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M E M O R A N D U M April 19, 2022

SUBJECT: SB 140; legal issues
(CSSB 140(EDC); Work Order No. 32-LS0911\B)

TO: Senator Tom Begich
Attn: Löki Tobin

FROM: Marie Marx
Legislative Counsel

You have asked several questions relating to SB 140. I have set out your questions and the answers to your questions below.

1. How would this legislation impact a student's right to privacy or unreasonable search? It is highly likely that SB 140, if enacted, will raise a legal challenge under the privacy clause of the Alaska Constitution. Section 14.18.150(b) of the bill provides:

> A student who participates in an athletic team or sport designated female, women, or girls must be female, based on the participant's biological sex as either female or male, as designated at the participant's birth. The biological sex listed on a participant's birth certificate may be relied on to establish the participant's biological sex designated at the participant's birth if the sex designated on the birth certificate was designated at or near the time of the participant's birth.

The bill is otherwise silent regarding how a participant's "biological sex as either female or male, as designated at the participant's birth" is determined. To the extent the process established to make this determination under SB 140 requires disclosure to a school or others of a student's biological sex or transgender status, or requires a student to produce records or other evidence of the student's biological sex, such requirements may violate the student's right to privacy. Further, requiring a transgender female to participate in an athletic team or sport designated male will require the student to publicly disclose the student's transgender status, which may also violate the student's right to privacy.

Unlike the federal constitution, art. I, sec. 22, of the Alaska Constitution contains an express guarantee of the right to privacy. The Alaska Supreme Court has stated on more than one occasion that the Alaska Constitution affords broader protections than does the

federal constitution.[1] Right to privacy cases in Alaska are divided into two categories: those that claim a right of personal autonomy, and those that seek to shield sensitive personal information from public disclosure.[2] SB 140 raises issues under both categories. Facts surrounding a person's transgender status or biological sex can be intensely private. As the Alaska Supreme Court has stated, "few things [are] more personal than one's body."[3]

When the state burdens or interferes with a fundamental aspect of the right to privacy, it must demonstrate a "compelling governmental interest and the absence of a less restrictive means to advance that interest."[4] However, when state action interferes with non-fundamental aspects of privacy, "the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest."[5] Alaska courts have yet to consider the right to privacy in the context of transgender status.

Section 1 of SB 140 provides a statement of legislative findings and intent. Under this language, the state's interests are: maintaining fairness in athletic opportunities for women; promoting sex equality; preserving an even playing field in school athletic programs; maintaining opportunities for female athletes to demonstrate their strength, skills, and athletic abilities; and providing female athletes with opportunities to obtain recognition and accolades, and college scholarships. Therefore, at a minimum, the state will have to show that requiring disclosure to a school or others of a student's biological sex or transgender status, or requiring a student to produce records or other evidence of the student's biological sex, bears a close and substantial relationship to the furtherance of these interests. If a court instead applies the higher compelling interest standard to a challenge of SB 140, it would be necessary to show a compelling state interest, and that no narrower means could be used to accomplish that interest.

SB 140 allows a participant's birth certificate to be used to establish the participant's biological sex designated at the participant's birth in certain circumstances, but does not require that it be used. While it is unclear how a participant's "biological sex as either female or male, as designated at the participant's birth" is otherwise determined, the draft bill does not authorize a search of the participant to establish the participant's biological

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[1] *See, e.g., Shagloak v. State*, 597 P.2d 142 (Alaska 1979); *State v. Glass*, 583 P.2d 872 (Alaska 1978); *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

[2] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126 (Alaska 2019).

[3] *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997).

[4] *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

[5] *Id.*

sex "as designated at the participant's birth." If SB 140 did allow such a search, the bill would implicate the right to protection against unreasonable search and seizure under the United States Constitution[6] and the Constitution of the State of Alaska.[7]

2. How does AS 14.18.150 impact equal protection as it only prohibits biological males from participating in female sports, but not vice versa? It is highly likely that, if SB 140 were enacted into law and challenged, a court would find that SB 140 unlawfully discriminates against transgender females in violation of the equal protection clause of the Alaska Constitution. SB 140 provides, "A student who participates in an athletic team or sport designated female, women, or girls must be female, based on the participant's biological sex as either female or male, as designated at the participant's birth." Under this restriction, the bill treats transgender females differently than transgender males, cisgender females, and cisgender males. Under SB 140, transgender males, cisgender females, and cisgender males are permitted to play on sports teams that align with their gender identity. Only transgender females are prohibited from doing so. Significantly, under SB 140, all female athletes who wish to play on sports teams that align with their gender identity will have to prove their "biological sex . . . as designated at the [athlete's] birth" because all female athletes are subject to SB 140's restrictions. Transgender males and cisgender males who wish to play on sports teams that align with their gender identity are not subject to the bill's requirements because SB 140 does not restrict transgender males from participating in an athletic team or sport designated male. This "creates a different, more onerous set of rules for women's sports when compared to men's sports."[8]

