

STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT
STATEMENT OF DECISION

SUMMARY

On August 31, 2023, the State Board of Education voted to adopt regulation changes to amend 4 AAC 06.115(b)(5) addressing interscholastic activities in Alaska. The proposed regulation change would amend 4 AAC 06.115(b)(5) to require nonprofit associations that administer and promote interscholastic activities in Alaska to ensure fairness, safety, and equal opportunity for female students in high school athletics by providing “that if a separate high school athletics team is established for female students, participation shall be limited to females who were assigned female at birth.” The term “athletics” as used in the proposed regulation means competitive or contact sports, as determined by the association.

BACKGROUND

I. March 16, 2023 Board Meeting

On March 16, 2023, the board passed a resolution titled “Resolution to Preserve Opportunity for Student Athletes While Balancing Competitive Fairness, Inclusion, and Safety for All Who Compete.” The resolution supported passage of regulations to “prioritize competitive fairness and safety on the playing field while allowing all students to participate in activities” and that the regulations should “provide a girls’ division with participation based on a student’s sex at birth” a “division for students who identify with either sex or gender; and a “process for appeal for all students.” As a result of the resolution, the Department of Education and Early Development (DEED or the department) worked with the Department of Law to prepare a draft regulation for the board’s consideration.

II. June 8, 2023 Board Meeting

At the board’s June 8, 2023, meeting, it voted to send out for public comment proposed regulation changes to 4 AAC 06.115. However, before sending the proposed regulation out for public comment, the board elected to make some revisions to the proposed regulation. Specifically, the board revised the regulation to limit its applicability to high school level competitive or contact sports. These revisions were made after consideration of the proposed Title IX regulations and after consultation with the board’s attorneys in an executive session.

Title IX of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in any education program or activity receiving federal financial assistance.¹ Importantly, on April 6, 2023, the USDOE proposed new Title IX regulations that would, if adopted as is, directly address the issue of transgender² student athletes.³ In its proposed regulations, the federal government has taken the position that 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 constitute unlawful sex discrimination under Title IX. However, the federal government has stated that for older students, especially at the high school and college level, USDOE expects that sex-related criteria that limit participation of 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 regulations’ other requirements.⁴

At the June 8, 2023, meeting the board heard public comment on the proposed regulation both in person and remotely. The board listened to all of the comments from members present at the meeting and participating remotely. The public comment lasted for approximately one hour and 44 minutes.⁵

III. Public Notice of Proposed Regulation Change

¹ Under Title IX, “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681(a).

² “A ‘transgender’ individual’s gender identity does not correspond to their sex assigned at birth, while a ‘cisgender’ individual’s gender identity corresponds with the sex assigned to them at birth.” Gender identity is the term used to describe a person’s sense of being male, female, neither or some combination of both. *Hecox v. Little*, No. 20-35813, 2023 WL 5283127, *18, *13-*14 (9th Cir. Aug. 17, 2023)(citations omitted).

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22860 (proposed Apr. 13, 2023)(to be codified at 34 CFR pt. 106).

⁴ 88 Fed. Reg. at 22875

⁵ June 8, 2023 recording of State Board of Education meeting, https://education.alaska.gov/State_Board (public comment opened at 00:09:02 and ended at 01:53:43)

On June 21, 2023, DEED provided notice of the proposed regulations, in accord with the Administrative Procedures Act⁶, and provided thirty days to submit written comments and the opportunity to provide oral comment at the Board’s July 26, 2023, meeting.

IV. July 26, 2023 Board Meeting

On July 26, 2023, the board held a virtual meeting that included the opportunity for public comment on all agenda items. The board’s agenda included consideration of adoption of the amendments to 4 AAC 06.115. The board scheduled two hours for public comment, but the agenda stated that “[i]n the event that there are more than two hours of public comment, the board may move to amend the agenda to extend the oral hearing.”

