

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1521 Facility Requirements Based on Sex

**SPONSOR(S):** Plakon and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1674

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee		Thompson	Anstead
2) Justice Appropriations Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

Currently, Florida law does not address whether all businesses, schools, hospitals or prisons are required to provide separate restrooms or changing rooms for people based on their sex. However, the Florida Building Code does require that certain businesses that are open to the public, like public lodging establishments and restaurants, have at least one restroom that is available to the public. In addition, Florida law does not currently make it a crime for a person of one sex to enter a restroom or changing room intended for use by the opposite sex.

The bill creates the "Safety in Private Spaces Act."

The bill:

- Requires public and private sector covered entities that maintain a restroom or changing facility to have restrooms separately designated for males and females or a unisex restroom or changing facility.
- Limits instances when a person may enter a restroom or changing facility designated for the opposite sex to the following circumstances:
  - For assisting or chaperoning a minor child, elderly person, or disabled person.
  - For law enforcement or governmental regulatory purposes.
  - For emergency situations.
  - For custodial, maintenance, or inspection purposes, if not in use.
  - If the appropriate designated restroom or changing facility is out of order or under repair and the opposite designated restroom or changing facility contains no person of the opposite sex.
- Makes it a second degree misdemeanor for a person 18 years of age or older to willfully enter a restroom or changing facility designated for the opposite sex and refuse to immediately depart.
- Requires educational institutions to establish disciplinary procedures for violators under 18 years old.
- Requires all covered entities who must be licensed to operate in the state to submit documentation regarding compliance with restroom and changing facilities requirements, as applicable, upon initial or renewal application for licensure, after July 1, 2023.
- Requires domestic violence centers and correctional institutions to provide separate accommodations for females and males, based on their sex.
- Makes covered entities who fail to comply with such requirements subject to penalties and licensure or regulatory disciplinary action.
- Authorizes the Attorney General to bring a civil action to enforce these provisions against any covered entity, to seek injunctive relief, and to impose a fine of up to \$10,000 for any covered entity found to have willfully violated such provisions.
- Directs fines collected to be deposited in the General Revenue Fund.

The bill may have an indeterminate fiscal impact on state and local government and the private sector.

The effective date of the bill is July 1, 2023.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME h1521.RRS

DATE 3/25/2023

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Restrooms and Building Codes

Until roughly 1850, there were no indoor toilet facilities in America. Everyone used outdoor restrooms to meet basic human needs, which were mostly single-user and not sex-designated. The first regulation requiring separate restroom facilities for men and women was passed in 1887 by Massachusetts, which required the establishment of separate restrooms in businesses. “Wherever male and female persons are employed in the same factory or workshop, a significant number of separate and distinct water-closets, earth-closets, or privies shall be provided for the use of each sex and should be plainly designated.” Mixed use of such facilities was also specifically prohibited in some states. Over the course of the next thirty years, almost every state passed its own provision for separate restrooms for men and women.<sup>1</sup> Historians indicate that these laws were based on the social norms of the times and the intention to protect women.<sup>2</sup>

These requirements were carried over in building codes throughout the U.S.<sup>3</sup> Building codes in the U.S. provide a mechanism for the uniform adoption, updating, interpretation, and enforcement of uniform building standards. Typically, restroom requirements are based on a public building’s capacity to determine how many restrooms should be built. Most codes mandate a minimum number of toilets and urinals per sex. Previously, these requirements resulted in more facilities being made available for men than for women, resulting in famously long lines for ladies’ rooms, which lead to “Potty Parity” laws.<sup>4</sup> Florida’s law required three women’s toilets for every two for men in certain facilities.<sup>5</sup> After various changes over the years, Florida has settled on incorporating the International Plumbing Code into the state building code which sets the number of toilets for the expected public use and size of a facility -- usually two female toilets for every one male depending on occupancy.<sup>6</sup>

The Florida Building Code provides that where plumbing fixtures are required, usually based on being open to the public, separate facilities must be provided for each sex<sup>7</sup> with correct signage<sup>8</sup>, with certain exceptions.<sup>9</sup> For example, family or assisted-use toilet facilities are permitted to serve as the required separate facilities and are not required to be identified for exclusive use by either sex.<sup>10</sup> Single-user toilet facilities and bathing rooms, and family or assisted-use toilet and bathing rooms, must be identified for use by either sex.<sup>11</sup>

Requirements for restrooms may differ depending on the type of building or business. For example: The Florida Building Code requires swimming pools with a bathing load of 20 persons or less to utilize a unisex restroom. Pools with bathing loads of 40 persons or less may utilize two unisex restrooms or

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<sup>1</sup> TIME, Maya Rhodan, Why Do We Have Men's and Women's Bathrooms Anyway?, May 16, 2016, <https://time.com/4337761/history-sex-segregated-bathrooms/> (last visited Mar. 22, 2023).

