

LEGAL REVIEW NOTE

Bill No. HB 734

LC2904, Hard Copy Review Copy, as of
February 24, 2025

Short Title: Prohibit dispensing of
menstrual products in school male-
designated restrooms

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

HB 734, as drafted, may raise potential constitutional concerns associated with Article X, section 9(2)(a) of the Montana Constitution. Section 9(2)(a) provides that "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the

Montana university system and shall supervise and coordinate other public educational institutions assigned by law.” (Emphasis added).

According to the Montana Supreme Court, this constitutional provision grants a high degree of independence and autonomy to the Board of Regents, subject only to the Legislature’s power of appropriation. *Board of Regents v. Judge*, 168 Mont. 433 (1975). The Court in *Judge* further noted that “Inherent in the constitutional provision granting the Regents their power is the realization that the Board of Regents is the competent body for determining priorities in higher education.” *Id.* at 454. In that case, the Court evaluated a number of statutory restrictions imposed on the university system, including a provision that limited salary increases for certain university officials. The Court held that this statute “specifically [denied] the Regents the power to function effectively by setting its own personnel policies and determining its own priorities” and held that limitation to be unconstitutional. *Id.*

More recently, the Montana Supreme Court struck down a law that authorized the concealed carry of firearms anywhere in the state, including on campuses within the Montana University System (MUS). *Board of Regents v. State*, 2022 MT 128, ¶ 4. This law ran contrary to a policy adopted by the Board of Regents, which provided that only certain individuals acting in the capacity of police or security department officers with the requisite training and qualifications can carry firearms on campus. *Id.* at ¶ 3. The Montana Supreme Court found that allowing the legislation to supersede the Board policy:

...would give the Legislature control and supervision over MUS campuses and render the Board ministerial officers with no true authority other than to effectuate the Legislature’s will. Such application directly contradicts the constitutionally granted powers of the Board and undermines the Board’s ability to govern the MUS, while expanding the Legislature’s power in contravention of the express constitutional language [in Article X, section (9)(2)].

Id. at ¶ 19. Citing *Judge*, the Court reiterated that the Board’s control over “academic, administrative, and financial matters of substantial importance” to the MUS was granted by the Montana Constitution to the exclusion of the Legislature’s ability to direct policies or priorities in these areas through law. *Id.* at ¶ 14. The Court also held that the Board’s firearms policy relates directly to the academic and administrative operations of the university system and is “undoubtedly within the scope of” the Board’s constitutional authority. *Id.* at ¶ 20. The statute enacted by the legislature was overturned as an unconstitutional infringement on the Board’s constitutional responsibility to oversee the MUS. *Id.* at ¶ 19.

As drafted, Section 4 of HB 734 provides:

NEW SECTION. Section 4. Prohibition on placement of menstrual products in male-designated restrooms -- enforcement. (1) A public educational institution may not provide, install, or maintain menstrual product dispensers in male-designated restrooms.

(2) Existing menstrual product dispensers in male-designated restrooms must

be removed within 60 days of [the effective date of this act].

(3) (a) The superintendent of public instruction shall oversee compliance with this section for public elementary and secondary schools.

(b) The board of regents of higher education shall oversee compliance for units of the Montana university system and community colleges.

(4) A public educational institution found in violation of this section must receive a written notice from the applicable overseeing authority under subsection (3) and shall remove menstrual product dispensers in violation of this section within 30 days.

(5) If a public educational institution fails to comply within the designated timeframe, the appropriate overseeing authority may withhold a portion of administrative funding until compliance is achieved.

(6) This section does not prohibit public educational institutions from providing menstrual products in female-designated restrooms or making them available in nurse's offices, student health centers, or other appropriate locations.

While this applies to a "public educational institution", which would include public schools as well as the university system, the Montana Supreme Court has noted that "the Legislature cannot avoid Article X, § 9's grant of power to the Board by simply adding non-MUS institutions to the law." *Barrett v. State*, 2024 MT 86, ¶49. The prohibition in HB 734 may raise potential questions about whether this bill infringes on the academic, administrative, and financial matters of substantial importance to the MUS and whether the bill conforms with Article X, section (9)(2)(a), of the Montana Constitution.

Requester Comments: