

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 29, 2022

1:33 p.m.

MEMBERS PRESENT

Senator Roger Holland, Chair
Senator Mike Shower, Vice Chair
Senator Shelley Hughes
Senator Robert Myers
Senator Jesse Kiehl

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 140

"An Act relating to school athletics, recreation, athletic teams, and sports."

- HEARD & HELD

SENATE BILL NO. 196

"An Act relating to transparency and compelled speech in public education."

- MOVED CSSB 196(JUD) OUT OF COMMITTEE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 246(FIN)

"An Act restricting the release of certain records of convictions; relating to misconduct involving marijuana by persons 18, 19, or 20 years of age; amending Rule 17(h), Alaska Rules of Minor Offense Procedure; and providing for an effective date."

- BILL HEARING CANCELED

SENATE BILL NO. 124

"An Act restricting the release of certain records of convictions; relating to misconduct involving marijuana by persons 18, 19, or 20 years of age; amending Rule 17(h), Alaska

Rules of Minor Offense Procedure; and providing for an effective date."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: SB 140

SHORT TITLE: DESIGNATE SEX FOR SCHOOL-SPONSORED SPORTS

SPONSOR(s): SENATOR(s) HUGHES

05/12/21	(S)	READ THE FIRST TIME - REFERRALS
05/12/21	(S)	EDC
03/03/22	(S)	EDC AT 10:00 AM BUTROVICH 205
03/03/22	(S)	Heard & Held
03/03/22	(S)	MINUTE(EDC)
03/12/22	(S)	EDC AT 10:00 AM BUTROVICH 205
03/12/22	(S)	Heard & Held
03/12/22	(S)	MINUTE(EDC)
04/06/22	(S)	EDC AT 9:00 AM BUTROVICH 205
04/06/22	(S)	Moved CSSB 140(EDC) Out of Committee
04/06/22	(S)	MINUTE(EDC)
04/08/22	(S)	EDC RPT CS 4DP SAME TITLE
04/08/22	(S)	DP: HOLLAND, HUGHES, STEVENS, MICCICHE
04/25/22	(S)	JUD REFERRAL ADDED AFTER EDC
04/27/22	(S)	JUD WAIVED PUBLIC HEARING NOTICE, RULE 23
04/29/22	(S)	JUD AT 1:30 PM BUTROVICH 205

BILL: SB 196

SHORT TITLE: PUBLIC ED: SPEECH, DISCLOSE INST MATERIAL

SPONSOR(s): SENATOR(s) REINBOLD

02/15/22	(S)	READ THE FIRST TIME - REFERRALS
02/15/22	(S)	EDC, JUD
03/25/22	(S)	EDC AT 9:00 AM BUTROVICH 205
03/25/22	(S)	Heard & Held
03/25/22	(S)	MINUTE(EDC)
04/04/22	(S)	EDC AT 9:00 AM BUTROVICH 205
04/04/22	(S)	Heard & Held
04/04/22	(S)	MINUTE(EDC)
04/13/22	(S)	EDC AT 9:00 AM BUTROVICH 205
04/13/22	(S)	-- MEETING CANCELED --
04/20/22	(S)	EDC AT 9:00 AM BUTROVICH 205
04/20/22	(S)	Moved CSSB 196(EDC) Out of Committee
04/20/22	(S)	MINUTE(EDC)

04/22/22 (S) EDC RPT CS 1DP 1NR 2AM SAME TITLE
04/22/22 (S) DP: HOLLAND
04/22/22 (S) NR: STEVENS
04/22/22 (S) AM: HUGHES, MICCICHE
04/25/22 (S) JUD AT 1:30 PM BUTROVICH 205
04/25/22 (S) Heard & Held
04/25/22 (S) MINUTE (JUD)
04/29/22 (S) JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

DANIEL PHELPS, Staff
Senator Shelley Hughes
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Co-presented a PowerPoint, Input from Athletes, and presented the sectional analysis for SB 140.

TREG TAYLOR, Attorney General
Department of Law
Anchorage, Alaska

POSITION STATEMENT: Testified on legal issues during the hearing on SB 140.

MARIO BIRD, Attorney
Law Office of Mario L. Bird
Anchorage, Alaska

POSITION STATEMENT: Provided invited testimony in support of SB 140.

LYNDA GIGUERE, representing self
Juneau Alaska

POSITION STATEMENT: Testified in opposition to SB 196.

PHILLIP MOSER, representing self
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SB 196.

DAVID BOYLE, representing self
Anchorage, Alaska

POSITION STATEMENT: Testified in support of SB 196.

JESSIE ALLOWAY, Solicitor General
Statewide Section Supervisor
Opinions, Appeals, and Ethics
Civil Division

Department of Law
Anchorage, Alaska

POSITION STATEMENT: Testified on legal issues of SB 196.

ED KING, Staff
Senator Roger Holland
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Explained amendments to SB 196 on behalf of the committee.

SENATOR LORA REINBOLD
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Sponsor of SB 196.

ACTION NARRATIVE

[1:33:32 PM](#)

CHAIR ROGER HOLLAND called the Senate Judiciary Standing Committee meeting to order at 1:33 p.m. Present at the call to order were Senators Myers, Hughes, Shower, Kiehl, and Chair Holland.

SB 140-DESIGNATE SEX FOR SCHOOL-SPONSORED SPORTS

[1:34:12 PM](#)

CHAIR HOLLAND announced the consideration of SENATE BILL NO. 140 "An Act relating to school athletics, recreation, athletic teams, and sports."

[CSSB 140(EDC) was before the committee.]

[1:34:28 PM](#)

SENATOR HUGHES, speaking as sponsor, paraphrased the sponsor statement for SB 140.

[Original punctuation provided.]

[1:34:51 PM](#)

Fifty years ago, women's sports changed forever. In 1972 slightly over 300,000 women and girls played college and high school sports in the United States. When I was a teenager, the only option for a female to be connected to a public-school athletic program was to be a cheerleader, and the cheerleading squads were

small (5-10) at each high school. As of 2022, the number of female athletes in the U.S. has increased by over 900 percent to more than 3.5 million women and girls thanks to the passage of Title IX.