<sup>2</sup> *Id.* During this same period, separate facilities were required in almost every area of society for women’s safety. For example: women’s reading rooms, and women’s train cars.

<sup>3</sup> Suellen Hoy, *Chasing Dirt, The American Pursuit of Cleanliness*, Oxford University Press, Oct. 10, 1996.

<sup>4</sup> New York Times, John Brach, New Ballpark Statistic: Stadium’s Toilet Ratio, April 12, 2009, <https://www.nytimes.com/2009/04/13/sports/baseball/13potty.html?auth=login-google1tap&login=google1tap> (last visited on Mar. 22, 2023).

<sup>5</sup> S. 553.141 (1997).

<sup>6</sup> American Restroom Association, *Potty Parity, Overview*, <https://americanrestroom.org/potty-parity/> (last visited Mar. 22, 2023). *See also*, s. 553.86, F.S.

<sup>7</sup> S. 553.86, F.S.

<sup>8</sup> S. 403.4, F.B.C.

<sup>9</sup> S. 403.2, F.B.C.

<sup>10</sup> S. 403.2.1, F.B.C.

<sup>11</sup> S. 403.1.2, F.B.C.

meet the requirements based on square footage. Each such restroom must include a water closet, a diaper change table, a urinal, and a lavatory. Pools with a bathing load larger than 40 persons must provide separate sanitary facilities labeled for each sex.<sup>12</sup>

Some states have specifically adopted laws related to restrooms and who is permitted to use them. For example: In 2016, North Carolina enacted the Public Facilities Privacy & Security Act (Act). The Act preempted any anti-discrimination ordinances passed by local communities and compelled schools and state and local government facilities containing single-gender restrooms to only allow people of the corresponding sex as listed on their birth certificate to use them.<sup>13</sup> In 2017, the portion of the Act regarding restroom use was repealed and, in 2020, the portion that prohibited local governments from passing anti-discrimination ordinances was sunset.<sup>14</sup>

## Florida Public Lodging Establishments and Public Food Service Establishments

The Division of Hotels and Restaurants (Division) within the Department of Business and Professional Regulation (DBPR) is charged with enforcing the provisions of ch. 509, F.S., and all other applicable laws relating to the inspection and regulation of public lodging establishments and public food service establishments<sup>15</sup> for the purpose of protecting the public health, safety, and welfare.<sup>16</sup> Public lodging establishments are classified as a hotel, motel, vacation rental, nontransient apartment, transient apartment, bed and breakfast inn, or timeshare project.<sup>17</sup>

According to Florida laws and regulations governing hotels and restaurants, each public lodging establishment and each public food service establishment in the state is required to maintain public restroom facilities in accordance with the Florida Building Code as approved by the local building authority,<sup>18</sup> and must meet the following requirements:

- Each transient establishment that does not provide private or connecting restrooms shall maintain one public restroom on each floor for every 15 guests, or major fraction of that number, rooming on that floor.<sup>19</sup>
- Each public lodging establishment and public food service establishment must be supplied with potable water and provide adequate sanitary facilities for the accommodation of its employees and guests. Such facilities may include, but are not limited to, showers, handwash basins, toilets, and bidets, and must be connected to approved plumbing in accordance with the Florida Building Code as approved by the local building authority.<sup>20</sup>
- Each public lodging establishment and public food service establishment is required to provide at least one conveniently located restroom facility for its employees and guests as approved by the local building authority having jurisdiction.<sup>21</sup>
- Public access to restroom facilities may not be permitted through food preparation, storage, or ware washing areas.<sup>22</sup>
- Restroom fixtures must be of readily cleanable sanitary design. Restroom facilities must be kept clean, in good repair and free from objectionable odors. Restrooms must provide at least 20 foot candles of light. The walls, ceilings and floors of all restroom facilities shall be kept in good condition.<sup>23</sup>

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<sup>12</sup> S. 403.6, F.B.C.

