



November 14, 2023

Hon. Rob Bonta
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Bonta:

Pursuant to Elections Code Section 9005, we have reviewed the proposed measure (A.G. File No. 23-0027, Amendment #2) related to schools notifying parents of a student's gender identity; school, college, and university sex-segregated facilities and athletic programs and activities; and certain gender-affirming medical treatments for individuals under the age of 18 years.

Background

Gender Identity

Some People Are Transgender or Nonbinary. Gender identity generally refers to a person's internal sense of being male, female, or something else. Transgender persons identify differently than the sex they were assigned at birth. For example, transgender females identify as female but were assigned male at birth, while transgender males identify as males but were assigned female at birth. Also, gender nonbinary persons identify as both male and female, somewhere in between, or neither.

Various Ways Transgender and Nonbinary Persons Can Affirm Their Gender Identity. Transgender and nonbinary persons may change their name, use different pronouns, or wear certain clothing to change their body shape and physical appearance to affirm their gender identity. Additionally, transgender and nonbinary persons can receive certain health care services, including mental health services and medical treatments. Medical treatments can include prescription drugs to postpone the development of puberty (known as "puberty blockers"), hormone therapies, and surgeries. For transgender children, decisions around which


Legislative Analyst's Office
California Legislature
Gabriel Petek, Legislative Analyst
925 L Street, Suite 1000, Sacramento, CA 95814
(916) 445-4656

treatment to provide and when to provide the treatment are made jointly by the physician and parent of the child, generally following professionally recognized standards.

Transgender and Nonbinary Persons Are a Small Share of California's Total Population.

While there is limited data on the number of transgender and nonbinary persons in California, the Williams Institute at the University of California, Los Angeles School of Law estimates about 200,000 of the state's 33 million population aged 13 years and over (less than 1 percent) identify as transgender. Transgender and nonbinary persons generally comprise similarly small shares of students and staff in California's public education system and people enrolled in the state's publicly funded health programs.

Education

State Law and Policy Includes Certain Protections for Transgender and Nonbinary

Students. State law includes provisions prohibiting discrimination based on sex, gender, gender identity, and gender expression. For example, existing state law requires students in public K-12 schools be permitted to use facilities and participate in athletic programs and activities consistent with their gender identity, regardless of what sex is listed on the student's official school record. While not required by state law, the general policy of California colleges and universities is to allow students to use facilities based on their gender identity, maintain all-gender restrooms on campuses, and allow transgender students to participate in athletic programs and activities based on their gender identity under certain conditions.

Federal Law and Policy Also Include Certain Protections. Title IX of the Education Amendments of 1972 prohibits schools, colleges, and universities receiving federal funds from discriminating against individuals based on their sex. The U.S. Department of Education currently interprets Title IX as also prohibiting federally funded schools, colleges, and universities from discriminating based on gender identity. (Currently, 20 states—not including California—are temporarily exempt from the gender-based interpretation of Title IX due to pending litigation.) In the fall of 2023, the federal government is expected to release new Title IX regulations on the prohibition of gender discrimination and rules for gender-based participation in federally funded school, college, and university athletic programs.

State Law Allows Transgender and Nonbinary Students to Participate in Either Girls State or Boys State Conferences. The American Legion and American Legion Auxiliary Organization operate separate week-long leadership conferences for high school students known as Boys State and Girls State conferences. Existing state law exempts the conferences from sex discrimination provisions, meaning participation in each conference can be segregated based on sex. However, as a condition of being exempt from sex discrimination provisions, gender nonbinary and transgender students must be allowed to participate in either Girls State or Boys State conferences.

Health

State Law Protects Access to Gender-Affirming Medical Care. A number of laws in California protect access to gender-affirming medical care for transgender individuals. For example, California law prohibits health insurance plans from discriminating against transgender

patients, including by denying patients access to gender-affirming treatments when the treatments are medically necessary.

Federal Law and Policy Also Include Certain Protections. Section 1557 of the Patient Protection and Affordable Care Act prohibits discrimination on the basis of race, color, national origin, age, disability, or sex in health programs or activities receiving federal funds. With regard to sex, the law prohibits discrimination as defined in Title IX (described earlier). The federal government has released guidance indicating that sex discrimination includes discrimination on the basis of sexual orientation and gender identity. This guidance is the subject of litigation in the federal court system.