SENATOR HUGHES remarked that playing basketball was not an option when she was a teenager, but her daughter played varsity basketball due to Title IX.

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This year, as we celebrate Title IX's 50th anniversary, women and girls stand, once more, at risk of losing an even playing field in sports. An ever-increasing trend of males and transgender women who were born male playing in women's sports threatens competition and fairness. Girls and women should not be robbed of the chance to be selected for a team, to win a championship, or to be awarded a college scholarship due to the physical advantages of transgender women.

Title IX promises, "No person in the United States shall, on the basis of sex, be excluded from participation, or be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

The goal of SB140 is not to preclude transgender athletes from competition or equal access to sports and athletic programs in schools. Rather, thanks to Title IX, transgender athletes are protected from discrimination in sports and promised equal access to athletic programs.

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The goal of SB140 to ensure discrimination against girls and women does not occur - that they are treated fairly and not disadvantaged in athletic programs compared to male-bodied athletes. Undeniable evidence and scientific research conclude that the average biological male body is stronger, larger, and faster than the average female body even after testosterone suppression treatment. This is particularly true in high school athletics. For example, many male high school track and field athletes consistently beat the

times of the best female Olympians who've trained intensely for years. Male-bodied athletes have a substantial physical advantage over female athletes in sports, regardless of the beliefs that the male-bodied athlete may hold about their sexuality or gender identity.

For decades, biological sex-specific separations in athletics have preserved competition while allowing women the chance to win. The great triumph of Title IX and the success of millions of women in athletics must not be discarded in the name of social progress. SB140 stands for an equal opportunity for all.

The bill would require public schools to designate their athletic teams male, female, or co-ed and a student who participates in an athletic team designated female to be female based on her biological sex. Private schools competing against public schools would also be required to comply with these rules.

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SENATOR HUGHES added that SB 140 creates an even playing field in women's sports by creating an eligibility requirement that members on a school athletic or sports-designated female, women, or girls be biologically female based on the athlete's biological sex at birth.

SENATOR HUGHES stated that scientific research concludes that the average biological male body is stronger, larger, and faster than the average female body even after testosterone suppression treatment. This is particularly true in high school athletics. Many male track and field athletes consistently beat the times of the very best female Olympians who have trained intensely for years.

SENATOR HUGHES highlighted that this topic has come to the forefront of public debate online and in the news. Transwomen dominate in various women's sports nationwide at the high school and college levels. For example, 16 members of the University of Pennsylvania swim team authored a joint letter to their school regarding their teammate, Lia Thomas, a transwoman.

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SENATOR HUGHES read a quote from the letter about Lia Thomas:

We fully support Lia Thomas in her decision to affirm her gender identity and to transition from a man to a woman. Lia has every right to live her life authentically. However, we also recognize that when it comes to sports competition, that the biology of sex is a separate issue from someone's gender identity. Biologically, Lia holds an unfair advantage over competition in the women's category, as evidenced by her rankings that have bounced from #462 as a male to #1 as a female.

Lia's inclusion with unfair biological advantages means that we have lost competitive opportunities. Some of us have lost records.

[1:38:16 PM](#)

SENATOR HUGHES stated that this was the concern addressed by SB 140.

SENATOR HUGHES said she is not opposed to transgenders or is full of hatred as some have stated because she values everyone. She offered her view that transgender athletes like Lia Thomas deserve the opportunity to compete and win fairly. However, it must not come at the cost of excluding otherwise qualified biological females from the only category of sport in which they can hope to succeed. SB 140 is neutral regarding gender identity and does not factor in an individual's choices about their sexuality or eligibility to play school sports. It offers every athlete an equal opportunity to compete on at least two teams: a coed team and a team that aligns with their biological sex at birth. The spirit of SB 140 is rooted in Title IX and seeks to establish protections for women and girls so they will not be robbed of future opportunities. This bill has received hundreds of hours of work from national experts and attorneys familiar with Title IX and relevant case law. She noted the binding Ninth Circuit [Court of Appeals] precedent in *Clark v. Arizona*, in which the court upheld the right for six separate athletic teams and prohibited boys from playing on the girls' volleyball team.

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SENATOR HUGHES related that the previous committee spent roughly seven and one-half hours analyzing the bill, four of which were to take public testimony. The committee spent the remaining time reviewing constitutional matters in two subsequent hearings. Six amendments were adopted to tighten the bill and remove any doubt that SB 140 infringes on constitutional rights.

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At ease

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CHAIR HOLLAND reconvened the meeting.

[1:41:43 PM](#)

DANIEL PHELPS, Staff, Senator Shelley Hughes, Alaska State Legislature, Juneau, Alaska, stated the reasoning for SB 140. First, women across the state and country had asked for protection for their athletic programs. Second, science and research indicate an indisputable athletic advantage in male bodies compared to female bodies. Third, United States laws, particularly Title IX, prohibit discrimination based on sex in education programs, including sports. US courts have consistently recognized and established a precedent for the physiological differences between men and women, which merits sex-based separation in athletics.

[1:42:28 PM](#)

MR. PHELPS co-presented a PowerPoint on the Even Playing Field Act, slide 1, INPUT FROM ATHLETES.

[1:42:33 PM](#)

CHAIR HUGHES read quotes on a series of slides in the PowerPoint, which read:

"I would have won my first-ever high school track meet if it weren't for this [male-bodied] athlete...It was very disappointing."

[MARGARET ONEAL, Hawaii]

"Those with a male sex advantage should not be able to compete in women's sport."

[SHARRON DAVIES, British Olympic Silver Medalist]

"I don't know of a woman athlete who doesn't want trans girls to be treated fairly..."

But the cost of treating her fairly should not come at the cost of discriminating against a biologically-female-at-birth woman."

