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ATTORNEY GENERAL OPINION NO. 2023- 2

The Honorable Carrie Barth
State Representative, 5th District
State Capitol, Room 167-W
Topeka, KS 66612

Re: Women's Bill of Rights

Synopsis: SB 180, in conjunction with K.S.A. 8-243(a), requires that driver's licenses issued by the Kansas Department of Revenue (KDOR) list the licensee's biological sex at birth. If KDOR knows that the sex listed on an existing license does not reflect the licensee's biological sex at birth (such as when KDOR has previously changed the sex on a person's driver's license), SB 180 requires KDOR to update its data set to reflect the licensee's sex at birth and include that sex on any licenses it issues to that individual in the future.

K.S.A. 75-52,134 requires that the Kansas Department of Corrections (KDOC) house only biological females in the specified portion of the Topeka Correctional Facility. Section 1(a) of SB 180 does not apply to agency policies and procedures that do not constitute rules and regulations and therefore does not restrict KDOC's placement of inmates more generally.

Section 1(c) of SB 180 requires that the Kansas Department of Health and Environment (KDHE) list a person's biological sex at birth on the person's birth certificate. This is an ongoing requirement, so if KDHE has previously modified a birth certificate to list a sex other than the person's biological sex at birth, SB 180 requires KDHE to restore the birth certificate to its original form.

Cited herein: K.S.A. 8-243; 65-2401; 65-2402; 65-2405; 65-2406; 65-2409a; 65-2417; 75-52,134; 77-415; 2023 Senate Bill 180.

* * *

Dear Representative Barth:

As State Representative for the Fifth District, you ask the following questions about 2023 Senate Bill 180 (SB 180):

- (1) Whether SB 180 requires a person's biological sex to be listed on a driver's license issued by the State of Kansas;
- (2) Whether SB 180 prohibits women's corrections facilities, such as Topeka Correctional Facility, from housing any individual who does not meet the statutory definitions for "female" established by SB 180, subsection (a)(2) and, relatedly, whether men's prisons are prohibited from housing a biological female, as defined by SB 180, who identifies as male and requests placement in a men's prison; and
- (3) Whether birth certificates issued in the State of Kansas must indicate the person's biological sex at birth.

SB 180 establishes a Women's Bill of Rights. It was adopted on April 27, 2023, when the Legislature overrode the Governor's veto of the bill, and is scheduled to take effect on July 1, 2023.

As relevant here, section 1(a) of SB 180 provides:

(a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual's biological sex pursuant to any state law or rules and regulations, the following shall apply:

- (1) An individual's "sex" means such individual's biological sex, either male or female, at birth;
- (2) a "female" is an individual whose biological reproductive system is developed to produce ova, and a "male" is an individual whose biological reproductive system is developed to fertilize the ova of a female;
- (3) the terms "woman" and "girl" refer to human females, and the terms "man" and "boy" refer to human males;
- (4) the term "mother" means a parent of the female sex, and the term "father" means a parent of the male sex;

- (5) with respect to biological sex, the term “equal” does not mean “same” or “identical”;
- (6) with respect to biological sex, separate accommodations are not inherently unequal; and
- (7) an individual 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.

In addition, section 1(c) of the bill, which is also relevant to your inquiry, requires that:

Any school district, or public school thereof, and any state agency, department or office or political subdivision that collects vital statistics for the purpose of complying with anti-discrimination laws or for the purpose of gathering accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth.

Having provided this statutory background, we now turn to your specific questions about SB 180.

Driver’s Licenses

K.S.A. 8-243(a) requires that driver’s licenses issued by the Kansas Department of Revenue (KDOR)’s Division of Vehicles “shall bear” the licensee’s “gender,” among other information. Although this statute uses the term “gender,” rather than “sex,” “gender” is often used to mean “sex.” Contemporary dictionaries commonly offer “sex” as one definition of “gender,”¹ and “gender” is used to refer to “sex” in several other Kansas statutes.² While more recently, some people have begun using

¹ See, e.g., *Gender*, American Heritage Dictionary of the English Language (5th ed. 2015); *Gender*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003); *Gender*, Webster’s Third New International Dictionary (1993); see also *Gender*, Webster’s New World College Dictionary (5th ed. 2014) (“either of the two sexual divisions, male or female, into which human beings are divided”). See generally *Gender*, Garner’s Dictionary of Legal Usage (3d ed. 2011) (attributing the rise of “gender” as a synonym for “sex” to the “distracting duality” of the latter word; “When men see or hear the word *sex*, they think of only one thing.” (quoting *Transcript of Interview of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg*, 70 Ohio St. L.J. 805, 817 (2009))).

