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MEMORANDUM March 14, 2024

SUBJECT: Constitutional and legal concerns
(HB 183; Work Order No. 33-LS0735\A)

TO: Representative Andi Story
Attn: Miranda Worl

FROM: Margret Bergerud
Legislative Counsel

You asked several questions relating to HB 183, which are set out and answered below.

1. How would this legislation impact a student's right to privacy or unreasonable search?
It is highly likely that the bill, if enacted, will raise a legal challenge under the privacy clause of the Alaska Constitution. 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 "can be 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] The bill raises issues under both categories.

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 the bill requires disclosure to a school or others of a student's biological sex or transgender status, or requires a student to produce

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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) (citing *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997); *Ravin*, 537 P.2d at 500) (internal footnote omitted).

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 may require the student to publicly disclose the student's transgender status, which may also violate the student's right to privacy.

In the personal information context "[f]or the right to privacy to apply, there must be both a legitimate expectation of privacy and a claim of substantial infringement, as distinguished from a minimal one."[3] "A legitimate expectation of privacy is an expectation that 'society is prepared to recognize as reasonable.'"[4] The Alaska Supreme Court has not directly addressed whether a person's status as a transgender student is the type of personal information protected by art. I, sec. 22.

The court has, however, described the personal information privacy interest as "an individual's interest in protecting 'sensitive personal information . . . which if, disclosed . . . , could cause embarrassment[,] anxiety,' humiliation, harassment, or economic and physical reprisals."[5] Because disclosure of a student's status as a transgender student could, at a minimum, cause embarrassment, humiliation, and anxiety, and in more severe instances subject the student to harassment or other harm, it is likely that a court would conclude that a transgender student has a fundamental privacy interest in the student's status as a transgender student.[6] As the Alaska Supreme Court has stated, "few things [are] more personal than one's body."[7]

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." 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."

Section 1 of HB 183 provides a statement of legislative findings and intent. Under this language, the state's interests are: maintaining fairness in athletic opportunities for

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[3] *Id.* at 126 - 27 (citing *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 222 (Alaska 2005); *Alaska Wildlife Alliance*, 948 P.2d at 980).

[4] *Id.* at 127 (quoting *International Ass'n of Fire Fighters, Local 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999)).

[5] *Id.* (alterations in original) (citations and internal footnotes omitted).

[6] *See, e.g., K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, 2012 WL 2685183 (Alaska Super., 2012) (concluding that a person's privacy interest in transgender status is entitled to protection, but not deciding whether it is a fundamental privacy interest subject to strict scrutiny because the challenged program failed to satisfy even less rigorous scrutiny).

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

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 HB 183, it would be necessary to show a compelling state interest, and that no narrower means could be used to accomplish that interest.

HB 183 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 sex "as designated at the participant's birth." If HB 183 did allow such a search, the bill would implicate the right to protection against unreasonable search and seizure under the United States Constitution and the Constitution of the State of Alaska.

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 the bill, if enacted, will raise a legal challenge under the equal protection clause of the Alaska Constitution. 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." Under this restriction, the bill treats transgender females differently than transgender males, cisgender females, and cisgender males. Specifically, 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 the bill, 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 the bill'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 the bill 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

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

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 the bill, 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.[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]

If the bill were enacted into law and challenged, a reviewing court would likely consider any governmental 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.[13] 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."[14] In *Hecox v. Little*, the Ninth Circuit Court of Appeals distinguished the applicable analysis in *Clark*, which involved cisgendered boys playing on a team for girls, from the applicable analysis in cases involving transgendered girls playing on a team for girls.[15] There, an Idaho law banned transgendered girls from competing on school athletics teams reserved for girls, included a "sex verification process" that allowed anyone to question the gender of any student playing on a team reserved for

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

[10] *See Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023) (" heightened scrutiny applies to laws that discriminate on the basis of transgender status, reasoning that gender identity is at least a 'quasi-suspect class.'"; *citing 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.").

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

[12] *Id.*

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

[14] *Id.* at 1169.

