



October 27, 2015

Dear Superintendent:

I am writing in regards to multiple recent media stories which describe the Nebraska School Activities Association's plans to draft a policy on the participation of transgender students in athletics.<sup>1</sup> Additionally, our office has received intakes from transgender students and/or their parents in the last year regarding other important legal and policy issues they face in educational settings. As such, we wanted to share the following legal and policy resources with you for your consideration. We recently provided similar information to the NSAA. We encourage each school district to consider establishing inclusive policies that respect the gender identity of each student in order to ensure all students have a safe, supportive, and appropriate framework for their educational and extracurricular activities.

As a threshold matter it is critical that all parties utilize legally appropriate and respectful language when working on this issue. "Gender identity" is commonly defined as a person's deeply held sense or psychological knowledge of their own gender. The term "transgender" describes people whose gender identity is different from the sex they were assigned at birth. Medical opinion is unequivocal that gender identity is not a choice. Many people have and express a clearly established gender identity while in school or even before they reach school age.<sup>2</sup>

It is critical that when you consider these issues your policies are anchored in respect for the clear legal rights of all students. Such an approach will not only support and respect the rights of all students but can also minimize the potential

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<sup>1</sup> [http://journalstar.com/news/state-and-regional/nebraska/nsaa-drafting-policy-on-participation-of-transgender-students-in-sports/article\\_875642c6-e7fd-5439-8ae7-ecc7b7512e20.html](http://journalstar.com/news/state-and-regional/nebraska/nsaa-drafting-policy-on-participation-of-transgender-students-in-sports/article_875642c6-e7fd-5439-8ae7-ecc7b7512e20.html) and [http://journalstar.com/news/local/education/nsaa-still-working-on-policy-on-transgender-students-participation-in/article\\_73e96111-8b74-5b2c-9ddf-77a794339bb9.html](http://journalstar.com/news/local/education/nsaa-still-working-on-policy-on-transgender-students-participation-in/article_73e96111-8b74-5b2c-9ddf-77a794339bb9.html)

<sup>2</sup> See World Prof'l Ass'n for Transgender Health ("WPATH"), *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* at 1 (June 17, 2008), available at [http://www.wpath.org/uploaded\\_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf) (citing American Academy of Pediatrics).

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loss of federal funds and costly, embarrassing, and time intensive civil rights litigation that may arise if a school discriminates against transgender students.

### **OVERVIEW:**

We draw your attention to a recently released first-of-its-kind resource titled, "*Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools.*" This is an incredibly helpful and comprehensive guide intended for school administrations, teachers, and parents about how to provide safe and supportive environments for all transgender students. The report was produced in partnership by staffers from the ACLU, National Center for Lesbian Rights (NCLR), Gender Spectrum, the National Education Association (NEA), and the Human Rights Campaign (HRC).<sup>3</sup>

### **POLICY FRAMEWORK:**

Nebraska is one of only 15 states that has failed to pass a policy to address participation for transgender student athletes. There are many states with clear, long standing, inclusive policies that should serve as appropriate models for your consideration. Below please find a few examples from some of our sister states and a recent sound model developed locally at Bellevue Public Schools:

**Colorado:** The Colorado High School Activities Association permits student athletes to compete as the gender they self-identify: "in order to insure appropriate gender assignment for purposes of athletic eligibility, a transgender student-athlete's home school will perform a confidential evaluation to determine the gender assignment for the prospective student-athlete."<sup>4</sup>

**Minnesota:** The Minnesota High School Sports League permits student athletes to compete as the gender they self-identify with written confirmation by the parent/guardian.<sup>5</sup>

**South Dakota:** South Dakota High School Activities Association permits student athletes to participate in sports per the gender affirmed by their parent/guardian.<sup>6</sup>

**Wyoming:** The Wyoming High School Athletic Association permits student athletes to participate in sports per their expressed gender identity.<sup>7</sup>

**Bellevue Public Schools:** Bellevue Public Schools in Nebraska has recently adopted an appropriate policy to support transgender students and mitigate litigation risk and liability in a variety of related contexts such as restroom use, locker room use, and PE classes.<sup>8</sup>

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<sup>3</sup> <https://www.aclu.org/report/schools-transition>

<sup>4</sup> <http://www2.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf>

<sup>5</sup> <http://www.mshsl.org/mshsl/ParticipationInMSHSLActivities.pdf>

<sup>6</sup> <http://www.sdhsaa.com/portals/0/pdfs/handbook/athletics/6-generalsportsinformation.pdf> (page 7)

<sup>7</sup> <http://www.whsaa.org/handbook/Handbook.pdf> (page 39)

<sup>8</sup> [http://www.bellevuepublicschools.org/vimages/shared/vnews/stories/50a50390760f3/Transgender\\_Students\\_511R.pdf](http://www.bellevuepublicschools.org/vimages/shared/vnews/stories/50a50390760f3/Transgender_Students_511R.pdf)



## LEGAL FRAMEWORK:

The Equal Protection Clause of the US Constitution and Title IX both prohibit discrimination based on gender or gender stereotyping. Treating someone differently because of their gender identity is illegal under the Department of Justice’s interpretation of the Constitution and federal law. Therefore, denying a student access to sports activities based on their gender identity may result in litigation.

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in any education program, such as a public school, that receives federal financial assistance. 20 U.S.C. § 1681(a). Federal courts have made clear that Title IX protects students from discrimination based on gender identity, gender nonconformity, or transgender status. *See, e.g., Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

Schools who attempted to prevent a student from using a restroom in accordance with their gender identity have been found liable in court cases all across the country.<sup>9</sup>

The U.S. Department of Education’s Office for Civil Rights (“OCR”), which enforces Title IX, published recent guidance making explicit that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity and femininity” and indicating that it would accept such complaints for investigation and resolution.<sup>10</sup>

OCR and the U.S. Department of Justice have entered into binding settlement agreements requiring school districts to allow transgender students to use restrooms and other sex-segregated facilities that correspond to their gender identity instead of separate individual restrooms – just like other boys and girls.<sup>11</sup>

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<sup>9</sup> *See, e.g., Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 10 (Colo. Div. of Civil Rights June 17, 2013), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (school district discriminated against transgender girl based on her sex by not allowing her to use the girls’ restroom); *see also Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013) (in Title VII employment discrimination case, allegation that employer repeatedly denied transgender female employee access to the women’s restroom could establish a claim of sex discrimination); *cf. Doe v. Regional Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (denying transgender girl use of the girls’ restroom at her school violated state’s Human Rights Act).

<sup>10</sup> U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* at 5 (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>11</sup> Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>; Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 3 (July 24, 2013), available at <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

We believe this same body of law will provide supportive precedent in any sports-related lawsuits brought by transgender student athletes if an inappropriate policy is established and implemented.

**CONCLUSION:**

While the NSAA works on their policy, we recommend you consider this information for policy development as appropriate within your own school district to protect the rights of transgender students. Please contact us at your convenience if we may be of any further assistance. Thank you for your time and consideration.



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