

Nebraska School Activities Association – Gender Participation Policy

The Nebraska School Activities Association (NSAA) has developed this policy to address the eligibility and participation of students in NSAA-sponsored athletics based upon gender.

A. Purpose: The NSAA has as one of its central purposes the fostering and maintenance of a level playing field for the students competing in the activity programs of member high schools. The NSAA’s rules-making process involves educators who are specialists in the field of fostering, promoting and caring for the safety and best interests of students, and assuring that students participating in school activities are provided a fair chance to participate in a manner that enhances their education. The principle of competitive equity and the maintenance of a level playing field, and the safety and preservation of the personal privacy interests of student athletes are basic values of schools, and our society as a whole, and is clearly a "substantial interest"¹ of activity associations. To such end, this Gender Participation Policy seeks to balance the important goals of:

- Equal Opportunity: Providing equal opportunities in all aspects of school programming for all students is a core value in education.
- Physical Safety of Student: Protecting the health and safety of all students by assuring that female students are protected from physical injury as a result of participation in activities with biological males or androgen-supplemented biological females who are generally stronger and faster than biological females²; and,
- 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;³ and,
 - Preserving protections of female athletic activities through the contact sport exclusion to Title IX.⁴
- Personal Privacy: Protecting the personal privacy of all student athletes

¹ See *Clark v. Arizona Interscholastic Asso.*, 695 F.2d 1126, 1131 (9th Cir. Ariz. 1982); citing *Petrie*, 75 Ill.App.3d at 989, 394 N.E.2d at 862 (Redressing past discrimination against women in athletics is a legitimate and important government interest); Neb. Rev. Stat. § 79-2,104; Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g; *Johnston v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41823, (U.S. Dist. Court, Western District of Penn.), March 31, 2015.

² See *Clark v. Arizona Interscholastic Asso.*, *Supra* at 1131; *Kahn v. Shevin*, 416 U.S. at 355, 94 S. Ct. at 1737, 40 L. Ed. 2d at 193; *Michael M. v. Sonoma County Superior Court*, 450 U.S. at 469, 101 S. Ct. at 1204, 67 L. Ed. 2d at 442; *Orr v. Orr*, 440 U.S. 268, 280-82, 99 S. Ct. 1102, 1112-13, 59 L. Ed. 2d 306, 319-21 (1979)(The court has recognized average real differences between the sexes).

³ ARTICLE: The Title IX Athletic Regulations and the Ideal of a Gender-free Society, 11 U. Denv. Sports & Ent. Law J. 3, 36. citing *O'Connor v. Board of Education*, 645 F.2d 578 (7th Cir. Ill. 1981).

⁴ *Springs Exempted Village School Dist. Bd. of Education v. Ohio High School Athletic Asso.*, 647 F.2d 651 (6th Cir. Ohio 1981).

participating in NSAA activities.⁵

B. Definitions: The following definitions apply to this policy:

1. “Gender” means the state of being male or female.
2. “Transgender” means having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.
 - a. Female-to-Male (FTM) transgender person means one who was born with a female body but who identifies as a boy or man.
 - b. Male-to-Female (MTF) transgender person means one who was born with a male body but who identifies as a girl or woman.
3. “Gender identity” means an innate sense of one’s own gender.
4. “Gender expression” means external appearance, characteristics or behaviors typically associated with a specific gender.

C. Gender Based Participation:

1. **Gender Eligibility:** A student’s gender for purposes of eligibility for NSAA-sponsored athletic activities shall be determined by the sex noted on the student’s birth certificate.⁶

2. **Cross-Gender Participation:** Girls may participate on boys’ teams when there is no girls sport or comparable sport (e.g., softball and baseball) or team offered in that sport by the member school. Boys are not allowed to play girls sports or on girls teams even when there is no corresponding boys sport.⁷

D. Transgender Student Participation: The NSAA Gender Participation Policy only addresses bona fide transgender students and does not alter the foregoing cross-gender participation rule.

