

## The Rights of LGBTQ, Nonbinary, or Gender-Nonconforming Students

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Discrimination against LGBTQ people is illegal. Courts have increasingly recognized the rights of students who identify as gay or transgender, as well as students who are nonbinary or gender-nonconforming (sometimes referred to as “gender-expansive”). Students who are LGBTQ or gender-expansive have the same rights as other students, and schools are required to intervene and correct policies or practices that discriminate against students based on sexual orientation or gender identity or expression.

### DISCRIMINATION IS AGAINST THE LAW

The U.S. Supreme Court and many federal courts have consistently affirmed that discrimination on the basis of sexual orientation, transgender status, gender identity, or gender expression is unlawful discrimination “on the basis of sex” and prohibited by law.<sup>1</sup> Pennsylvania does not have a statute expressly prohibiting discrimination against LGBTQ people, but the Pennsylvania Human Relations Commission recognizes discrimination based on sexual orientation or gender identity/expression as sex discrimination.<sup>2</sup>

### Terms to Know

“**LGBTQ**” is an acronym that stands for lesbian, gay, bisexual, transgender, and queer.

“**Sexual orientation**” refers to a person’s physical or emotional attraction to another person. People may define their sexual orientation as lesbian, gay, bisexual, pansexual, asexual, queer, straight, or another term.

“**Gender identity**” refers to a person’s self-conception or deeply felt understanding of their gender, such as male, female, genderqueer, nonbinary. Gender identity may vary over time. A student’s gender identity may or may not align with their chromosomes, genitalia, hormone levels, or other biological indicators of sex other than gender identity.

“**Gender expression**” refers to the ways a person outwardly displays their gender identity and how society perceives those markers as masculine, feminine, or androgynous – for example, haircuts, clothing, accessories, mannerisms, etc.

“**Cisgender**” refers to people who feel their gender identity matches the gender they were assigned at birth.

“**Transgender**” refers to many different kinds of people who do not identify with their expected gender role or whose gender identity does not match some or all of their biological indicators of sex other than their gender identity. A student who identifies as transgender may identify as a male, female, nonbinary, genderqueer, or some other term.

“**Gender-nonconforming**” (GNC) refers to people whose gender expression does not conform to society’s expectations for people of a given gender or does not conform to expectations based on assigned gender. Some people may use the term “gender-expansive.”

“**Nonbinary**” is an umbrella term for people who identify as a gender that is neither entirely man nor entirely woman. Some people may use the term “genderqueer.” For more information, see: <https://www.translanguageprimer.org/primer-index>

## THE RIGHT TO BE OUT AND RIGHT TO PRIVACY

You have the right to be open about your sexual orientation. Your school cannot tell you to be silent about your sexual orientation or punish you for wearing LGBTQ-affirming clothing or accessories.<sup>3</sup> Your school should not “out” you to anyone without your permission.<sup>4</sup> The federal Family Educational Rights and Privacy Act (FERPA) forbids schools from disclosing a student’s private information, including medical information regarding a student’s gender assigned at birth, absent permission from the student or guardian.<sup>5</sup>

## THE RIGHT TO PARTICIPATE IN SCHOOL ACTIVITIES

You have the right to form and meet as a Gender Sexuality Alliance (GSA) at school if they allow other non-academic clubs to meet at school.<sup>6</sup> Your school cannot stop you from going to prom or another school activity with your date just because your date is the same gender as you.<sup>7</sup>

In 2020-21, anti-LGBT activists introduced dozens of bills across the country, including in Pennsylvania, to prohibit trans students from participating in school sports on the boys or girls team that aligns with their gender identity.<sup>8</sup> A Pennsylvania bill was discussed at a hearing in August 2021 but Governor Wolf said he would veto it. These discriminatory bills are being successfully challenged in court.<sup>9</sup> If your school limits the way transgender students can play sports, contact the [ACLU-PA](#).

## ACCESS TO FACILITIES

School districts cannot discriminate against transgender and nonbinary students by requiring them to use a bathroom or locker room that does not match their gender identity.<sup>10</sup> Schools should provide a gender-neutral/all-genders bathroom option for students who identify as nonbinary or gender-expansive and others who may feel safer using that option.<sup>11</sup>

## THE RIGHT TO AFFIRMING NAME AND GENDER IDENTITY IN SCHOOL INTERACTIONS

If a student who is transgender, gender-nonconforming, or nonbinary identifies a chosen name and pronouns, school staff must use that name and pronoun for all interactions, written, digital and verbal, except where required by law to use a child’s legal name (i.e., official school record and state standardized tests must list a legal name, but daily roll call and display name on Google Classroom should use chosen name).<sup>12</sup> Purposefully and persistently misgendering a student can be harassment or discrimination.<sup>13</sup>

## EXPRESSING YOUR GENDER IDENTITY

Your school cannot discipline you for expressing your gender identity.<sup>14</sup> Your school should not stop transgender, nonbinary, or gender-nonconforming students from wearing clothes that they let cisgender students wear. This area of case law is underdeveloped, but there are strong arguments that gendered dress codes constitute illegal sex discrimination.<sup>15</sup>

## INTERACTING WITH SCHOOL POLICE OR SCHOOL RESOURCE OFFICERS

Police have historically targeted LGBTQ and nonbinary people – and those who identify as Black or Brown in particular – for disproportionate stops, searches, and harassment. This is discrimination and should not be happening in schools. School police officers cannot search you or your bag without a reasonable suspicion of wrongdoing.<sup>16</sup> They cannot search you just because of your sexual orientation, gender identity/expression, or race.

You should email or write a complaint to your principal and your city’s police review board if a school police or resource officer is inappropriate with you. In the School District of Philadelphia, you can submit an [anonymous complaint online](#).

## THE RIGHT TO BE SAFE AT SCHOOL

You have the same right to be safe in school as every other student. Unfortunately, LGBTQ students – and LGBTQ students of color in particular – are disproportionately subjected to bullying and harassment, with insufficient intervention by school staff. Behavior may qualify as harassment if the offensive conduct relates to gender, sex, sexual orientation, gender identity or expression, race, color, national origin/ethnicity, age, disability, or religion. Your school’s actions may qualify as discrimination if a school staff member is treating you badly because of your sexual orientation, gender identity or expression, or another student is treating you badly because of your sexual orientation, gender identity, or gender expression, and your school does nothing to stop it.<sup>17</sup>

Your school has an affirmative duty to address harassment against LGBTQ students the same way they would address harassment against any other student. In addition, Title IX prohibits your school from ignoring harassment based on gender stereotyping.<sup>18</sup>

If you are being bullied or harassed, follow ELC’s [Checklist](#) for tips about recording and reporting incidents, and see our full guide for more info: [What Can I Do If My Child is Bullied or Harassed? A Parent’s Guide to Advocacy in Pennsylvania Public Schools](#).

Consider using this reporting tool if your school does not have its own reporting form: [Request for Bullying/Harassment Investigation](#).

The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English learners, LGBTQ students, and children experiencing homelessness.

ELC’s publications provide a general statement of the law. However, each situation is different. If questions remain about how the law applies to a particular situation, contact ELC’s Helpline for information and advice – visit [www.elc-pa.org/contact](http://www.elc-pa.org/contact) or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) – or contact another attorney of your choice.

<sup>1</sup>See *e.g. Bostock v. Clayton County*, 590 U.S. \_\_\_, 140 S.Ct. 1731 (2020)(holding that dismissal of an employee for being gay or transgender is sex-based discrimination under Title VII); *Adams by and through Kasper v. School Board of St. Johns County*, No. 18-13592, 2021 WL 2944396 (11<sup>th</sup> Cir. Jul. 14, 2021)(finding bathroom policy which prevented transgender male student from using boys bathroom violated Equal Protection Clause); *United States EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) (gay male employee stated a claim of sex discrimination based on sex stereotyping that a person should conform to heterosexuality).

<sup>2</sup> Pennsylvania Human Relations Commission, Guidance on Discrimination on the Basis of Sex under the Pennsylvania Human Relations Act 3 (Aug. 2, 2018) (delineating prohibitions in the PHRA against discrimination on the basis of sex prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression).

<sup>3</sup> See *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (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 advocating fair treatment for LGBT people was unconstitutional).

<sup>4</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (police officer's threat to out a teenage arrestee as gay to the teen's grandfather violated the teen's constitutional right to privacy).

<sup>5</sup> FERPA is the Family Educational Rights and Privacy Act. See 20 U.S.C.A. § 1232g (West).

<sup>6</sup> See e.g. *Straights & Gays for Equality v. Osseo Area Sch. Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008) (Equal Access Act prohibited school from denying non-curricular gay equality group meeting when other noncurricular groups can meet).

<sup>7</sup> *Aaron Fricke v. Richard B. Lynch*, 491 F.Supp. 381 (D.R.I. 1980) (school violated male gay student's First Amendment rights when they tried to prevent the student attending prom with his male date).