<sup>13</sup> North Carolina General Assembly, *House Bill 2/SL2016-3*, <https://www.ncleg.gov/BillLookup/2015E2/H2> (last visited Mar. 20, 2023).

<sup>14</sup> North Carolina General Assembly, *House Bill 142/SL2017-4*, <https://www.ncleg.gov/BillLookup/2017/h142> (last visited Mar. 20, 2023).

<sup>15</sup> S. 509.013(5)(a), F.S.

<sup>16</sup> S. 509.241, F.S.

<sup>17</sup> S. 509.242(1), F.S.

<sup>18</sup> S. 509.221(2)(a), F.S.

<sup>19</sup> S. 509.221(2)(c), F.S.

<sup>20</sup> S. 509.221(1), F.S.

<sup>21</sup> R. 61C-1.004, F.A.C.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

- Restrooms must be completely enclosed and have tight-fitting, self-closing doors, except restrooms located in public lodging establishments or located outside a public food service establishment, may have entrances and exits constructed in such a manner as to ensure privacy of occupants. Restroom doors shall not be left open except during cleaning or maintenance. Handwashing signs must be posted in each restroom used by employees.<sup>24</sup>
- In a restroom where more than one toilet is provided, each toilet must be separated by a partition from adjoining fixtures and a door shall be provided which will partially conceal the occupant from outside view.<sup>25</sup>
- Nontransient establishments, vacation rentals, and timeshare projects are exempt from the provisions of this subsection.<sup>26</sup>

## Federal Regulations Related to Restrooms

Enacted in 1970, the Occupational Safety and Health Act (OSHA) guarantees that employers will provide all employees with safe work conditions. It includes accessibility to restrooms and sanitary conditions.<sup>27</sup> It provides that restroom facilities for employees must be made available based on the knowledge that restroom restrictions can result in employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.

OSHA covers the number of water closets required depending on the number of employees. At work sites with up to 15 employees, one water closet is expected to be provided; Otherwise, the standard is one for every 40 employees. If employee restrooms are made available to the public, they must comply with local building code requirements, and OSHA and ADA requirements.

Florida law requires all restrooms to be compliant with the Americans With Disabilities Act (ADA), which, among other things, directs the provision of as-needed restroom breaks as a reasonable accommodation for an employee who needs to use the facilities due to an injury, disability, or illness.

Requirements include that different facilities have to be provided for each sex unless the restrooms themselves can be occupied by no more than one person and can be locked from the inside. Each restroom is required to be a separate compartment, with a door, that is separated from the next by partitions. Public restrooms must be completely closed and have tight-fitting doors that close properly to ensure privacy. In addition, entrances and exits must be designed to promote an occupants' privacy.<sup>28</sup>

## Family Restrooms

According to the American Restroom Association, ADA accessible single-stall restrooms are important for people living with “special needs.” These restrooms allow people with special needs to visit museums, parks, theaters, libraries and other public places.<sup>29</sup> Family style, unisex, or single-user restrooms (often called handicapped restrooms) offer flexibility. Males or females, and one or more individuals (i.e. family members), of the same or opposite sex, can use them. They can also provide such amenities as two toilets, one for adults and one for children, and a changing table.<sup>30</sup>

People with visible physical disabilities are not the only users of single-stall handicapped restrooms. The single-stall washroom (whether it is called family style or handicapped washroom) provides a

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 29 CFR 1910.141(c)(1)(i).

<sup>28</sup> Americans with Disabilities Act, *ADA Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities*, <https://archive.ada.gov/taman3.html>; The ADA-Compliant Restroom, <https://www.buildings.com/ada-compliance/article/10191973/the-ada-compliant-restroom>; ADACP, ADA guidelines for restroom accessibility <https://adacompliancepros.com/ada-guidelines-for-restroom-accessibility/>

<sup>29</sup> American Restroom Association, Family and Unisex Restrooms, <https://americanrestroom.org/family-unisex-restrooms/> (last visited Mar. 20, 2023).

