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April 30, 2019

Superintendent Gregory Frigoletto  
Wayne Highlands School District  
474 Grove Street  
Honesdale, PA 18431

**Re: Rights of Transgender Students**

Dear Mr. Frigoletto:

As education advocates, we write to express our support for Honesdale High School’s practice of allowing transgender students access to the facilities with which they identify and to respond to allegations in the complaint filed by a cisgender student with the U.S. Department of Justice’s Office of Civil Rights.

The Education Law Center is a non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. For over 40 years, ELC has advocated on behalf of the most at-risk students — children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English learners, lesbian, gay, bisexual, transgender, and/or queer (LGBTQ) students, and children experiencing homelessness.

We are responding to allegations in the complaint recently filed against the Wayne Highlands School District by a cisgender student who attends Honesdale.<sup>1</sup> Specifically, we write concerning the claims that: (1) Pennsylvania law 24 Pa. Stat. Ann. § 7-740 (West) prevents schools from allowing transgender students to use the facilities with which they identify; (2) the presence of a transgender person in a sex-segregated space is per se harassment; and (3) allowing a transgender student to use the facilities with which they identify is a change from Honesdale’s prior practices and should have been accompanied by notice to students and their families.

**1. 24 Pa. Stat. Ann. § 7-740 (West) does not prohibit transgender students from using the facilities with which they identify.**

Just last year, a federal court held that the provisions of the Pennsylvania Public School Code governing water-closets and out-houses *cannot* be construed to prohibit the presence of

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<sup>1</sup> In addition to being mistaken as to the state of the law, the complaint was grossly inappropriate in its description of the relevant events, including describing a minor’s undergarments and genitals in gratuitous detail without her consent and in a legal filing directly contrary to her interests. The complaint also attempts to incorporate issues of sexual orientation not at issue, implying that transgender students who are gay, lesbian, or bisexual should be subject to additional scrutiny that would exclude them from facilities that align with their gender identities. The inclusion of these statements is patently offensive. We are aware of no schools within the Commonwealth that interrogate the sexual orientation of cisgender students before permitting them to utilize sex-segregated facilities.

transgender students in the bathrooms that align with their gender identities.<sup>2</sup> Like the Honesdale complainants, the plaintiffs in *Doe by & through Doe v. Boyertown Area Sch. Dist.* argued that the language in 24 Pa. Stat. Ann. § 7-740 (West) that public school bathrooms be “used separately by” the sexes limited the rights of transgender students when using sex-segregated school facilities. The court ruled against the claims of cisgender students in that case, dismissing the argument that 24 Pa. Stat. Ann. § 7-740 (West) provides any legal basis for the exclusion of transgender students from sex-segregated facilities.

**2. Cisgender students’ discomfort with the presence of their transgender peers does not create a claim of Title IX harassment.**

The complainant’s claim that, under Title IX, the mere presence of a transgender student in a sex-segregated facility is harassment and creates a hostile environment for cisgender students who do not share the transgender student’s sex assigned at birth has also been dismissed by the courts. The same case rejecting the state statutory argument under 24 Pa. Stat. Ann. § 7-740 (West) also ruled that sharing a sex-segregated facility with someone who shares one’s gender identity but not sex assigned at birth does not, in itself, constitute harassment under federal law.<sup>3</sup>

Not only is Title IX case law unsupportive of the assertions in the complaint, but our federal and state laws clearly protect the rights of transgender students to use the facilities with which they identify.<sup>4</sup> Case law interpreting Title IX and the Constitution consistently find that discrimination against a transgender student on the basis of their transgender status is sex discrimination under those laws.<sup>5</sup> Similarly, the Pennsylvania Human Relations Commission (PHRC) recently clarified that discrimination on the basis of an individual’s transgender status or gender identity is included within the PHRA’s prohibition of sex discrimination.<sup>6</sup>

**3. Allowing students to use the facilities that align with their gender identities is not a change in district policy requiring formal notice to students and families.**

In permitting a transgender student to use the facilities that align with her gender identity, the Wayne Highlands School District simply complied with its legal obligations to protect the rights of transgender students when those legal rights were first invoked. Based on the available facts, it appears that no out transgender or gender-nonconforming student had invoked the right to use facilities aligned with their gender identities until the circumstances at issue in the

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<sup>2</sup> See *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 407 (E.D. Pa. 2017), *aff’d*, 890 F.3d 1124 (3d Cir. 2018), and *aff’d*, 897 F.3d 518 (3d Cir. 2018).

<sup>3</sup> *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 535 (3d Cir. 2018) (“[T]he appellants had not met their burden of establishing that the mere presence of transgender students in bathrooms and locker rooms constitutes sexual harassment.”).

<sup>4</sup> See, e.g. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287–88 (W.D. Pa. 2017); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017).

<sup>5</sup> See *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018); *Evancho*, 237 F. Supp. 3d 267; *A.H.*, 290 F. Supp. 3d 321.

<sup>6</sup> See Pa. Human Relations Comm’n, *Guidance on Discrimination on the Basis of Sex under the Pennsylvania Human Relations Act* (Aug. 2, 2018).

complaint. The fact that the student population of the school has recently changed or become known does not alter Wayne Highlands' responsibility under the law or its obligation to adopt policy consistent with the law. District policy should always conform with the law, and the law is unambiguous in its protection of the right of transgender students to use facilities that align with their gender identities.

\* \* \*

Not only is Honesdale's practice of permitting transgender and gender-nonconforming students to use the facilities with which they identify consistent with our state and federal civil rights laws, but the practice aligns with the scientific and medical community's consensus of how to determine sex. Determining a person's sex is multi-faceted, and takes into consideration not just a person's genitals, but other biological indicators such as hormone levels, chromosomes, *and gender identity or brain sex*.<sup>7</sup> Where one or more indicators of sex is incongruent with the others (as is the case with both intersex and transgender people), the medical community recognizes that gender identity or brain sex is determinative of the individual's sex.<sup>8</sup> To view transgender people as somehow not the sex that aligns with their gender identity is to misunderstand what scientists overwhelmingly agree on—that an individual's gender identity is as innate and biological as any of the other indicators of sex and, in fact, is determinative of an individual's sex.<sup>9</sup>

The complaint challenging Honesdale's trans-affirming policies is mistaken as to the state of the law, contrary to best practices for building inclusive and supportive schools, and grossly discriminatory regarding LGBTQ people. We encourage you to continue your efforts to build an inclusive school environment and hope you will consider Education Law Center a resource as you respond to student concerns.

Sincerely,

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Cc: Lee Krause, Esq.

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<sup>7</sup> See generally M. Dru Levasseur, Esq., *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943 (2015).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also Bailey Vogt, *Brains of transgender Individuals match their gender identity, not their sex assigned at birth*, Metro Weekly (June 14, 2018), <https://www.metroweekly.com/2018/06/brains-of-transgender-individuals-match-their-gender-identity-not-their-assigned-sex-at-birth/>.