[DONNA LOPIANO, Former CEO, Women's Sports Foundation]

"I didn't feel it was fair for [this athlete] to be playing [and taking] away a position from girls who could have started, which to me was so wrong on so many levels."

[DESTINY LABUANAN, Maui, Hawaii]

"We know who's going to win the race before it even begins...it just seems like all our hard work is going down the drain."

[ALANNA SMIH, Danbury, CT]

"I knew that I was the fastest girl here, one of the fastest in the state....Then, the gun went off. And I lost."

[CHELSEA MITCHELL, Canton, CT]

When it comes to women's sports, biology matters."

[INGA THOMPSON, 10x National Champ, 3x Olympian,
3x World Medalist, 2x Podium Finisher in the Women's
Tour de France]

["When it comes to competitive athletics,] sex segregation is the only way to achieve equality for girls and women."

[MARTINA NAVRATILOVA, Winner of 18 Grand Slam Tennis
Singles Titles]

SENATOR HUGHES encouraged members to read the slides because those who made the statements were incredible female athletes. She offered to post the PowerPoint to BASIS.

[1:43:57 PM](#)

MR. PHELPS turned to THE SCIENCE portion beginning on slide 15. He reviewed slide 16, THE BRITISH MEDICINE JOURNAL.

Objective: to examine the effect of gender-affirming hormones on athletic performance among transwomen and transmen.

Findings: The 15-31% athletic advantage for transwomen pre-therapy.

9% faster mean run speed in transwomen after the 1 year period of testosterone suppression that is

recommended by World Athletics for inclusion in women's events.

[1:44:19 PM](#)

MR. PHELPS reviewed slide 17, THE HILTON LUNDBERG STUDY.

Objective: Review how difference in biological characteristics between biological males and females affect sporting performance and assess whether evidence exists to support the assumption that testosterone suppression in transgender women removes the male performance advantage and thus delivers fair and safe competition.

Findings: The performance gap between males and females becomes significant at puberty.

10-50% depending on the sport

Strength, lean body mass, muscle size, and bone density are only trivially affected by testosterone suppression

MR. PHELPS reviewed slide 19, DUKE LAW.

Objective: Comparing athletic performances between the best elite women to boys and men

Findings: Female bodied athletes are not competitive for the win against males. The lowest end of the male range is three times higher than the highest end of the female range.

MR. PHELPS referred to slide 20, which consisted of a table illustrating that boys and men outperform women.

[1:45:00 PM](#)

MR. PHELPS turned to the portion of the PowerPoint entitled, ACCORDING TO THE COURTS. He reviewed slide 22.

There are "[i]nherent differences' between men and women," and these differences "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."

United States v. Virginia
581 U.S. 515, 533 (1996).

MR. PHELPS reviewed slide 23, which read:

"Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition."

Kleczek v. Rhode Island Interscholastic League, Inc.
612A.2d 734, 738 (R.I. 1992)

MR. PHELPS reviewed slide 24, which read:

"It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement."

Cape v. Tenn. Secondary Sch. Athletic Ass'n.
563 F.2d 793, 795 (6th Cir. 1977)

[1:45:59 PM](#)

CHAIR HOLLAND asked whether the PowerPoint was already posted to BASIS since it was presented to the Senate Education Committee.

SENATOR HUGHES said this PowerPoint presentation was condensed.

[1:46:51 PM](#)

TREG TAYLOR, Attorney General, Department of Law, Anchorage, Alaska, stated that he had reviewed the correspondence from Legislative Legal counsel and previous testimony. He opined that there was no facial constitutional infirmity with SB 140 pertaining to the Alaska Constitution, US Constitution, Alaska law, or federal law. He noted that Legislative Legal memo [from Marie Marx, Legislative Counsel, dated March 2, 2022] used language including may, might, or could, but the arguments and analysis lacked certainty. He acknowledged that arguments could be made, which was common in any challenges to statutory provisions.

[1:48:20 PM](#)

SENATOR KIEHL noted that the sponsor referred to older federal court cases. He asked whether the federal courts had distinguished any cases related to transgender individuals in recent years.

ATTORNEY GENERAL TAYLOR said he was unsure which cases he was alluding to, perhaps Karnoski [v. Trump] but in the most recent case, the Supreme Court made it clear that Bostock v. Clayton County only related to Title VII [of the Civil Rights Act of 1964] employment issues for gay and transgender individuals. That case determined that an employer could not discriminate or terminate a person solely based on their gender identity or sexual orientation. He offered his view that an effort has been made nationwide to make the Title VII court decision apply to all gender issues. However, the federal courts have not yet weighed in on those issues.

[1:49:37 PM](#)

SENATOR KIEHL noted that the US Supreme Court analysis in Bostock limited the application to employment. Still, the court's analysis of the questions concluded that discrimination based on sexual orientation or gender identity involves sex as a but-for cause. He asked how he saw Alaska or other courts distinguishing the language the sponsor read from Title IX. He noted that language refers to discrimination based on sex, which is identical to language analyzed by the Supreme Court in Bostock.

ATTORNEY GENERAL TAYLOR responded that Title IX would potentially be found unconstitutional under the Legislative Legal Counsel's analysis. He offered his view that when the Legislative Legal attorney did not find arguments about the right to privacy, they went on to equal protection issues. He stated that it's easy to see why there's not an equal protection issue related to the state's interest, which was adequately pointed out in the introduction of the bill. He acknowledged that arguments could be made; however, it's up to the courts to decide. He maintained there clearly were no constitutional issues with the bill.

CHAIR HOLLAND turned to invited testimony.

[1:52:08 PM](#)

MARIO BIRD, Attorney, Law Office of Mario L. Bird, Anchorage, Alaska, as invited testifier, spoke in support of SB 140. He offered to address the legality of SB 140 as it applied to the Alaska Constitution, including issues related to equal protection, and the right to privacy in art. I, sec. 22 and civil rights provision in art. 1, sec. 3 of the Alaska Constitution.