<sup>30</sup> *Id.*

higher level of privacy than the multi-stall public restrooms. In addition, people using an ostomy pouch often prefer the additional access space and increased privacy of a unisex restroom.<sup>31</sup>

## Pay Toilets

Currently, there is a shortage of public restrooms in U.S. cities. However, this wasn't always the case. Publicly-available for-pay restrooms used to be common in the U.S. In the early 1900s, they were available at railroad stations, airports, bus stations, and highway rest stops. They were also common in busy urban commercial districts. For the most part, people had to pay for the stalls, which opened with coins, while urinals were free. By 1970, America had over 50,000 for-pay toilets.<sup>32</sup>

In the 1970s, several separate interests began dismantling this business model. One was the feminist movement, which pointed out differences in charges - some companies charged for using commodes or toilets, which were more expensive to operate than urinals, but did not charge for urinals. Another was the Committee to End Pay Toilets in America (CEPTA), a group of teenagers who got tired of paying to use restrooms. As a result, states began passing legislation to ban for-pay restrooms.<sup>33</sup>

Instead of free public toilets available for all, public toilets pretty much disappeared from American cities, since cities found it expensive and difficult to keep them safe and clean. By 1980, almost none existed in the United States. In Europe, where there was no such movement, pay public toilets continue to operate today. Today, in the United States, many complain that restrooms are unsafe, unclean, and in disrepair, and have a reputation for attracting illegal activity.<sup>34</sup> The resulting restroom shortage has resulted in real inconvenience in cities, and sometimes public health problems.<sup>35</sup>

## Federal Guidance, Recent Cases Related to the Use of Restrooms, Title IX, Title VII and Discrimination Laws

Public debate, legal questions, and concerns exist regarding whether discrimination against a transgender<sup>36</sup> student or transgender employee constitutes discrimination “**on the basis of sex.**” Such issues have multiple contexts, including debate over transgender restroom policies. Interpretations of the protections are varied.

In June 2020, the U.S. Supreme Court issued its opinion in *Bostock v. Clayton County*, holding that under Title VII, prohibited “sex” discrimination includes prohibiting employers from discriminating against employees because of an individual’s sexual orientation or gender identity. The Court reached its conclusion by interpreting the Title VII’s statutory language, particularly the phrase “**based on sex.**” The Court noted that it was only addressing the question of whether employees could be fired under Title VII for their LGBTQ status and was not addressing issues such as “restrooms, locker rooms... or anything else of the kind.”<sup>37</sup>

Title VII of the Civil Rights Act of 1964 is a federal law that protects employees against discrimination in the workplace based on certain specified characteristics, including race, color, national origin, sex, and religion. Title VII provides:

“It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

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<sup>31</sup> *Id.*

<sup>32</sup> Catalyst, U.S. Cities Should Bring Back For-pay Toilets, <https://catalyst.independent.org/2020/02/13/u-s-cities-should-bring-back-for-pay-toilets/> (last visited Mar. 20, 2023).

<sup>33</sup> *Id.*

<sup>34</sup> Marketplace, Chelsea Wald, *ShelfLife, What happened to America’s public toilets?, April 13, 2021*, <https://www.marketplace.org/2021/04/13/what-happened-to-americas-public-toilets/> (last visited Mar. 22, 2023).

<sup>35</sup> *Id.*

<sup>36</sup> The term “transgender” is an “umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” Definition from the GLAAD Media Reference Guide, <http://www.glaad.org/reference/transgender> (last visited Mar. 19, 2023).

<sup>37</sup> *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, 140 S. Ct. 1731, 1737 (2020).

to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>38</sup>

Title VII applies to employers in both the private and public sectors that have 15 or more employees. It also applies to the federal government, employment agencies, and labor organizations.

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC). The Attorney General, through the Employment Litigation Section (ELS) of the U.S. Department of Justice (DOJ) brings lawsuits under Title VII against state and local government employers after the EEOC refers a complaint to the DOJ and investigates employers when there is reason to believe that an employer's policy or practice discriminates against a group of job applicants or employees based on their race, color, religion, sex (including sexual orientation and gender identity), or national origin.<sup>39</sup>

The U.S. Department of Education (USDOE) Office for Civil Rights (OCR) enforces, among other statutes, Title IX of the Education Amendments of 1972,<sup>40</sup> which protects people from discrimination based on sex in education programs or activities that receive federal financial assistance. Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>41</sup>

Title IX applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the USDOE. These recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories of the United States.<sup>42</sup> Title IX is enforced through private causes of action against the federal funding recipient, and by federal agencies that provide funding to the educational programs or activities.<sup>43</sup>

### *Guidance by Federal Agencies*

Since 2016, the USDOE and DOJ have issued multiple guidance documents addressing whether Title IX and Title VII apply to claims of discrimination in programs or activities based on **gender identity** or sexual orientation.

