



June 14, 2017

Dear Superintendent:

The ACLU of Nebraska is a non-profit, non-partisan organization dedicated to promoting, protecting, and preserving civil rights and civil liberties guaranteed to all Nebraskans by the United States and Nebraska Constitutions. Among these liberties is the right of students to a public school education free from unlawful harassment and the right to have equal access to school facilities.

We are writing to every school district today because we have heard questions raised about the current state of the law for transgender students under the new federal administration. We correspond with you today to provide you with concrete law that has *not* changed despite changes in the political climate.

These issues impact real Nebraska kids and their families. Our office has received intakes from students and their parents with issues like those discussed at the recent Transgender Students Rights rally in Lincoln: “Sometimes Quinn Tolzin, 14, has to wait half an hour to use the restroom at school. The eighth-grade student said because there aren't restrooms for gender nonconforming students, she must go to the nurse's office. Alex Yindrick, a gender queer high school senior, said they have no place to change clothes for gym class, either. They also resort to the nurse's office, where it's sometimes necessary to wait behind students being checked out for injuries or illness.”¹

According to the most recent GLSEN National School Climate Survey, LGBT (lesbian, gay, bisexual or transgender) students in schools with a GSA or a comprehensive anti-bullying policy experienced lower levels of anti-LGBT victimization. Also, LGBT students with an LGBT-inclusive curriculum were more likely to report that their classmates were somewhat or very accepting of LGBT students (76 percent vs. 42 percent). The survey also found that transgender and gender-nonconforming students had particularly hostile experiences.²

Transgender students simply want the opportunity to fully participate in their schools, get a quality education, make friendships, and eventually graduate. State and federal law requires that those opportunities be available, but more than that, supporting

¹ http://journalstar.com/news/local/rally-gives-transgender-and-lgbtq-community-hope/article_e24fbb07-62ef-5721-b200-d72d68fa6e16.html

² <https://www.glsen.org/article/lgbtq-secondary-students-still-face-hostility-school-considerable-improvements-show-progress>

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transgender students means more students are likely to graduate, go onto higher education and ultimately contribute to our communities.

FEDERAL LAWS: Public school students are protected by federal law from discrimination or harassment based on gender, race, color, religion, sex, national origin, or disability. *See, e.g.*, Titles IV and VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation of 1973, Titles II and III of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act.

While the new administration has withdrawn their support of transgender students' right to access appropriate bathrooms (discussed further below), the Department of Justice and Education has remained steadfast in requiring efforts to stop bullying. Their "Dear Colleague" letter stated "Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all student, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection."³

STATE LAWS: The right to a public school education is guaranteed by the Nebraska State Constitution for all persons between the age of 5 and 21 years. Article VII-1.

Our state legislature has taken a firm stance against bullying. The state law provides "Bullying disrupts a school's ability to educate students; and bullying threatens public safety by creating an atmosphere in which such behavior can escalate into violence." Neb. Rev. Stat. 79-2,137.

State law also specifically prohibits discrimination by schools on the basis of sex, including making it illegal to exclude a person from "any academic, extracurricular, research, occupational training, or other program or activity, except athletic programs," on the basis of sex. Neb. Rev. Stat. 79-2,116.

COURT DECISIONS: In addition to these state and federal laws, courts repeatedly have found that schools must intervene and help a student who is being bullied or harassed. Failure to protect a student who is accessing his or her constitutional right

³ Dear Colleague letter dated February 22, 2017, available online: <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>

to attend school has resulted in liability for school officials. See, e.g. *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1134-35 (9th Cir. 2003). School officials must take seriously the claims of harassment and fully and effectively resolve them. See *Flores* at 1135-36 (“Failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference.”). Schools that have failed to do so have had to pay hundreds of thousands of dollars in damages.

In addition to these cases requiring a school to intervene in bullying, there remains a long list of court decisions that have required schools to provide a transgender student with a restroom in accordance with their gender identity.⁴ As one federal judge wrote in her ruling permitting a transgender student to use the correct bathroom in Wisconsin, “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”⁵

We know it can be confusing when some cases are still on appeal—most notably, the U.S. Supreme Court remanded the case of ACLU client Gavin Grimm to the 4th Circuit Court of Appeals earlier this year. That remand doesn’t change the fact that the 4th Circuit ruled in favor of Gavin’s right to use male bathrooms since he identifies as male, and that ruling stands as good law. And while the change in administration means the U.S. Department of Education’s guidance may be uncertain, the state and federal statutes and court decision cited above have not changed at all.

⁴ 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). Title IX has been the basis of court rulings in favor of transgender students all across the country. 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).

⁵ *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017), available at <https://transgenderlawcenter.org/archives/13892>

CONCLUSION: We have charged the educators in our country not only with teaching our children, but with protecting them while they learn. Parents trust teachers and all school staff to stand watch over our children where we cannot. The possibility that any educator would protect or promote the happiness, safety, or education of one child over another, especially for discriminatory reasons, is an affront to the laws and morals of this nation.

There are many excellent free resources to help school administrators and teachers learn more about how to support their students who are transgender. You can find “Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools” online here: <https://www.aclu.org/report/schools-transition>

Many more frequently asked questions, model policies and training toolkit are available from Gender Spectrum:

<https://www.genderspectrum.org/resources/education-2/#more-424>

In Nebraska, you also have the example set by the Bellevue School District to proactively address the rights of transgender students with their comprehensive policies.⁶ We urge you to share this information with faculty and staff and ensure that all are ready to guarantee an educational environment that is healthy and protective of all students and fosters respect for all students and staff of every race, ethnic origin, religion, gender, sexual orientation, gender identity and all other characteristics.

Please let us know if you believe we may assist you in this endeavor in any way.



Amy A. Miller
Legal Director

cc: Nebraska State Board of the Department of Education
Nebraska School Boards Association
Nebraska Association of School Administrators

⁶https://www.bellevuepublicschools.org/vimages/shared/vnews/stories/50a50390760f3/Transgender_Students_511R.pdf