The board adjusted the time for public comment to accommodate all members of the public who wished to make public comment, which lasted over three hours.⁷ The board also held an executive session that included attorney-client consultation related to the regulations. When it came time to discuss the proposed regulations and possible adoption, the board acknowledged the significant number of public comments and thanked the public for their input. The board then determined that it would not take any action on the proposed regulation amendments, in light of the need to fully consider all facets of the issue, the significant number of public comments and the fact that two new board members had just joined the board. One board member stated that she had reviewed all of the public comments but would like additional time to review all of the sources cited in the public comments.⁸

V. Public Comment

The formal written public comment period started on June 21, 2023 and ended July 21, 2023. The public submitted approximately 1300 written comments during this period. Additional written comments continued to be submitted to the department, after

⁶ AS 44.62.190(a) includes publication of the notice in a newspaper of general circulation, posting of the notice on the Alaska Online Public Notice System, furnishing the notice to persons who have requested such notice and additional notice requirements.

⁷ July 26, 2023 recording of State Board of Education meeting at 00:04:55, https://education.alaska.gov/State_Board (public comment begins at 00:04:55 and closes at 03:11:07).

⁸ *Id.* at 4:25:59.

the July 26, 2023 public hearing. The department received a substantial number of comments both in support and in opposition to the proposed regulation.

DISCUSSION

The board listened to and considered all oral public comments and reviewed and considered all written public comments, including references to additional documents and studies. The board also consulted with and received advice from the Department of Law related to the legal landscape surrounding the proposed regulations and litigation over similar laws and regulations across the country. The board reviewed the language of the statutes cited as authority for the regulation, in particular Alaska Statute (AS) 14.18.040. Finally, the board considered its role and DEED's general role and authority in regard to students in Alaska.

After considering all of the comments submitted on the regulations, the advice from the Department of Law, the role of DEED and the State Board and statutory and other support, the voting members of the board voted unanimously to approve the proposed regulations.⁹

I. Authority and Role of Board

In considering the authority for the regulation and the role of the board, the board reviewed AS 14.18.040. This statute has been in existence since 1981, when the legislature enacted it as part of a chapter addressing the prohibition against discrimination based on sex or race in public education. Specifically, AS 14.18.040 states that:

Equal opportunity for both sexes in athletics and in recreation shall be provided in a manner that is commensurate with the general interest of the members of each sex. **Separate school-sponsored teams may be provided for each sex.** (emphasis added).

The legislature has not chosen to amend or repeal this statute in the forty-two years since it was enacted. The legislature also chose to instill the board with the

⁹ All voting members of the board voted in favor of the proposed regulation amendments. Advisory board members may cast advisory votes, but advisory votes are not counted in determining the disposition of board matters. 4 AAC 03.025(g). Of the advisory members, the military advisor abstained from voting and the student advisor voted against the proposed regulation amendments.

authority to adopt regulations to implement this chapter.¹⁰ Chapter 18 also includes a statute granting to the board enforcement authority to ensure compliance with the provisions of the chapter and the regulations and procedures adopted under it.¹¹ The statutory scheme makes clear that the legislature entrusted enforcement and implementation of this chapter to the State Board of Education.

The proposed regulation at issue here provides needed clarification to implement AS 14.18.040, so that school districts can interpret it consistently. The board is well within its specific authority to pass regulations to implement AS 14.18.040 and, even if it did not have this specific authority, it could adopt regulations under its more general authority to adopt regulations necessary to carry out the provisions of Title 14.¹²

II. Public Comment

In general, the public comments focused on seven major issues, which the board specifically reviewed and considered.

A. Equal protection

First, the board reviewed and considered the issue of equal protection, or that the proposed regulation would inappropriately treat classes of people differently. For the board to treat the two groups differently it must show that the regulation serves an important governmental objective and that the regulations are substantially related to the

¹⁰ AS 14.18.080(a) provides “[t]he board shall adopt regulation under AS 44.62 (Administrative Procedure Act) to implement this chapter.”

¹¹ AS 14.18.090 states: (a) The board shall enforce compliance by school districts and regional educational attendance areas with the provisions of this chapter and the regulations and procedures adopted under it by appropriate order made in accordance with AS 44.62. After a hearing conducted by the office of administrative hearings (AS 44.64.010) and a finding by the board that a district or a regional educational attendance area is not in compliance with this chapter and is not actively working to come into compliance, the board shall institute appropriate proceedings to abate the practices found by the board to be a violation of this chapter.