The equal protection clauses of the United States and Alaska Constitutions prohibit disparate government treatment of similarly situated individuals unless the government justifies the disparate treatment. Courts subject sex-based discrimination to heightened scrutiny, i.e., the classification must serve important government objectives and there must be a substantial relationship between the discrimination and achievement of those objectives.[9] The Ninth Circuit has also applied a heightened level of scrutiny to disparate treatment of transgender individuals.[10] While the United States Supreme Court has not yet decided the equal protection issue raised by SB 140, in *Bostock v. Clayton County, Georgia*, the United States Supreme Court held that discrimination based on sexual

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[6] U.S. Constitution, amend. IV.

[7] Art. I, sec. 14, Constitution of the State of Alaska.

[8] *Hecox v. Little*, 479 F. Supp. 3d 930, 985 (D. Idaho 2020).

[9] *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

[10] *See Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) ("We conclude that the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.").

orientation and gender identity is sex discrimination under Title VII.[11] The Court stated: "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[12]

Federal district courts have enjoined similar acts enacted in Idaho and West Virginia, finding in part that the transgender females challenging the acts would likely succeed on the merits of their claims that the acts violated their right to equal protection.[13] As the West Virginia court explained:

> All other students in West Virginia secondary schools—cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys' teams—are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school, as far as I am aware, that is forbidden from playing on a girls' team and must join the boys' team.[14]

A reviewing court would consider any government objectives furthered by the bill and consider whether the bill's disparate treatment of transgender females is substantially related to furthering those objectives.

In *Clark, By and Through Clark v. Arizona Interscholastic Ass'n*, the Ninth Circuit addressed a challenge to a rule of the Arizona Interscholastic Association (AIA), restricting interscholastic volleyball competition to single-sex teams.[15] The court held that "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is unquestionably a legitimate and important interest, which is served by precluding males from playing on teams devoted to female athletes."[16] In *Hecox v. Little*, the Idaho federal district court analyzed *Clark*.[17] The Idaho court recognized:

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[11] 140 S.Ct 1731, 1741 (2020).

[12] *Id*.

[13] *Hecox*, 479 F. Supp. at 987; *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *6 (S.D.W. Va. July 21, 2021).

[14] *B. P. J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021).

[15] *Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982).

[16] *Hecox v. Little*, 479 F. Supp. 3d 930, 952 (D. Idaho 2020), *citing Clark, ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).
[17] *Hecox*, 479 F. Supp. at 987.

> In *Clark*, the Ninth Circuit determined a policy in Arizona of excluding boys from girls' teams simply recognized "the physiological fact that males would have an undue advantage competing against women," and would diminish opportunity for females. The *Clark* Court also explained that "even wiser alternatives to the one chosen" did not invalidate Arizona's policy since it was "substantially related to the goal" of providing fair and equal opportunities for females to participate in athletics.[18]

However, the court in *Hecox* distinguished *Clark*, stating:

> While the Court recognizes and accepts the principals [*sic*] outlined in *Clark*, *Clark*'s holding regarding general sex separation in sport, as well as the justifications for such separation, do not appear to be implicated by allowing transgender women to participate on women's teams. In *Clark*, the Ninth Circuit held that it was lawful to exclude cisgender boys from playing on a girls' volleyball team because: (1) women had historically been deprived of athletic opportunities in favor of men; (2) as a general matter, men had equal athletic opportunities to women; and (3) according to stipulated facts, average physiological differences meant that "males would displace females to a substantial extent" if permitted to play on women's volleyball teams. These principals [*sic*] do not appear to hold true for women and girls who are transgender.[19]

The *Hecox* court explained, "Heightened scrutiny requires that a law solves an actual problem and that the 'justification must be genuine, not hypothesized.' . . . In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances."[20] The West Virginia court reached a similar conclusion when evaluating the state's proffered objective that "the statute is to provide equal athletic opportunities for female athletes and to protect female athletes while they participate in athletics."[21] The court found that a transgender student, B.P.J., was likely to succeed on the merits of her equal protection claim, concluding in part:

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[18] *Hecox*, 479 F. Supp. 3d at 976 (citations omitted).

[19] *Id*. (citations omitted).

[20] *Id*. at 979.

[21] *B. P. J. v. W. Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 355 (S.D.W. Va. 2021).