[1:52:56 PM](#)

MR. BIRD referred to Justice Ginsburg's opinion in *US v. Virginia*, related to the Virginia Military Institute (VMI) case, in which young women sued based on VMI's admission policy. In that case, Justice Ginsburg wrote the opinion of the court stating, "Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is."

MR. BIRD stated that opinion, along with Justice Ginsburg's legal work while she was at the US Equal Employment Opportunity Commission (EEOC), provides the basis for distinguishing between biological males and biological females. He said that is the basis for SB 140.

[1:53:24 PM](#)

MR. BIRD said the existing statute, AS 14.18.050 (b) makes a distinction between males and females. He read:

(b)Separation of the sexes is permitted during sex education programs and during participation in physical education activities if the purpose of the activity involves bodily contact.

MR. BIRD explained that this statute was based on the differences between biological female and biological male bodies. He noted that there had been an extensive discussion of federal law, which he would avoid since it is not his area of expertise. However, he related his understanding that previous committees discussed the federal register, Title 34, CFR 106.41, which Attorney General Taylor alluded to under Title IX. He agreed by using some of the analysis by Legislative Legal that even Title IX would be unconstitutional and would defy equal protection. He offered his view that the Legislative Legal analysis that tried to "knock down" all of Title IX was flawed.

[1:54:49 PM](#)

MR. BIRD pointed out that Alaska has some exemplars on both sides of this issue. In the late 2000s, Michaela Hutchison was the first female to compete and win a state wrestling championship. Another female, Hope Steffensen, did the same thing later. He said he played against Hannah Carlson and Kerry Weiland, who both had stellar careers in hockey. He stated that young women in Alaska have excelled in smaller schools and have gone on to have national careers.

MR. BIRD contrasted that with Nattaphon Wangyot, a biological male who competed as a female and won third and fifth place at the 2016 Alaska State Track Championships. He noted that the Alaska Association of School Boards indicated it had not seen any evidence that female sports have been affected by transgender athletes, which is not true. This issue was brought forth because a biological male competed in women's sports.

[1:56:16 PM](#)

MR. BIRD summarized his testimony saying that he did not see equal protection issues under Alaska's case law or the equal protection clause striking down SB 140. Second, regarding the right to privacy, the Alaska School Activities Association (ASAA) rules were predicated on things like a medical exam, student course load, transfer requirements, grade point average (GPA), age, and other eligibility considerations. He said all of these are preexisting privacy issues, but people typically do not sue based on their right to privacy. Schools don't disclose information, such as a person failing a grade, but the student would be ineligible to participate in sports.

MR. BIRD referred to art. I, sec. III of the Alaska Constitution, pertaining to civil rights, which read, "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin." He said he did not find any reference to this provision in Legislative Legal briefs. He suggested perhaps case law establishes that the Alaska Supreme Court will allow separate accommodations dependent on sex. He recalled a criminal case relating to prostitution, which the court struck down because it was strictly female. Any distinctions as to gender must rest upon some logical justification having a basis on the actual conditions of human life. He offered his view that SB 140 puts that front and center. Scientific data confirms a difference between biological females and biological males regarding athletic performance. He related it was a 1979 case, but even if it were to be used, SB 140 would pass muster.

[1:59:22 PM](#)

MR. BIRD said the district courts in Alaska allowed judges to require certain business attire, but it differentiates between sexes. The Supreme Court found no merit in the contention that a coat and tie requirement amounts to impermissible gender discrimination because it applies to males and not to females. He emphasized that the case law that exists indicates that this is permissible.

MR. BIRD pointed out that the constitutional right to privacy and the civil rights provision in the Alaska Constitution specifically state, "The legislature shall implement this section." It is the legislature's job to implement the meaning by passing legislation, ensuring that the law meets constitutional muster. He offered his belief that that has already happened once by adopting the committee substitute (CS) for SB 140, Version B. He reiterated that he views SB 140 as having met constitutional muster under Alaska case law and the Alaska Constitution. He recommended that members pass the bill from committee.

[2:01:02 PM](#)

SENATOR KIEHL clarified that no attorneys serve on the Senate Judiciary Committee. He stated that he had cited Justice Ginsburg on the VMI case. He was somewhat confused because it was a portion of her reasoning in a ruling that struck down VMI's attempts to discriminate based on sex and segregation. He asked for his rationale.

MR. BIRD related his understanding that while it did strike down the discrimination portion, it maintained that VMI should provide separate facilities for biological females. He offered his view that is the reason the language about the differences between men and women are enduring appears. He stated that VMI provided separate barracks and locker rooms.

[2:02:50 PM](#)

SENATOR KIEHL asked whether it was ever acceptable to discriminate within the boundaries of a single biological sex. He noted runners, including Semenya, [a South African intersex biological female gold medalist], and Masingi and Mboma, [Namibian sprinters with a natural high testosterone levels] as examples. He offered his view that the definition of biological sex was tied in.

MR. BIRD responded that he was unfamiliar with the runners. He indicated that a whole area of law in the American Disabilities Act covers biological sex, for example, Casey [Martin] sued the PGA Tour in order to play golf. In terms of whether it was appropriate to set off one competitor from another, he suggested it happens every day between junior varsity (JV) and varsity players. Players must meet certain eligibility requirement to compete at local, regional, or state.

MR. BIRD stated that the bill was clear about what constitutes biological sex, but he thought Version B was an improvement from the original version.

[2:05:34 PM](#)

SENATOR KIEHL pointed out that the term "biological sex" is undefined in the bill. He wondered whether the definition included testosterone levels and chromosomes or if biological sex is based on what is on the birth certificate.

MR. BIRD responded that it would depend on the physicals required of athletes before they can compete under the ASAA rules. He stated that this bill puts forward the requirement of using the biological sex per the person's birth certificate.

SENATOR KIEHL said it was helpful to know the bill's definition had nothing to do with physical characteristics.

[2:06:57 PM](#)

SENATOR KIEHL asked about liability provisions. The bill would create rights of action, but none of the tort caps appear to apply. He asked what remedies and liabilities the bill would create.