(b) After a finding by the board that a district or regional educational attendance area has not complied with AS 14.18.020 - 14.18.070, and that the measures taken under (a) of this section have been ineffective, the board shall withhold state funds in accordance with AS 14.07.070.

¹² AS 14.07.060.

achievement of those objectives.¹³ In reviewing this issue, the board considered the important governmental objectives of fairness, safety, and equal opportunity for female students in high school athletics. It also considered whether the regulation is substantially related to those objectives, and determined it is.¹⁴

In particular, the proposed regulation is directly tied to the objective of promoting fairness. School districts and athletic associations, as well as organizations governing athletics at higher levels have long recognized the need for separate sports teams and divisions. These separate divisions are based factors such as school size and student sex, which is addressed further below.

The proposed regulation is also directly tied to the objective of promoting safety. One board member recounted an instance in North Carolina involving a transgender female athlete seriously injuring a biological female athlete in a varsity volleyball game in September of 2022. The transgender student played on the opposing team and spiked the ball with such velocity it hit the injured student in the face, and she was knocked unconscious and unable to complete her volleyball season due to the injury.¹⁵ The regulation specifically and only applies to high school competitive or contact sports, in which athletes are more likely to be injured. The legislature has recognized the importance of student safety in athletics and the role of the Alaska School Activities Association in student safety when it passed statutes addressing concussions in student athletes, for example.¹⁶

Finally, the proposed regulation is also directly tied to the objective of providing equal opportunities for female students in high school athletics where no participant has an unfair and disproportionate advantage over the rest.

B. Privacy Concerns

¹³ See generally *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005).

¹⁴ The board does not opine on what standard of scrutiny should apply to any equal protection claim that could be raised in response to the regulation.

¹⁵ August 31, 2023 recording of State Board of Education meeting at 01:15:50, https://education.alaska.gov/State_Board; see also Yaron Steinbuch, *Injured North Carolina volleyball player urges transgender ban for female sports teams in schools*, NEW YORK POST, <https://nypost.com/2023/04/21/nc-volleyball-player-urges-transgender-ban-for-schools-female-sports/> (last visited Sept. 12, 2023)

¹⁶ See AS 14.30.142; AS 14.30.143.

Second, the board reviewed and considered the concern that all girls could be subject to embarrassing invasions of their privacy to prove they were born female. For example, commenters raised concern that individuals born female but presenting with more stereotypically masculine features may be questioned or targeted in a way that may violate their privacy rights.

The proposed regulation does not raise privacy concerns because students may show sex assigned at birth by submitting a form or a birth certificate, which is something that many students already submit to their school district. The proposed regulation does not require any invasive testing or physical examinations. This is different from a recent 9th Circuit Court decision, *Hecox v. Little*, in which the court found that the law's sex dispute mechanism, which allowed an individual to dispute a player's sex, requiring a provider to verify the student's biological sex through the player's reproductive anatomy, genetic makeup or normal endogenously produced testosterone levels was likely unconstitutional.¹⁷

Here, the proposed regulation is consistent with an individual's right to privacy and does not require invasive testing or examinations.

C. Local Control of Education

Third, the board reviewed and considered the questions raised in some public comments about whether this type of issue should be left to local schools. For example, the Association of Alaska School Boards (AASB) noted that local school boards function as local governance units and implement a system of education (including addressing participation in school athletics), through their board policies. AASB suggested that the proposed regulation would infringe on the local control model.¹⁸ The concept of local control is based on the legislature delegating the task of school operation to the local school districts.¹⁹ The board reviewed and considered whether this regulation change would infringe on the local control of school districts and conclude it does not.

¹⁷ *Hecox v. Little*, No. 20-35813, 2023 WL 5283127, *18 (9th Cir. Aug. 17, 2023).