⁵ See *Johnston v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41823, (U.S. Dist. Court, Western District of Penn.), March 31, 2015; and, *Grimm v. Gloucester County School Board*, 2015 U.S. Dist. LEXIS 124905 U.S. Dist. Court, Eastern District of Virginia), September 17, 2015.

⁶ Neb. Rev. Stat. § 71-604.01 (2005). “Upon receipt of a notarized affidavit from the physician that performed sex reassignment surgery on an individual born in this state and a certified copy of an order of a court of competent jurisdiction changing the name of such person, the Department of Health and Human Services Finance and Support shall prepare a new certificate of birth in the new name and sex of such person in substantially the same form as that used for other live births. The evidence from which the new certificate is prepared and the original certificate of birth shall be available for inspection only upon the order of a court of competent jurisdiction.” Note: World Professional Association for Transgender Health, “Standards of Care for the Health of Transsexual, Transgender, and Gender Non-Conforming People”, 2012 Edition, Chapter VI. *Assessment and Treatment of Children and Adolescents With Gender Dysphoria*, page 21, *Irreversible Interventions* – “Genital surgery should not be carried out until (i) patients reach the age of majority to give consent for medical procedures in a given country, and (ii) patients have lived continuously for at least 12 month in the gender role that is congruent with their gender identity. The age threshold should be seen as a minimum criterion and not an indication in and of itself for active intervention.”

⁷ *Saint v. Nebraska School Activities Association*, 684 F. Supp. 626 (1988), holding that the NSAA was restrained from refusing to permit female student from wrestling on boys’ wrestling team.

1. Privacy Statement: As stated under the “Purpose” section of this policy, it is a fundamental tenant of the NSAA to protect the personal privacy of all student athletes participating in NSAA activities. Pursuant to such Purpose, protecting the privacy of transgender student athletes must be a priority for all athletic departments and affiliated school personnel. Information regarding a student’s transgender status, legal name, or gender assignment at birth may constitute medical information. All medical information shall be kept confidential in accordance with applicable state, local and federal privacy laws. All discussions and documentation at each level of the process by the member school, Gender Identity Eligibility Committee and the NSAA shall be kept confidential unless the student and family make a specific request otherwise.

2. Procedures: The following procedures shall apply to participation by a transgender student in NSAA activities:

a. Notice to the School: The student and parent shall contact the member school administrator or athletic director, in writing, indicating that the student is a transgender individual, having a consistent gender identity different than the sex on the student’s birth certificate, and list the NSAA sport(s) in which the student would like to participate.

b. Member School Determination: The member school shall determine if the student meets the activity eligibility standards for participation established by the NSAA and whether the student meets the requirements of participation established by the member school.

c. Application for Participation to the NSAA: Upon receipt of notice from the transgender student and/or parent of a transgender student wishing to participate in interscholastic sports in a manner consistent with his/her gender identity, the member school, if the member school determines that the student meets the requirements for initial eligibility under standards of participation established by the member school, shall file an application for participation in NSAA activities by the transgender student (Transgender Student Application) on a form provided by the NSAA, providing the information required by this policy. The costs related to the Gender Identity Eligibility Committee shall be an NSAA expense.

d. Review and Required Approval by NSAA Gender Identity Eligibility Committee: Upon receipt of such notice the NSAA shall take the following actions:

(1) Gender Identity Eligibility Committee: The NSAA shall convene the Gender Identity Eligibility Committee (Committee) specifically trained to respond to gender identity eligibility inquiries to review the Transgender Student Application. The Committee shall make written findings and determinations approving or disapproving the Transgender Student Application to be set forth in writing and delivered confidentially to the member school and the Executive Director of the NSAA. The eligibility of the student

to participate in NSAA activities must be approved unanimously by the Committee considering the Transgender Student Application. This Committee will be comprised of the following persons:

- i. Physician with experience in transgender health care.
- ii. Psychiatrist, psychologist, or licensed mental health professional.
- iii. School administrator from a non-appealing school.
- iv. NSAA staff member.

