

**REPORT OF THE
CHIEF LEGISLATIVE ANALYST**

DATE: November 14, 2018

TO: Honorable Members of the Rules, Elections & Intergovernmental Relations Committee

FROM: Sharon M. Tso 
Chief Legislative Analyst

Council File No: 18-0002-S127
Assignment No: 18-10-0971

SUBJECT: Resolution to OPPOSE any legislation or administrative action that would narrowly define sex as either male or female, immutable from birth.

CLA RECOMMENDATION: Adopt Resolution (Koretz – O’Farrell) to include in the City’s 2017-2018 Federal Legislative Program, opposition to any legislation or administrative action that would narrowly define sex as either male or female, immutable from birth.

SUMMARY

The Resolution (Koretz – O’Farrell), introduced October 3, 2018, advises that the federal Department of Health and Human Services is considering narrowing the legal definition of sex to mean either male or female at birth. The proposed change would result in the elimination of legal protections in employment, housing, education, and healthcare for over 1 million Americans who identify as transgender or nonbinary. The proposed change follows the withdrawal of similar Obama-era policies that recognized gender identity in schools, prisons, the military, and homeless shelters.

The Resolution further advises that the Trump administration is considering utilizing an alternate interpretation of Title IX to justify an attack on civil rights. The proposed change is consistent with the efforts of the Trump administration to alienate non-cisgender constituents.

The Resolution recommends that the City oppose any action that would narrowly define sex as either male or female, immutable from birth.

BACKGROUND

Title VII of the Civil Rights Act of 1964 protects against employment discrimination for several immutable characteristics including sex. Because a definition for “sex” is not provided, the definition is open to interpretation. The protections provided by Title VII have been interpreted to include gender identity rather than only the immutable physical characteristics of an individual. *Price Waterhouse v. Hopkins* (1989) established a precedent that discrimination based on a person’s nonconformity to social expectation of gender constitutes sex discrimination, however this precedent has not been established by law.

As a result, the federal government has enforced anti-discrimination protections for gender identity on the basis of interpretation. Accordingly, the way the federal government interprets “sex” for the purpose of Title VII protection has changed several times. In 2006 the Department of Justice (DOJ) stated in litigation that Title VII’s sex discrimination prohibition did not cover gender identity discrimination. In 2014, the DOJ, under former Attorney General Eric Holder, released a guidance memo that reversed the DOJ’s position and clarified that sex discrimination is to be construed as including gender identity. The Department of Education (DOE) and DOJ also released a joint guidance letter asserting that Title IX

protections, which cover discrimination in education, include protections for gender identity discrimination and is therefore prohibited in schools which receive federal funding.

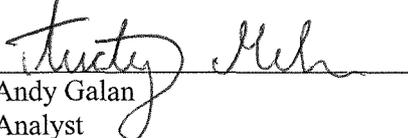
Many of the Obama administration's positions on gender identity issues have been reversed in recent years. In 2017 the DOE and DOJ joint guidance was rescinded and a replacement was not issued. A statement released by the White House indicated that the change in policy was intended to return power to the states. More recently, on October 4, 2017, the DOJ released a memorandum titled "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964" which rescinded the guidance provided by the 2014 DOJ memo. The memo states that Title VII protects from discrimination based on sex, encompassing men and women, and does not encompass gender identity discrimination. The Trump administration is also reviewing a proposed rule change from Department of Health and Human Services (HHS) which would remove the gender identity protections in the Affordable Care Act.

Under a broad interpretation of Title VII, the law provides individuals with protection from discrimination based on gender identity. A narrow interpretation of the term "sex" would remove employment discrimination protections under Title VII for non-gender conforming individuals and would require new legislation to provide these protections. According to the New York Times, an unreleased leaked HHS memo proposes a definition for "sex" under Title IX. The proposed definition would be a narrow interpretation, defining gender as "a person's status as male or female based on immutable biological traits identifiable by or before birth." Such a change may result in the loss of access to several federally funded programs for gender non-conforming individuals.

Opposition to any legislation and/or administrative action that would narrowly define sex is consistent with City efforts to provide equal access to essential services and protect the civil and human rights of all individuals.

DEPARTMENTS NOTIFIED

Bureau of Contract Administration


Andy Galan
Analyst

Attachments: 1. Resolution (Koretz – O'Farrell)

RESOLUTION

WHEREAS, any official position of the City of Los Angeles with respect to legislation, rules, regulations or policies proposed to or pending before a local, state or federal governmental body or agency must have first been adopted in the form of a Resolution by the City Council with the concurrence of the Mayor; and

WHEREAS, the Trump administration's Department of Health and Human Services is threatening to narrow the legal definition of gender to permanently male or female at birth, thus eliminating legal protections for the over 1 million Americans who identify as transgender or nonbinary; and

WHEREAS the proposed change would declare that federal sex discrimination bans would not protect these people from discrimination in the workplace, housing, education, and health care, with potentially life-altering consequences regarding discrimination at schools and health programs that receive federal funds or subsidies; and

WHEREAS, the proposed change comes after several federal agencies have withdrawn Obama-era policies that recognized gender identity in schools, prisons, the military and homeless shelters; and

WHEREAS, the administration is using a perverse interpretation of Title IX regulations – meant to prevent sex discrimination, not promote it – to justify this attack on civil rights; and

WHEREAS, the very sentiment behind the change is bigoted, scientifically dubious, and wholly unsurprising from an administration that has taken every opportunity to turn its back on its non-cisgender constituents;

NOW, THEREFORE, BE IT RESOLVED with the concurrence of the Mayor, that by adoption of this resolution the City of Los Angeles hereby includes in its 2017-2018 Federal Legislative Program opposition to any legislative or administrative action which would narrowly define sex as either male or female, immutable from birth.

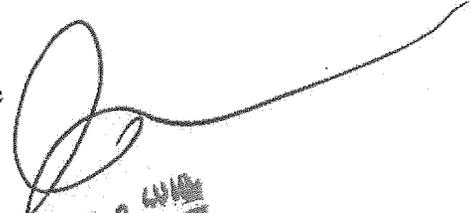
PRESENTED BY:


PAUL KORETZ
Councilmember, 5th District

ORIGINAL

SECONDED BY:



cc 
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