



October 17, 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. 23-0019, Amendment #1) related to students using school, college, and university sex-segregated facilities and participating in athletic programs and activities based on their gender identity.

Background

Sex, Gender, and Gender Identity. Sex generally refers to a person being biologically male, female, or intersex. The attitudes, feelings, and behaviors that a given culture associates with these biological designations are generally known as gender. Gender identity generally refers to a person's internal sense of being male, female, or something else. 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 male and female, or neither male or female.

Student Records and Data. Public K-12 schools are required to maintain official student records which include basic student information, including legal name and sex. Typically, public K-12 schools receive this information from forms filled out by parents or legal guardians or government-issued documents. Changes to official student records generally require parental consent and/or the submission of appropriate legal documents. Parents or legal guardians have a right to access all official student records. In addition to official student records, the California Department of Education collects student data from public K-12 schools to comply with state and federal reporting requirements. Beginning in 2019-20, public K-12 schools could report a student's gender as either male, female, or nonbinary. There is no state requirement for private


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K-12 schools to collect certain student information. Colleges and universities also collect information on a student's gender.

Transgender and Nonbinary Persons. 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. Below, we provide data reported by California schools, colleges, and universities on the gender of students and staff. This data is collected somewhat differently by segment. (We were not able to find data on the number of transgender and nonbinary athletes in California schools, colleges, and universities.)

- ***K-12 Schools.*** About 5,000 of the state's 5.9 million public school students (less than 1 percent) were recorded as nonbinary in the state-maintained data system in 2022-23. Additionally, less than 1 percent of classified staff identified as nonbinary in 2021-22. (Classified staff consist of a variety of non-teaching staff, such as instructional aides, custodians, office clerks, and school nutrition staff. We were not able to find data on the gender identity of other school staff.)
- ***California Community Colleges (CCC).*** Less than 1 percent of CCC students, faculty, and staff identified as gender nonbinary in fall 2022.
- ***California State University (CSU).*** While there is limited data on the number of transgender and nonbinary students across all CSU schools, some individual CSU schools reported having less than 1 percent of enrolled transgender, gender nonbinary, or students whose gender expression does not adhere to traditional gender norms (or gender non-conforming students) in fall 2022. Additionally, less than 30 CSU employees identified as nonbinary in fall 2019.
- ***University of California (UC).*** About 2 percent of enrolled students identified as transgender, gender nonbinary, or gender non-conforming in fall 2022. (We were unable to find data on the number of UC employees who are transgender or nonbinary.)

State Law Regarding Gender Identity in K-12 Schools. State law includes provisions prohibiting discrimination based on sex, gender, gender identity, and gender expression. For example, existing state law requires that students in public K-12 schools be permitted to participate in athletic teams and competitions and use facilities consistent with their gender identity, regardless of what sex is listed on the student's official school record. Additionally, existing state law requires public and private schools serving grades 1 to 12 provide and maintain at least one all-gender restroom on or before July 1, 2026.

Facility and Athletic Policies in California Colleges and Universities. State law requires all single-user toilet facilities in any place of state or local government agency to be identified as all-gender toilet facilities, which aligns with California college and university policies. Additionally, while not required by state law, general policy of colleges and universities is to allow students to use facilities based on their gender identity. Athletic policies for colleges and universities typically are based on state and federal antidiscrimination laws and policies and guidance issued by the national and/or regional college and university athletic organizations.

Currently, colleges and universities allow transgender students to participate in athletic programs and activities based on their gender identity under certain conditions, which may vary by athletic program or activity.

Federal Law Regarding Gender Discrimination on School, College, and University Campuses. Federal law prohibits schools, colleges, and universities from discriminating against individuals based on their sex, with various exemptions. For example, Title IX of the Education Amendments of 1972 and associated regulations allow schools, colleges, and universities receiving federal funds to maintain separate facilities, including restrooms and locker rooms, on the basis of 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. This means students, parents, employees, and other persons can submit a Title IX complaint if they experience gender-based discrimination in educational programs or activities. For example, the federal government has stated that limiting use of school restrooms or participating in school athletics based on biological sex rather than gender identity could trigger a Title IX complaint. (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. Federally funded schools, colleges, and universities that do not adhere to Title IX may face fiscal penalties, such as loss in federal funds or fines. In total, the federal government provides more than \$10 billion annually to California public schools, colleges, and universities for student financial aid assistance, funding at high-poverty schools, special education students, and other purposes.

