

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

May 2, 2022

9:08 a.m.

MEMBERS PRESENT

Senator Roger Holland, Chair
Senator Shelley Hughes
Senator Robert Myers
Senator Jesse Kiehl

MEMBERS ABSENT

Senator Mike Shower, Vice Chair

COMMITTEE CALENDAR

SENATE BILL NO. 140

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

- MOVED CSSB 140 (JUD) OUT OF COMMITTEE

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
04/29/22 (S) Heard & Held
04/29/22 (S) MINUTE(JUD)
05/02/22 (S) JUD AT 9:00 AM BUTROVICH 205

WITNESS REGISTER

MATT SHARP, Senior Legal Counsel
State Government Relations National Director
Alliance Defending Freedom
Atlanta, Georgia

POSITION STATEMENT: Provided invited testimony on legal questions related to SB 140.

KENNETH JACOBUS, Attorney
Law Offices of Kenneth Jacobus
Anchorage, Alaska

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

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

POSITION STATEMENT: Provided invited testimony on legal issues related to SB 140.

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

POSITION STATEMENT: Answered questions during the hearing on SB 140 on behalf of the sponsor.

ACTION NARRATIVE

[9:08:52 AM](#)

CHAIR ROGER HOLLAND called the Senate Judiciary Standing Committee meeting to order at 9:08 a.m. Senators Myers, Hughes, Kiehl, and Chair Holland were present at the call to order.

SB 140-DESIGNATE SEX FOR SCHOOL-SPONSORED SPORTS

[9:09:33 AM](#)

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. SB 140 was previously heard on 4/29/2022.]

[9:09:59 AM](#)

SENATOR KIEHL asked for further discussion of the broad equal protection issues SB 140 raises. The bill applies to transgender girls and women but not transgender boys and men. He said this strikes him as something the courts would consider suspect classification. He wondered how that was constitutionally defensible.

SENATOR HUGHES responded that Title IX is based on physiological differences, so gender-specific sports fall under Title IX. Further, every student athlete would have at least two options. The person could participate on a team aligned with their biological sex at birth or on a coed team. She highlighted that students would not be banned from participating in sports.

[9:12:53 AM](#)

MATT SHARP, Senior Legal Counsel, State Government Relations National Director, Alliance Defending Freedom, Atlanta, Georgia, offered his view that the Alaska Supreme Court interpreted the equal protection clause in the Alaska Constitution as more robust than the federal equal protection clause. The two groups being treated differently in SB 140 are biological males and females. The findings supported by case law recognize the physical differences between men and women, and those differences matter on the playing field.

MR. SHARP related that the Ninth Circuit Court of Appeals upheld an Arizona policy that men were not eligible to compete on women's teams because of the physiological differences. Allowing men to compete on women's teams would erase equality and fairness of opportunity for women in sports. In its ruling, the Ninth Circuit agreed to the preferential treatment which was permissible because the state has an interest in ensuring equal opportunities for females and to remedy past discrimination where females have been denied opportunities to play in sports on an equal basis. He opined that a similar analysis would apply to SB 140 within the US Constitution and the Alaska Constitution because it focuses on equal opportunities for men and women and furthers the state's interest in doing so.

[9:15:10 AM](#)

SENATOR KIEHL pointed out that his analysis only points to two classes. However, he was unsure a court would agree. The bill

speaks to gender as per birth certificates without addressing chromosomal differences, intergender individuals, and those who have undergone hormonal treatments for specified timeframes as required by some interscholastic associations' eligibility rules. He wondered whether that would create additional considerations beyond the sex listed on a person's birth certificate.

SENATOR HUGHES responded that the previous committee, the Senate Education Committee, addressed medical intersex conditions at birth [gender dysphoria based on a physical impairment] recognized by the Americans with Disabilities Act (ADA). The bill does not define "gender identity" but indicates that "sex" means biological sex. She characterized this as an eligibility requirement. Schools have other eligibility requirements, such as requiring students to have a certain grade point average (GPA) or to fall within a certain age bracket. When babies are born, they are assigned as males or females, although the bill contains allowances for intersex conditions based on chromosomal differences.

