

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-2450  
LAA.Legal@akleg.gov  
120 4th Street, Room 3

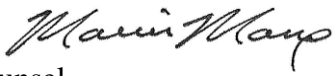
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## MEMORANDUM

March 2, 2022

**SUBJECT:** SB 140; legal issues (SB 140; Work Order No. 32-LS0911\A)

**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?  
A transgender female attempting to participate in sports or any student may assert that the bill violates their constitutional 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.<sup>1</sup> 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.<sup>2</sup> SB 140 raises issues under both categories. A student will have to reveal the student's biological sex in order to participate in sports. Facts surrounding a person's biological sex can be intensely private. As the Alaska Supreme Court has stated, "few things [are] more personal than one's body."<sup>3</sup>

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."<sup>4</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126 (Alaska 2019).

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

<sup>4</sup> *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

interest."<sup>5</sup> Alaska courts have yet to consider the right to privacy in the context of transgender status. At a minimum, the state must show that requiring a student who participates in an athletic team or sport designated female, women, or girls to be female, based on the participant's biological sex, bears a close and substantial relationship to the furtherance of a legitimate state interest. It is unclear what legitimate state interest the state has in such a requirement, or how SB 140 bears a close and substantial relationship to that interest.

The draft 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." It does not authorize a search to establish a participant's biological sex. 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 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? By restricting participation in women's sports, 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. 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.<sup>6</sup> The Ninth Circuit has also applied a heightened level of scrutiny to disparate treatment of transgender individuals.<sup>7</sup> Similarly, the United States Supreme Court has described treatment of transgender individuals as a form of sex-based discrimination.<sup>8</sup>

There is a high likelihood the bill, if enacted, will raise an equal protection challenge. As above, it is unclear how the bill's disparate treatment of transgender females furthers sufficient government objectives. A reviewing court would consider any government

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<sup>5</sup> *Id.*

<sup>6</sup> *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>7</sup> *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.").

<sup>8</sup> *See Bostock v. Clayton Cnty., Georgia*, 140 S.Ct 1731, 1741 (2020) (explaining that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex").

objectives furthered by the bill and consider whether the bill's disparate treatment of transgender females is substantially related to furthering those objectives. Federal district courts 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.<sup>9</sup> 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.<sup>10</sup>

3. AS 14.18.160 prohibits several entities from considering action against a school district that complies with 14.18.150. Does this impact due process, especially if AS 14.18.150 violates an individual's constitutional rights? The draft prohibits a "governmental entity, licensing or accrediting organization, athletic association, or school district" from considering "a complaint, open an investigation, or take adverse action against a school or school district for complying with AS 14.18.150." It is unclear whether this provision is intended to prohibit a court from hearing such complaints. However, to the extent it does so, it would likely violate the right to access the courts under the due process clause of the Alaska Constitution. Article I, sec. 7 of the Alaska Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." The Alaska Supreme Court has recognized that the due process clause of the Alaska Constitution contains within it a "right of access" to the courts.<sup>11</sup> This right is more expansive than that provided by the federal constitution.<sup>12</sup>

It would also raise an issue under the separation of powers doctrine.<sup>13</sup> Ultimately, it is the responsibility of the judicial branch to determine whether an entity has violated a student's constitutional rights.

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<sup>9</sup> *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020); *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).

<sup>10</sup> *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).

<sup>11</sup> 516 P.2d 1215, 1217 - 20 (Alaska 1973).

<sup>12</sup> *Varilek v. City of Houston*, 104 P.3d 849, 855 (Alaska 2004).

<sup>13</sup> The separation of powers doctrine applies in this state. *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). The doctrine prohibits one branch of government from encroaching upon and exercising the powers of another branch and

4. AS 14.18.170 permits an individual to hold an employee or representative of school personally liable; however, what is the minimum for making such a claim? What if the student participating has Turner Syndrome or looks masculine? What is the minimum burden of proof? SB 140 provides that a student who is deprived of an athletic opportunity or suffers direct or indirect harm resulting from a violation of AS 14.18.150, a student subjected to retaliation or other adverse action as a result of reporting a violation of AS 14.18.150 to certain entities, and a school or school district that suffers direct or indirect harm as a result of a violation of AS 14.18.150 may bring "a private cause of action . . . for injunctive relief, damages, and any other relief available under law." It is impossible to evaluate all potential causes of action that may be brought under SB 140. The standards for a potential cause of action would depend on the type of claim asserted, the remedy requested, and the facts related to the claim.

5. Are there any federal laws that prohibit this legislation or any current litigation that challenges this legislation's constitutionality (like Title 9)? Disparate treatment of transgender individuals may raise Title IX concerns. Title IX is a federal civil rights law addressing education that provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>14</sup> The United States Supreme Court has, in the context of Title VII (a federal civil rights law addressing employment), concluded that discrimination against a transgender individual is sex-based discrimination.<sup>15</sup> The United States Supreme Court has not yet decided whether transgender discrimination is sex discrimination under Title IX. SB 140 has not been enacted into law, but as noted above, a federal district court recently enjoined a similar act enacted in West Virginia based in part on finding that the

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requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976). The purpose of the separation of powers doctrine is to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government. *Id.* at 5. The Constitution of the State of Alaska allocates such judicial power to the courts:

**Judicial Power and Jurisdiction.** The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Art. IV, sec. 1, Constitution of the State of Alaska. *See also* AS 22.05.010.

<sup>14</sup> 20 U.S.C. §1681(a).

<sup>15</sup> *Bostock*, 140 S.Ct at 1741.

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transgender female challenging the act would likely succeed on the merits of her claim that the act violated Title IX.<sup>16</sup>

6. How does this legislation negate or impact local school boards from self-determining local school policy? If your question pertains to whether SB 140, if enacted, would supersede a local school board policy, the answer is yes.

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

MYM:lme

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<sup>16</sup> *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).