In 2016, the DOJ and USDOE issued a letter<sup>44</sup> containing "significant guidance" on how the departments applied sex discrimination protections under Title IX to transgender students, including **access to restrooms**, locker rooms, and similar facilities. Litigation challenging the enforceability of its protections providing access to restrooms and other facilities that match a student's **gender identity**

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<sup>38</sup> 42 U.S.C. §§ 2000e - 2000e17 (as amended).

<sup>39</sup> U.S. Department of Justice Employment Litigation Section, *Laws We Enforce, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964*, <https://www.justice.gov/crt/laws-we-enforce#:~:text=The%20Attorney%20General%2C%20through%20ELS,to%20the%20Department%20of%20Justice>. (last visited Mar. 20, 2023).

<sup>40</sup> 20 U.S.C. 1681 through 1688; Pub. L. 100-259, 102 Stat. 28 (Mar. 22, 1988).

<sup>41</sup> 20 U.S.C. § 1681(a).

<sup>42</sup> U.S. Department of Education Office of Civil Rights, *Title IX and Sex Discrimination*, [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last visited Mar. 20, 2023).

<sup>43</sup> Title IX is not the exclusive remedy for victims of sex discrimination in schools. In matters pertaining to public colleges, universities, or school districts, 42 U.S.C. § 1983 provides an avenue for relief against state actors who deprive individuals of a constitutional right. The Supreme Court has held that Title IX does not displace the availability of § 1983 claims based on the Equal Protection Clause for plaintiffs alleging gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 248 (2009).

<sup>44</sup> U.S. Department of Education, Dear Educator (June 23, 2021),

<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf> (last visited Mar. 20, 2023).

ensued.<sup>45</sup> In 2017, the DOE and the DOJ rescinded the letter.<sup>46</sup> The rescission letter indicated that the original letter caused extensive litigation regarding school restrooms and locker rooms and pointed to regard for the primary role of the States and local school districts in establishing educational policy.<sup>47</sup>

In 2021, President Biden signed an executive order addressing implementation of non-discrimination<sup>48</sup> protections<sup>49</sup> on the basis of “sex” related to Title IX and Title VII.<sup>50</sup> The executive order cited the 2020 U.S. Supreme Court Bostock decision<sup>51</sup> as the basis. However, the Supreme Court did not state that “gender identity” is a protected characteristic. Instead, it held that **discrimination on the basis of “transgender status”** is a form of sex discrimination. The court did not provide a definition for transgender status.<sup>52</sup> The USDOE<sup>53</sup> issued guidance and the EEOC<sup>54</sup> issued Technical Assistance Document indicated that USDOE and EEOC would enforce Title VII and Title IX to require transgender persons to be allowed to use facilities (restrooms, locker rooms, etc.) **consistent with their gender identity**.<sup>55</sup>

In 2021, 20 states filed suit against the USDOE, the EEOC and the DOJ, alleging that the guidance documents and Technical Assistance Document were unlawful.<sup>56</sup> On July 15, 2022, the U.S. District Court for the Eastern District of Tennessee entered a preliminary injunction barring the EEOC and the USDOE from enforcing guidance documents issued to interpret Title VII and Title IX to prohibit discrimination based on sexual orientation and gender identity.<sup>57</sup> In March of 2022, the State of Texas filed suit, arguing that the EEOC guidance does not coincide with law because it diverges from the stated protections of Title VII as interpreted through Bostock.<sup>58</sup> In October, 2022, the U.S. District Court for the Northern District of Texas **held that the EEOC guidance addressing sexual orientation and gender identity discrimination in the workplace is unlawful**. The Court granted the state’s request for declaratory judgment, declared the guidance unlawful, and vacated the guidance on a nationwide basis.<sup>59</sup>

In June 2022, the USDOE released proposed changes to Title IX regulations for public comment extending Title IX’s prohibition on discrimination based on sex to sexual orientation and gender identity, giving such protections to transgender students.<sup>60</sup>

### *Cases Related to State and Local Policies*

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<sup>45</sup> U.S. Department of Education, *Dear Colleague Letter on Title IX Coordinators*, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> (last visited Mar. 20, 2023).

<sup>46</sup> Jackson Lewis, *Trump Administration Rescinds Guidance on Transgender Rights under Title IX*, <https://www.jacksonlewis.com/publication/trump-administration-rescinds-guidance-transgender-rights-under-title-ix> (last visited Mar. 20, 2023).