[2:07:24 PM](#)

SENATOR HUGHES stated that an amendment was added in Version B to make it clear nothing prohibits due process, so that an individual could file legal action. One stated goal is to protect school districts and schools from expensive, repeated cases, but the person could still file a lawsuit.

SENATOR KIEHL wondered what remedies a court might order if a student alleged that they did not get the full scholarship because of noncompliance. He asked whether the court could order the full cost of attending an Ivy League school.

SENATOR HUGHES stated she could not speculate on future court rulings.

[2:09:40 PM](#)

SENATOR KIEHL stated that the new Sec. 14.18.170 in Section 3 of the bill speaks to direct and indirect harm. Since this would not be subject to Alaska's other court caps, he wondered if the sponsor envisioned pain and suffering damages or punitive damages.

SENATOR HUGHES answered that it would be on a case-by-case basis. She stated that she could not predict a scenario and why a person might file a lawsuit. She explained that several more attorneys plan to testify at a future hearing who may have a better response.

[2:10:48 PM](#)

MR. PHELPS stated that amendments to the bill take a step back from prescribing what the courts should do; instead, it is left to the courts to determine their rightful role.

[2:11:18 PM](#)

SENATOR KIEHL stated that the bill prohibits some entities from suing [under the new Section 14.18.160 in Section 3.] He asked for the separation of powers for those who may not take adverse action against a school or school district for complying. He said that provision raises some constitutional concerns for him.

SENATOR HUGHES referred to page 3, to Sec. 14.18.180, and read.

- (a) Nothing in AS 14.18.150 - 14.18.190 abrogates, restricts, or otherwise limits
 - (1) the access of any person to a state or federal court; or
 - (2) a person's right to bring in state or federal court a complaint or cause of action arising out of AS 14.18.150 - 14.18.190.

SENATOR HUGHES asked him to point out how the bill would restrict who could take legal action.

[2:12:12 PM](#)

SENATOR KIEHL referred to page 2, lines [21]-23, Sec. 14.18.160.

- (a) A governmental entity, licensing or accrediting organization, athletic association, or school district may not take adverse action against a school or school district for complying with AS 14.18.150.

SENATOR KIEHL asked what was envisioned in subsection (a) if not legal action.

SENATOR HUGHES responded that Sec. 14.18.160 does not refer to adverse action through the courts. She explained that if one school district felt like another district their athletes competed with was not complying with the requirements to have

male, female or coed athletic teams, they couldn't use that provision to prevent the school from competing in a tournament. Thus, this provision refers to adverse action taken outside of the courts. The Legislative Legal attorney indicated that Sec. 14.18.180, related to access to courts, provides sufficient clarification.

[2:13:35 PM](#)

CHAIR HOLLAND recalled that the previous committee amended the bill to clarify adverse action.

SENATOR KIEHL asked how many districts have coed varsity or inter-school level teams.

[2:14:20 PM](#)

SENATOR HUGHES offered to do research and report to the committee. She related her understanding that it was reasonably common in the smaller schools. She said if the bill were to pass, nothing would prevent a school from expanding coed opportunities.

[2:14:41 PM](#)

SENATOR KIEHL related his understanding that the bill was gender-neutral because coed teams were an option. He thought it would be helpful to determine gender neutrality using factual analysis.

[2:15:46 PM](#)

SENATOR SHOWER noted some female athletes could compete against men and do well, but statistically, a female who does well in a male-dominated sport is a rare exception. However, a male competing against females typically rises to the top due to biological differences. He added that he held records in two different sports. He predicted that his records would have held in each category if he had competed as a girl. Thus, he cannot support biological males competing with biological females.

[2:17:30 PM](#)

SENATOR HUGHES mentioned Serena and Venus Williams and highlighted that a biological male who ranked 203rd was able to beat both. Florence Griffith Joyner still holds the 100 and 200-meter sprint records. A man who was ranked 5,006 beat her record. Typically, the differences at the Olympic level between biological females are within a second. Lydia Jacoby won the Olympic 100-meter breaststroke, whereas her counterpart Adam Petey swam 7.5 seconds faster. She expressed concern that girls

would not have a level playing field and a chance for victory if this was not addressed.

[2:19:20 PM](#)

SENATOR KIEHL answered that Senator Hughes did not use examples of transgender athletes who had been through hormonal therapies that are required at the elite levels in order to compete as women. He pointed out that one of his constituents underwent some of those therapies and was allowed to compete under AASA rules. His constituent did not crush it or dominate the sport. He asked why the International Olympic Committee protocols for addressing transgender athletes was insufficient for Alaska.

SENATOR HUGHES stated that the data shows that even after multiple years of testosterone suppression therapy, there are still significant differences. One study shows a 9 percent difference. She said the size of the skeleton matters and the amount of leverage. Although some muscle mass decreases with hormone suppression, it is still greater than a biological female.

[2:21:37 PM](#)

CHAIR HOLLAND held SB 140 in committee.

[2:21:51 PM](#)

At ease

SB 196-PUBLIC ED: SPEECH, DISCLOSE INST MATERIAL

[2:23:06 PM](#)

CHAIR HOLLAND reconvened the meeting and announced the consideration of SENATE BILL NO. 196 "An Act relating to transparency and compelled speech in public education."

CHAIR HOLLAND noted that this was the second hearing in this committee and the intention was to hear public testimony.

[2:23:30 PM](#)

CHAIR HOLLAND opened public testimony on SB 196.

[2:24:11 PM](#)

LYNDA GIGUERE, representing self, Juneau Alaska, stated that SB 196 does not solve problems or make the lives of Alaskans better. Instead, it could make the teacher's job untenable. She viewed SB 196 as a distraction from real issues, and anti-education. It seeks to divide an already fractured country. She

offered her view that its ultimate goal was to instill fear and distress in teachers, all just to rally the base. She urged members not to pass SB 196.

