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MEMORANDUM

June 1, 2023

SUBJECT: State Board of Education and Early Development proposed regulation (Work Order No. 33-LS0892)

TO: Representative Jennie Armstrong
Attn: Tristan Walsh

FROM: Marie Marx 
Legislative Counsel

You requested an opinion relating to a regulatory change proposed by the State Board of Education and Early Development (state board). Specifically, you asked whether the proposed regulation raises issues under the privacy clause of the Alaska Constitution or under Title IX of the Education Amendments of 1972.

1. Right to privacy. It is highly likely that the proposed regulation, if adopted, will raise a legal challenge under the privacy clause of the Alaska Constitution. Unlike the federal constitution, art. I, sec. 22, of the Alaska Constitution contains an express guarantee of the right to privacy. The Alaska Supreme Court has stated on more than one occasion that the Alaska Constitution affords broader protections than does the federal constitution.¹ Right to privacy cases in Alaska "can be divided into two categories: those that claim a right of personal autonomy, and those that seek to shield sensitive personal information from public disclosure."² The proposed regulation raises issues under the second category.

The proposed regulation provides:

4 AAC 06.115(b)(5) is amended by adding a new subparagraph to read:
(D) ensures fairness, safety, and equal opportunity in athletics by providing, in consideration of responses to a school survey under 4 AAC 06.520,
(i) a separate team for each sex with participation based on a student's sex assigned at birth; or

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

² *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126 (Alaska 2019) (citing *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997); *Ravin*, 537 P.2d at 500) (internal footnote omitted).

(ii) a team for students of either sex regardless of sex assigned at birth.³

Read in context with existing 4 AAC 06.115(b)(5), if adopted, the proposed regulation would provide:

(b) A school or school district may join and, to the extent authorized by its budget, may pay dues to the Alaska School Activities Association, Inc., or any other voluntary, nonprofit association whose purpose is to administer and promote interscholastic activities in Alaska so long as the association

...

(5) administers interscholastic activities in a manner that ...

(D) ensures fairness, safety, and equal opportunity in athletics by providing, in consideration of responses to a school survey under 4 AAC 06.520,

(i) a separate team for each sex with participation based on a student's sex assigned at birth; or

(ii) a team for students of either sex regardless of sex assigned at birth.

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

In the personal information context, "[f]or the right to privacy to apply, there must be both a legitimate expectation of privacy and a claim of substantial infringement, as distinguished from a minimal one."⁴ "A legitimate expectation of privacy is an expectation that 'society is prepared to recognize as reasonable.'"⁵ The Alaska Supreme Court has not directly addressed whether a person's status as a transgender student is the

³ June 2023 State Board of Education Meeting Information Packet, Item 6B.1, Proposed Interscholastic Activities Regulations 2023200149, available at https://education.alaska.gov/state_board/june-2023.

⁴ *Doe*, 444 P.3d at 126 - 27 (citing *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 222 (Alaska 2005); *Alaska Wildlife Alliance*, 948 P.2d at 980).

⁵ *Id.* at 127 (quoting *Int'l Ass'n of Fire Fighters, Loc. 1264 v. Municipality of Anchorage*, 973 P.2d 1132, 1134 (Alaska 1999)).

type of personal information protected by art. I, sec. 22.

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

State disclosure of sensitive personal information protected by art. I, sec. 22, is unconstitutional unless "disclosure [is] nonetheless required to serve a compelling state interest . . . [and] the necessary disclosures occur in that manner which is least intrusive with respect to the right to privacy[.]"⁸ If a court finds that a transgender student has a protected privacy interest in the student's status as a transgender student, the state would have to show a compelling state interest necessitates the disclosure, and that no narrower means could be used to accomplish that interest.

2. Title IX. In *Bostock v. Clayton County, Georgia*, the United States Supreme Court held that discrimination based on sexual orientation and gender identity is sex discrimination under Title VII.⁹ However, the United States Supreme Court has not yet decided whether transgender discrimination is sex discrimination under Title IX.

The United States Department of Education (department) is the agency tasked with promulgating regulations implementing Title IX.¹⁰ On April 6, 2023, the department released a notice of proposed rulemaking on athletic eligibility under Title IX.¹¹ The

⁶ *Id.* (alterations in original) (citations and internal footnotes omitted).

⁷ *See, e.g., K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183 (Alaska Super. Mar. 12, 2012) (concluding that a person's privacy interest in transgender status is entitled to protection, but not deciding whether it is a fundamental privacy interest subject to strict scrutiny because the challenged program failed to satisfy even less rigorous scrutiny).

⁸ *Doe*, 444 P.3d at 126 (quoting *Alaska Wildlife Alliance*, 948 P.2d at 980).

⁹ 140 S.Ct 1731, 1741 (2020).

¹⁰ *See* 20 U.S.C. 1681- 1688.

¹¹ FACT SHEET: United States Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams (April 6, 2023), <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>; *see also* United States

proposed rule would apply to public K-12 schools, as well as colleges, universities, and other institutions that receive federal funding, and would provide:

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.¹²

The department summarized the proposed rule as follows:

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

Taking those considerations into account, the Department expects that, under its proposed regulation, elementary school students would generally be able to participate on school sports teams consistent with their gender identity and that it would be particularly difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity. For older students, especially at the high school and college level, the Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements.

...

School teams vary widely across the United States, with some that are very competitive, especially for high school and college students with advanced skills, and others, such as "no cut" teams, that allow all students to join and participate. Some schools also offer teams at lower levels of competition, such as intramural or junior varsity teams, that allow all or most interested students to participate. Sex-related eligibility criteria that

¹² *Id.*

restrict students from participating consistent with their gender identity would have to reflect these differences in competition.

...

Preventing students from participating on a sports team consistent with their gender identity can stigmatize and isolate them, and those students may not be able to participate at all if the only other option is to participate on a team that does not align with their gender identity. This is different from the experience of a student who is not selected for a team based on their skills. If a school could achieve its important educational objective by using sex-related criteria that would cause less harm but the school chooses not to minimize the harm, the school might not satisfy the proposed regulation, depending on the specific facts involved.¹³

The state board's proposed regulation does not account for differences among students across grade and education levels, different levels of competition, and different types of sports. If the United States Department of Education's proposed rule is adopted¹⁴ and if the state board's proposed regulation is adopted and challenged, it is likely that a court would find that the regulation unlawfully discriminates against transgender students in violation of Title IX. If the United States Department of Education's proposed rule is not adopted, I do not know whether a court would find transgender discrimination is sex discrimination under Title IX. Alaska courts have not yet addressed this issue, and as discussed above, neither has the United States Supreme Court.

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

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¹³ *Id.*

¹⁴ The department anticipates it will adopt the final Title IX rule in October 2023. *See* A Timing Update on Title IX Rulemaking, United States Department of Education, available at https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/?utm_source=Title+IX+Solutions&utm_campaign=35e6665d99-EMAIL_CAMPAIGN_2022_06_23_04_20_COPY_01&utm_medium=email&utm_term=0_2d88a94288-35e6665d99-431428967.