

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)).

## FISCAL IMPACT REPORT

**SPONSOR**     Cook/Montoya RD/     **ORIGINAL DATE**     02/24/21  
                   Townsend/Black/Lord     **LAST UPDATED**     \_\_\_\_\_     **HB**     304  
**SHORT TITLE**     Women’s Sports Protection Act     **SB**     \_\_\_\_\_  
**ANALYST**     Chilton

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Minimal	Minimal	NFI	Minimal	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

University of New Mexico (UNM)  
 Office of the Attorney General (NMAG)  
 Department of Health (DOH)

#### No Response Received

New Mexico Activities Association (NMAA)  
 New Mexico State University (NMSU)  
 Higher Education Department (HED)  
 Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 304, enacts the “Women’s Sports Protection Act,” which would restrict participation by transgender athletes to the sports teams assigned to their “biologic sex.”

Section 2 of the bill would establish legislative findings, asserted to include the following:

- There are only two sexes, determined at fertilization of the ovum;
- Difference between males and females are genetically determined;
- There are inherent differences between men and women;
- Boys do better on tests of strength, speed and endurance than girls;

## House Bill 304 – Page 2

- These differences are related to higher testosterone levels in males than in females;
- These differences result in different sports capabilities;
- Testosterone suppression has been shown in studies not to diminish biologic male advantage; and
- Sex equality is furthered by maintaining sex-specific teams.

Section 3 defines school as including public or private primary and secondary schools and all post-secondary schools and colleges and universities.

Section 4 indicates that biologic sex (not herein defined) determines whether an athlete competes on a girl's/women's or boys/men's team.

Section 5 indicates that no complaint or investigation is to be undertaken of a school complying with Section 4 of this bill.

Section 6 of the bill establishes legal rights for those aggrieved by a school's following or not following provisions of the Women's Sports Protection Act.

There is no effective date of this bill. It is assumed that the effective date is 90 days following adjournment of the Legislature.

### **FISCAL IMPLICATIONS**

There is no appropriation in House Bill 304, and no apparent fiscal impact on New Mexico state agencies, other than that personnel time would be required to promulgate and disseminate new regulations.

### **SIGNIFICANT ISSUES**

Approximately twenty U.S. states are discussing legislation to ban transgender women from participating in women's sports in what appears to be a coordinated campaign which has resulted in legislation moving forward in approximately nine states this year. To this point only Idaho has passed a law in this regard, but there have been demonstrations against such laws being considered in at least Utah, South Dakota and North Dakota this year. In March 2020, according to the National Conference of State Legislatures, then-U.S. Attorney General William Barr filed a statement-of-interest opposing Connecticut's policy of allowing transgender persons from participating in the sports of the gender with which they identify.

House Bill 304 would appear to apply only to transgender females, as transgender females are said to maintain an advantage in strength and speed for a period after receiving hormone treatment to effect transition from biologic sex and transgender males maintain a disadvantage in strength and speed for a period after their hormone treatment. The International Association of Athletics Federations and the International Olympic Committee have ruled that transgender females must have demonstrated testosterone levels below a specified level for 12 months before they can participate in female sports governed by those bodies.

In a recent review article authored by Bethany Jones at Loughborough University, Leicestershire, England, the author asserts, "We reviewed 31 national and international transgender sporting

policies, including those of the International Olympic Committee, the Football Association, Rugby Football Union and the Lawn Tennis Association. After considering the very limited and indirect physiological research that has explored athletic advantage in transgender people, we concluded that the majority of these policies were unfairly discriminating against transgender people, especially transgender females. The more we delved into the issue, the clearer it became that many sporting organizations had overinterpreted the unsubstantiated belief that testosterone leads to an athletic advantage in transgender people, particularly individuals who were assigned male at birth but identify as female.” (This study was cited by the Department of Health: Jones BA, Arcelus J, Bouman WP, Haycraft E. Sport and transgender people: A systematic review of the literature relating to sport participation and competitive sport policies. *Sports Med.* 2007; 47:701. Available at [www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC5357259).)

A recent study looking at transgender U.S. Army personnel but published in the *British Journal of Sports Medicine*, by authors Timothy A. Roberts, Joshua Smalley and Dale Ahrendt from Kansas City, Missouri and Fort Sam Houston, Texas shows some advantage in strength and speed for transgender females at one year after hormone treatment, but not two years from treatment, and corresponding disadvantages for transgender males for about the same period.

The University of New Mexico expresses concern about the state adopting a policy that would put it in conflict with policies of the National Collegiate Athletic Association (NCAA). Such conflict might lead to state colleges and universities being sanctioned by the NCAA, including financially-damaging prohibitions of these institutions hosting championship events. UNM provides a link to NCAA policy on transgender athletes, issued in 2011 and reaffirmed since.

DOH expresses concern that a policy as espoused in House Bill 304 could exacerbate the stresses faced by transgender people, which include a high incidence of sexual abuse, bullying, and suicide. DOH goes on to quote from an article from the Council of Europe:

“Patriarchal and sexist views legitimize violence to ensure the dominance and superiority of men. Other cultural factors include gender stereotypes and prejudice, normative expectations of femininity and masculinity, the socialization of gender, an understanding of the family sphere as private and under male authority, and a general acceptance of violence as part of the public sphere (e.g. street sexual harassment of women), and/or as an acceptable means to solve conflict and assert oneself. Norms around sexuality also help to account for the high numbers of homeless LGBT+ young people, and for the prevalence of hate crimes against them, on the grounds that they are considered a “threat” to societal norms. The same norms around sexuality can help to account for the mass rape of women.” (<https://www.coe.int/en/web/gender-matters/what-causes-gender-based-violence>).

## **TECHNICAL ISSUES**

Sections 4A and 4B of the act seem to conflict with one another. Section 4A would appear to make the act applicable to both transgender males and females, stating that interscholastic and intramural school-sponsored teams will be based solely on biologic sex. Section 4B would apply this limitation only to transgender females.

House Bill 304 does not indicate what test would be performed to determine “biologic sex.” Would that be chromosome test, a physical examination, a psychological test or some other

methodology.

## **SIGNIFICANT ISSUES**

HB304 could potentially face legal scrutiny given its explicit findings that “there are only two biological sexes” and “a person’s sex is determined at fertilization and revealed in utero or at birth” given that current state law allows for a third gender option, as well as the right to change one’s legal gender.

## **OTHER SUBSTANTIVE ISSUES**

DOH raises concern that passage of the bill “may potentially risk federal funding for education, specifically Title IX, the federal law that prohibits discrimination in federally funded schools... HB304 may have a negative impact on transgendered individual’s health and may support the continuance of violence against women and sexual and gender minorities.”

And, according to the Office of the Attorney General,

HB304 could potentially face legal scrutiny given its explicit findings that “there are only two biological sexes” and “a person’s sex is determined at fertilization and revealed in utero or at birth” given that current state law allows for a third gender option, as well as the right to change one’s legal gender.

In addition to the bill potentially being discriminatory on the basis of one’s sexual orientation/gender identity, the bill may also trigger discrimination on the basis of one’s gender. The bill’s legislative findings explicitly state that male and female athletes should be treated differently and are not “similarly situated” because of this classification. As such, if challenged, and because it applies to public institutions, it would apply to intermediate scrutiny.

LAC/sb