<sup>47</sup> U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter* (Feb. 22, 2017), <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf> (Last visited Mar. 2023).

<sup>48</sup> U.S. Department of Justice, Civil Rights Division, *MEMORANDUM TO: Federal Agency Civil Rights Directors and General Counsels*, <https://www.justice.gov/crt/page/file/1383026/download> (last visited Mar. 19, 2023).

<sup>49</sup> 34 C.F.R. ch. I.

<sup>50</sup> Executive Order 13988.

<sup>51</sup> *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>52</sup> *Id.*

<sup>53</sup> U.S. Department of Education and U.S. Department of Justice, *Confronting Anti-LGBTQI+ Harassment in Schools*, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf> (last visited Mar. 20, 2023).

<sup>54</sup> U.S. Equal Employment Opportunity Commission, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender> (last visited Mar. 20, 2023); *See also*, JD Supra, *District Court Enjoins EEOC and Department of Education Guidance Protecting LGBTQ Rights*, <https://www.jdsupra.com/legalnews/district-court-enjoins-eeoc-and-7385661/> (last visited Mar. 20, 2023).

<sup>55</sup> *Id.*

<sup>56</sup> *Tennessee. et al. v. U.S. Dep’t of Educ. et al.*, Case No. 3:21-cv-308 (E.D. Tenn.).

<sup>57</sup> *Id.*

<sup>58</sup> *State of Texas v. EEOC*, Case No. 2:21-cv-00194-Z.

<sup>59</sup> *Id.*

<sup>60</sup> U.S. Department of Education, *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment> (last visited Mar. 20, 2023).

In 2020, the U.S. Fourth Circuit Court of Appeals determined that a Maryland local school board's policy refusing to allow a transgender student to use the school restroom that **corresponds with their gender identity** violated both the Fourteenth Amendment Equal Protection Clause<sup>61</sup> and Title IX. The court further held that the school's refusal to amend the student's school records<sup>62</sup> to accurately reflect gender, in accordance with driver's license and birth certificate information, also violated the Equal Protection Clause and Title IX.<sup>63</sup> In 2021, the U.S. Supreme Court declined to hear the case, leaving the appellate court decision in place, which says the school district discriminated against a transgender student by not permitting the student to use a certain restroom at school.<sup>64</sup>

In 2022, the U.S. Eleventh Circuit Court of Appeals determined that a Florida local school board's policy requiring students to use the restroom **corresponding to their biological sex** was proper based on both the U.S. Constitution and Title IX.<sup>65</sup> The majority opinion provided that Title IX allows schools to provide separate restrooms on the basis of biological sex.<sup>66</sup> However, the dissenting opinions indicated that the restroom policy was discriminatory because "[u]nderlying this sex-assigned-at-matriculation restroom policy, ... is the presumption that biological sex is accurately determinable at birth and that it is a static or permanent biological determination."<sup>67</sup>

In October, 2022, the Florida State Board of Education adopted a rule requiring that if a school board or charter school governing board has a policy or procedure that allows for separation of restrooms or locker rooms according to some criteria **other than biological sex at birth**, the policy or procedure must be posted on the district's website or charter school's website, and must be sent by mail to student residences to fully inform parents.<sup>68</sup> The rule went into effect on November 22, 2022.<sup>69</sup>

## **Proposed Changes**

The bill creates the "Safety in Private Spaces Act."

The bill provides the intent that "females and males should be provided restrooms and changing facilities for their exclusive use in order to maintain public safety, decency, and decorum."

The bill defines the following terms:

- "Changing facility" means a room in which two or more persons may be in a state of undress in the presence of others, including, but not limited to, a dressing room, fitting room, locker room, changing room, or shower room.
- "Correctional institution" means any state correctional institution as defined in s. 944.02, F.S., juvenile detention center or residential program as described in s. 985.03, F.S., county or municipal detention facility as defined in s. 951.23, F.S., private correctional facility as defined in s. 944.710, F.S., or any other facility used for the detention of adults or juveniles charged with or convicted of a crime.
- "Covered entity" means any:
  - Educational institution, as defined in s. 768.38, F.S.
  - Public accommodations, as defined in s. 760.02(11), F.S.