(2) Information to be provided to the Committee: The following information shall be provided by the member school to the Committee with regard to the Transgender Student Application:

- i. Current school registration information;
- ii. A written statement from the student and parent(s)/guardian(s) affirming the consistent gender identity and expression to which the student self-relates;
- iii. 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;
- iv. Written verification from an appropriate health-care professional (physician, psychologist) of the student's consistent gender identification and expression;
- v. Medical documentation of hormonal therapy, sexual re-assignment surgery, physiological testing, counseling, and other medical or psychological interventions on behalf of the student.
- vi. Any other relevant documentation or information provided by the member school or the student or the student's parents or guardians.

(3) Review Criteria: The following review criteria should be used by the Committee to review and determine whether to approve or disapprove the Transgender Student Application:

- i. 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;

(b) That there has been submitted credible 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;

(c) That there has been submitted credible written verification from an appropriate health-care professional (physician, psychologist) of the student's consistent gender identification and expression; and,

(d) For a transgender female (or Male-to-Female) (MTF) student only, that there has been submitted credible medical documentation of hormonal therapy, sexual re-assignment surgery and physiological testing; such documentation must establish that the transgender female has either completed a minimum of one year of hormone treatment related to gender transition⁸ 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.

(4) Further Policies:

i. Hormone supplementation/suppression therapy under supervision of a licensed physician when taken as prescribed does not violate the NSAA Performance Enhancing Supplement policy.

ii. In any case where a transgender student athlete is taking hormone treatment related to gender transition, that treatment must be monitored by a physician, and the NSAA must receive regular reports about the athlete's eligibility according to these guidelines.

iii. Once a student is approved as a transgender student athlete in an NSAA sport(s), the student may not return to his/her gender identified on the birth certificate for athletics participation purposes unless another evaluation is undertaken by the NSAA Gender Identity Eligibility Committee because of a change in circumstances. A transgender female (Male-to-Female or MTF) student may participate on a boys' team pursuant to paragraph C.2. above [e.g. when there is no girls sport or comparable sport (e.g., softball and baseball) or team offered in that sport by the member school]. A transgender male (Female-to-Male or FTM) student who has been approved for participation on male teams under this policy shall not be eligible for participation on female teams pursuant to paragraph C.2. above.

⁸ See, World Professional Association for Transgender Health, "Standards of Care for the Health of Transsexual, Transgender, and Gender Non-Conforming People", 2012 Edition, pages 36-38.

iv. If the student is denied participation as a transgender student athlete in an NSAA sport(s), the student's eligibility remains with the school's teams as determined by the individual's birth certificate.

v. Nothing in this policy shall be construed to encourage parents and guardians of students or the students themselves to undergo sex reassignment surgery, hormone treatment or other medical treatment resulting in change to the student's gender, as such treatments have obvious physical, psychological and social implications.

5. Appeal Process: If the initial Committee review results in a disapproval by the Committee of the Transgender Student Application, the member school on behalf of the student may seek review of the student's Transgender Student Application for eligibility for participation by an Appeals Committee through the following appeals procedure. The costs related to the Gender Identity Eligibility Committee on appeal shall be an NSAA expense.

i. The student will be scheduled for an appeal hearing before a second NSAA Gender Identity Eligibility Committee (Appeals Committee) specifically trained to hear gender identity appeals. The NSAA shall schedule a hearing as expeditiously as possible, but in no case later than five (5) school business days prior to the first full interscholastic contest that is the subject of the petition, or within a reasonable time thereafter in cases of emergency, including, but not limited to, any unforeseeable late student enrollment.

ii. The Appeals Committee will be comprised of the individuals identified in subparagraph D.2.d.(1), provided, at least two of the individuals chosen must not have been on the Committee that initially considered the student's Transgender Student Application.

iii. The Appeals Committee shall be provided all information provided to the initial Committee along with the determination of the initial Committee, and such additional information that the member school or the student through the member school wishes to provide the Appeals Committee.

