



January 11, 2016

Dr. Jim Tenopir
Nebraska School Activities Association
500 Charleston St.
Lincoln NE 68508

Dear Dr. Tenopir and NSAA Board of Directors:

I write in response to the draft Gender Participation policy currently under review by NSAA. As we have previously outlined, we believe the law requires much broader inclusion of transgender athletes than this draft would permit.

We are disappointed that Nebraska is moving in a direction that will expose NSAA and individual school districts to liability and the possible loss of federal funding. The current proposal does not meet clear federal guidance nor recent federal court rulings.

We will not repeat the legal authority holding that full equal treatment of transgender people is required under Title IX, but we will refer you to our previous correspondence. I will note, however, that you appear to be placing reliance on several outlier cases in your footnote 5. Those cases from Pennsylvania and Virginia should not be considered a safe harbor for NSAA's plan to restrict transgender student participation. The Pennsylvania case is a single trial court judge's opinion and in the university setting. The Virginia case is still on active appeal with the Department of Justice's participation on behalf of the student. Both are from other circuits and are not binding on Nebraska.

There are many aspects of this draft policy that are inappropriate, diverge from best practices, and are unduly invasive into transgender students' rights. Briefly, we suggest the following problems be addressed:

- The draft offers no explanation how the Gender Identity Eligibility Committee will intersect with the clear privacy rights of students under state and federal laws such as FERPA and Neb. Rev. Stat. 79-2,104. (Section "Gender Identity Eligibility Committee")
- The one year wait period for male-to-female students (but not female-to-male students) is the sort of bright line gender discrimination Title IX was designed to eliminate. (Section on "Review Criteria")
- Physiological testing of bone structure and muscle mass has no standards or benchmarks; if a student has better muscle mass than 1% of her peer group, is that too much? (Section on "Review Criteria")

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA
FOUNDATION

134 S. 13TH ST. #1010
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

LEGAL HELP LINE
1.855.557.ACLU (2258)

www.aclunebraska.org

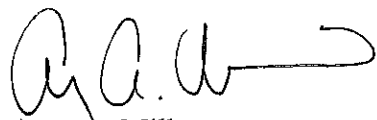
- The committee will receive "regular reports"--the frequency and content of the report is not defined. (Section "Further Policies")
- Training of the Appeals Committee is referenced without indicating who will conduct that training. (Section "Appeals Process")
- Costs of the Transgender Student Application and Appeals are mentioned without explanation of the scope of what costs are involved.
- Use of bathrooms per birth sex directly flouts clear federal law that directs students may use the bathroom of their gender identity.²
- Use of bathrooms shall be "as appropriate and available"--what if the location has no separate private bathroom or locker room?

But there is one provision that will essentially forbid all participation by transgender students that must be reworked: requiring an amended birth certificate.

We found a confusing contradiction within the policy regarding whether a transgender athlete must have changed his or her birth certificate. Section C and footnote 1 seem to require the student to have a reissued birth certificate. Section D 2 (a), in contrast, seems to assume that transgender athletes will not have a new birth certificate and proceeds to assume in such a situation the student may still participate if they meet the Gender Identity Committee's standards.

We suggest that your final version of the policy strike references to birth certificate as the decisive factor and return to the best practices outlined in our previous correspondence where students will be permitted to participate per their gender identity as established by their parent and physician. In the alternative, maintaining the Gender Identity Committee structure for an individualized assessment without the birth certificate requirement probably meets bare minimum legal standards.

As you know, medical experts do not recommend younger transgender people for surgery. If your intent is that an athlete must have a new birth certificate, you will have passed a sweeping prohibition of all transgender athletes which is likely to be met with intense disfavor by a reviewing court.



Amy A. Miller
Legal Director

² See, e.g., *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 10 (Colo. Div. of Civil Rights June 17, 2013), (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).