Student Gender Issues Update
Administrator Days - 2016

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Student Gender Issues Update

• “Transgender” is a relatively new word in our vernacular, particularly as it relates to students attending Nebraska public schools. Surprisingly, over the past few years, issues related to transgender students have arisen throughout the state.

Student Gender Issues Update

• The issues thus far have been related to participation in music, drama and speech, but likely soon will involve athletics.
• As public schools, we must (and do) educate children as we find them, or as many schools state as their purpose, “Every Student, Every Day.”
Student Gender Issues Update

• This session will discuss the most recent events and current case law regarding transgender students, and provide discussion of approaches for school administrators in addressing the myriad of issues presented for the individual student and their classmates.

Student Gender Issues Update

• **Recent events:**
  – January 2016: Nebraska School Activities Association – Board of Directors approves “Gender Participation” policy.
    • Restroom/locker room access based upon anatomical sex.
  – April 2016:
    • 4th Circuit Court of Appeals decision in Virginia school case = transgender student access to restrooms.
Student Gender Issues Update

• Recent events:
  – May 2016:
    • OCR/DOJ “Dear Colleague” letter regarding restroom/locker room access and activity participation.
  – June 2016:
    • NFHS Meeting with OCR officials regarding application of May 13, 2016 Dear Colleague Letter.
    • OCR/DOJ settlement of Dorchester School District in South Carolina case.

• Recent events:
  – July 2016:
    • Nebraska Attorney General files law suit in the U.S. District Court for the District of Nebraska challenging the application of federal Title IX regulations:
      – Contrary to specific Nebraska schools law found at Neb. Rev. Stat. § 79-2,124.
      – Contrary to federal administrative procedures.
NSAA Policy - Purpose

• “Every student, every day!”

• Minimize discrimination (Title IX):
  – See *Clark v. Arizona Interscholastic Asso.*, 695 F.2d 1126, 1131 (9th Cir. Ariz. 1982).

• Student Safety:

NSAA Policy - Purpose

• “Every student, every day!”

• Competitive Equity:
  – Maintaining a “level playing field” is an inherent expectation at all levels of sport competition and a key value of the schools that are members of the NSAA. Maintaining such competitive equity in NSAA-sponsored activities is indispensable in:
    • Preserving Title IX protections for female activities.
    • Preserving protections of female athletic activities through the contact sport exclusion to Title IX.
NSAA Policy - Purpose

• “Every student, every day!”

• Personal Privacy:
  – Protecting the personal privacy of all student athletes participating in NSAA activities.

Contents of Gender Participation Policy

• Initial determination = sex on birth certificate
• Girls may participate on boys teams when there is no girls’ sport or comparable sport
• Boys are not allowed to play girls sports or on girls teams even when there is no corresponding boys sport
• Procedures for participation begin with student/parent requesting in writing ability for student to participate as transgender athlete.
Sequence of Policy Steps

- School then makes NSAA eligibility determination.
- School petitions NSAA for participation considerations if school deems they are OK with student participating.
- NSAA “Gender Identity Eligibility Committee” would be convened; costs borne locally, not by NSAA.
- Gender Identity Eligibility Committee comprised of physician, psychologist, NSAA staff, school administrator from non-appealing school.

Info Provided To Committee

- Current school registration information
- Written statement from student/parents affirming consistent gender identity/expression.
- Documentation from others to affirm actions, attitudes, dress demonstrating consistent gender identity.
- Written verification from appropriate healthcare professional of the student’s consistent gender identity.
Info Provided To Committee

- Medical documentation of hormonal therapy, reassignment surgery, counseling, and other medical or psychological interventions.
- Other relevant information or documentation from member school, student or parents.

