



June 14, 2022

Ryan Ponder  
President, Matanuska-Susitna Borough School Board  
501 North Gulkana Street  
Palmer, AK 99645

*via email to* Ryan.Ponder@matsuk12.us

**Re: Proposed revisions to BP 6145, “Extracurricular and Co-Curricular Activities”**

Dear Mr. Ponder:

The ACLU of Alaska writes to you today in strong opposition to proposed revisions to BP 6145, which seek to prohibit transgender girls from playing on girls’ sports teams. The proposed policy is harmful, illegal, and unconstitutional, and we urge the school board to abandon consideration of these revisions.

Attempting to ban transgender girls from playing on girls’ teams constitutes illegal discrimination under the United States and Alaska Constitutions and Title IX. Courts across the country have unanimously blocked governmental actions seeking to ban transgender student athletes from playing sports that align with their gender identity. If adopted, the School Board’s new restrictive policy could be subject to judicial challenge and/or enforcement from the U.S. Department of Education’s Office for Civil Rights (OCR).

**We detail only some of the ways in which this policy is illegal and unconstitutional, as well as relevant caselaw, in an appended explanation.**

Trans youth, like all youth, want to participate in the activities they love, including athletics. They participate in sports for the same reasons

other young people do: to challenge themselves, improve fitness, and be part of a team. But this policy would send a message to vulnerable transgender youth that they are not free to do so, and would lead to perverse and exclusionary outcomes.

BP 6145 presents a host of privacy concerns. It would force students to furnish a birth certificate, which is not necessary for school admission and may not be available to all students, in order to play on girls' sports teams. In cases where "biological sex" — which is complex and [does not break down](#) in a neat male/female binary — can't be determined, we are concerned the district would next use its authority to subject students to [invasive tests](#). It would also encourage gender policing of girls, leading to calls for those who appear "too masculine" or "too muscular" to be subject to additional scrutiny. Finally, it may force transgender students to involuntarily reveal their transgender status when they have not chosen to do so, robbing them of vital agency to decide when, where, and how to be out.

Moreover, telling transgender girls that they can only join coeducational sports teams is not equality. It's exclusion. Pushing transgender students out of affirming spaces and communities only heightens the risk of harm to their physical and emotional wellbeing, [including suicidality](#). School belonging, on the other hand, [may serve as a protective factor](#) from harm.

The school board has taken commitments to promote safe and healthy environments for all students, to provide equal opportunity for all individuals, and to eliminate discriminatory practices through its programs. If adopted, the proposed revisions to BP 6145 will mean the school board has failed each of those commitments and failed its obligations to transgender youth in district schools. We urge the school board to permanently table these proposed revisions to BP 6145, and work to create a welcoming atmosphere for transgender and all LGBTQ+ youth in the district.

Sincerely,



Mr. Ryan Ponder  
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Michael Garvey  
Advocacy Director

Stephen Koteff  
Legal Director

cc: Members of the Matanuska-Susitna Borough School Board:

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Dr. Randy Trani, Superintendent of the Mat-Su Borough School  
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## **The Proposed Revisions Are Illegal and Unconstitutional**

The Matanuska-Susitna Borough School Board athletic policy would be amended to state, in part:

*c) Each school within the District, whose students or teams compete against other schools, must designate each school-sponsored athletic team or sport a:*

- 1. male, men, or boys team or sport;*
- 2. female, women, or girls team or sport; or*
- 3. coeducational or mixed team or sport.*

*d) A student who participates in an athletic team or sport designated female, women, or girls must be female, based on the participant's biological sex as either female or male, as designated at the participant's birth. The biological sex listed on a participant's birth certificate may be relied on to establish the participant's biological sex designated at the participant's birth if the sex designated on the birth certificate was designated at or near the time of the participant's birth.*

Preventing transgender girls from playing sports with other girls, as this policy seeks to do, would deprive them of their right to Equal Protection under the Fourteenth Amendment to the U.S. Constitution.<sup>1</sup> The ACLU sued the first two states that tried to bar transgender students from participating in sports in accordance with their gender identities, and federal courts blocked both laws as unconstitutional for purposes of preliminary injunctions.

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<sup>1</sup> A policy that violates the Equal Protection Clause of the United States Constitution is almost certain to violate the equal protection guarantee of the Alaska Constitution as well. The Alaska Supreme Court has explained that “Alaska’s equal protection clause is more protective of individual rights than the federal equal protection clause.” *State v. Anthony*, 810 P.2d 155, 157 (Alaska), *on reh’g*, 816 P.2d 1377 (Alaska 1991). *See also State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (Article I, Section 1 “protects Alaskans’ right to non-discriminatory treatment more robustly than does the federal equal protection clause.”) There is every reason to believe, therefore, that Alaska courts would adopt the analyses and conclusions of the federal courts that have decided this issue.

There are also three other lawsuits being litigated against transgender sports bans in Tennessee, Florida, and Utah; and in all five of these cases, plaintiffs have brought equal protection challenges under two theories: (1) that discrimination against transgender people is inherently based on sex, and therefore the level of scrutiny applicable to sex discrimination applies to discrimination based on transgender status; and (2) that transgender people are a quasi-suspect class and therefore entitled to heightened scrutiny.