¹⁸ July 2023 State Board of Education Meeting, 7B.6 Public Comment Week 5 - 7.16.23 - 7.21.23, at 520-521, https://education.alaska.gov/state_board/july-2023 (last visited Sept. 12, 2023).

¹⁹ AS 14.12.020(b) ("Each borough or city school district shall be operated on a district-wide basis under the management and control of a school board"); AS 14.08.021 (delegating authority to operate public schools to regional attendance areas).

When the legislature passed AS 14.18.040, stating that “separate school-sponsored teams may be provided for each sex” and passed AS 14.18.080, providing that the board shall adopt regulations to implement the chapter, it intended that DEED would pass implementing regulations. The regulation provides needed clarification to implement AS 14.18.040, so that school districts can interpret it consistently. In addition, the legislature has not granted any authority to local school districts in this area, instead the legislature has granted authority to the board to adopt regulations implementing AS 14.18.040.²⁰

D. Concerns that the Legislature is the Proper Body to Address this Issue

Fourth, some public commenters have said that the legislature should decide this issue and that there have been proposals before the legislature to do so, which have not passed. The board considered this issue. Certainly, the legislature could amend the education law and directly address this topic. The board disagrees, however, that this possibility precludes the board from addressing this issue.

The State Board of Education is at the head of DEED.²¹ DEED has numerous specific duties and responsibilities over education in the state.²² It also has the authority to exercise general supervision over the public schools of the state²³ and authority to adopt regulations to implement the education statutes²⁴ In addition, the legislature has given the board specific authority to adopt regulations to implement the statute allowing separate school-sponsored teams for each sex. When it passed these statutes, the legislature gave authority on this topic to the board. The proposed regulation change provides needed clarification to implement AS 14.18.040, so that school districts can interpret it consistently.

Some commenters have noted that unlike the legislature, the board is not elected. According to those commenters the board should not engage in this level of regulatory promulgation. The legislature, which is composed of elected officials, determined in their elected capacity how the board should be appointed.²⁵ The governor, in his elected

²⁰ AS 14.18.080.

²¹ AS 14.07.075.

²² AS 14.07.165; AS 14.07.170

²³ AS 14.07.020.

²⁴ AS 14.07.060.

²⁵ AS 14.07.085.

capacity, then appointed the board members.²⁶ After that appointment the legislature, again in its elected capacity, consented to those appointments. Therefore, the board is working under the authority determined appropriate by elected officials.

E. Concerns that the Proposed Regulation is Unnecessary or too Broad to Accomplish its Objective

Fifth, some commenters raised the question of whether the proposed regulation is unnecessary or too broad and that alternatives, such as height or weight rules, could be used to ensure safety and fair competition in sports. The board reviewed and considered this concern and concluded that the adopted regulation is necessary to ensure fair competition and safety concerns and that other narrower alternatives could not accomplish the same goal.

As noted above, the board has already narrowed the language of the proposed regulation from the original version to limit its impact to apply only to high school students in competitive or contact sports. This language is consistent with AS 14.18.040 and in alignment with the proposed Title IX regulations.

In addition, the board believed that alternative restrictions on height and weight would not address all of the purposes of the regulation. Individuals born female could still be displaced and discriminated against in favor of those born male if the regulation contained height and weight restrictions rather than the proposed language.

F. Concerns that the Regulation is Based on Stereotypes instead of Science

Some commenters stated that there is no scientific consensus on how transgender athletes perform compared cisgender athletes or that transgender females who are prepubescent, taking puberty blockers or receiving hormone therapy would have no physical advantage over cisgender females. Other commenters cite to the results of specific athletic competitions and to anatomical differences between males and females.

The board reviewed and considered the public comments raising this issue and reviewed scientific studies cited in public comments and we concluded that the proposed regulation is supported by science and not based on stereotypes.

²⁶

Id.

As an initial matter, the regulation is consistent with state law allowing separate teams for each sex which itself is a recognition of biological differences between males and females. It is also consistent with the current Title IX regulations that authorize separate sports teams for each sex, as long as selection for such teams is based upon competitive skill or the activity involved is a contact sport.²⁷ Additionally, the proposed new Title IX regulations also recognize those differences in allowing for some limitations on transgender student athletes, based on age and education levels and the nature of the sports league. Next, the board reviewed specific areas of scientific study in its determination that the regulation is supported by science.

