



October 27, 2015

Nebraska School Activities Association
Board of Directors
500 Charleston St.
Lincoln NE 68508

Dear Members of the Board:

I am writing in regards to multiple recent media stories which describe your plans to draft a policy on the participation of transgender students in athletics.¹ We commend your decision to re-visit this important policy matter. As such, we have compiled a variety of helpful legal and policy resources to guide your deliberations.

We look forward to working with you and other interested parties to ensure an appropriate policy that will ensure all students who wish to participate in athletics can do so within a safe, supportive, and appropriate policy framework that respects the gender identity of each student. It is critical that you adopt a policy anchored in respect for the clear legal rights of all students. Such a policy will foster meaningful participation in athletics for all students, and will provide critical guidance to school districts to help minimize the potential loss of federal funds and costly, embarrassing, and time intensive civil rights litigation that may arise if this body or 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 includes specific sections on the very topics before you regarding participation in sports, extracurricular activities and related issues. The report was produced in partnership by staffers from the ACLU, National Center for Lesbian Rights

¹ 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

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(NCLR), Gender Spectrum, the National Education Association (NEA), and the Human Rights Campaign (HRC).²

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.³

“Guiding Principles” delineated in *Schools in Transitions* note that, “The expression of transgender identity, or any other form of gender expansive behavior, is a healthy, appropriate and typical aspect of human development. A gender-expansive student should never be asked, encouraged or required to affirm a gender identity or to express their gender in a manner that is not consistent with their self-identification or expression. Any such attempts or requests are unethical and will likely cause significant emotional harm. It is irrelevant whether a person’s objection to a student’s identity or expression is based on sincerely held religious beliefs or the belief that the student lacks capacity or ability to assert their gender identity or expression (e.g., due to age, developmental disability or intellectual disability).”⁴

SCHOOL ATHLETICS ARE A PART OF THE SCHOOL EXPERIENCE:

Athletics and participation in extracurricular activities are an integral part of the school experience—they can lead to building self-confidence, increase both physical and mental health, create lasting friendships, and open a pathway to possible college scholarships. As such, ensuring access for all students based on their gender identity should be the goal for all schools. As the National Federation of State High School Associations has said, “Participation in high school sports is recognized as an important aspect of developing positive self-esteem and a connection to school and community as well as a deterrent to the use of alcohol, drugs, tobacco or other unhealthy activities. Ensuring that all students, including transgender students, have the opportunity to participate in a wide variety of school sports experiences complements the academic mission of schools.”⁵

² <https://www.aclu.org/report/schools-transition>

³ 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 (citing American Academy of Pediatrics).

⁴ Page 3 <https://www.aclu.org/report/schools-transition>

⁵ “Developing Policies for Transgender Students on High School Teams,” September 8, 2015. <https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams/>

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 from 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."⁶

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.⁷

South Dakota: South Dakota High School Activities Association permits student athletes to participate in sports per the gender affirmed by their parent/guardian.⁸

Wyoming: The Wyoming High School Athletic Association permits student athletes to participate in sports per their expressed gender identity.⁹

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.¹⁰

Many of states have had inclusive transgender policies in place for quite a while, and their experience is helpful for Nebraska. For example, earlier this year Media Matters did a survey of officials at the largest school districts in 12 states with protection for transgender students. Not a single district reported "any incidences of harassment or inappropriate behavior" as a result of "allowing transgender students to access facilities they're comfortable with."¹¹

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.

⁶ <http://www2.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf>

⁷ <http://www.mshsl.org/mshsl/ParticipationInMSHSLActivities.pdf>

⁸ <http://www.sdhsaa.com/portals/0/pdfs/handbook/athletics/6-generalsportsinformation.pdf> (page 7)

⁹ <http://www.whsaa.org/handbook/Handbook.pdf> (page 39)

¹⁰ http://www.bellevuepublicschools.org/vimages/shared/vnews/stories/50a50390760f3/Transgender_Students_511R.pdf

¹¹ Page 24 <https://www.aclu.org/report/schools-transition>

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.¹²

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.¹³

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.¹⁴ We believe this same body of law will be provide supportive precedent in any sports – related lawsuits brought by transgender student athletes if an inappropriate policy is established and implemented.

¹² *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 (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).

¹³ 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>.

¹⁴ 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>.

CONCLUSION:

Again, we commend the NSAA for their work reviewing this important issue. 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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cc: Jim Tenipoir, NSAA Executive Director