> At this point, I have been provided with scant evidence that this law addresses any problem at all, let alone an important problem. When the government distinguishes between different groups of people, those distinctions must be supported by compelling reasons.[22]
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> . . .
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> [P]ermitting B.P.J. to participate on the girls' teams would not take away athletic opportunities from other girls. Transgender people make up a small percentage of the population: 0.6% of the adult population generally, and 0.7% of thirteen-to seventeen-year-olds. The number of transgender people who wish to participate in school-sponsored athletics is even smaller. Insofar as I am aware, B.P.J. is the only transgender student at her school interested in school-sponsored athletics. Therefore, I cannot find that permitting B.P.J. to participate on the girls' cross country and track teams would significantly, if at all, prevent other girl athletes from participating.[23]

In an April 3, 2022, letter from the Association of Alaska School Boards to the Senate Education Committee relating to SB 140, the association stated, "In Alaska, we have not been able to obtain any evidence of female sports being affected, much less dominated, by transgender athletes."[24] Similar to the court's conclusion in *B. P. J. v. West Virginia State Board of Education*, if a court finds that there is little evidence of female sports being affected by transgender athletes in Alaska, the court may conclude that SB 140 fails to address an important problem, and that the state lacks a compelling reason to prohibit transgender females from playing on sports teams that align with their gender identity.

In sum, based on the above, it is highly likely that, if SB 140 were enacted into law and challenged, a court would find that SB 140 unlawfully discriminates against transgender females in violation of the equal protection clause of the Alaska Constitution.

3. What is the statutory definition of biological sex? There is no definition of "biological sex" provided in the Alaska statutes or in SB 140.

4. How does a student's right to privacy align with use of their birth certificate to determine their biological sex? As discussed above, to the extent SB 140 requires

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[22] *Id*. at 350.

[23] *Id*. at 356 (citations omitted).

[24] Letter from the Association of Alaska School Boards to the Senate Education Committee, dated April 3, 2022, available at: http://www.akleg.gov/basis/get_documents.asp?session=32&docid=92311.

disclosure to a school or others of a student's biological sex or transgender status, or requires a student to produce records or other evidence of the student's biological sex, such requirements may violate the student's right to privacy.

5. How does section AS 14.18.160 align with federal law, for example the current interpretation of Title IX? Can state trump federal law in this case if federal law states that sex is defined as gender identity? In *Bostock v. Clayton County, Georgia*, the United States Supreme Court held that discrimination based on sexual orientation and gender identity is sex discrimination under Title VII.[25] The Court stated: "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[26] While the United States Supreme Court has not yet decided whether transgender discrimination is sex discrimination under Title IX, multiple federal courts have extended the holding in *Bostock* to challenges under Title IX.[27]

The United States Department of Education (department) is the agency tasked with promulgating regulations implementing Title IX.[28] The department recently issued guidance in light of *Bostock v. Clayton County, Georgia*. The department interpreted *Bostock*'s holding as applying to Title IX, explaining that

> In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. __ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

[25] *See Bostock v. Clayton Cnty., Georgia*, 140 S.Ct 1731, 1741 (2020).

[26] *Id*.

[27] *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020) (policy prohibiting transgender male from using male restroom discriminated against student in violation of Title IX); *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (policy prohibiting transgender male from using male restroom discriminated against student in violation of Title IX); *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2021 WL 3081883, at *7 (S.D. W. Va. 2021) (biologically male student excluded from participation on female sports team; demonstrated likelihood of success on the merits of Title IX claim).

[28] *See* 20 U.S.C. §§ 1681- 1688.

> The Department issues this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.
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> Interpretation:
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> Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.
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> Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock*, this interpretation flows from the statute's "plain terms." See *Bostock*, 140 S. Ct. at 1743, 1748-50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within [the Department's Office for Civil Rights]'s responsibility to enforce Title IX's prohibition on sex discrimination.[29]

The United States Department of Justice is charged with coordination of the implementation and enforcement of Title IX by executive agencies,[30] and the United States Department of Justice's Civil Rights Division also recently concluded that *Bostock*'s analysis applies to Title IX.[31] Based on the above, it is highly likely that a court would find that transgender discrimination is sex discrimination under Title IX. It is therefore also highly likely that, if SB 140 were enacted into law and challenged, a court would also find that SB 140 unlawfully discriminates against transgender females in violation of Title IX.

Federal laws preempt state laws if they conflict. The law of federal preemption "is derived from the supremacy clause of art. VI of the federal Constitution, which declares that federal law shall be 'the supreme Law of the Land; and the Judges in every State

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[29] Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 FR 32637-01, 2021 WL 2531043 (June 22, 2021).

[30] Exec. Order No. 12250, § 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980).

[31] Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"[32] Where state law comes into conflict with federal law, "the Supremacy Clause of the United States Constitution dictates that state law must always yield."[33] To the extent that SB 140, if enacted, conflicts with Title IX, Title IX would preempt the bill.