² In particular, K.S.A. 65-6710(a)(3) provides for printed materials informing pregnant women that “[g]ender, eye color and other traits are determined at fertilization,” a clear reference to sex rather than gender identity. And K.S.A. 65-6726, which prohibits abortion based on the “sex of the unborn child,” is titled “Abortion based on gender; prohibited.” While that title was editorially supplied by the Office of Revisor of Statutes, which drafts bills for the Legislature, this indicates that both the Legislature and the office that performs the service of legislative drafting for the Legislature use “gender” and “sex” synonymously.

“gender” to refer to a “gender identity” apart from one’s biological sex at birth, we believe that the Legislature in K.S.A. 8-243 used “gender” in its traditional sense to mean “sex.”

This conclusion is buttressed by the fact that KDOR itself has used the terms “gender” and “sex” interchangeably. In carrying out K.S.A. 8-243’s gender-identification requirement, KDOR uses the word “sex” on driver’s licenses,³ indicating that KDOR has always understood “gender” in K.S.A. 8-243 to mean sex. Since the Legislature adopted SB 180 against this backdrop, we believe the Legislature would have understood its definition of “sex” in SB 180 to govern the meaning of “gender” as used in K.S.A. 8-243.

Consequently, we conclude that section 1(a) of SB 180, in conjunction with K.S.A. 8-243(a), requires KDOR to list the licensee’s “biological sex, either male or female, at birth” on driver’s licenses that it issues.

This raises questions about existing driver’s licenses that list a gender identity different than the person’s biological sex at birth. Under section (1)(c) of SB 180, “any state agency . . . that collects vital statistics . . . for the purpose of gathering accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth.” We believe that KDOR is subject to this provision. Although “vital statistics” is not defined in SB 180, the term is frequently used to refer to data about births,⁴ and at minimum KDOR collects licensees’ birth dates.⁵ Thus, references to sex or gender in the “data set” maintained by KDOR must reflect a licensee’s biological sex at birth.⁶ A driver’s license is not simply a physical card issued to a licensed driver; it is reflection of a data set that is continually maintained and updated to ensure its accuracy.⁷ Updated addresses and photographs exemplify the nature of the driver’s license as a data set that is maintained through time. Accordingly, if KDOR knows that the sex listed in its data set does not reflect the licensee’s biological sex at birth (such as when KDOR has previously changed the sex on a person’s driver’s license), SB 180 requires KDOR to update its data set to reflect the licensee’s sex at birth and include that sex on any licenses it issues to that individual in the future.⁸

³ <https://www.ksrevenue.gov/dovrealid.html> (providing sample images of REAL ID and non-REAL ID licenses).

⁴ See K.S.A. 65-2401(a); *Vital Statistics*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/vital%20statistics>.

⁵ KDOR also collects information about licensees’ sex, height, weight, and eye color, among other items.

⁶ SB 180, § 1(c).

⁷ K.S.A. 8-249(a)(4) (requiring KDOR to “maintain suitable records from which information showing the following may be obtained: . . . all data fields printed on drivers’ license and identification cards issued by the state”).

⁸ In the case of a person who seeks to identify and present himself or herself as a member of the opposite sex, that person is entitled to reflect that new image in the manner the person presents

Correctional Facilities

Turning to your question about prisons, we note that section 1(b) of SB 180 states that “distinctions between the sexes with respect to . . . prisons or other detention facilities . . . are substantially related to the important governmental objectives of protecting the health, safety and privacy of individuals in such circumstances.” While this section declares that these distinctions are justified, it does not mandate that the Kansas Department of Corrections (KDOC) make these distinctions.