California Helps Pay for Health Care for Many Individuals, Including Gender Affirming Medical Care. State and local governments help certain Californians pay for health care through a number of different programs. For example, Medicaid, known as “Medi-Cal” in California, provides health coverage to eligible low-income California residents and enrolls around one-third of Californians. It is funded from a mix of federal, state, and local funds. Health care services covered by Medi-Cal include gender affirming medical treatments for transgender individuals, generally when considered to be medically necessary.

California Licenses Health Care Providers. California law requires health insurance plans, health care providers, and health care facilities to be licensed to provide health care services. Several departments are responsible for licensing health care entities in California. For example, the Department of Consumer Affairs includes numerous licensing boards that license health care providers, such as physicians, nurses, and pharmacists, among others. These departments and boards generally cover the cost to license providers and investigate complaints by charging affected providers fees and fines.

PROPOSAL

Defines Biological Sex. State law does not define biological sex. The measure defines biological sex as either male or female, based on specified physiological and genetic attributes. Additionally, under the measure, the biological sex listed on a student’s birth certificate would be considered correct only if it was entered at or near the time of the student’s birth or modified to correct any clerical errors.

Requires Schools Notify Parents and Legal Guardians if a Student Requests to Be Treated as a Gender Different From Official School Records. Public schools are required to maintain official student records which include basic student information, including legal name and sex. The measure requires official school records to include other names—in addition to the student’s legal name—and the gender submitted by the student’s parents or legal guardians at enrollment, which would be used to refer to the student by school staff. The measure requires schools to notify parents and legal guardians as soon as practicable, but preferably within three days, when a student under the age of 18 or “any person acting on behalf of a [student]” requests that the student be treated as a gender different than what is listed in official records. Requests that would trigger a notification to parents or legal guardians include, but are not limited to, a student asking the school to address them by a different name or pronouns. Schools must obtain written approval from a student’s parents or legal guardians before the school, teachers, administrators,

certified staff, school counselors, employees, or agents of the school can provide any gender-related accommodations.

Prohibits Transgender Female Students From Participating in Athletic Programs or Activities Designated for Biological Female Students. The measure repeals existing state law that allows students to participate in sex-segregated K-12 school programs and activities, including athletic teams and competitions, consistent with the student's gender identity regardless of what gender is listed on the student's official school record. The measure also requires participation in any athletic program or activity designated for female students to be based on biological sex, not gender identity. This means transgender girls and women would not be able to participate in athletic programs and activities designated for biological females. The prohibition would apply to both public and private institutions and schools serving any students from grades 7 to 12 and colleges and universities.

Requires Sex-Segregated Facilities on School, College, and University Campuses Be Segregated Based on Biological Sex. The measure repeals existing state law allowing students to use K-12 school facilities based on their gender identity. The measure also requires use of sex-segregated facilities (such as restrooms and locker rooms) at schools, colleges, and universities be based on biological sex. For example, a transgender female would need to use an all-gender restroom or the restroom designated for biological males. This requirement would apply to both private and public institutions and to students, staff, and any other person on school, college, and university campuses.

Eliminates Requirement to Allow Gender Nonbinary and Transgender Students to Participate in Either Girls State or Boys State Conferences. The measure repeals existing state law that requires gender nonbinary and transgender students be allowed to participate in either Girls State or Boys State conferences. As a result, whether gender nonbinary and transgender students can participate in either conference based on their gender identity, regardless of their biological sex, would be a decision made by the conference administrators.

Prohibits Providing Certain Medical Treatments That Affirm a Different Gender Than Biological Sex for Youth. The measure prohibits health care providers (such as a physician or a nurse) from providing patients under the age of 18 certain medical treatments that affirm a gender identity different than the patient's biological sex. The prohibition specifically would apply to prescribing or administering puberty blockers, hormones or hormone antagonists, and surgery or medical procedures. The measure allows for certain exceptions from this prohibition, such as treatments for children born with a medically verifiable genetic disorder of sexual development. Other than services meeting these exceptions, providing a prohibited medical service under the measure would be considered unprofessional conduct and subject to discipline, including revoking of the health care provider's license or certification.