[2:26:42 PM](#)

PHILLIP MOSER, representing self, Juneau, Alaska, spoke in opposition to SB 196. He was unsure whether there was a moral argument that had not already been made for the obscene nature of this bill. He viewed SB 196 as incredibly problematic. The bill seeks to punish people for speech in the classroom. He characterized it as similar to the "don't say gay bill" in Florida. This bill would deputize regular citizens to punish teachers, and it would create a clear pathway to do so.

MR. MOSER said this means teachers who are already underpaid in Alaska would be subject to litigation from anyone at any point for something as small as a gay teacher making reference to their husband. A parent could bring a civil suit, which could be costly for the teacher. He characterized it as a chilling effect on teachers and schools. This bill could involve the attorney general in numerous lawsuits.

MR. MOSER noted the issue of teachers and schools being subject to litigation under the bill appears intended to erase any mention of race, sex, or orientation from schools. He expressed concern that people who fall under those categories would be at risk should this bill pass.

[2:29:03 PM](#)

MR. MOSER said he testified several days ago on a bill introduced by Senator Reinbold that would require every political officer to read the Alaska Constitution and the Declaration of Independence. He offered his view that it would be illegal for teachers to mention that bill since they inherently list issues based on sex and race. He asked members not to support SB 196 because it was morally and ethically horrendous.

[2:30:37 PM](#)

DAVID BOYLE, representing self, Anchorage, Alaska, spoke in support of SB 196 to help prevent students from being taught to hate one another based on race. He stated that students need to be able to read. He stated that he attended previous hearings on the bill. Those who oppose the bill expressed concern that students will not be taught about certain events. Alaska's students can still learn how the United States evolved over

time. He recited a number of historical references to events and listed a number of prominent historical figures who owned slaves to illustrate his point. He stated that America is the best place to live and raise kids.

[2:34:06 PM](#)

MR. BOYLE paraphrased a portion of the new business item number 39 from NEA.

B. Provide an already-created, in-depth, study that critiques empire, white supremacy, anti-Blackness, anti-Indigeneity, racism, patriarchy, cisheteropatriarchy, capitalism, ableism, anthropocentrism, and other forms of power and oppression at the intersections of our society, and that we oppose attempts to ban critical race theory and/or The 1619 Project.

MR. BOYLE urged members to move SB 196 from committee.

[2:35:24 PM](#)

JESSIE ALLOWAY, Solicitor General, Statewide Section Supervisor, Opinions, Appeals, and Ethics, Civil Division, Department of Law, Anchorage, Alaska, explained that the enforcement provision would give the attorney general express authority to enforce the law. It also grants the attorney general authority to issue advisory opinions requested by the school district, charter school, or public school.

[2:35:58 PM](#)

MS. ALLOWAY stated that the authority to bring a civil action is not necessarily an expansion of the attorney general's authority. The Alaska Supreme Court has held that the attorney general has common law powers, except where limited by statute or conferred on some other state agency. Under the common law, the attorney general has the power to bring any action they think is necessary to protect the public interest. This includes the power to enforce an Alaska Statute. However, the attorney general exercises that authority very rarely, in part due to resources but also because that authority is used on matters of significant public interest. At the previous hearing, Senator Myers asked if the attorney general had this authority and, if so, if it was used regularly. She reiterated that the attorney general has the authority but rarely uses it.

[2:37:18 PM](#)

MS. ALLOWAY stated that the provision to issue advisory opinions would be an expansion of the attorney general's authority and would likely require a significant amount of the department's resources. She acknowledged that the appellate section does issue advisory opinions. Those opinions can be through the government or other state agencies and the legislature. She stated those were infrequent, but it takes a significant amount of work to issue them. The other provisions that require the attorney general to issue advisory opinions include ballot initiatives and the Ethics Act. The Ethics Act allows the attorney general to issue advisory opinions for state employees and former state employees who may have questions about whether they can perform certain work once they leave state employment or enter private practice or employment. Those require the attorney general to act within 60 days on completed requests. Thus, there would be some back and forth. This would significantly increase the areas in which the attorney general would issue advisory opinions.

[2:38:53 PM](#)

CHAIR HOLLAND moved to adopt Amendment 1, work order 32-LS0768\D.2.

32-LS0768\D.2
Marx
4/28/22

AMENDMENT 1

OFFERED IN THE SENATE BY SENATOR HOLLAND
TO: CSSB 196(EDC)

Page 1, line 9, through page 2, line 22:

Delete all material and insert:

"* **Sec. 2.** AS 14.18.080(b) is amended to read:

(b) The Board of Regents shall adopt rules under AS 14.40.170(b)(1) to implement AS 14.18.010 - 14.18.110 [THIS CHAPTER].

* **Sec. 3.** AS 14.18.100(b) is amended to read:

(b) A person aggrieved by a violation of AS 14.18.010 - 14.18.110 [THIS CHAPTER] or of a regulation or procedure adopted under AS 14.18.010 - 14.18.110 [THIS CHAPTER] as to postsecondary education has an independent right of action in superior court

for civil damages and for such equitable relief as the court may determine."

Renumber the following bill sections accordingly.

Page 5, following line 24:

Insert a new subsection to read:

"(c) In this section,

(1) "school district" means a borough school district, a city school district, a regional educational attendance area, a state boarding school, and the state centralized correspondence study program;

(2) "state agency" means a department, office, agency, state board, commission, public corporation, or other organizational unit of or created under the executive branch of state government."

Page 5, line 25, through page 6, line 6:

Delete all material.

Page 6, lines 7 - 15:

Delete all material and insert:

"Sec. 14.18.190. Definitions. In AS 14.18.150 - 14.18.190, "public school" does not include the University of Alaska or another postsecondary institution."

[2:39:11 PM](#)

SENATOR HUGHES objected for discussion purposes.

[2:39:23 PM](#)

ED KING, Staff, Senator Roger Holland, Alaska State Legislature, Juneau, Alaska, explained that Amendment 1 would maintain that the implementation and enforcement remedy sections in existing law that cover the rest of AS 18 would extend to the new provisions added by SB 196.