[9:17:33 AM](#)

MR. SHARP agreed with Senator Hughes that sex has long been recognized as binary. He acknowledged that some individuals are born with an intersex condition, in which normal sex characteristics did not develop in the womb, perhaps because of a hormone issue. He said ADA protects intersex individuals. The US Supreme Court in *Bostock v. Clayton County* recognized that sex is biologically based, consisting of two sexes. All state laws providing protections based on sex acknowledge that there are two sexes, which builds on precedent and legal recognition. Sometimes sex matters, such as when participating in sports, and SB 140 seeks to protect equal opportunities and fairness for women athletes.

[9:18:43 AM](#)

CHAIR HOLLAND invited Mr. Jacobus to testify.

[9:18:59 AM](#)

KENNETH JACOBUS, Attorney, Law Offices of Kenneth Jacobus, Anchorage, Alaska, stated that he is a solo practitioner. He said he agrees in essence with Mr. Sharp. He indicated that SB 140 was a bill only about protecting the right of women to compete in athletic activities. He offered his view that it was not an anti-transgender bill.

MR. JACOBUS related that he sent a letter to the Senate Judiciary Committee [dated May 1, 2022) that outlined legal issues. He briefly summarized the issues. The Alaska Courts have not decided on the right to privacy, so it is difficult to predict how the courts will rule on the right to privacy as it applies to female sports.

MR. JACOBUS said he agrees with Mr. Sharp regarding equal protection, that there is a distinction. He indicated his letter discusses why the Bostock v. Clayton County case does not apply. He stated that he does not see any constitutional infirmities with the bill. He cautioned that the legislature should not be deterred from passing SB 140 just because there might be unanswered constitutional questions. The legislature must determine what is in the best interest of the vast majority of Alaskan girls and women who want to participate fairly and compete in athletic endeavors.

[9:21:19 AM](#)

MR. JACOBUS highlighted that it might be necessary to identify the athletic endeavors. He mentioned a Tennessee case filed last November. A student was born a woman, changed to a male, and wanted to compete in the male golf tournament but was not allowed to do so. He suggested that the state consider amending SB 140 by prohibiting girls from participating on boys' teams. It might be necessary to make some distinctions about the type of sport involved, such as wrestling, football, or weightlifting. He spoke in support of SB 140.

[9:23:13 AM](#)

CHAIR HOLLAND referred to page 3 of Mr. Jacobus's letter [dated May 1, 2022] that mentioned two students, one with Turner's syndrome and another who looked masculine. Both students were female. Since Turner's syndrome affects only females and someone who looks masculine by inference must be biologically female. Thus, neither student would be affected by the bill.

[9:24:06 AM](#)

SENATOR KIEHL referred to Alaskans' right to privacy Mr. Jacobus discussed in his letter. He agreed that the Alaska courts had not ruled directly on the right to privacy and transgenders. He said he is intrigued at his de minimis infringement on the right to privacy. Although he didn't recall the exact quote, the Alaska Supreme Court had argued that there is nothing more personal than one's body when applying a citizen's constitutional right to privacy.

SENATOR KIEHL wondered how a citizen's right to privacy would be applied if the bill were to pass. He related a scenario where a transgender young woman's birth certificate indicated "male," that the person had transitioned and undergone health care treatments to conform to female gender identity, and their body bore the marks associated with females. If that person moved to Alaska and wanted to compete in sports, they must play on a men's team based on their birth certificate. He asked Mr. Jacobus to speak to his de minimis infringement on privacy analysis, because it was difficult for him to see how it would apply.

MR. JACOBUS responded that other laws protect medical information. He acknowledged that transgender participation in sports had become a political issue, not just a legal one. He stated that some believe it is important to protect girls, but others are interested in protecting transgender rights. He said he was unsure whether the Alaska Supreme Court would decide to protect transgenders or the majority of girls who must participate equally in sports activities.

[9:27:12 AM](#)

SENATOR HUGHES explained that the federal Family Educational Rights and Privacy Act is similar to the Health Insurance Portability and Accountability Act of 1996 (HIPPA) because an individual's information must be kept confidential. She surmised that if the school district denied a transgender girl from participating on a female team, an observer might surmise what sex was listed on the birth certificate even though the school could not reveal that information. The transgender student identifying as a female would have other options, such as playing on a men's team, and that team might also have other girls participating. Thus, she did not believe requiring a birth certificate would breach a person's right to privacy.