[15] *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).

girls, and would have subjected a girl whose sex was questioned to "intrusive medical procedures to verify her sex, including gynecological exams."[16] The law did not subject cisgender boys, cisgender girls, or transgender boys to the same prohibitions or requirements. The court noted that transgender women, "like women generally. . . have historically been discriminated against, not favored"[17] and found that heightened scrutiny applied to the equal protection claim. The court found that the transgender women athletes who were plaintiffs in the lawsuit were likely to succeed on the merits of their lawsuit.[18] The court therefore upheld the preliminary injunction that had been issued by a lower court that prevented Idaho from enforcing the law.[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]

A U.S. District Court for the southern district of West Virginia reached a similar conclusion on a motion for a preliminary injunction 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:

> 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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[16] *Id.* at 1015.

[17] *Id.* at 1028.

[18] *Hecox*, 79 F.4th at 1016.

[19] *Id.* at 1039.

[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).

[22] *Id.* at 350.

> [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]

Later, the same court, ruling on a motion for summary judgment, found that the West Virginia law did not violate equal protection, was related to the important governmental interest of providing equal opportunities to participate in athletics, and thus did not violate Title IX.[24] The court dissolved its prior order enjoining West Virginia from enforcing its law.[25] However, the court's order dissolving its preliminary injunction was stayed by the Fourth Circuit Court of Appeals on February 22, 2023, leaving intact the order prohibiting the state from enforcing the law.[26]

In an April 3, 2022, letter from the Association of Alaska School Boards to the Senate Education Committee relating to SB 140, previously introduced legislation that was analogous to the current HB 183, 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." If a court finds that there is little evidence of female sports being affected by transgender athletes in Alaska, the court may conclude that HB 183 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.

The Ninth Circuit Court of Appeals has found a law similar to those proposed in HB 183 likely violate the equal protection clause of the federal constitution. Although the Fourth Circuit Court of Appeals has not ruled on the issue, it has reinstated an injunction that was based on the same conclusion. While this is a quickly-evolving area of law and I cannot be certain, I think it is highly likely that, if HB 183 were enacted into law and challenged, a court would find that HB 183 unlawfully discriminates against transgender females in violation of the equal protection clause of the Alaska Constitution.

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

[24] *B.P.J. v. West Virginia State Board of Education*, 649 F.Supp.3d 220 (S.D.W. Va. 2023).

[25] *Id.* at 233.

[26] *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113, at *1 (4th Cir. Feb. 22, 2023).

3. What is the statutory definition of biological sex? There is no definition of "biological sex" provided in the Alaska statutes or in HB 183.

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 HB 183 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.

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*, the United States Supreme Court held that discrimination based on sexual orientation and gender identity is sex discrimination under Title VII.[27] 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."[28] However, the United States Supreme Court has not yet decided whether transgender discrimination is sex discrimination under Title IX.[29]

The United States Department of Education (department) is the agency tasked with promulgating regulations implementing Title IX.[30] The department has issued guidance in light of *Bostock v. Clayton County, Georgia*, and 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 (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.

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[27] *Bostock*, 140 S.Ct at 1741.

[28] *Id.*

[29] In *B.P.J. v. West Virginia State Board of Education*, 649 F.Supp.3d 220 (S.D.W. Va. 2023), the U.S. District Court ruled that a West Virginia statute prohibiting transgender girls from playing on a team with cisgendered girls does not violate Title IX. That ruling was stayed by the Fourth Circuit Court of Appeals and an earlier injunction prohibiting the state from enforcing that law remains in place. *See B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, No. 23-1078, 2023 WL 2803113, at *1 (4th Cir. Feb. 22, 2023).

[30] *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.[31]

Although Department of Education is currently enjoined from enforcing this guidance in 20 states, including Alaska, it is likely a court would still find the interpretation holds persuasive value.[32] Further, the United States Department of Justice is charged with coordination of the implementation and enforcement of Title IX by executive agencies,[33] and the United States Department of Justice's Civil Rights Division also recently concluded that *Bostock*'s analysis applies to Title IX.[34] 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 HB 183 were enacted into law and challenged, a court would also find that HB 183 unlawfully discriminates against transgender females in violation of Title IX.