Fiscal Effects

No Fiscal Effects if Not Implemented. In recent years, several states have enacted policies similar to this measure, including prohibiting certain gender-affirming medical treatments for children; requiring parental notification for gender-related accommodations at schools; and restricting the use of sex-segregated facilities and participation in athletic programs and activities

at schools, colleges, and universities to biological sex. In addition, some schools in California have enacted parental notification policies similar to the one proposed in this measure. Many of the above policies are being litigated in the state and federal court system to determine whether they conflict with the State Constitution, United States Constitution, and other federal laws. At the time of this analysis, the courts have allowed policies in some states to take effect, while policies in other states have not been allowed to go into effect. If a court were to rule policies similar to provisions included in the measure (or the measure itself) could not go into effect, then those provisions would have no fiscal effect on the state or local government. The fiscal effects described below assume the provisions of the measure can be fully implemented.

Potential Minor Savings From No Longer Covering Prohibited Medical Treatments. State and local government health programs that pay for gender-affirming puberty blockers, hormone therapies, and surgeries for youth could no longer do so. The savings could be as much as in the millions of dollars annually, which represents a very small share of overall state and local spending (for example, the state General Fund provides \$37.5 billion to Medi-Cal in 2023-24). In the long run, the savings could be impacted by many other factors. For example, some Medi-Cal enrollees under the age of 18 may choose to receive gender-affirming medical services when they are adults. In these cases, some of the spending associated with prohibited services would still occur, but at a later time for the individual. Prohibiting certain gender-affirming medical treatments on individuals under the age of 18 also could affect the use of other health care services (such as mental health services), with corresponding fiscal impacts.

Minor Administrative Costs for Schools, Colleges, and Universities. The education-related components of the measure would generate several millions of dollars of administrative costs for schools, colleges, and universities (less than 0.01 percent of annual state funding for schools, colleges, and universities). For example, schools, colleges, and universities would need to revise policy manuals and training materials; obtain approval from the school board and other school groups on the new procedures; inform and train school staff, employees, and contractors of the new procedures; process written parent consent forms for gender-related accommodations; and modify data collection policies and systems to track biological sex as defined by the measure to ensure proper implementation. Additionally, the measure could trigger additional Title IX discrimination complaints and investigations, resulting in an unknown, but likely minor, increase in Title IX workload costs for schools, colleges and universities.

Potential, but Unknown, Cost Pressure Related to Federal Fiscal Penalties. If the measure was implemented and found to violate federal anti-discrimination laws, such as Title IX or Section 1557, the state and local governments may face federal fiscal penalties, such as loss of federal Medicaid and education funds or fines. This could place pressure on state and local governments to backfill lost federal funding. Whether action is taken and the magnitude of such action is unknown, but the impact could be significant.

Other Potential Cost Pressures. The education-related changes in the measure may generate indirect cost pressures for other government-funded programs and services. For example, once notified by the school, parents or legal guardians may seek out counseling or other supportive services for their child. State and local government costs could increase to the extent the supportive services are provided through a government-funded program. Additionally, while not

legally required to do so, schools, colleges, and universities may choose to convert existing sex-segregated facilities into all-gender facilities to allow transgender students to use any and all facilities. The potential magnitude of these cost pressures is unknown.

Summary of Fiscal Effects. Assuming the measure could be legally implemented, there would be the following fiscal effects:

- Potentially minor savings in state and local health care costs of up to millions of dollars annually from no longer paying for prohibited services for individuals under the age of 18. These savings could be affected by many other impacts, such as individuals seeking treatment later in life.
- Minor administrative and workload costs to schools, colleges, and universities, up to several millions of dollars initially.
- Potential, but unknown, cost pressures to state and local governments related to federal fiscal penalties if the measure results in federally funded schools, colleges, universities, or health care providers being deemed out of compliance with federal law.

Sincerely,

for Gabriel Petek
Legislative Analyst

for Joe Stephenshaw
Director of Finance