CHAIR HOLLAND invited Mr. Bird to respond.

[9:29:12 AM](#)

MARIO BIRD, Attorney, Law Office of Mario L. Bird, Anchorage, Alaska, responded to Senator Kiehl's earlier question on whether the right to privacy allows for a de minimis infringement. He said he was unsure whether that language appears in Alaska case law. He stated that case law related to art. 1, sec. 22 of the Alaska Constitution does not provide an absolute guarantee of the right to privacy. He read quotes from several cases from the annotated statutes.

"No one has an absolute right to do things in the privacy of his own home, which will affect himself or others adversely."

Ravin v. State

"It is part of the judicial function to ensure that governmental infringements of this right are supported by sufficient justification."

Falcon v. Alaska Public Offices Commission

In expressing the rights to free speech and privacy, the framers of the state constitution have recognized a right of universal freedom and the right to be left alone which is rooted in the natural inclination of human beings of these rights and a free society such as this have never been recognized as absolute and without limitations.

Messerli v. State

[9:30:49 AM](#)

MR. BIRD offered his view that there was clear precedent that privacy is not an unlimited right. He stated that the function of the judiciary was to decide that balance. Still, the legislature has the authority to implement laws that define the right to privacy, which is what this bill does.

[9:31:23 AM](#)

MR. BIRD recalled Mr. Sharp mentioned that federal law corroborates the binary nature of human sexuality. Alaska Statutes already address this. AS 14.18.040(a) reads, "(a) Equal opportunity for both sexes in athletics and in recreation shall be provided in a manner that is commensurate with the general interests of the members of each sex." He noted that the language "both" and "each" presupposes male and female, which appears later in the statutes. He stated that [Plass ph.] v. State struck down legislation that was only directed at the female body. Again, it was tethered not only to the actual conditions of human life but to the male body and the female body. He highlighted that those are the same distinctions SB 140 draws.

[9:32:48 AM](#)

SENATOR KIEHL said Mr. Bird read several Alaska Supreme Court statements interpreting the Alaska Constitution on the right to be left alone and the strengths of Alaskans' rights to privacy

and equal protection. He asked whether there was a close and substantial relationship between the approach SB 140 takes and the problem it purports. The committee previously discussed people who compete as women whose birth certificates indicate female, yet they have extremely high natural testosterone levels. He noted some international organizations do not allow them to compete on women's teams. The committee also discussed transgender women who have undergone gender-conforming health care.

SENATOR KIEHL stated that the sponsor included studies that spoke to average differences; however, the issue relates to the rights of individuals. He suggested that the likelihood was low that the courts would take average-based impingement on all transgender women's rights in high school and college sports and say that it is closely and substantially tailored to the issue at hand. He wondered if other mechanisms could be used to deal with the theoretical competitive advantage.

[9:34:54 AM](#)

SENATOR HUGHES agreed that she had highlighted averages between males and females. However, other research details testosterone suppression over multiple years that still showed substantial differences. She noted she had referred to that in one of the slides in the condensed presentation. She stated there was still a 9 percent difference in speed or strength.

SENATOR KIEHL asked for the age of patients in the study.

CHAIR HOLLAND suggested that while he searched for the answer, Mr. Sharp could comment.

[9:36:30 AM](#)

MR. SHARP said he was unsure whether anything in the bill would require the public disclosure of private information. Currently, under the Alaska School Activities Association (ASAA) rules, students must disclose considerable personal information to determine their eligibility for sports. Every student must submit their sports physical exam results and medical history. Although this information is confidential and protected by HIPAA, students must submit it to the school for eligibility determinations. Students must also provide other personal information, including submitting grades, their weight if participating in some sports such as wrestling, and any disciplinary information. This law would rely on the students' birth certificate to identify their sex. He offered his belief

this additional requirement would not violate the right to privacy.

