

# Your Right to be Free from Discrimination Based on Sexual Orientation and Gender Identity

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## Your Right to be Treated Equally Regardless of Sexual Orientation

- Lesbian, gay, bisexual and queer students have the same right to be free from discrimination and harassment as other students.<sup>1</sup>
- While there is no federal or state law that expressly prohibits discrimination on the basis of sexual orientation, some cities, townships and counties have adopted local anti-discrimination ordinances that prohibit discrimination in public places<sup>2</sup> based on sexual orientation.<sup>3</sup>

## Your Right to be Free from Sex Discrimination and Sexual Harassment

- Federal law prohibits sexual harassment or discrimination based on sex.<sup>4</sup> This protection against sexual harassment applies to gay students as well as straight students.

## Your Right to Be 'Out' and Right to Privacy

- LGBT public school students have a First Amendment right to be open about their sexual orientation if they so choose. Schools cannot tell students to be silent about being gay, or punish students for talking about their sexual orientation or censor students for wearing LGBT-positive clothing or accessories (if otherwise permissible within a school dress code).<sup>5</sup>
- Your school does not have the right to "out" you as gay to anyone without your permission.<sup>6</sup>

## Your Right to Form a Gay Straight Alliance (GSA) and Meet at School

- If your school allows other non-academic groups to meet on school property, they cannot prohibit a Gay Straight Alliance from meeting at school.<sup>7</sup>

## Your Right to Go to Prom with Your Chosen Date

- You have the right to attend prom or other school activity with a same-sex partner.<sup>8</sup>

## Rights as a Transgender and Gender Non-Conforming Student

- The law is somewhat unclear with regard to the rights of transgender and gender non-conforming students. However, litigation and policy advocacy is currently ongoing to protect the rights of students.
- Some school districts have adopted express policies that recognize the rights of transgender and gender non-conforming students to, among other things: be called by their chosen name and pronoun, dress according to their gender identity, and use the bathroom and participate in sports consistent with their gender identity.<sup>9</sup> Importantly, the school districts of Philadelphia and Pittsburgh also recognize the right of a transgender student to maintain their privacy and accordingly prohibit school personnel from disclosing a student's transgender status without the student's permission.<sup>10</sup>
- If your school does not have a policy protecting transgender rights, it is currently unclear whether courts will enforce federal law to protect your rights. In February 2017, a federal judge in Pittsburgh ordered that a school district must allow transgender students to use the bathroom that matches their gender identity. This is a preliminary order and the case is ongoing. Also in February 2017, the Trump Administration withdrew 2016 guidance from the U.S. Departments of Education and Justice that affirmed Title IX's protection of transgender students. However, while the 2016 guidance served as a helpful guide to schools, the civil rights protection remains in the Title IX statute itself and courts have affirmed the rights of transgender people under Title IX's broad prohibition against discrimination based on sex and sex stereotyping.<sup>11</sup>
- Some towns and counties have local laws that prohibit discrimination based on gender identity.<sup>12</sup>

Schools should work with individual students to provide accommodations respecting your gender identity. Call the Education Law Center if you have questions about your need for accommodations.

### What is bullying or harassment?

Bullying and harassment can come in many forms and range from name-calling or making fun of you because of your religious beliefs to physical assault. The conduct can be verbal but may also come in the form of texts or messages sent through social media.

### What should a parent do first?

First, talk to your child. Then raise your concerns with a teacher or someone you trust in the school. If this doesn't address the problem, take further action.

## BULLYING CHECKLIST

### Keep Detailed Records

- Describe the bullying (who, what, where, and when).
- Write down how the bullying has impacted you.
- Write down the names of school employees that you or your child have talked to about the bullying. Don't forget to also write down the date and time you spoke to them!

### Ask the School to Take Action

- Get your school district's bullying and/or harassment policy.
- Write a letter to the school principal describing the bullying and how it is impacting you or your child. You can send it by email or deliver it in person.
- Call your school district's bullying hotline.
- Write a letter to your school board and/or speak at a board meeting.