<sup>8</sup> As of August 2021, 36 states had introduced anti-trans sports bills and nine states passed such legislation into law. An anti-trans sports bill was introduced by the Pennsylvania General Assembly in April 2021, and a hearing was held in August 2021 before the House Education Committee; Republican leaders said at that time they need more information. Governor Wolf has said he would veto anti-trans sports legislation. See, *9 States Have a Transgender Sports Ban On the Books. Now It's Being Talked About in Pennsylvania*, 90.5 WESA (Aug. 5, 2021), <https://www.wesa.fm/identity-community/2021-08-05/9-states-have-a-transgender-school-sports-ban-on-the-books-now-its-being-talked-about-in-pennsylvania>.

<sup>9</sup> See, e.g., *B.P.J. v. West Virginia State Board of Educ.*, Civ.No. 2:21-cv-00316, Slip Op. Jul. 21, 2021 (S.D.W.Va.) (trans student must be allowed to try out for the girls' cross-country and track teams at her school, blocking West Virginia from enforcing a law that bans transgender girls and women from participating in school sports), available at <https://www.aclu.org/legal-document/bpj-v-west-virginia-state-board-education-first-amended-complaint>; *Human Rights Campaign Files Lawsuit Against Florida's Transgender Sports Ban & Announces Future Litigation in Arkansas, Mississippi and Tennessee*, Jun. 30, 2021, <https://www.hrc.org/press-releases/human-rights-campaign-files-lawsuit-against-floridas-transgender-sports-ban-announces-future-litigation-in-arkansas-mississippi-and-tennessee>.

<sup>10</sup> See *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4<sup>th</sup> Cir. 2020), *cert denied* ---S.Ct. ---, 2021 WL 2637992 (District Court and Fourth Circuit held that school violated Title IX and Equal Protection Clause when they prohibited Grimm from using the same restrooms as other boys and forced him to use separate restrooms because of his transgender identity; US Supreme Court denied cert); *Adams*, 2021 WL 2944396; *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1055 (7<sup>th</sup> Cir. 2017) (transgender student denied access to facilities that matched their gender identity was likely to succeed as claim of sex discrimination under Title IX); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (school board resolution limiting transgender students' access to bathrooms was found likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F.Supp.3d 321 (M.D. Pa. 2017) (transgender student prohibited from using girls bathroom stated a claim for violation of Title IX and Equal Protection Clause); Pennsylvania Human Relations Commission, *Guidance on Discrimination on the Basis of Sex under the Pennsylvania Human Relations Act 3*.

<sup>11</sup> For example, the School District of Philadelphia committed to providing a gender-neutral bathroom in every school building. <https://www.inquirer.com/education/gender-neutral-bathrooms-philadelphia-schools-lgbtq-students-20210712.html>.

<sup>12</sup> The same analysis protecting students from discrimination in restroom use also applies to students' rights to have their gender affirmed in how they are addressed at school. See *Adams*, 2020 WL 4561817. See 20 U.S.C.A. § 1232g (FERPA forbids schools from disclosing a student's private information). FERPA requires parental consent to a change in the official school record of a student. See U.S. Dep't. of Educ., *Family Educational Rights and Privacy Act: Guidance for Parents* (Feb. 2011) (describing the rights of parents/guardians and students under FERPA).

<sup>13</sup> See *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (recognizing claims of indirect discrimination under Title IX where school had actual notice of harassment between students but failed to address it); *Whitaker By Whitaker*, 858 F.3d 1034 (applying Title IX to discrimination based on transgender status).

<sup>14</sup> See *Tinker*, 393 U.S. 503; *Gillman*, 567 F. Supp. 2d 1359.

<sup>15</sup> See *Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at \*1 (S.D. Miss. Sept. 15, 2011) (refusing to dismiss a gender-nonconforming student's Equal Protection and Title IX challenges of her school's policy that differentiated what students may wear in yearbook pictures on the basis of sex); Letter from James D. Esseks, Director of ACLU's Lesbian Gay Bisexual Transgender & HIV Project (Dec. 7, 2015), <https://www.aclu.org/letter/open-letter-schools-about-gendered-dress-codes>, (last visited Aug. 14, 2018).

<sup>16</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student generally permissible if there are reasonable grounds for suspecting the search will turn up evidence that student is violating the law or school rules and the search is no more intrusive than necessary).

<sup>17</sup> See e.g., *Davis Next Friend LaShonda D.*, 526 U.S. at 633.

<sup>18</sup> 20 U.S.C. 1681 et seq; Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (interpreting *Bostock v. Clayton County*,) (Jan. 20, 2021) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.