1. Scientific Studies Provide Evidence of Sex Differences in Athletic Performances

The board discussed and reviewed biological differences between the sexes, as shown in scientific studies, the results of athletic competitions and the modifications between male and female competitions in particular sports.

First, one board member discussed a 2018 study on circulating testosterone as the hormonal basis of sex differences in athletic performance.²⁸ The study found that from male puberty onward, the sex difference in athletic performance emerges as circulating concentrations of testosterone rise. After male puberty, the testes produce 30 times more testosterone than before puberty, resulting in men having 15 to 20-fold greater circulating testosterone than children or women at any age.²⁹

The study stated,

²⁷ 34 CFR §106.41(b) (“Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”)

²⁸ Handelsman, David J et al. *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*. ENDOCRINE REVIEWS vol. 39,5 (2018): 803-829. doi:10.1210/er.2018-00020

²⁹ *Id.* at 811.

The striking male postpubertal increase in circulating testosterone provides a major, ongoing, cumulative and durable physical advantage in sporting contests by creating larger and stronger bones, greater muscle mass and strength, higher circulating hemoglobin as well as possible behavioral differences. In concert, these render women, on average, unable to compete effectively against men in power-based or endurance-based sports.³⁰

The authors of the study noted that muscle mass is the most obvious driver of male athletic advantage, since on average women have 50% to 60% of men's upper arm muscle, 65% to 70% of men's thigh muscle and 60% to 80% of men's leg strength.³¹

In addition to differences in muscle mass, the study addresses that men and boys have distinct athletic advantages in bone size, strength, and configuration. "On the average, men are 7-8% taller than women with longer, denser and stronger bones. The major effects of men's larger and stronger bones would be manifest via their taller stature as well as the larger fulcrum with greater leverage for muscular limb power exerted in jumping, throwing, or other explosive power activities."³²

Another study found that "male and female athletes perform almost equally in running and jumping events up to the age of 12. Beyond this age, males outperform females."³³ The proposed regulation preserves the opportunities for individuals born female by eliminating the unfair competitive advantages of individuals born male. In addition, the regulation recognizes that the male unfair competitive advantage becomes pronounced at the age of 12 and above, which is why the regulation only applies to high school students. This unfair competitive advantage in athletic performance in most sports is the basis for the commonly accepted division of athletic competition in male and female categories.

³⁰ *Id.* at 805.

³¹ *Id.* at 812.

³² *Id.* at 818.

³³ Tønnessen E, Svendsen IS, Olsen IC, Guttormsen A, Haugen T (2015) *Performance Development in Adolescent Track and Field Athletes According to Age, Sex and Sport Discipline*. PLOS ONE 10(6): e0129014, <https://doi.org/10.1371/journal.pone.0129014>, at p. 7-8. (Last visited September 12, 2023)

Second, biological differences between born-male and born-female athletes are shown in the results of athletic competitions, which illustrates a wide disparity among the top female and top male athletes in high school athletics. Board members cited several examples to illustrate this point.³⁴ One example is Olympic gold medalist Lydia Jacoby's best time in the girls' 100-meter breaststroke, which is almost four seconds slower than the Alaska state high school record for boys' 100-meter breaststroke.³⁵

These athletic competition results exemplify the physiological differences between biological males and females and support the historical separation of the sexes for athletic competitions.

Third, biological differences between the sexes are also the basis for modifications between female competitions and male competitions in particular sports. For example, different organizations governing sports at all levels (but particularly at high school and above) provide shorter net heights for female volleyball, smaller size and lighter weight for basketballs for females, shorter distances for female track and field, golf, baseball/softball among other modifications. These modifications are based on physiological differences between males and females.