## What Should You Do If Your Rights Are Violated

- Look up your school policy. How is it supposed to be applied? Is it being applied differently in your case?
- Keep detailed records of any problems, complete with dates of incidents, people involved, and when and to whom you reported the problems. Share a written list of problems with your principal.
- Advocate for a school policy protective of LGBT and gender non-conforming students. Call Education Law Center for advice and sample policies (215-238-6970 or 412-258-2120).
- If harassment persists, you can file a formal complaint with one of the following agencies
  - [Pennsylvania Human Relations Commission](#) (717-787-4410)
  - [Philadelphia Human Relations Commission](#) (215-686-4670)
  - [Pittsburgh Commission on Human Relations](#) (412-255-2600)
  - Pennsylvania Department of Education Office of Safe Schools
    - [Bullying Prevention Consultation Line](#) (1-866-716-0424)
  - [U.S. Department of Education's Office for Civil Rights](#) (215-656-8541)
  - [U.S. Department of Justice's Civil Rights Division](#) (1-877-292-3804)
- See ELC's factsheet about bullying and harassment at [www.elc-pa.org](http://www.elc-pa.org)
- Contact ELC for more information: 215-238-6970, 412-258-2120, [www.elc-pa.org](http://www.elc-pa.org).

*The information presented is not legal advice and should not be relied on as such. Every situation is different. To learn about how these laws may apply in your particular situation, please contact an attorney of your choice or contact the Education Law Center for a referral.*

## ENDNOTES

1 See Equal Protection Clause of Fourteenth Amendment of U.S. Constitution; *Nabozny v. Podlesny*, 92 F.3d 446 (7<sup>th</sup> Cir. 1996) (school violated Equal Protection and discriminated on the basis of gender as female students who were victims of student-on-student harassment were treated differently by school officials than male LGBTQ students as there is no "rational basis" for permitting a student to assault another student based on the victim's sexual orientation); see also *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130 (9<sup>th</sup> Cir. 2003) (if school officials either "intentionally discriminated or acted with deliberate indifference" to the rights of gay students, including failure to act in a manner that is reasonable, failure to take further steps once realizing that their actions were inadequate, and failure to properly train teachers, students, and campus monitors about the school district's policies of prohibiting harassment due to sexual orientation, the students could have an Equal Protection claim).

2 This is known as prohibiting discrimination in "public accommodations." Title II of the Civil Rights Act of 1964 defines public accommodations as a limited number of facilities which are open to the public such as hotels, restaurants, public schools and public libraries. See 42 U.S.C. § 2000(a).

3 The following municipalities in Pennsylvania prohibit public accommodation discrimination on the basis of sexual orientation (SO), gender identity (GI), or both (check [www.equalitypa.org](http://www.equalitypa.org) for updates). We have noted here where the ordinance text expressly includes public schools: City of Philadelphia (1982 SO, 2002 GI); City of Harrisburg (1983)(SO; school); City of Pittsburgh (1997); City of York (1998); City of Lancaster (2002)(SO; school); Allentown Ordinance (2002); Erie County (2002); City of Erie (2002); New Hope Borough (2002); City of Scranton (2003); Swarthmore Borough (2006); City of West Chester (2006); City of Easton (2006); Lansdowne Borough (2006); State College Borough (2007); Allegheny County (2009); City of Reading (2009); Doylestown Borough (2010); Lower Merion Township (2010); Borough of Conshohocken (2011)(SO, GI; school); Haverford Township (2011); City of Bethlehem (2011); Springfield Township (2011); Newtown Borough (2011); Whitemarsh Township (2011); Jenkintown Borough (2011); Susquehanna Township (2011); Cheltenham Borough (2012); Abington Township (2012); Upper Merion Township (2012); East Norriton Township (2012); City of Pittston (2013); Bristol Borough (2013)(SO, GI; school); Downingtown (2014); Ambler Borough (2016); Dickson City (2016); Wilkes-Barre; Carlisle (2016).

4 See Title IX of the Civil Rights Act of 1964. Revised Sexual Harassment Guidance issued by the Department of Education explains that “sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in the guidance.” Office for Civil Rights, Dep’t of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 3 (2001) [hereinafter Revised Sexual Harassment Guidance], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. The Revised Sexual Harassment Guidance gives the following example: [I]f a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim’s ability to participate in or benefit from the school’s program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student’s sexual orientation (e.g., “gay students are not welcome at this table in the cafeteria”), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX. *Id.* at 3. In other words, harassment that targets a student on the basis of his or her sexual orientation without being sexual in nature is not prohibited by Title IX.