MR. KING stated that the existing language in AS 18 is treated differently. The enforcement is by the State Board of Education for K-12 and by the Board of Regents for the University of Alaska. The bill proposes that the new law has a different enforcement mechanism through the attorney general's office. Amendment 1 would remove the provision to go through the attorney general's office and maintains that all of the

enforcement actions for K-12 would go through the Board of Education.

MR. KING said that Sections 2, 3, and 4 were deleted. However, components of those sections were reinstated that bind those two provisions because the new provisions do not apply to the university. Thus, the provisions related to the Board of Regents do not include the university.

[2:41:02 PM](#)

SENATOR HUGHES asked whether anything would prohibit someone from taking an independent action through the courts.

MR. KING answered no. The enforcement by the Board of Education would exist throughout the chapter, including the existing language. The remedy provision in AS 14.18.100 would apply. He read:

- (a) A person aggrieved by a violation of this chapter or of a regulation or procedure adopted under this chapter as to primary or secondary education may file a complaint with the board and has an independent right of action in superior court for civil damages and for such equitable relief as the court may determine.

[2:42:20 PM](#)

CHAIR HOLLAND closed public testimony on SB 196.

[2:42:26 PM](#)

SENATOR KIEHL related his understanding that a private person has a right of action. He asked whether they would need to exhaust the remedy through the Board of Education before going to court or if either option was available.

MR. KING responded that nothing in the bill changes the process in existing law regarding filing a lawsuit. If that avenue needs to be exhausted before court action is available to the person, nothing in the bill would change that if the amendment is adopted.

[2:43:25 PM](#)

MS. ALLOWAY responded that in this particular instance, where the statute is granting a private right of action for an individual, the person would not necessarily need to exhaust

their administrative remedy. She said she would need to research this further before providing a definitive answer.

CHAIR HOLLAND referred to a fiscal note from the Department of Law. He asked whether Amendment 1 would make the fiscal note moot.

MS. ALLOWAY responded yes, because it would remove the necessity for additional resources that would be required to provide advisory opinions.

[2:44:31 PM](#)

SENATOR KIEHL asked whether it would be more efficient to require that these complaints go through the Board of Education before a lawsuit can be filed. He expressed concern about legal costs to school districts.

CHAIR HOLLAND deferred to Ms. Alloway to discuss whether the state could restrict someone's access to the courts.

[2:45:23 PM](#)

MS. ALLOWAY responded that there were provisions in statutes that require a party to exhaust their administrative remedies. The reason for that is to allow, in this case, the school board to fix its own errors prior to litigation. She explained that there would not be any legal issue if a provision within the statutes required a party to exhaust the administrative remedies. They would go through the administrative process and once that process was completed, it could be appealed to the superior court.

[2:46:10 PM](#)

SENATOR KIEHL suggested amending the bill to save legal costs.

CHAIR HOLLAND indicated that he would not pursue an amendment at this time.

[2:46:36 PM](#)

SENATOR HUGHES removed her objection.

[2:46:40 PM](#)

CHAIR HOLLAND heard no further objection, and Amendment 1 was adopted.

[2:46:57 PM](#)

CHAIR HOLLAND moved to adopt Amendment 2, work order 32-LS0768\D.1.

32-LS0768\D.1
Marx
4/27/22

AMENDMENT 2

OFFERED IN THE SENATE BY SENATOR HOLLAND
TO: CSSB 196(EDC)

Page 4, lines 25 - 27:
Delete all material.

Reletter the following subparagraphs accordingly.

[2:46:59 PM](#)

SENATOR HUGHES objected for discussion purposes.

[2:47:11 PM](#)

MR. KING explained that Amendment 2 was a clean-up amendment to remove duplicate language that resulted from an amendment that passed in the previous committee of referral. He directed attention to the language on page 4, lines 25-27 that was significantly similar to the language on lines 28-30. He stated that subparagraph (B) would not allow a person to compel a student to believe those concepts described in paragraph (2), whereas subparagraph (A) provides an unbound restriction. Amendment 2 would remove subparagraph (A) and retain subparagraph (B).

CHAIR HOLLAND noted it would also require renumbering subsequent subparagraphs.

MR. KING agreed.

CHAIR HOLLAND characterized Amendment 2 as a clean-up amendment.

[2:48:20 PM](#)

SENATOR HUGHES noted that subparagraph (A) included the word "encourage" and subparagraph (B) did not. She asked whether Amendment 2 would allow encouragement and if that language was too gray.

[2:49:04 PM](#)

CHAIR HOLLAND stated that it would not disallow teachers and other personnel from encouraging students. He said the committee could make a conceptual amendment to add "encourage" before "direct" in subparagraph (B) if so desired.

[2:49:28 PM](#)

SENATOR MYERS offered his view that using "encourage" was a bit of an issue because subparagraphs (A) and (B) speak to what [a teacher, administrator, or other employee] could not do. However, the language on page 5, lines 15-18, indicates staff could not prohibit voluntary participation in a training, a seminar, continuing education, an orientation, or therapy. He offered his view that to have staff direct or compel would be problematic but to encourage implies that the student was already considering participating. He said it seems confusing to prohibit a voluntary action in one provision but allow it in another. He suggested that removing "encourage" seemed appropriate.

[2:50:57 PM](#)

CHAIR HOLLAND agreed that direct or compel was more active than encourage.

[2:51:07 PM](#)

MR. KING stated that the reference in paragraph (2) [on page 4, line 4] uses direct or otherwise compel, but it does not use encourage, so for consistency, which is likely why the language does not occur in paragraph (3)(B), which read, "...adhere to a belief or concept described in (2) of this subsection"

CHAIR HOLLAND asked him to restate the explanation.

MR. KING referred to paragraph (2) that read, "may not direct or otherwise compel a student...." He reiterated that the word "encourage" is not in the reference, so it would be more consistent to not use it in subparagraph (B).