Policies in Other States. Over 20 states have passed legislation requiring student participation in sex-segregated athletic programs and activities be based on biological sex, regardless if a student's gender identity is different. In some of these states, courts have issued temporary injunctions that have prevented these policies from being implemented while the cases are pending further judicial review. (This is in addition to the previously mentioned 20 states that are currently exempt from the gender-based interpretation of Title IX.) Additionally, there are opposing rulings from different federal circuit courts on whether policies that limit use of sex-segregated restrooms in schools based on biological sex violate federal laws.

Girls State and 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.

Proposal

Prohibits Transgender Female Students From Participating in Competitive 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 competitive athletic program or activity designated for female students 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. (Schools, colleges, and universities could still allow transgender boys and men to participate in athletic programs and activities designated for biological males.) The prohibition would apply to schools serving any students from grades 7 to 12 and colleges and universities that offer sex-segregated athletic programs or activities. These rules would apply to both public and private institutions. The measure defines biological sex as either male or female, based on specified physiological and genetic attributes.

Requires Sex-Segregated Facilities on School, College, and University Campuses Be Segregated Based on Biological Sex. The measure repeals existing state law that allows a student to use K-12 school facilities consistent with the student's gender identity regardless of what gender is listed on the student's official school record. The measure also requires sex-segregated facilities (including, but not limited to, restrooms and locker rooms) on the campuses of schools, colleges, and universities be used by persons based on biological sex. This would apply to both private and public institutions and to students, staff, and any other person on campuses. For example, a person who identifies as a transgender female would need to use an all-gender restroom or the restroom designated for biological males. The definition of biological male and biological female are the same as those used for participating in athletic programs and activities.

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.

Fiscal Effects

As discussed above, there is pending litigation and courts have issued temporary injunctions to prevent the implementation of policies in some states that limit participation in school, college, and university athletic programs and activities based on biological sex, regardless if a student's gender identity is different. Additionally, there are conflicting rulings from different federal circuit courts on whether sex-segregated restrooms in schools based on biological sex violate federal law. As such, there is legal uncertainty regarding the extent to which the measure would be implemented and the resulting fiscal effects on the state and local governments.

No Fiscal Effects if Not Implemented. If a court were to rule that policies similar to the measure (or the measure itself) could not be implemented, then the measure could not be legally implemented and thus would have no fiscal effect on the state or local governments.

Minor Costs for Schools, Colleges, and Universities if Implemented. If the measure could be implemented legally, it would have the following cost impacts on state and local governments:

- ***Minor Administrative Costs.*** The measure would generate minor administrative costs for schools, colleges, and universities. For example, schools, colleges, and universities would need to revise policy manuals and training materials and modify data collection policies and systems to track biological sex as defined by the measure to ensure proper implementation. These costs could initially total a few million dollars statewide across schools, colleges, and universities (less than .01 percent of their annual state funding).
- ***Unknown, but Likely Minor, Costs Associated With Title IX Complaint and Investigation Workload.*** The measure could trigger additional Title IX complaints. Potential Title IX complaints could be based on claims that either the limits on participation in athletics and school facilities are a form of gender discrimination or the limits are not being implemented correctly. In both cases, the amount of time and resources schools, colleges, and universities spend on investigating Title IX complaints would increase. The potential magnitude of these workload-related costs is unknown, but likely minor relative to overall funding for schools, colleges, and universities.

Potential, but Unknown, Cost Pressures Related to Federal Fiscal Penalties. If the measure could be implemented legally and was found to violate Title IX, schools, colleges, and universities may face federal fiscal penalties, such as loss of federal funds or fines. This could place pressure on state and local governments to provide schools, colleges, and universities with additional funding to cover any federal fiscal penalties, though whether action is taken and the magnitude of such action is unknown.

Other Potential Cost Pressures. If the measure could be implemented legally, since the measure does not require schools, colleges, and universities to modify existing facilities, there would be no direct increase to facility costs. However, there may be facility cost pressures. For example, 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. There could be other cost pressures associated with complying with the measure, depending on how schools, colleges, and universities respond to these requirements. Additionally, the measure may generate indirect cost pressures for other government-funded programs and services. For example, transgender students may seek out supportive services to the extent their mental health is impacted by the proposed changes under the measure. State and local government costs could increase to the extent the supportive services are provided through a government-funded program. The potential cost pressures on other government-funded programs and services are unknown. The potential magnitude of these indirect costs is unknown.

Summary of Fiscal Effects. We estimate the measure would have the following fiscal effects:

- Minor administrative and workload costs to schools, colleges, and universities, which could range from no effect to a few millions of dollars initially, depending on whether the measure can be legally implemented.
- If legally implemented, there could be potential, but unknown, cost pressures related to federal fiscal penalties if the measure results in schools, colleges, or universities being deemed out of compliance with federal law.

Sincerely,

for Gabriel Petek
Legislative Analyst

for Joe Stephenshaw
Director of Finance