iv. The Appeals Committee shall apply the same review criteria as utilized by the initial Committee, and shall make written findings and determinations approving or disapproving the Transgender Student Application to be set forth in writing and delivered confidentially to the member school and the Executive Director of the NSAA. The eligibility of the student to participate must be approved unanimously by the Appeals Committee considering the Transgender Student Application for participation. The student/student's family and the school on whose sports team the student would be participating will be notified of the Appeals Committee's decision in writing within forty-

eight (48) hours once that decision has been reached.

v. Upon completion of the appeal to and through the Appeals Committee, the student will have exhausted all administrative remedies available to him/her. No further appeals with or through the NSAA exist at that point. However, due to the nature of these issues, the same student may have her/his case revisited by the NSAA as the facts and circumstances of the student evolve or change. The NSAA would not anticipate revisiting a case without a sufficient lapse of time such that the circumstances of the case have changed significantly.

E. Use of restrooms and locker rooms at NSAA athletic contests and activities based upon student gender: It is the purpose of this policy to allow all students to participate fairly and equally in high school athletics and activities, while also upholding the basic principles of privacy and personal dignity held by each student.⁹ While accommodations may be necessary to meet the unique needs of individual students, it is the goal that all students will be able to comfortably participate while respecting the privacy rights of others.

The NSAA acknowledges that many member schools' facilities have been outfitted with changing areas and locker rooms, including restrooms and showers, separated by gender. It has been widely recognized that restrooms and locker rooms are places where students have an expectation of privacy.¹⁰ Maintaining separate restroom and shower facilities for each gender is a cost effective way to retain the reasonable expectation of privacy that students have while using the restroom and changing and showering before and after physical activity.¹¹

A transgender student who has been granted permission by the NSAA to participate in activities of the gender with which the student identifies, but has not undergone sex reassignment surgery, shall at NSAA-sponsored contests be permitted to use the restrooms and locker rooms associated with their birth sex or shall be assigned private toilet, locker and shower room facilities appropriate for the student's gender identity, as appropriate and available.¹²

⁹ *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).

¹⁰ See *Koepfel v. Speirs*, 808 N.W. 2d 177, 181 (Iowa 2011), *Stuart v. Metropolitan Government of Nashville*, 679 F. Supp. 2d 851, 859-60.

¹¹ See *State v. Dennison*, 2012 WL 1580610 (Ohio App. 2012).

¹² *Johnston v. University of Pittsburgh*, 2015 U.S. Dist. LEXIS 41823, (U.S. Dist. Court, Western District of Penn.), March 31, 2015 ("UPJ's policy of segregating its bathroom and locker room facilities on the basis of birth sex is "substantially related to a sufficiently important government interest." *Glenn v. Brumby*, 663 F. 3d 1312, 1316 (11th Cir. 2011) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446--47, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). Specifically, UPJ explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F. 3d 1215, 1224 (10th Cir. 2007) (the use of women's public restrooms by a biological, transgender male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason); *Causey v. Ford Motor*

Coaches are encouraged to use spaces outside the locker room for team meetings or other events where important information is shared with the team. When a member school is traveling, school representatives should identify safe spaces to accommodate a transgender student's need for restrooms and locker rooms and privacy.

Co., 516 F. 2d 416 (5th Cir. 1975)." *Id.* at 26; and, *Grimm v. Gloucester County School Board*, 2015 U.S. Dist. LEXIS 124905 U.S. Dist. Court, Eastern District of Virginia), September 17, 2015 ("Department of Education regulations stipulate: A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex. 34 C.F.R. § 106.33. This regulation (hereinafter, "Section 106.33") expressly allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable. When Congress delegates authority to any agency to "elucidate a specific provision of the statute by regulation, any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The Department of Education's regulation is not "arbitrary, capricious, or manifestly contrary to the statute." Rather Section 106.33 seems to effectuate Title IX's provision allowing separate living facilities based on sex. Therefore, Section 106.33 is given controlling weight").