



MONTANA LEGISLATIVE BRANCH

Legislative Fiscal Division

Room 110 Capitol Building * P.O. Box 201711 * Helena, MT 59620-1711 * (406) 444-2986 * FAX (406) 444-3036

Director
AMY CARLSON

DATE: March 22, 2023
TO: Senator Ellis and Senator Flowers
FROM: Fiscal and Services Divisions
RE: SB 458 Expanded Analysis

In consultation with staff attorneys¹ the Legislative Fiscal Division has determined that any, all, or none of federal special revenue authority may be impacted depending on how state agencies choose to implement SB 458 if it were to pass. Below is a table that displays federal revenue authority for FY 2022 actuals and FY 2023 appropriations (both years include COVID stimulus funding).

Agency Federal Special Revenue Authority

	<u>FY 2022 Actuals</u>	<u>FY 2023 Appropriations</u>
Section A General Government	357,452,828	1,884,227,148
Section B Public Health and Human Services	2,711,487,464	3,044,292,893
Section C Natural Resources and Conservation	594,240,988	1,614,005,482
Section D Public Safety, Judicial Branch	21,595,876	46,420,203
Section E Education and Culture	401,339,377	713,638,506
Section F Long Range	1,023,726	187,854,961
<u>Grand Total</u>	<u>4,087,140,258</u>	<u>7,490,439,193</u>

In addition, federal revenue authority received by the Montana University System (MUS) directly from the federal government may be impacted depending on how the universities choose to implement SB 458 if it were to pass. For FY 2022 federal funding was about \$312.5 million.

This analysis, per your request, does not include potential litigation costs.

¹ Determining how the passage of SB458 may impact federal funds to the State of Montana is speculative. The terms "sex," "male," and "female" are used throughout the Montana Code Annotated but not defined. SB458 provides the definition for those terms.

The United States Supreme Court has determined that the protected class of sex under Title VII of the Civil Rights Act of 1964, as amended, includes sexual orientation and gender identity. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). The definitions provided in SB458 do not appear to have any impact on the inclusion of sexual orientation under the protected class of sex, but may be an issue when considering gender identity since the definitions rely on biological and reproductive elements of a human being rather than an individual's

subjective identity as any gender. Therefore, under the SB458 definitions, a transgender individual may be required to only identify as either male or female based on biology, rather than their preferred gender under Montana statutes that use the words “sex,” “male,” or “female.”

While the *Bostock* holding only applies to discrimination in the area of employment, federal agencies under the Biden Administration have been directed to apply the same interpretation to other federal laws that prohibit sex discrimination, such as Title IX of the Education Amendments of 1972, as amended. However, it is notable and further points to the speculative nature of determining the fiscal impact of the passage of SB458, that under the Trump Administration the U.S. Department of Education’s Office for Civil Rights, which enforces Title IX, unequivocally stated that the *Bostock* decision does not construe Title IX and instead used the “ordinary public meaning” of the word “sex.” Accordingly, the changing nature of the direction from the federal executive branch makes it difficult to determine to what extent the definitions in SB458 may run contrary to federal laws.

As noted, Title VII of the Civil Rights Act of 1964, as amended, and currently interpreted by the U.S. Supreme Court, prohibits discrimination in employment based on biological sex, failure to conform with sex stereotypes, sexual orientation, and gender identity. Federal laws and contracts often require a state’s compliance with non-discrimination laws as a condition of federal funding. SB458’s provision of definitions for “sex,” “male,” and “female” does not presuppose that Montana’s state agencies will begin making hiring and employment decisions contrary to federal non-discrimination laws. Indeed, the Governmental Code of Fair Practices provides that “[s]tate and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to ... sex 49-3-201, MCA. Accordingly, our state and local agencies should not be considering sex, under any definition or ideology, in the area of employment. On the other hand, an argument can be made that defining male and female to the exclusion of a transgender individual may then allow a state or local governmental entity to use that characteristic to discriminate.

Furthermore, considering these terms are currently used in Montana code, yet undefined and presumably understood by state agencies in regular operation, it is uncertain in what way these definitions will impact or change the way state agencies operate. SB458 does not provide direction to state agencies on how to implement the definitions in the bill. Therefore, much like the issue for the federal laws, the supervision by the governor over the executive branch will dictate to what extent these definitions are applied and used for day-to-day operations. For example, even if the Department of Corrections currently relies on inmate self-identification of their sex to determine housing placement, the language in SB458 does not remove the possibility of continued self-identification by an inmate, rather it just provides the parameters by which an inmate may choose which sex to identify. Likewise, the language in SB458 does not preclude or require that the Department of Corrections begin medical testing or physical examinations to determine inmate sex. Thus, how the state agencies choose to implement SB458 if it were to pass is determinative of whether or not that implementation could impact federal funding.