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<sup>61</sup> The Fourteenth Amendment Equal Protection Clause provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>62</sup> U.S. Department of State, Bureau of Consular Affairs, *Gender Reassignment Applicants*, <http://travel.state.gov/content/passports/english/passports/information/gender.html> (last visited Mar. 19, 2023).

<sup>63</sup> *Grimm v. Gloucester County School Board*, 972 F.3d 586 (Aug. 20, 2020).

<sup>64</sup> U.S. Supreme Court, Order List: 594 U.S. (June 28, 2021), 20-1163 GLOUCESTER COUNTY SCHOOL BOARD V. GRIMM, GAVIN The petition for a writ of certiorari is denied, [https://www.supremecourt.gov/orders/courtorders/062821zor\\_6j37.pdf](https://www.supremecourt.gov/orders/courtorders/062821zor_6j37.pdf) (last visited Mar. 20, 2023).

<sup>65</sup> *Drew Adams v. School Board of St. John's County, Florida*, No. 18-13592 (December 30, 2022).

<sup>66</sup> Florida Department of Highway Safety and Motor Vehicles, *Gender Reassignment*, <http://fdhsmv.rapidinstitutes.com/answer/gender-reassignment> (last visited Mar. 19, 2023).

<sup>67</sup> *Id.*

<sup>68</sup> R. 64V-1.002, F.A.C.

<sup>69</sup> R. 6A-10.086, F.A.C.



- Public shelter space under s. 252.385, F.S.
- Service provider, as defined in s. 397.311(44), F.S.
- Health care facility, which means:
  - Provider as defined in s. 408.803, F.S.;
  - Provider with an active health care clinic exemption under s. 400.9935, F.S.;
  - Continuing care facility with a certificate of authority under chapter 651, F.S.;
  - Optical establishment permitted under s. 484.007, F.S.;
  - Massage establishment licensed under s. 480.043, F.S.;
  - Pharmacy as defined in s. 465.003, F.S.;
  - Office described in s. 459.0138, F.S., which is required to register with the Department of Health;
  - Pain-management clinic registered under s. 458.3265, F.S.;
  - Electrolysis facility licensed under 478.51, F.S.;
  - Health care setting owned or operated by a health care practitioner as defined in s. 456.001, F.S.; or
  - Provider licensed under ch. 394, ch. 397, or part IV of ch. 468, F.S.
- "Female" means a person belonging, **at birth**, to the **biological sex** which has the specific reproductive role of producing eggs.
- "Male" means a person belonging, **at birth**, to the **biological sex** which has the specific reproductive role of producing sperm.
- "Restroom" means a room that includes one or more water closets. This term does not include a unisex restroom.
- "Sex" means the classification of a person as **either female or male** based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia **present at birth**.
- "Unisex changing facility" means a room intended for a single-occupant or a family in which one or more persons may be in a state of undress, including, but not limited to, a dressing room, fitting room, locker room, changing room, or shower room that is enclosed in floor-to-ceiling walls and accessed by a full door with a secure lock that prevents another individual from entering while the changing facility is in use.
- "Unisex restroom" means a room that includes one or more water closets that is intended for a single-occupant, or a family, and the room is enclosed in floor-to-ceiling walls and accessed by a full door with a secure lock that prevents another individual from entering while the room is in use.
- "Water closet" means a toilet or urinal.

The bill requires a covered entity that maintains a water closet to, at a minimum, have:

- A restroom designated for exclusive use by females and a restroom designated for exclusive use by males; or
- A unisex restroom.

The bill requires a covered entity that maintains a changing facility to, at a minimum, have:

- A changing facility designated for exclusive use by females and a changing facility designated for exclusive use by males; or
- A unisex changing facility.

The bill authorizes a person to enter a restroom or changing facility designated for the opposite sex under the following circumstances:

- To accompany another person of the opposite sex for the purpose of assisting or chaperoning a minor child, elderly person, or disabled person.
- For law enforcement or governmental regulatory purposes.
- To render emergency medical assistance or to intervene in any other emergency situation where the health or safety of another person is at risk.
- For custodial, maintenance, or inspection purposes, provided that the restroom or changing facility is not in use.

- If the appropriate designated restroom or changing facility is out of order or under repair and the opposite designated restroom or changing facility contains no person of the opposite sex.

The bill makes it a second degree misdemeanor for a person 18 years of age or older to:

- Willfully enter, for a purpose other than those allowed, a restroom or changing facility designated for the opposite sex; **and**
- Refuse to immediately depart when asked to do so by another person present in the restroom or changing facility.