MR. SHARP highlighted that the question was not whether an elite female athlete could compete with an average male but how a comparably fit and trained female could compete with a comparably fit and trained male. Despite her world and Olympic track standing, thousands of men and about 200 high school boys could beat Allyson Felix's record. This data supports sex-based classifications and the need for separate categories for men and women because men will always have a competitive advantage when comparing comparably fit and trained male and female athletes.

[9:40:06 AM](#)

SENATOR HUGHES pointed out that Lia Thomas had met the National Collegiate Athletic Association (NCAA) guideline and had undergone testosterone treatment for a minimum of one year.

[9:40:33 AM](#)

DANIEL PHELPS, Staff, Senator Shelley Hughes, Alaska State Legislature, Juneau, Alaska, on behalf of the sponsor, identified the study that Senator Hughes referred to earlier as the Hilton-Lundberg study [Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage.] The study found a performance gap of 10 to 50 percent, depending on the sport, from male to female bodies. After 12 months of testosterone suppression, transgender women experienced a 5 percent reduction in their comparative advantage based on their muscle density, strength, endurance, and muscle mass. Thus, it resulted in a 10 to 50 percent advantage and only a 5 percent reduction. He added that this study related to youth ages 9 to 17.

[9:41:47 AM](#)

SENATOR KIEHL asked the record to reflect that not every school district requires a birth certificate or requests a student's biological sex. He recalled several comments about federal courts recognizing binary and biological basis for sex under Title IX. He agreed that was the case at one time. He asked whether any of the presenters could direct him to recent federal cases requiring the consideration of gender identity and transgender athletes under Title IX.

[9:43:13 AM](#)

MR. BIRD deferred to Mr. Sharp.

[9:43:24 AM](#)

SENATOR HUGHES referred to the US Supreme Court decision in *Bostock v. Clayton County*, related to Title VII [of the Civil Rights Act of 1964] employment issues for gay and transgender individuals [decided on June 15, 2020.] She read a portion of the decision.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

[9:44:14 AM](#)

MR. SHARP stated Senator Hughes' quote from the *Bostock v. Clayton County* decision is precisely on point. He referred to another portion of the majority decision, which read "...referring only to biological distinctions between male and female." He stated that the US Supreme Court was working on an understanding of what sex means in federal law and the US Constitution.

[9:44:55 AM](#)

SENATOR KIEHL said if there were no federal district or circuit court cases that upheld the underlying arguments in the bill, he was interested in other federal guidance. He asked how the US Department of Education interpreted Title IX regarding transgender athletes.

[9:45:38 AM](#)

MR. SHARP responded that the US Department of Education has historically understood that Title IX and its prohibition on sex discrimination works exactly like SB 140. Although the agency recognizes that sex is biologically based, it is still permissible to have separate programs for men and women.

MR. SHARP related that in May 2013, the Obama administration issued a "Dear Colleague" letter saying it was now interpreting sex under Title IX to mean "gender identity." Since then, the federal agencies have interpreted the definition differently, depending on the administration. However, the federal courts will ultimately be the final decision-makers. He opined that the *Bostock* ruling cut through the agency interpretations and

indicated that "sex" refers to the biological distinction between males and females. The US Supreme Court ruled that women could enroll in the Virginia Military Institute. However, it recognized differences in the standards due to the differences in males and females, which are permissible under federal law.

[9:48:19 AM](#)

SENATOR HUGHES referred to Alaska's Department of Education and Early Development website, stating that birth certificates are required for enrollment in Alaska's public schools.

CHAIR HOLLAND solicited further discussion on SB 140.

[9:48:47 AM](#)

At ease

[9:49:53 AM](#)

CHAIR HOLLAND reconvened the meeting.

[9:50:12 AM](#)

SENATOR HUGHES moved to adopt Amendment 1, work order 32-LS0911\B.1.

32-LS0911\B.1
Marx
4/28/22

AMENDMENT 1

OFFERED IN THE SENATE
TO: CSSB 140(EDC)

Page 3, lines 17 - 18:
Delete "secondary, or postsecondary"
Insert "or secondary"

[9:50:17 AM](#)

CHAIR HOLLAND objected for discussion purposes.

[9:50:17 AM](#)

MR. PHELPS stated that Amendment 1 would remove "or postsecondary" and insert "or" before "secondary".