In *Hecox v. Little*, a federal court in Idaho blocked that state’s law targeting transgender student athletes as violating the Equal Protection Clause and failing to meet heightened scrutiny.<sup>2</sup> A federal court in West Virginia also recently issued a preliminary injunction blocking that state’s transgender sports ban from taking effect. West Virginia unsuccessfully attempted to stop transgender student athletes from participating in sports with bill language that was very similar to the Board’s proposed policy—requiring students to compete on sports teams based on “biological sex determined at birth.”<sup>3</sup> Even though proponents of the law claimed to be helping women’s sports, the federal court found “scant evidence” for this law and declared that it likely violated the U.S. Constitution’s Equal Protection Clause.<sup>4</sup>

For a public school district to meet heightened scrutiny in prohibiting a student from a sports team based on their transgender status, the district would be required to establish an “exceedingly persuasive justification.”<sup>5</sup> This justification “must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations

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<sup>2</sup> 479 F. Supp. 3d 930, 984–85 (D. Idaho 2020) (“In short, the State has not identified a legitimate interest served by the Act that the preexisting rules in Idaho did not already address, other than an invalid interest of excluding transgender women and girls from women’s sports entirely, regardless of their physiological characteristics.”).

<sup>3</sup> *B. P. J. v. W. Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 352 (S.D.W. Va. 2021).

<sup>4</sup> *Id.* at 350.

<sup>5</sup> *Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 724 (1982).

about the different talents, capacities, or preferences of males and females.”<sup>6</sup> As other courts have found, there is no justification for barring transgender students from playing sports that align with their gender identity that comes close to meeting this standard. And the preferences, biases, or concerns of other parents cannot form a valid basis for discrimination, since that would undermine the very foundation of the Equal Protection Clause.<sup>7</sup> Indeed, a lawsuit brought by the parents of cisgender (non-transgender) student athletes in Connecticut that sought to challenge that state’s rules allowing transgender girls to participate in girls’ sports was dismissed by a federal court in Connecticut.<sup>8</sup>

Barring a student from playing sports based on their gender or gender identity also violates Title IX. In *B.P.J.*, the court enjoined West Virginia’s transgender sports ban under both the Equal Protection Clause and Title IX.<sup>9</sup>

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

<sup>7</sup> See, e.g., *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972) (finding that race-based preferences of parents “cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system”); *United States v. Virginia*, 518 U.S. 515, 545 (1996) (rejecting the state’s proffered justification that the Virginia Military Institute should remain exclusive to men since most women would prefer not to attend); *Bostock*, 140 S. Ct. at 1741 (explaining that the focus in sex discrimination cases is “on individuals rather than groups . . . So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.”).

<sup>8</sup> *Soule by Stanescu v. Connecticut Ass’n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at \*1 (D. Conn. Apr. 25, 2021).

<sup>9</sup> *B. P. J.*, 550 F. Supp. 3d at 356 (“Again, as in *Grimm*, I also have little difficulty finding that B.P.J. is harmed by this law. All other students in West Virginia secondary schools—cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions trying to play on the boys’ teams—are permitted to play on sports teams that best fit their gender identity. Under this law, B.P.J. would be the only girl at her school, as far as I am aware, that is forbidden

A “claim under Title IX requires a plaintiff to allege that the defendant (1) received federal financial assistance, and (2) excluded the plaintiff from participating in the defendant’s educational programs because of the plaintiff’s sex.”<sup>10</sup> The court found in *B.P.J.* this type of legislation is designed to exclude transgender students from participation in sports because of their sex. Under the reasoning set forth by the Supreme Court in *Bostock v. Clayton County, Georgia*,<sup>11</sup> prohibiting transgender students from playing sports in accordance with their gender identity is impermissible sex discrimination, since those students are treated worse under the law because of their sex. This analysis comports with the rulings of federal courts across the country, which have applied *Bostock* to Title IX and found that transgender students in schools have a right to use sex-separated facilities like bathrooms and locker rooms that align with those students’ gender identity.<sup>12</sup>

Attempts to use Title IX to restrict transgender students from playing sports have also failed. Last year, a lawsuit brought by cisgender (non-transgender) student athletes in Connecticut that sought to challenge that state’s rules allowing transgender girls to participate in girls’ sports was dismissed by a federal judge in Connecticut.<sup>13</sup> The court found that Title IX does not allow cisgender students to sue transgender students who participate in sports—to the contrary, Title IX protects *all* students from gender discrimination, including transgender students’ right to participate in sports.

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from playing on a girls' team and must join the boys' team. Like the discriminatory policy in *Grimm*, this law both stigmatizes and isolates B.P.J.”).

<sup>10</sup> *Manley v. Texas S. Univ.*, 107 F. Supp. 3d 712, 725 (S.D. Tex. 2015).

<sup>11</sup> 140 S. Ct. 1731 (2020)

<sup>12</sup> *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021).

<sup>13</sup> *Soule*, 2021 WL 1617206, at \*1.