For example, ASAA follows the National Federation of High School Sports for many high school sports, including track and field. The NFHS provides different specifications for male and female hurdles, including race length, hurdle heights, distance to first hurdle, distance between hurdles and distance from last hurdle to finish. In all categories the male distances are longer and hurdle heights are higher.³⁶

The scientific studies addressed above detail physiological differences between individuals born male and female, which are borne out in the results of athletic competitions and which account for different specifications for male athletic competitions versus female athletic competitions. The board addresses below how hormone therapy affects these physiological differences.

³⁴ See August 31, 2023 recording of State Board of Education meeting at 0021:46.

³⁵ Alaska Swim & Dive State Performances, ASAA, <http://asaa.org/wp-content/uploads/archive/records/swim-dive/Alaska-Swim-Dive-State-Performances.pdf>, (last visited September 12, 2023).

³⁶ USATF Officials Best Practices, Hurdle Heights and Placement, <https://www.nfhs.org/media/6892931/rule-comparison-document-final.pdf> (last visited September 12, 2023).

2. Research demonstrates that administration of testosterone suppression or estrogen therapy does not eliminate the physical advantages males have over females in athletics.

Board members cited to studies finding that testosterone suppression treatment does not eliminate the physical advantages those born male have over those born female in athletics. One study reviewed longitudinal data examining the effects of testosterone suppression on muscle mass and strength in transgender women who had undergone a 12-month testosterone suppression treatment. The authors found very modest changes in these individuals—only a 5% loss of lean body mass, muscle area, and strength.³⁷ The study concluded that “[m]uscular advantage enjoyed by the transgender women is only minimally reduced when testosterone is suppressed.”³⁸

Another study referenced by a board member titled, “Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology,” considered how prenatal and postnatal testosterone and estrogen therapy affects elite transgender athletes. The physiological difference between the sexes includes athletic performance advantages, such as increased muscle mass and strength, stronger bones, different skeletal structure, better adapted cardiorespiratory systems, and early developmental effects on brain networks.³⁹

The author of the study stated that testosterone secreted before birth, postnatally, and then after puberty is the major factor that drives these physiological sex differences.⁴⁰ This study also found that male physiology cannot be reformatted by estrogen therapy in transwoman athletes because testosterone has driven permanent effects through early life exposure.⁴¹ Findings show estrogen therapy can affect some anatomical structures but

³⁷ Hilton, Emma N, and Tommy R Lundberg. *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, SPORTS MEDICINE (Auckland, N.Z.) vol. 51,2 (2021): 199-214, at 205, Doi:10.1007/s40279-020-01389-3, <https://pubmed.ncbi.nlm.nih.gov/33289906/> (last visited Sept. 12, 2023).

³⁸ *Id.* at 205-206.

³⁹ Heather, Alison K., *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, INTERNATIONAL JOURNAL ENVIRONMENTAL RESEARCH & PUBLIC HEALTH, 2022, at 1, 3, <https://pubmed.ncbi.nlm.nih.gov/35897465/> (last visited Sept. 12, 2023).

⁴⁰ *See id.* at 3-5.

⁴¹ *See id.* at 5-6.

fails to create a female-like physiology in a transgender female elite athlete.⁴² The author concluded:

Given that sports are currently segregated into male and female divisions because of superior male athletic performance, and that estrogen therapy will not reverse most athletic performance parameters, it follows that transgender women will enter the female division with an inherent advantage because of their prior male physiology.⁴³

These scientific studies support the board’s decision to adopt the regulation amendment providing that for high school level competitive or contact sports “if a separate high school athletics team is established for female students, participation shall be limited to females who were assigned female at birth.” The studies confirm that individuals born male retain competitive advantages over individuals born female, even if they undergo hormone therapy or testosterone suppression. The regulation acknowledges that competitive advantage and promotes fairness and equal opportunity for female students by limiting female sports to those who do not have an unfair competitive advantage.

G. Intersex Individuals

The seventh and last major issue raised in public comments is about whether the regulation treats intersex individuals fairly. The board has reviewed and considered this concern and conclude that the proposed regulation treats intersex individuals fairly.

