sex" to make clear that in this context, it is physical sex not gender identity, gender expression, or gender stereotype that matters. Sport is sex segregated because of the performance gap between males and females that emerges from the onset of male puberty. The higher levels of testosterone produced by testes from that point forward are the primary driver of the performance gap. Thus, for purposes of sex segregated sport, it is essential to know whether the individual has testes and bioavailable testosterone outside of the female range (male) or has ovaries and bioavailable testosterone in the female range (female). The terms "sex assigned at birth" and "natal sex" are preferred by some but do not consistently convey the same information, e.g., in a case where an individual has changed the sex listed on their birth certificate.

1. **Competitive school sports teams shall be sex-segregated. Students shall be eligible for the girls' team if their biological sex is female and for the boys' team if their biological sex is male.**

- A. **The student's biological sex shall be established and eligibility determined on the basis of the standard pre-season eligibility form. *The form must make clear to the physician that they are certifying the student's biological sex, not the sex recorded on their birth certificate and not their gender identity.*¹**
- B. *Neither schools nor school-related athletic associations shall entertain third-party challenges to a student's sex unless there is a reasonable basis to believe that the student's physician provided inaccurate information on the pre-season eligibility form. A student's failure to conform to gender stereotypes is not a reasonable basis upon which to review an athlete's eligibility.*²

2. **Exceptions**

- A. **Exceptions pertaining to boys' sports teams and events**
 - i. **Students whose biological sex is female shall be permitted to try out for the boys' team and, if selected, to compete in boys' events when there is no comparable girls' team and playing safety is not an issue for that individual;**
 - ii. *Transgender boys shall be permitted to try out for the boys' team and to compete in boys' events even when there is a comparable girls' team if playing safety is not an issue for that individual.*

B. Exceptions pertaining to girls' sports teams and events

- i. Transgender boys shall be permitted to compete on the girls' team without restriction, so long as they are not on gender affirming hormones.³*
- ii. Transgender girls shall be eligible to join a girls' team even when there is a comparable boys' team, if their inclusion does not present playing safety issues for the other students. Their eligibility for competition shall be as follows:*
 - a. If they have never experienced male puberty, they shall compete on an equal basis with students who are competition-eligible.⁴*
 - b. If they have experienced all or part of male puberty, they shall not compete head-to-head against students who are competition-eligible unless they establish that they have mitigated their male sex-linked performance advantages.⁵*

C. The burden of proof shall be on the student seeking an exception to establish that its terms have been met.⁶

3. Different options for intramural events and interscholastic co-ed or open competition should be developed and offered in tandem with exclusive, sex-segregated interscholastic competition when this can be done consistent with playing safety.

¹ The pediatric standard of care requires physicians to know this information for general medical purposes. Requiring physicians to report the information they already have or should have on the standard pre-season eligibility form should involve no new or additional physical intrusion. It is important to make the distinctions among biological sex, sex recorded on the birth certificate, and gender identity, because these may not be concordant.

² Schools currently rely on the student's physician's representations on the pre-season eligibility form. Specific questions on that form regarding the student's sex should not trigger different treatment. No one who is not privy to the student's private medical information should be permitted to challenge those representations unless they possess admissible evidence demonstrating that the physician intentionally, recklessly, or negligently misrepresented the information they provided on the pre-season eligibility form.

³ Students whose biological sex is female but who identify as boys are transgender boys. Some transgender boys are on gender affirming hormones, i.e., testosterone. Regardless of their motivation, the exogenous use of testosterone by female athletes is doping.

⁴ Individuals whose biological sex is male but who identify as girls are transgender girls. They may not experience any part of male puberty if they go on puberty blockers immediately before or at the onset of male puberty, and then transition directly to female gender affirming hormones following a period on puberty blockers. When they

keep their testosterone levels within the female range throughout, they do not develop the male secondary sex characteristics that justify separate sex sport. Therefore, there is no reason to exclude them from female competition.

⁵ Students in this category who cannot or do not wish to try to establish that they have mitigated their male sex-linked performance advantages should be accommodated in ways that do not involve head-to-head competition for scores, places, titles, prizes, and records. Otherwise, this provision is not intended to suggest that a transgender girl should or should not suppress their hormones, or that providing minors with this option is or is not acceptable. It is simply designed to recognize that some transgender girls do suppress their hormones, and that this affects the extent to which they have the traits that separate competition for girls was designed to exclude. In the interests of all concerned – program administrators, the female athlete population, and transgender athletes – to facilitate their ability to demonstrate that they have mitigated their male sex-linked performance advantages, we recommend borrowing a version of the international and current NCAA standard, i.e., allowing the transgender girl to establish eligibility by showing that she has been on hormone suppression for at least a year and that throughout that period she has consistently kept her testosterone (T) levels within the normal female range, i.e., under 3 (or at most under 5) nmol/L. The concept underlying this standard was borrowed by the international sports organizations from the standard of care in trans medicine. Because of this, most trans girls and women on hormone suppression are able easily to meet it. (Note that the IOC has withdrawn its 2015 guidance providing that a T level under 10 nmol/L would suffice. In part this is because that number is much higher than a healthy female can ever reach. Almost all females, including the most athletic females, have T levels under 2. Raising the line to 5 includes all healthy females, including those with polycystic ovaries.) Verification can simply be by certification from the athlete's physician that she is on hormone suppression and that the physician has confirmed that throughout the relevant period, the athlete had T levels within the range. Only if the physician was not planning to check their patient's levels on a regular basis would sport be asking anything new and different from them than what they would already be doing as part of their standard treatment protocol.

⁶ This is consistent with eligibility requirements in general. Thus, girls who seek to play on boys' teams must establish that there is no comparable girls' team and that playing safety is not an issue. Transgender boys who seek to play on boys' teams when there is a comparable girls' team must establish that they are transgender and that playing safety is not an issue. Transgender boys who seek to compete head-to-head in girls' events must establish that they are not on male gender affirming hormones. Transgender girls who seek to compete head-to-head in girls' events must establish that they have mitigated their male sex-linked performance advantages according to the national sport governing body standard for their sport or event. Schools and athletic associations that have not already done so should develop procedures to facilitate the exceptions process.