Committee - Approval/ Disapproval

- For the Committee to approve the Transgender Student Application the information presented must establish to the members of the Committee that the transgender student has met each of the following criteria:
  - (a) That the transgender student affirms and exhibits the consistent gender identity and expression to which the student self-relates;
Committee - Approval/ Disapproval

– (b) That there has been submitted creditable documentation from individuals such as, but not limited to, parents, friends and/or teachers, affirming the actions, attitudes, dress and manner and demonstrate the student’s consistent gender identification and expression;

Committee - Approval/ Disapproval

– (c) That there has been submitted creditable written verification from an appropriate health-care professional (physician, psychologist) of the student’s consistent gender identification and expression; and,
Committee - Approval/Disapproval

– (d) For a transgender female (or Male-to-Female) (MTF) student only, that there has been submitted creditable medical documentation of hormonal therapy, sexual re-assignment surgery and physiological testing; . . .

Committee - Approval/Disapproval

– (d) such documentation must establish that:
  • the transgender female has either completed a minimum of one year of hormone treatment related to gender transition or undergone medically confirmed gender reassignment procedure, and,
  • demonstrated to the Committee through a medical examination and testing and physiological testing that the transgender female student athlete does not possess physical (bone structure, muscle mass, and/or testosterone hormonal levels, etc.) or physiological advantages over genetic females of the same age group.
ACLU Letter

• January 16, 2016 – ACLU letter from Amy Miller, Legal Director:
  – “[T]he Gender Identity Committee structure for an individualized assessment without the birth certificate requirement probably meets bare minimum legal standards.”

OCR/DOJ Dear Colleague Letter

• May 13, 2016 – OCR/DOJ Dear Colleague Letter, page 3:
  – “Athletics. Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport. A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students.”
OCR/DOJ Dear Colleague Letter

• May 13, 2016 – OCR/DOJ Dear Colleague Letter, page 3:
  – Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students’ participation on the competitive fairness or physical safety of the sport.”

Restroom/Locker Rooms

• NSAA Policy:
  – Policy to allow fair and equal participation, still maintaining privacy—for athlete and others.
  – Students have general expectation of privacy in restrooms and locker rooms.
  – A transgender student granted permission to participate and not had sex reassignment surgery shall at NSAA-sponsored events be permitted birth-sex restrooms and locker rooms, or assigned private facilities.
Restroom/Locker Rooms

• Case law in a state of flux – supporting case law:
  – Iowa Civil Rights Commission v. Burlington Area Community YMCA, (Administrative Decision) Iowa Department of Inspections and Appeals; Goins v. West Group, 635 N.W. 2d 717 (Minn. 2001).
  – Circuit Court of Cook County Illinois, No. 15, CH 12497, August 15, 2015, Circuit Court – 18.
  • “The District’ s decision making in this instance is arguably not based on [Student]’ s sexual orientation, but instead on his anatomical sex.”

• OCR/DOJ “Dear Colleague Letter (DCL) of May 13, 2016, page 3:
  – “Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.”
Restroom/Locker Rooms

– However, the DOJ/OCR recognize that notwithstanding the foregoing statement, it is appropriate for school to seek to “confirm” the student’s assertion of transgender status. The DOJ/OCR in the DCL incorporate “Examples of Policies and Emerging Practices for Supporting Transgender Students”.

– In those materials, at paragraph/item 2, they ask the question, “How do schools confirm a student’s gender identify?” In answering that question, they cite with approval the following:

• “Alaska’s Anchorage School District developed administrative guidelines (“Anchorage Administrative Guidelines”) noting that being transgender “involves more than a casual declaration of gender identity or expression” but does not require proof of a formal evaluation and diagnosis. Since individual circumstances, needs, programs, facilities and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis.”

– Thus, the DOJ/OCR allows that there is a measure of discernment involved in “confirming” that a student has a gender identity other than assigned at birth.
OCR/DOJ Enforcement

On June 2, 2016, representatives of the NFHS met with Seth Galanter and his staff with the US DOE/OCR to discuss the Dear Colleague letter dated May 13, 2016.