6. How does the limit to 2 years under AS 14.18.170 impact a person's constitutional rights? Section 14.18.170(d) provides, "An action brought under this section must be commenced within two years of the event giving rise to the complaint." The section to which this refers, AS 14.18.170, relates to harm resulting from a violation of AS 14.18.150, and retaliation or other adverse action resulting from reporting a violation of AS 14.18.150. Therefore, under the plain language of sec. 14.18.170, the claims described in that section must be "commenced within two years of the event giving rise to the complaint." This statute of limitations may apply to constitutional claims arising from sec. 14.18.170. Alaska's statutes of limitations generally apply to constitutional claims.[34] The Alaska Supreme Court has stated that, "All civil claims are governed by statutes of limitations. Alaska Statute 09.10.010 provides that '[a] person may not commence a civil action except within the periods described in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.' There is no exception for constitutional claims."[35] For example, the Court has held that certain statutes of limitations apply to claims brought under the takings clauses of the Alaska Constitution.[36]

However, while the statute of limitations in sec. 14.18.170 may apply to constitutional claims arising from sec. 14.18.170, it would likely not preclude a person from challenging the constitutionality of the statute itself. First, a state statute cannot foreclose a challenge under the federal constitution.[37] Second, failure to bring a constitutional challenge within a limited time period does not make an unconstitutional statute

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[32] *Bald v. RCA Alascom*, 569 P.2d 1328, 1331 (Alaska 1977).

[33] *Allen v. State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance*, 203 P.3d 1155, 1160 - 61 (Alaska 2009).

[34] *Smith v. State*, 282 P.3d 300, 304 (Alaska 2012).

[35] *Id*.

[36] *Id*.

[37] The supremacy clause of art. VI of the federal Constitution declares that federal law shall be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

constitutional. So long as an unconstitutional statute exists, the injury remains. I cannot predict with certainty how such a challenge would be resolved. Ultimately, it will be up to the court to decide whether a late-filed constitutional challenge to sec. 14.18.170 will be allowed.

7. Regarding ADA and Individuals with Disabilities Education Act, is a student diagnosed with gender dysphoria under the DSM-5 protected under this clause? Section 14.18.180(b) provides that, "AS 14.18.150 - 14.18.190 may not be construed to modify a person's rights under 20 U.S.C. 1400 - 1482 (Individuals with Disabilities Education Act), 29 U.S.C. 794, or 42 U.S.C. 12101 – 12213." The purpose of the Americans with Disabilities Act[38] (ADA) includes providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[39] The ADA explicitly excludes the following conditions from the definition of disability: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.[40] The Ninth Circuit and United States Supreme Court have not yet addressed whether this provision excludes the condition of gender dysphoria[41] from ADA coverage, and consequently, from ADA's protections. Therefore, I cannot predict with certainty whether a student diagnosed with the condition of gender dysphoria would be protected under the ADA. However, at least one court has held that 42 U.S.C. 12211(b) does not exclude from ADA coverage "disabling conditions that persons who identify with a different gender may have - such as [the condition of] gender dysphoria, which substantially limits [a person's] major life activities of interacting with others, reproducing, and social and occupational functioning."[42]

The Individuals with Disabilities Education Act (IDEA) conditions the receipt of federal funds on states' maintenance of policies and procedures ensuring that a "free appropriate public education" is available to all children with disabilities between the ages of three

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[38] 42 U.S.C. 12101 - 12213.

[39] 42 U.S.C. 12101(b)(1).

[40] 42 U.S.C. 12211(b).

[41] Gender dysphoria is the medical condition "characterized by incongruence between one's experienced/expressed gender and assigned sex at birth, and clinically significant distress or impairment of functioning that results." *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1026 n. 8 (D. Alaska 2020).

[42] *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017).

and twenty-one.[43] A free appropriate public education requires the provision of "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability" as well as "transportation, developmental, corrective and other supportive services required to ensure that the child benefits from that special education."[44] Students and their parents may take action for a school's failure to implement a satisfactory Individualized Education Plan (IEP).[45] However, IDEA's coverage applies only to certain categories of disability.[46] I could not find a court case analyzing the rights of transgender students under IDEA. It is possible that a court would find that some transgender students may have rights under IDEA, based on a diagnosis of gender dysphoria, and that these students may be entitled to IEPs that address their specific needs.

Please let me know if I may be of further assistance.

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[43] 20 U.S.C. 1412(a)(1)(A). *See also Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 (9th Cir. 2016).

[44] 20 U.S.C. 1401(9), (26), and (29); *See also Timothy O.*, 822 F.3d at 1110.

[45] 20 U.S.C. 1415(a).

[46] 20 U.S.C. 1401(3)(A)(i).