A second degree is a second degree misdemeanor is punishable by a term of up to 60 days imprisonment and a \$500 fine.<sup>70</sup>

The bill requires each educational institution to establish in its code of student conduct disciplinary procedures for any person under 18 years of age who:

- Willfully enters, for a purpose other than those purposes allowed, an educational institution restroom or changing facility designated for the opposite sex; **and**
- Refuses to immediately depart when asked to do so by another person present in the restroom or changing facility.

The bill requires a domestic violence center under chapter 39, F.S., to provide separate overnight accommodations for females and males based on their sex. This requirement does not apply to mixed-sex family units.

The bill requires a correctional institution to house females and males in its custody separately, based on their sex. This requirement applies to all housing assignments in a correctional institution, including temporary assignments.

The bill requires covered entities that are required to obtain a license to operate in the state to submit documentation regarding compliance with the requirements for water closets and changing facilities, as applicable, upon initial application for such license or on first renewal after July 1, 2023. Failure to comply can result in licensure or regulatory disciplinary action, as applicable.

The bill authorizes the Attorney General to:

- Bring a civil action to enforce these provisions against any covered entity.
- Seek injunctive relief.
- Seek to impose a fine of up to \$10,000 for any covered entity found to have willfully violated these provisions.

The bill directs fines collected to be deposited in the General Revenue Fund.

The bill provides severability.

## B. SECTION DIRECTORY:

Section 1: Creates s. 553.865, F.S.; providing a short title; providing legislative findings; providing definitions; providing requirements for exclusive use of restrooms by gender; providing requirements for exclusive use of changing facilities by gender; providing exceptions; prohibiting willfully entering a restroom or changing facility designated for the opposite sex and refusing to immediately depart when asked to do so by another person present there; providing criminal penalties; providing requirements for exclusive use of domestic violence centers by gender; providing requirements for correctional institutions; requiring entities that receive state licenses to submit compliance documentation; authorizing the Attorney General to bring enforcement actions; authorizing civil penalties; providing for certain funds to be deposited in the General Revenue Fund.

<sup>70</sup> Ss. 775.082, and 775.083, F.S.

Section 2: Provides severability.

Section 3: Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

Indeterminate. The Attorney General is authorized to impose a fine of up to \$10,000 for violations. Fines collected must be deposited in the General Revenue Fund.

#### 2. Expenditures:

Indeterminate.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

Indeterminate.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

This bill may implicate the Equal Protection Clause of the United States Constitution<sup>71</sup> and/or the similar clause in the Florida Constitution.<sup>72</sup> In general, sex-based discrimination by a state government is subject to intermediate scrutiny. This standard requires the government to show that its gender classification is substantially related to a sufficiently important government interest.<sup>73</sup>

Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments Act of 1972, which prohibit discrimination on the basis of sex, may be implicated. The U.S. Supreme Court has found that under Title VII, prohibited "sex" discrimination includes prohibiting employers from discriminating

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<sup>71</sup> The 14th Amendment reads in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

<sup>72</sup> Article I, s. 2, Fla. Const., reads in pertinent part: "All natural persons, female and male alike, are equal before the law..."

<sup>73</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

against employees because of an individual's sexual orientation or gender identity. In this case, the Court noted that it was only addressing the question of whether employees could be fired under Title VII for their LGBTQ status and not issues such as "restrooms, locker rooms... or anything else of the kind."<sup>74</sup>

A recent en banc decision by the U.S. Eleventh Circuit Court of Appeals determined that a Florida school board's policy requiring students to use the restroom corresponding to their biological sex comports with both the U.S. Constitution and Title IX.<sup>75</sup> The ruling creates a potential "circuit split" among the nation's federal appeals courts because both the Seventh Circuit and the Fourth Circuit have ruled in favor of students wishing to use the restroom facilities consistent with their "gender identity" rather than their sex at birth. Such circuit splits make it more likely that the U.S. Supreme Court may take up the issue to ensure uniformity among the circuits on the issue.

**B. RULE-MAKING AUTHORITY:**

Covered state agencies may need to promulgate new or revise existing rules to implement the requirements of the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The sponsor has indicated that an amendment will be filed that will clarify applicability.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

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<sup>74</sup> *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737 (2020).

<sup>75</sup> *Drew Adams v. School Board of St. John's County, Florida*, No. 18-13592 (December 30, 2022).