5 See *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969)(a student may not be punished for expressing views unless the school has reason to believe the speech or expression will “materially and substantially disrupt the work and discipline of the school”); *Gillman v. School Board for Holmes County, Florida*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (a school district’s censorship of T-shirts was unconstitutional).

6 See *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000)(finding police officer’s threat to out a teenage arrestee as gay to the teen’s grandfather, which caused the teen to commit suicide, violated the teen’s constitutional right to privacy, even though the teen voluntarily disclosed his sexual orientation to the officer); see also *Payne v. City of Philadelphia*, 2007 WL 4441207 (E.D.Pa. Dec. 18, 2007) (citing *Sterling* for Third Circuit’s recognition that “sexual orientation is an ‘intimate aspect’ of one’s personality and is therefore entitled to privacy protection under *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (the constitutional right to privacy includes an individual’s interest in avoiding divulgence of highly personal information)). But see *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D.Cal. 2007)(the court recognized a student’s reasonable expectation of privacy concerning sexual orientation at home, despite the student showing public affection to same-sex girlfriend at school, but the court found no Equal Protection, 1<sup>st</sup> Amendment or privacy violations for school outing student to parents because the principal had to explain context for discipline violation); *Wyatt v. Fletcher*, 718 F.3d 496 (5<sup>th</sup> Cir. 2013)(no clearly established right to privacy that would bar teacher or coach from discussing student’s private matters including sexual orientation with student’s parents; disputes application of Third Circuit *Sterling* case to school context).

7 See The Equal Access Act, 20 U.S.C. § 4071(a) (a school cannot deny equal access to student activities because of the “religious, political, philosophical, or other content of the speech at such meetings”).

8 *Aaron Fricke v. Richard B. Lynch*, 491 F.Supp. 381 (D.R.I. 1980) (the school violated male gay student’s First Amendment rights when the school tried to prevent the student’s attendance at prom with his male date; in response to the school’s claim that other students objected, the court stated “The [F]irst [A]mendment does not tolerate mob rule by unruly school children”).

9 See Philadelphia School District, School District of Pittsburgh, Springfield Township, Montgomery County, and the Great Valley School District in Chester County.

10 See Philadelphia School District Policy 252, Transgender and Gender Nonconforming Students (June 2016), available at <https://www.philasd.org/offices/administration/policies/252.pdf> ; School District of Pittsburgh Transgender and Gender Expansive Students Policy 102.3 (June 2016), available at <http://www.pps.k12.pa.us/cms/lib07/PA01000449/Centricity/Domain/4/Transgender%20Gender%20Expansive%20Students%20policy.pdf>.

11 See, e.g., *Evancho v. Pine-Richland School District*, Civil Action No. 2:16-cv-01537-MRH (W.D.Pa. 2016) (transgender students challenged school’s new restroom policy that required students to use the restroom that corresponds to their genitalia and prevents trans students from using the restroom consistent with their gender identity); *G.G. ex rel Grimm v. Gloucester County School Board*, 822 F. 3d 709 (4<sup>th</sup> Cir. 2016) (schools that bar students from using gender identity-appropriate restrooms discriminate based on sex in violation of Title IX), cert granted, 137 S.Ct. 369 (2016) (the United States Supreme Court sent the case back to 4<sup>th</sup> Circuit for reconsideration in light of the rescission of Title IX guidance). See ELC’s statement on the withdrawal of Title IX guidance, available at <http://www.elc-pa.org/2017/02/23/elc-statement-in-response-to-the-trump-administrations-withdrawal-of-title-ix-guidance/>.

12 The following municipalities in Pennsylvania prohibit public accommodation discrimination on the basis of gender identity. We have noted here where the ordinance text expressly includes public schools: Abington Township; Allegheny County; Allentown, City of; Bethlehem, City of; Bristol, Borough of (school); Cheltenham Township; Conshohocken, Borough of (school); Doylestown, City of; East Norriton, City of; Easton, City of; Erie County; Harrisburg, City of (school); Hatboro; City of Haverford Township; Jenkintown Borough; Lansdowne Borough; Lower Merion Township; New Hope Borough; Newton Borough; Philadelphia, City of; Pittsburgh, City of; Pittston, City of; Scranton, City of; Reading, City of; Springfield Township; State College Borough; Susquehanna Township; Swarthmore, City of; Upper Merion Township; West Chester Borough; Whitemarsh Township; York, City of.