– Overarching Themes:
  1. The Dear Colleague letter should **not** be considered a notice that the US DOE/OCR is beginning a 50 state (plus DC) **transgender policy audit**.
  2. **Only complaints** about particular schools, state associations received by US DOE/OCR **would trigger action** (i.e. inquiry, investigation); thus, if no complaint is filed, no action would be taken by US DOE/OCR.

OCR/DOJ Enforcement

June 2, 2016, NFHS Meeting with OCR:

– Overarching Themes:
  3. If a complaint(s) are raised by a school/state, action will be immediate and direct by US DOE/OCR.
  4. The Dear Colleague letter was produced and distributed to give guidance and request voluntary compliance of OCR policy.
Current Case Law

- See the “Transgender Student Litigation” chart attached.
  - Student v. Arcadia (Cal.) Unified Sch. Dist., 2013.
  - Students and Parents for Privacy v. U.S. Dep’t of Educ., No. 16-4945 (N.D. Ill. Filed May 4, 2016).

Current Case Law

- Nebraska:
  - State of Nebraska; State of Arkansas, Arkansas Division of Youth Services; State of Kansas; Attorney General Bill Schuette, For The People of The State Of Michigan; State of Montana; State of North Dakota; State of Ohio; State of South Carolina; State of South Dakota; State of Wyoming, Plaintiffs v. United States of America; United States Department of Education; United States Department of Justice, et al., filed July 8, 2016.
NE Attorney General Suit

• “The State of Nebraska and nine additional States seek a declaration that the Department of Education (“ED”) has violated the Administrative Procedure Act and numerous other federal laws by rewriting the unambiguous term “sex” under Title VII and Title IX to include “gender identity,” thereby seeking to control even local school determinations regarding how best to designate locker room and bathroom assignments. Without engaging in any rulemaking procedures—and in violation of the plain text and longstanding meaning of Titles VII and IX—ED issued a joint letter with the Department of Justice (“DOJ”) on May 13, 2016, declaring “significant guidance.””

NE Attorney General Suit

• “The letter confirmed that the federal executive branch has formalized its new definition of the term “sex” and threatened enforcement action against any of the more than 100,000 elementary and secondary schools that receive federal funding if those schools choose to provide students with showers, locker rooms, and restrooms designated by biological sex, consistent with one’s genes and anatomy.”
NE Attorney General Suit

• “2. As Title IX has expressly permitted until now, Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: “The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes.”

NE Attorney General Suit

• “22. Nebraska law provides school districts with the flexibility to fashion policies which weigh the dignity, privacy, and safety concerns of all students, while accommodating the legitimate interests of individuals who self-identify as having a gender that is the opposite of their sex.”
NE Attorney General Suit

• IV. CLAIMS FOR RELIEF:

NE Attorney General Suit

• IV. CLAIMS FOR RELIEF:
Case-by-Case Approach

• So, what should Nebraska Public Schools be doing to meet its obligation of “every student, every day”?  
  – We advise a “case-by-case” approach to restroom access:
    • We advise that schools NOT adopt a policy or policies on restroom use by transgender students, and suggest the handling of such issues on a “case-by-case” basis considering the realities of student privacy and student safety issues in working with transgender students and their parents or guardian.

Case-by-Case Approach

– We advise a “case-by-case” and “balancing of interests” approach to locker room access:
  • Paramount in the consideration of issues related to restroom use (and locker room use – discussed below) are the privacy and safety of all students; and, there are divergent opinions on the nature and extent of these concerns.
  • Possibly adopt an administrative practice to apply a “factors/protocol” like that included in the NSAA Gender Participation Policy.
Case-by-Case Approach

• **Addressing the Matter at Board Meetings:**
  – Addressing the restroom/locker room issue can be an emotional issue, as illustrated by the firestorm it has caused in several states and before boards of education.
  – It can give rise to comments by board members and members of the public that can exacerbate the situation and harm the school district’s ability to defend a challenged policy.

• **Remind folks - “Every student, every day!”**
Case-by-Case Approach

Every Student, every day!

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