Instead, your question must be answered by reference to section 1(a) of the bill, which provides definitions “with respect to the application of an individual’s biological sex pursuant to any state law or rules and regulations.” No state statute or Kansas Administrative Regulation requires KDOC to maintain separate correctional facilities for men and women as a general matter. K.S.A. 75-52,134 does specify that “[t]he part of the Topeka correctional facility which formerly was known as the state correctional-vocational training center at Topeka, Kansas, shall be used to confine or house only *female* inmates having a custody or security classification of medium or minimum or lower”⁹ The definition of “female” in SB 180 applies to this statute, which therefore requires that KDOC house only individuals who were biological females at birth in the specified portion of the Topeka Correctional Facility. But K.S.A. 75-52,134 does not apply more broadly to other facilities.

Rather, KDOC’s placement of inmates appears to be largely a matter of agency practices and procedures. This raises the question of whether the term “rules and regulations” in section 1(a) of SB 180 encompasses these practices and procedures.

“Rules and regulations” has an established meaning under Kansas law. The Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.*, provides that “each rule and regulation issued or adopted by a state agency shall comply with the requirements” of the Act.¹⁰ The Act defines “[r]ule and regulation,” “rule,” and “regulation” to mean “a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation.”¹¹ Rules and regulations so defined must go through an administrative process involving several layers of review, notice, and a public hearing before adoption.¹² We have found no rule or

himself in the photograph that is contained in the driver’s license data set. However, SB 180 requires that the designation of the person’s sex in both the data set and the physical card that reflects the data set must indicate the person’s biological sex at birth.

⁹ (Emphasis added.)

¹⁰ K.S.A. 77-415(b)(1).

¹¹ K.S.A. 77-415(c)(4).

¹² K.S.A. 77-420; 77-421.

regulation promulgated by the KDOC addressing the housing of inmates by sex. We conclude that an agency practice or policy that is not a “rule and regulation” as defined in K.S.A. 77-415(c)(4) is not subject to the definitions in section 1(a) of SB 180.

Birth Certificates

Finally, you ask about the listing of biological sex on a person’s birth certificate. The answer to this question turns on section (1)(c) of SB 180, which requires that “any state agency . . . that collects vital statistics . . . for the purpose of gathering accurate public health, crime, economic or other data shall identify each individual who is part of the collected data set as either male or female at birth.”

We have no trouble concluding that the Department of Health and Environment (KDHE) is a “state agency, department or office or political subdivision that collects vital statistics for the purpose of . . . gathering accurate public health, crime, economic or other data.” Elsewhere, “[v]ital statistics” is defined to include “the registration, preparation, transcription, collection, compilation, and preservation of data pertaining to birth[s]”¹³ And state law creates an “office of vital statistics”¹⁴ under KDHE’s jurisdiction and requires the KDHE Secretary to appoint a “state registrar of vital statistics”¹⁵ who is responsible for registering, maintaining, and issuing copies of birth certificates.¹⁶ Because KDHE collects vital statistics, SB 180 requires it to “identify each individual who is part of the collected data set as either male or female at birth.”¹⁷ Birth certificates maintained by KDHE, and copies of those certificates issued by KDHE, therefore must indicate the person’s biological sex at birth.

As with driver’s licenses, this raises questions about birth certificates that have previously been modified by KDHE to list a gender identity different than the person’s biological sex at birth. Section (1)(c) of SB 180 indicates an ongoing requirement—the “data set” maintained by the agency “shall identify each individual” who is part of that data set as male or female at birth. Accordingly, if KDHE has previously modified a birth certificate to list a sex different than the individual’s sex at birth, SB 180 requires KDHE to change the birth certificate back to reflect the individual’s sex at birth.

¹³ K.S.A. 65-2401(a).

¹⁴ K.S.A. 65-2402.

¹⁵ K.S.A. 65-2405.

¹⁶ K.S.A. 65-2406; 65-2409a; 65-2417.

¹⁷ SB 180, § 1(c).

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Anthony J. Powell

Anthony J. Powell
Solicitor General