

LFC Requester:

Lance Chilton

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: February 25, 2025

Check all that apply:

Bill Number: HB 559

Original Correction
Amendment Substitute

Sponsor: Rep. John Block and Rep. Rebecca Dow

Agency Name and Code Number: 305 – New Mexico Department of Justice

Short Title: Gender Identity & Child Custody

Person Writing Analysis: ASG Kellie Garcia
Phone: 505-479-2708
Email: KGarcia@nmdoj.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

May relate to HB 185, SB 459, and SB 500 (more detail in Conflicts section, below).

Duplicates/Relates to Appropriation in the General Appropriation Act: None noted.

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis: HB 559 would amend Section 40-4-9 NMSA 1978 to prohibit New Mexico courts from considering a parent's affirmation of a child's gender identity in custody decisions. It would also prohibit courts from determining that a parent's decision to *not* provide gender affirming health care or gender affirming mental health care to be detrimental, abusive, or inadequate. This bill would also amend the statute to strike the gendered "he" and replace it with the neutral term "child" or "minor" in multiple sections. Each Section is summarized in greater detail below:

Section 1:

- Amends the title of Section 40-4-9 NMSA to read, "Standards for the determination of child custody – prohibited considerations – gender affirmation – gender identity – prohibited determinations – definitions – hearing."
- Amends Section 40-4-9(A) parts (1) – (4) to strike the word "his" (in reference to the child at the heart of the custody dispute) and replace it with the more neutral "child."
- Adds a new subsection, creating a new Section 40-4-9(B). This would prohibit a court from considering a parent's affirmation of their child's gender identity in custody cases, if that identity is incongruent with their sex. This would also prohibit a court from considering a parent's decision to provide gender affirming health or mental health care for their child. It would also prohibit a court from considering a parent's decision *not* to provide gender affirming health or mental health care as: detrimental to health and welfare, inadequate provision for the child, abuse, an unsafe environment, inadequate provision of health care, inadequate guidance, a lack of moral fitness, a detrimental attitude toward the child, or as detrimental to the parent-child relationship and bonding.
- Amends what is currently Section 40-4-9(B) to become Section 40-4-9(C). This change would strike the word "he" (in reference to the child at the heart of the custody dispute) and replace it with the more neutral "the minor." It also strikes the word "such" and replaces it with "the."

- Amends what is currently Section 40-4-9(C) to become Section 40-4-9(D). This change would strike the word “his” (in reference to the child at the heart of the custody dispute) and replace it with the more neutral “the minor’s.” It also strikes the word “court” and replaces it with “judge.” It strikes the word “his” and replaces it with the more neutral “the judge’s” in two places.
- Adds a new subsection, creating Section 40-4-9(E). This contains definitions relevant to the bill. The defined terms are:
 - gender affirmation
 - gender-affirming health care
 - gender-affirming mental health care
 - gender identity
 - sex

Section 2: would make this legislation effective on July 1, 2025.

FISCAL IMPLICATIONS- N/A.

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

This bill may create a disincentive for a parent to support a transgender child’s gender identity, if that child is the subject of a custody dispute. This raises potential issues of impermissible sex-based discrimination. The Supreme Court has held that discrimination against transgender individuals may violate prohibitions against sex-based discrimination. *See Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020) (holding that employment discrimination against transgender individuals violated the prohibition against sex-based discrimination under Title VII of the Civil Rights Act of 1964).

This bill may run afoul of the prohibition against sex-based discrimination under the Equal Protection Clause of the U.S. Constitution, though no federal court has held that discrimination against transgender individuals is unconstitutional on this basis. Additionally, the proposed legislation is likely to incur challenge under the New Mexico Constitution. The New Mexico Constitution states that “[e]quality of rights under law shall not be denied on account of the sex of any person.” N.M. Const. art. II, § 18. The New Mexico Supreme Court has held that by adopting this language, the people of New Mexico intended to provide “something beyond that already afforded by the general language of the Equal Protection Clause.” *N.M. Right to Choose/NARAL v. Johnson*, 1995-NMSC-005, ¶ 30, 126 N.M. 788, 975 P.2d 841. The New Mexico Supreme Court has held that, in examining gender-based classifications and discrimination, courts “must begin from the premise that such classifications are presumptively unconstitutional, and it is the [government’s] burden to rebut this presumption” by a showing of a “compelling justification.” *Id.* ¶ 36. Here, to survive a challenge to the constitutionality of this law, the state would have to show that there is a compelling justification for barring judges from considering a parent’s support for their transgender child in a custody dispute.

This bill may also contradict the existing language of Section 40-4-9(A), requiring the court determine custody based on the best interests of the child. The “best interests of the child” standard is not fixed, and arguably, what may be in the best interests of a transgender child is to

be treated by a parent according to their gender identity, rather than the sex they were assigned at birth. “A determination of the best interests of the child, however, must be made on the basis of evidence before the court.” *A.C. v. C.B.*, 1992-NMCA-012, ¶ 18, 113 N.M. 581. Moreover, “[d]isapproval of morals or other personal characteristics cannot be used to determine the fitness of a person to care for a child.” *In re Jacinta M.*, 1988-NMCA-100, ¶ 11, 107 N.M. 769.

PERFORMANCE IMPLICATIONS

None noted

ADMINISTRATIVE IMPLICATIONS

None noted

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

May relate to HB 185, the Protection of Women’s Sports Act, would require all public educational institutions and athletic clubs offer equal athletic opportunities for men and women. This bill would mandate an athlete participate in the sports team that matches their biological sex assigned at birth. It creates a cause of action for individuals, public educational institutions, athletic associations, and teams who allege a harm or violation of the act, as well as a cause of action for retaliation for reporting a violation of the same. There does not appear to be any conflict with this bill.

May relate to SB 459, the Protection of Women’s Sports Act is a duplicate of HB 185, described above. There does not appear to be any conflict with this bill.

May relate to SB 500, the Detransitioner Protection Act, would prohibit health care providers from providing gender transitioning procedures to minors. Upon a minor or their parent inquiring about gender transition procedures, this bill would require health care providers provide information about the alleged effects of gender affirming care. Health care providers would only be able to point to psychotherapy as an appropriate treatment for gender dysphoria. Health care providers who violate the Act would be found to have engaged in unprofessional conduct and would be subject to discipline by their professional licensing body. The Act would create a cause of action for alleged violations of the same. Health care providers that do provide gender affirming care would be subject to reporting requirements to the State. Insurance providers that provide coverage for gender affirming care would be obligated to also cover detransition procedures to reverse gender affirming treatments. Persons seeking to have their designated sex on birth certificates, driver’s licenses, and other legal documents would be entitled to an expedited process to restore their documented gender to their assigned sex at birth. There does not appear to be a conflict with this bill.

TECHNICAL ISSUES

This bill would prohibit courts from considering a parent’s support for their child’s gender identity when making custody decisions. This may raise questions about the converse situation: presumably, this bill may allow a court to favorably consider a parent’s decision to *not* support their child’s gender identity or desire to seek gender affirming care. The effect may be that parental decisions that support gender affirming care for a transgender child are barred from consideration, while parental decisions that align with maintaining a child according to their assigned gender at birth are still available for judicial consideration.

OTHER SUBSTANTIVE ISSUES- N/A.

ALTERNATIVES- N/A.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL – Status quo.

AMENDMENTS- N/A.