Under the existing regulation, ASAA must provide a fair procedure for challenging the interpretation or application of a rule.⁴⁴ In other words, intersex individuals can challenge the implementation of the regulation if they feel they have been inappropriately categorized. The regulation also provides an appeal process for application of ASAA bylaws.⁴⁵ Intersex individuals could also work with their member school district on student eligibility questions.

The director of ASAA and Commissioner of Education both stated on the record that ASAA relies on school districts to follow ASAA requirements like age eligibility,

⁴² See *id.* at p. 6-7.

⁴³ *Id.* at p. 8.

⁴⁴ 4 AAC 06.115(b)(3).

⁴⁵ 4 AAC 06.115(c).

grade point average requirements and the prohibition of substance use.⁴⁶ Director Strickland stated that ASAA intends to tell schools that they need to have a student's birth certificate confirming with the parent that it shows their sex assigned at birth.⁴⁷ Intersex individuals would have the opportunity to work with their member schools and their parents to report their gender and if an individual disagreed with any ASAA determination it would have two levels of appeal to challenge that determination.

III. General Considerations

In addition to considering the major issues raised in public comment, the board also discussed and considered the history of transgender female participation in Alaska high school athletics and in other states, and considered how transgender students may be affirmatively accommodated under the regulation.

First, a board member reviewed and discussed specific instances of transgender female students displacing biological female students in athletic competitions. Board members noted limited instances in Alaska, but specifically discussed a transgender female athlete from Haines, Alaska who competed in a 2016 Alaska state track and field meet, capturing third place in the 200-meter dash and fifth in the 100-meter dash, displacing biological females who would have qualified and placed.⁴⁸

A board member also recounted examples of two transgender female athletes in Connecticut taking 15 state championships in track and field, displacing several biological female athletes.⁴⁹ The board discussed similar examples of displacement occurring in California and North Carolina.⁵⁰

Second, the board discussed and considered how transgender students may be affirmatively accommodated under the regulation. For example, one board member stated

⁴⁶ See August 31, 2023 recording of State Board of Education meeting, Commissioner Bishop at 1:11:49, Director Strickland at 01:11:44, https://education.alaska.gov/State_Board.

⁴⁷ *Id.* at 00:48:19.

⁴⁸ Beth Bragg, *At Alaska state track meet, a transgender athlete makes her mark*, ANCHORAGE DAILY NEWS, <https://www.adn.com/sports/2016/05/27/at-alaska-state-track-meet-a-transgender-athlete-makes-her-mark/> (last visited Sept. 12, 2023).

⁴⁹ See August 31, 2023 recording at 01:13:44, https://education.alaska.gov/State_Board.

⁵⁰ See *Id.* at 01:15:10.

that we don't want anyone to be excluded from participation in extracurricular activities.⁵¹ She then asked ASAA Director Strickland, "[w]ill ASAA support schools in creating a third open league to make it possible for everyone to participate. And how do you see that happening and coming together?"⁵² Director Strickland responded that if the proposed bylaw were to pass, we would say that in divisions that are separated based on sex, one team would be limited to females who were assigned female at birth and the other team would be open to either sex. He further explained that if a transgender female would be playing in the nonlimited division they could do so as they identify.⁵³ For example, ASAA would have a girls basketball division and another division they would simply refer to as basketball.⁵⁴

CONCLUSION

The board reviewed and considered extensive input on this regulation, including public comments from a large number of Alaskans as well as legislators, educational organizations and other interested individuals and considered numerous scientific studies and reports. The board held multiple public hearings and postponed its decision to further review extensive public comments and cited sources. The board considered advice from legal counsel and reviewed relevant federal law and state law cited as authority for the regulation. Finally, the board considered its role and DEED's general role and authority in regard to students in Alaska. After taking all of the above into consideration, the board voted to adopt the amendments to 4 AAC 06.115.

Approved this 21 day of September, 2023.

State Board of Education

By: 
James K. Fields, Chair
REAA Representative

⁵¹ See *Id* at: 00:48:56.

⁵² See *Id* at: 00:49:15.

⁵³ See *Id* at: 00:49:39.

⁵⁴ See *Id* at: 00:51:33.