[9:50:46 AM](#)

SENATOR HUGHES stated the intent was to include postsecondary in this policy, but after speaking with UAA President Pat Pitney, she decided that the timing wasn't right. She emphasized that Ms. Pitney supports the concept, but the university currently was considering other things.

CHAIR HOLLAND summarized that Amendment 1 would remove postsecondary schools from the bill.

SENATOR HUGHES agreed.

[9:52:46 AM](#)

CHAIR HOLLAND removed his objection; he found no further objection, and Amendment 1 was adopted.

[9:53:15 AM](#)

SENATOR HUGHES moved to adopt Conceptual Amendment 1.

[9:53:33 AM](#)

CHAIR HOLLAND objected for discussion purposes.

SENATOR HUGHES stated Conceptual Amendment 1 would delete lines 5-6 on page 2. She explained the intent was to accomplish removing postsecondary schools from SB 140.

[9:54:06 AM](#)

SENATOR KIEHL wondered what effect removing the definition of "sex" on lines 5-6 on page 2 would have on who could compete.

SENATOR HUGHES responded that removing the definition would not affect the overall bill, just Section 2, AS 14.18.040. She deferred to Mr. Phelps.

MR. PHELPS explained that AS 14.18.040. Discrimination and Recreational Athletic Activities currently addresses the university and defines "sex". Thus, removing it would only affect the university, but not [the remaining language in Article 2] beginning with AS 14.18.150.

[9:55:43 AM](#)

SENATOR KIEHL asked what problem deleting the definition of "sex" would fix.

MR. PHELPS answered that Sec. 14.18.040 references the Board of Regents and establishes procedures that the board shall adopt, so Conceptual Amendment 1 would remove the reference.

[9:56:24 AM](#)

SENATOR HUGHES stated that this would essentially remove the practice by the university to require students to have a birth certificate.

[9:56:53 AM](#)

CHAIR HOLLAND removed his objection to Conceptual Amendment 1; he heard no further objection, and Conceptual Amendment 1 was adopted.

CHAIR HOLLAND noted that Legislative Legal Services was authorized to make technical and conforming changes to comport with the committee's intent.

[9:57:32 AM](#)

SENATOR HUGHES said establishing this policy now will preserve Title IX for young women. She said she is not aware of any current issues with student-athletes in the state. She remarked that she heard from several transgender women who support the bill, but they asked to remain anonymous. The Women's Liberation Front, a feminist organization, supports SB 140. She characterized SB 140 as a nonpartisan bill. She stated that each student would have at least two options to compete.

[10:00:07 AM](#)

SENATOR MYERS moved to report the committee substitute (CS) for SB 140, work order 32-LS0911\B, as amended, from committee with individual recommendations and attached fiscal note(s).

[10:00:26 AM](#)

SENATOR KIEHL objected.

SENATOR KIEHL characterized SB 140 as a bill seeking a problem to solve. As the sponsor mentioned, Alaska does not have any cases involving transgender athletes. He offered his view that the bill runs afoul of Alaska's Constitution. It would require students to disclose personal information in ways that are not comparable to a student receiving a clean bill of health on their physical or making good grades. He said he did not find that level of breadth when it would force a transgender girl to reveal de facto their sex listed on a birth certificate. He stated that the right to privacy is lethal constitutionally, and the equal protection issues are too significant to overcome. The bill is based on a line on a person's birth certificate, which does not have anything to do with physicality or levels of hormones that may give the person physical advantages. The

jurisprudence runs opposite to what is constitutional and permissible under federal law.

[10:02:37 AM](#)

SENATOR KIEHL maintained his objection.

[10:02:48 AM](#)

A roll call vote was taken. Senators Myers, Hughes, and Holland voted in favor of the motion to report SB 140, Version B, from committee, and Senator Kiehl voted against it. Therefore, CSSB 140(JUD) was reported from the Senate Judiciary Standing Committee on a 3:1 vote.

CHAIR HOLLAND stated that on a vote of 3 yeas and 1 nay, CSSB 140(JUD) was reported from the Senate Judiciary Standing Committee.

[10:03:48 AM](#)

There being no further business to come before the committee, Chair Holland adjourned the Senate Judiciary Standing Committee meeting at 10:03 a.m.