

SESSION OF 2023

SUPPLEMENTAL NOTE ON SENATE BILL NO. 180

As Amended by House Committee on Health
and Human Services

Brief*

SB 180, as amended, would establish the Women's Bill of Rights and provide a meaning of biological sex for purposes of statutory construction. The bill would set intermediate constitutional scrutiny as the standard of judicial review to be applied with regard to laws and rules and regulations that distinguish between the sexes and would identify those areas where distinction between the sexes would be related to important governmental objectives. The bill also would require certain entities that collect vital statistics for the purposes outlined in the bill to identify each individual who is part of the collected data set as either male or female at birth. The bill would include that individuals born with a medically verifiable diagnosis of disorder/differences in sex development would receive available federal and state legal protections.

Defined Terms

The bill would provide that, despite any provision of state law to the contrary, the following would apply with respect to the application of an individual's biological sex pursuant to any state laws or rules and regulations:

- An individual's "sex" would mean an individual's sex at birth, either male or female;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- A “female” would mean an individual whose biological reproductive system is developed to produce ova;
- A “male” would mean an individual whose biological reproductive system is developed to fertilize the ova of a female;
- “Woman” and “girl” would refer to human females, and “man” and “boy” would refer to human males;
- “Mother” would mean a parent of the female sex, and “father” would mean a parent of the male sex; and
- With respect to biological sex, separate accommodations are not inherently unequal.

Standard of Judicial Review

The bill would note that laws and rules and regulations that distinguish between the sexes are subject to intermediate constitutional scrutiny. The bill would state intermediate constitutional scrutiny prohibits unfair discrimination against similarly situated male and female individuals but allows the law to distinguish between the sexes where such distinctions are substantially related to important governmental objectives.

The bill would require, and state that is despite any provision of state law to the contrary, that distinctions between the sexes be considered substantially related to the important governmental objectives of protecting the health, safety, and privacy of individuals, with respect to the following areas:

- Athletics;
- Prisons or other detention facilities;

- Domestic violence centers;
- Rape crisis centers;
- Locker rooms;
- Restrooms; and
- Other areas where biology, safety, or privacy are implicated that result in separate accommodations.

Vital Statistics Collection

The bill would require any school district, or public school, and any state agency, department, or office or political subdivision to identify each individual as either male or female at birth who is part of collected vital statistics data sets for the purpose of complying with anti-discrimination laws or gathering accurate public health, crime, economic, or other data.

Background

The bill was introduced by the Senate Committee on Public Health and Welfare at the request of Senator Erickson.

Senate Committee on Public Health and Welfare

In the Senate Committee meeting, representatives of Independent Women's Law Center, Independent Women's Voice, and Women's Liberation Front provided **proponent** testimony, generally stating a long-standing legal precedent requires equal treatment of similarly situated men and women but allows differentiation between the sexes when privacy, safety, or equal opportunity are at stake or when that differentiation is substantially related to an important government interest. The proponents stated this premise is being threatened by those who want to redefine common sex-

based words in a manner that separates sex from biology and by those who think separate is inherently unequal when it comes to sex. The proponents noted the bill would not change existing laws but would establish a legal definition of sex-based terms for clarity in the implementation of existing law.

Written-only proponent testimony was provided by representatives of the Kansas Catholic Conference and Kansas Family Choice.

Opponent testimony was provided by a human services professional, a private citizen, and representatives of the American Civil Liberties Union, Equality Kansas, and Kansas Interfaith Action. The opponents generally stated the bill would not protect women's rights but rather attempt to codify into law outdated, inaccurate, and under-inclusive definitions of sex and families and to absolve the State of its responsibility not to discriminate against transgender persons. The opponents stated the bill would try to codify in law a right to exclude transgender persons from certain spaces and erase persons who are nonbinary.

Written-only opponent testimony was provided by a former Kansas state representative, a social worker, four members of the clergy, an advanced practice registered nurse, a traveling nurse, a retired educator, four private citizens, and representatives of the Center of Daring and Kansas Legal Services.

House Committee on Health and Human Services

In the House Committee hearing on March 6, 2023, **proponent** testimony was provided by two representatives of Independent Women's Voice and a representative of Women's Liberation Front who generally stated that the premise of the bill is to identify individuals based upon objective observable biological sex rather than subjective gender.

Written-only proponent testimony was provided by representatives of Kansas Family Voice and Kansas Catholic Conference.

Opponent testimony was provided by representatives of American Civil Liberties Union of Kansas, Equality Kansas, Kansas Interfaith Action, Kansas Legal Services, Kansas Coalition Against Sexual and Domestic Violence, United School Administrators of Kansas and the Kansas Superintendents Association, Mid-America LGBT Chamber of Commerce, a physician, an attorney, and three private citizens, who generally stated that the bill adopts overly narrow definitions and discussed concerns around legality.

Written-only opponent testimony was provided by a former Kansas State representative; representatives from the Center of Daring, Kansas National Education Association, and Mainstream Coalition; five members of the clergy; and 40 private citizens.

Written-only neutral testimony was received from a representative of the Kansas Department of Corrections.

The House Committee recommended the bill be passed. The bill was later withdrawn from the calendar and re-referred to the House Committee.

The House Committee amended the bill as follows:

- To remove all the introductory clauses; and
- To add a new section to state that individuals born with a medically verifiable diagnosis of disorder/differences in sex development shall be provided legal protections and accommodations afforded under the Americans with Disabilities Act and applicable Kansas statutes.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Kansas State Department of Education estimates enactment of the bill would have a limited fiscal effect on school districts; a total effect could not be estimated. The bill could have a fiscal effect on Kansas Board of Regents institutions if the language conflicted with National Collegiate Athletic Association or other higher education-related policies or laws. Kansas higher education institutions could lose the ability to host events, which would decrease revenues, but the extent of that effect is unknown.

The Office of the Attorney General states the constitutionality of the legislation is likely to be challenged and would likely need to go through the appellate process for a definitive ruling on the validity of the law. The litigation could be ongoing for two to four years depending on the court system. The defense could be handled by agency staff using existing resources, but there could be a potential need for specialized outside counsel. If a challenge was successful, the State could be ordered to pay plaintiff's attorney fees and costs. A total fiscal effect could not be estimated.

The Kansas Office of Judicial Administration states enactment of the bill would have a negligible fiscal effect on expenditures and revenue for the Judicial Branch.

According to the Kansas Department of Health and Environment and the Kansas Human Rights Commission, enactment of the bill would have no fiscal effect on the operations of either of the respective agencies.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Women's Bill of Rights; biological sex definition; standard of judicial review; intermediate constitutional scrutiny; important governmental objectives; vital statistics