[2:51:49 PM](#)

At ease

[2:52:08 PM](#)

CHAIR HOLLAND reconvened the meeting and asked him to restate the explanation one more time.

[2:52:19 PM](#)

MR. KING responded that the language in the bill was consistent between the issue being discussed and the statute that was referenced. Thus, a change to the statute being referenced would require a change to the other statute.

SENATOR HUGHES expressed concern that students might sense teachers were encouraging them to participate in order to be in their good graces or get better grades. She suggested that if SB 196 became law and teachers could not direct or compel students to participate, that if a problem arose, it could be addressed.

[2:53:41 PM](#)

SENATOR HUGHES removed her objection.

[2:53:45 PM](#)

CHAIR HOLLAND heard no further objection, and Amendment 2 was adopted.

[2:54:20 PM](#)

SENATOR LORA REINBOLD, Alaska State Legislature, Juneau, Alaska, via teleconference, as sponsor of SB 196, stated that she agreed with the amendments. She highlighted that it was critical to have transparency in education.

[2:54:56 PM](#)

SENATOR KIEHL noted the committee discussed verbs. He asked whether this bill would stop a school district from teaching these concepts so long as they don't test students or make students state that they believe the concepts.

[2:55:29 PM](#)

SENATOR REINBOLD responded that the bill was carefully worded. She stated that it would not allow teachers to teach that someone was inherently one way or another based on their skin color. She stated that the state shouldn't fund teaching people to hate one another based on the color of their skin or that the country is inherently sexist or racist. She stated that the bill clearly identifies the things that public funding should not be used to teach. She offered her belief that about 13 states have similar legislation. She noted that Senator Hughes amended the bill in a previous committee, so she may have something to add.

[2:57:05 PM](#)

SENATOR HUGHES stated that nothing in the bill would prohibit a teacher from discussing race or discrimination. They just can't direct students to take a specific position. She indicated that

she consulted Legislative Legal on whether to add clarifying language to assure that teachers could teach history, such as Martin Luther King or the Holocaust, and was assured that it was not necessary to do so.

2:58:14 PM

MR. KING directed attention to page 5, line 12, subsection (b), that outlines the types of things not prohibited, including speech protected by the Constitution of the State of Alaska or the Constitution of the United States, including voluntary, uninduced, and uncoerced attendance or participation, and educational in-school discussion of, or assignment of material that incorporates the concepts so long as the school clarifies that it does not sponsor, approve, or endorse the concepts or material.

2:59:25 PM

SENATOR KIEHL offered his belief that the bill had irredeemable problems. It would create a bizarre situation where a school could teach American history, warts and all, but it couldn't test students on the material because students would need to affirm that the concepts were true. The bill is explicit that teachers cannot require students to do so. He expressed concern that the effect would be to remove parts of American history from the schools, which was problematic.

SENATOR KIEHL recalled when he attended high school in Alaska, students engaged in discussions on a wide variety of topics, facts, and bad behavior in history. It was an important part of the educational process. This bill wrenches any effect of teaching that in an effort to cancel those ideas.

SENATOR KIEHL noted the bill had bizarre gaps. He wondered why the bill cancels some ideas but not others. The bill doesn't mention ableism. He stated that in the last hearing the committee discussed that the bill doesn't cover oppression, inferiority, or superiority based on class, such as caste systems or the communist theories of class. He was unsure why the bill would cancel some things considered un-American but not others. He highlighted that the bill had numerous undefined terms. He characterized the bill as one of cancel culture.

SENATOR KIEHL acknowledged that the legislature does not consider a bill's cost to school districts because they don't issue fiscal notes since school districts are not state agencies. However, school districts are political subdivisions.

He expressed concern about the cost of monitoring the curricula and lesson plans for every teacher.

[3:03:23 PM](#)

CHAIR HOLLAND disagreed that the bill would prevent testing because it uses the language "affirm." He offered his view that what Senator Kiehl described was not the definition of "affirm." He asked how the bill would require school districts to monitor every classroom when the bill asks teachers to post the curricula.

SENATOR KIEHL responded that he was speaking to the potential of costly lawsuits to the school districts if it does not include the curricula, which would consist of lesson plans. Thus, school districts must monitor what teachers teach or risk private lawsuits.

CHAIR HOLLAND offered to discuss this at a later date.

[3:04:56 PM](#)

SENATOR KIEHL stated that Section 6 requires transparency, which is subject to lawsuits. He indicated that the Association of School Boards anticipated that mid-size school districts would need a fulltime position to comply with provisions in the bill. He stated that cost would be an administrative cost, using resources that would not educate students. He stated that he would oppose the bill because some provisions were unconstitutional, that some topics would be canceled and others would not, and a lot of American history would be "scrubbed" from the classroom.

[3:05:47 PM](#)

SENATOR HUGHES offered her view that SB 196 would not scrub history or stop classroom discussions about concepts or beliefs, but it would disallow teachers from forcing students to take certain positions on those concepts or beliefs. She suggested that amendments could be made to bridge any gaps, such as adding class. She offered her view that some things are happening in the classroom that should be addressed, and she appreciated Mr. Boyle reading the NEA resolution. She noted that parents have concerns, and it is important for students to be open-minded and develop critical thinking skills.

[3:07:18 PM](#)

SENATOR HUGHES moved to report the committee substitute (CS) for SB 196, work order 32-LS0768\D, as amended, from committee with individual recommendations and attached fiscal note(s).

3:07:41 PM

SENATOR KIEHL objected.

A roll call vote was taken. Senators Myers, Hughes, and Holland voted in favor of reporting the committee substitute (CS) for SB 196 from committee and Senator Kiehl voted against it. Therefore, CSSB 196(JUD) was reported from committee on a 3:1 vote.

CHAIR HOLLAND stated that the motion to report CSSB 196(JUD) from committee passed on a vote of 3 yeas and 1 nay.

3:08:16 PM

There being no further business to come before the committee, Chair Holland adjourned the Senate Judiciary Standing Committee meeting at 3:08 p.m.