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(Another?!) Transgender Update

There have been a few significant developments since our last update on this topic. Let's cover them briefly, and then talk about practical next steps:

NSAA Policy Update. By now, you've all heard that the NSAA Board's gender participation policy will remain in effect after the district-initiated proposals failed this month. [Here's the policy](#). This will now be policy for NSAA activity eligibility indefinitely, and by design it will require some decisions by your board.

Federal Court Litigation Update. In [our most recent update on this topic](#), we covered the then-current federal court decisions in which a court held that a school could limit the use of its restrooms based on biological sex. The student in that case, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-54 (E.D.Va. Sept. 17, 2015), appealed the district court decision to the United States Court of Appeals for the Fourth Circuit. Yesterday the Court of Appeals issued an opinion, [found here](#), which reversed the initial court ruling.

The Fourth Circuit concluded that the district court "did not accord appropriate deference to the relevant Department of Education [interpretation of its own] regulations." *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Apr. 19, 2016). Translation: courts should listen to the DOE/OCR interpretation of their own regulations. In rendering its decision, the Fourth Circuit did not outright decide that G.G. should be permitted to use the restroom facility consistent with his gender identity. Rather, they sent the case back to the district court to determine whether G.G.'s claims are valid under this more deferential approach.

OCR Enforcement Action Update. There have also been several OCR investigations and enforcement actions to date regarding gender identity, facility use, and activity participation. One Illinois district debated withdrawing a settlement agreement with OCR, which would have left the OCR with the choice of filing a compliance lawsuit against the district. We had been tracking that case closely, but in December that district decided instead to continue its settlement with OCR rather than engage in litigation over the gender identity issues. To date, OCR has successfully “settled” these cases by asking districts to do things like provide facility use and activity participation for students based on gender identity.

What do these updates mean? These updates make one thing obvious: the law in this area remains unsettled, even as the enforcement position of the federal agencies remains perfectly clear. The newest opinion in the *G.G.* case from the Fourth Circuit is a big win for groups like OCR and the ACLU which have been arguing that Title IX and other laws protect individuals on the basis of their gender identity. It represents the first major court decision endorsing the OCR’s position regarding protections for transgender students.

What are the next steps for Nebraska boards of education? The NSAA Board’s gender participation policy requires local school boards to decide how they will handle activity participation requests from transgender students. Now that we know the NSAA policy will remain in effect indefinitely, we will be providing our KSB policy service and policy update subscribers with a series of policy options for addressing activity participation. However, the new *G.G.* case further complicates the questions not addressed in the NSAA policy, such as facility use, student records, and others.

To date, we have advised our clients to tread lightly on those other issues and handle situations on a case-by-case basis. We still firmly believe that a very prudent decision for boards is to move forward slowly and avoid making sweeping decisions which could subject the district to litigation no matter what policy they put in place. We think districts with updated sex discrimination policies are entitled to wait for further developments in the law. As we’ve said from the beginning, the law is changing quickly in this area as evidenced by *G.G.* However, at a minimum school boards will need to address activity participation via policy or directives to administration. Should your board elect to address issues like facility use at the same time, we want to make options available, and we plan to do so for KSB policy subscribers in the coming weeks.

One other note about the *G.G.* case to consider when discussing this at the board level: Many patrons in the *G.G.* case addressed the board when it was considering how to form policy around the issues of gender identity. Generally, that district’s patrons opposed allowing transgender students to

use the bathroom facility consistent with their gender identity. The board ultimately decided to adopt a policy which said students must use the facilities consistent with their sex at birth. To our surprise, the Fourth Circuit judges quoted the most unkind comments made by patrons to imply that the board had improper motivations in setting its policy.

The question of transgender rights is going to be the subject of discussions in a lot of settings in the months to come, including your board meetings. As board members and administrators, you do have the right to form your own personal opinions and you have First Amendment rights to free expression. However, as school attorneys we believe that our job in defending your board's policy decisions could be more difficult if administrators and board members make a lot of sweeping public pronouncements about this issue. We would prefer that board members and administrators keep their own counsel and refrain from making provocative statements about the issue of transgender student rights, even as parents, patrons, and others may have very strong viewpoints on either side of this issue. We certainly believe personal convictions can and should drive policy in your community; however, on this particular issue we believe your district will be in the best position to defend its policy actions if the discussion of these issues is focused on the legal questions.

If you have questions or concerns about these or any related issues or are interested in your board's policy options, we recommend that you consult with your school district's attorney or call Karen, Steve, or Bobby.