

CANDACE McLAREN LANHAM
Chief Deputy Attorney General



ANTHONY G. BROWN
Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

CAROLYN A. QUATTROCKI
Deputy Attorney General

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

LEONARD HOWIE
Deputy Attorney General

PETER V. BERNS
General Counsel

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-7036

WRITER'S DIRECT DIAL NO
(410) 576-6590

February 5, 2024

TO: The Honorable Brian J. Feldman
Chair, Education, Energy, and Environment Committee

FROM: Rhea L. Harris
Deputy Chief, Legislative Affairs, Office of the Attorney General

RE: SB381- Education - Interscholastic and Intramural Junior Varsity and Varsity
Teams - Designation Based on Sex (Fairness in Girls' Sports Act)- **OPPOSE**

The Maryland Office of the Attorney General **OPPOSES Senate Bill 381.**

Senate Bill 381 requires interscholastic and intramural junior varsity and varsity athletic teams or sports sponsored by schools to be expressly designated based on biological sex. It also prohibits entities from taking adverse actions against a school for maintaining separate interscholastic and intramural junior varsity and varsity athletic teams and sports for students of the female sex. It provides that individuals have the right to bring a civil action.

The Maryland Office of the Attorney General opposes **SB381** because of its impact on transgender students, it may be contrary to Title IX and Equal Protection, thus barred by the Supremacy Clause. The Department of Education has issued a notice of interpretation¹ followed

¹ <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity>

by a notice of rulemaking that would prohibit discrimination against trans students precisely as described in this statute.²

In addition, the Civil Rights Division of the Department of Justice has joined the Department of Education and has filed a brief in a case in West Virginia asserting that Title IX and the Equal Protection Clause requires schools to permit students to participate in sports consistent with their gender identity.³ The Ninth Circuit upheld a preliminary injunction barring enforcement of a similar Idaho law on Equal Protection grounds. *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).

The Maryland Public Secondary Schools Athletic Association (MPSSAA) has had a transgender student policy for participation in interscholastic athletics since 2012. It has worked effectively to ensure fair competition and allowing students to participate on the athletic team of the gender they identify with. A categorical ban on transgender students from participating in athletics consistent with their gender identity across all sports, age groups, and levels of competition fail to account for differences among students across grade and education levels. They also fail to account for different levels of competition—including no-cut teams that let all students participate—and different types of sports. MPSSAA and MSDE expect that **SB381** does not increase fairness in competition. There is no evidence that including the small number of transgender students, particularly transgender girls, has altered competitive fairness in competition or caused cisgender girls to be excluded from spots on teams. But evidence is abundant that the ban harms the mental health of vulnerable students who connect to their schools and community through athletic competition. Categorically preventing participation of students on sports teams of the gender they identify adversely impacts a key component of public education to include students without regard to their identify and will have lasting impacts on the students.

SB381 likely violates federal and State non-discrimination laws and would likely not survive heightened scrutiny under the Equal Protection Clause.⁴ It would also run afoul of the U.S. Department of Education’s proposed Title IX regulation, which will require schools to account for differences among students across grade and education levels as well as the different levels of competition and different types of sports. Recent federal guidance explains the tailoring that would be expected:

For the forgoing reasons, the Maryland Office of the Attorney General requests an **UNFAVORABLE** vote on **Senate Bill 381**.

cc: Senator Mary Beth Carozza
Committee Members

² <https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf#page=32>

³ https://www.justice.gov/d9/case-documents/attachments/2021/06/22/2021.6.17_west_virginia_soi.pdf

⁴ See *Hecox v. Little*, 79 F.4th 1009, 1028 (9th Cir. 2023) (granting injunction to prevent enforcement of a similar law that would categorically ban transgender women and girls from all female athletic teams).