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[31] 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).

[32] *See State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21cv-308 (E.D. Tenn.) (July 15, 2022).

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

[34] 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.

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 shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"[35] Where state law comes into conflict with federal law, "the Supremacy Clause of the United States Constitution dictates that state law must always yield."[36] To the extent that HB 183, if enacted, conflicts with Title IX, Title IX would preempt the bill.

On April 6, 2023, the department released a notice of proposed rulemaking on athletic eligibility under Title IX.[37] The proposed rule would apply to public K-12 schools, as well as colleges, universities, and other institutions that receive federal funding, and would provide:

> If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.[38]

The department summarized the proposed rule as follows:

> One-size-fits-all policies that categorically ban transgender students from participating in athletics consistent with their gender identity across all sports, age groups, and levels of competition would not satisfy the proposed regulation. Such bans fail to account for differences among students across grade and education levels. They also fail to account for different levels of competition—including no-cut teams that let all students participate—and different types of sports.

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

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

[37] FACT SHEET: United States Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams (April 6, 2023), https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams; *see also* United States Department of Education Notice of Proposed Rulemaking (April 6, 2023), https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm.pdf.

[38] *Id.*

> Taking those considerations into account, the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity and that it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity. For older students, especially at the high school and college level, the Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements.
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> School teams vary widely across the United States, with some that are very competitive, especially for high school and college students with advanced skills, and others, such as "no cut" teams, that allow all students to join and participate. Some schools also offer teams at lower levels of competition, such as intramural or junior varsity teams, that allow all or most interested students to participate. Sex-related eligibility criteria that restrict students from participating consistent with their gender identity would have to reflect these differences in competition.
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> Preventing students from participating on a sports team consistent with their gender identity can stigmatize and isolate them, and those students may not be able to participate at all if the only other option is to participate on a team that does not align with their gender identity. This is different from the experience of a student who is not selected for a team based on their skills. If a school could achieve its important educational objective by using sex-related criteria that would cause less harm but the school chooses not to minimize the harm, the school might not satisfy the proposed regulation, depending on the specific facts involved.[39]

If the proposed rule is adopted and if the bill were enacted into law and challenged, it is highly likely that a court would find that the bill unlawfully discriminates against transgender females in violation of Title IX.[40]

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[39] *Id.*

[40] A final proposed rule is expected in March 2024, *see* https://www.politico.com/news/2024/02/03/education-department-title-ix-00139459#:~:text=The%20proposal%20was%20met%20with,consistent%20with%20their%20gender%20identity.

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.[41] The Alaska Supreme Court has stated that, "All civil claims are governed by statutes of limitations. AS 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."[42] For example, the Court has held that certain statutes of limitations apply to claims brought under the takings clauses of the Alaska Constitution.[43]

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.[44] Second, failure to bring a constitutional challenge within a limited time period does not make an unconstitutional statute 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[45] (ADA) includes providing "a clear and comprehensive

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

[42] *Id.*

[43] *Id.*

[44] 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."

[45] 42 U.S.C. 12101 - 12213.

national mandate for the elimination of discrimination against individuals with disabilities."[46] 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.[47] The Ninth Circuit and United States Supreme Court have not yet addressed whether this provision excludes the condition of gender dysphoria[48] 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."[49]

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 and twenty-one.[50] 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."[51] Students and their parents may take action for a school's failure to implement a satisfactory Individualized Education Plan (IEP).[52] However, IDEA's coverage applies only to certain

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[46] 42 U.S.C. 12101(b)(1).

[47] 42 U.S.C. 12211(b).

[48] 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).

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

[50] 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).

[51] 20 U.S.C. 1401(9), (26), and (29); *See also Timothy O.*, 822 F.3d at 1110.

[52] 20 U.S.C. 1415(a).

categories of disability.[53] 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.

MAB:boo
24-148.boo

[53] 20 U.S.C. 1401(3)(A)(i).