

May 19, 2022

Central Bucks School District
Board of Education and Policy Committee
16 Welden Drive
Doylestown, PA 18901

Dear School Board Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents in Central Bucks School District (District) regarding the Board's proposed policies relating to books and resource materials as well as what appears to be a hostile environment created by recent actions that deny the rights of students identifying as LGBTQ who are entitled to equal access to a quality education free from discrimination. We urge the Board and District to undertake their duty to affirmatively protect the rights of LGBTQ students as required and to reject the proposed policies (109, 109.1, 109.2).

Central Bucks Has Created a Hostile Environment for LGBTQ Students

ELC has grave concerns about student reports of a hostile environment and recent actions at Central Bucks schools which make LGBTQ students feel unsafe and discriminated against. We remind the Board and district staff of the following legal obligations and duties to these students:

- Students who identify as gay, lesbian, bisexual, transgender, or nonbinary have the same rights as other students and the district is required to intervene and correct practices that discriminate against LGBTQ students. The U.S. Supreme Court and many federal courts, including in Pennsylvania, 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 is prohibited by law.¹ The Pennsylvania Human

¹ 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 (11th Cir. Jul. 14, 2021)(finding bathroom policy which prevented transgender male student from using boys bathroom violated Equal Protection Clause); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018)(allowing trans students to use facilities does not violate cisgender students right to privacy); *Evancho v. Pine Richland Sch. Dist.*, 237 F.Supp.3d 267 (WDPA 2017)(challenge to school board resolution limiting trans students' access to bathrooms found likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F.Supp.321 (MDPa 2017)(trans student prohibited from using girls bathroom stated claim under Title IX and Equal Protection); see also *United*

Relations Commission also recognizes discrimination based on sexual orientation or gender identity/expression as sex discrimination.²

This protection encompasses the following rights, among others:

- Students have the right to be addressed by the name and pronoun they use, even if they haven't legally changed their name or gender. 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.³ For example, the official school record and state standardized tests may require listing a child's legal name, but daily roll call and displayed name of a student should be the chosen name. Purposefully and persistently misgendering a student has been found to constitute harassment or discrimination and may harm the mental and emotional health of students.⁴
- Schools should avoid sex-segregated academic programming generally and where segregated, ensure students have the equal right to participate in school programming according to their gender identity. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, non-binary or transgender students differently from other students may cause harm.⁵

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).

² 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).

³ 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).

⁴ *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).

⁵ *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 617-18 (4th Cir. 2020) (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment), as amended (Aug. 28, 2020), reh'g en banc denied, 976 F.3d 399 (4th Cir. 2020), cert. denied, 2021 WL 2637992 (June 28, 2021); *Adams*, 968 F.3d at 1306-07 (describing "emotional damage, stigmatization and shame" experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044-46, 1049-50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (describing "substantial and immediate adverse effects on the daily life and well-being of an eleven year-old" transgender girl from denial of equal treatment); *Doe v. Univ. of Scranton*, 2020 WL 5993766 (M.D.Pa. Oct. 9, 2020), at **1-3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington v. City of Attleboro*, No. 15-CV-12769-DJC, 2018 WL 475000, at **6-7 (D. Mass. Jan. 17, 2018) (describing "wide-spread peer harassment" and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation").

- Affirming school environments are associated with reduced suicide risk among LGBTQ youth. LGBTQ youth who reported having at least one LGBTQ-affirming space had 35% reduced odds of reporting a suicide attempt in the past year.⁶ Conversely, a hostile school climate perpetuates higher rates of truancy, absenteeism, and dropping out for LGBT youth.⁷ A Pride flag in a classroom is a sign that LGBTQ students are in a welcoming space and that they can come to the teacher in that classroom for support if needed. It is a message that hateful or discriminatory comments from other students will not be tolerated. Directing the removal of LGBTQ Pride flags in classrooms tells students they are not safe to be open about their identity in school and encourages bullying and harassment of LGBTQ students who are already at increased risk for depression and self-harm. The directed removal of Pride flags - but not materials relating to other cultural or identity markers - targets students based on their sexual orientation or gender expression and constitutes prohibited discrimination.
- Student speech that promotes fair and equitable treatment of LGBTQ people is constitutionally protected speech. School officials may not prohibit students from engaging in speech out of an “urgent wish to avoid the controversy which might result from the expression.”⁸ School officials may not censor peaceful expression solely because other students may have a hostile reaction.⁹ Rather, the First Amendment’s guarantee of the freedom of speech protects the rights of LGBTQ students to speak and express themselves openly in ways consistent with their identities.¹⁰ District actions that target certain speech or have the effect of stifling or discouraging identity-affirming speech or expression violates the First Amendment rights of students. Schools may not chill expression by failing to provide adequate safeguards and support to LGBT students. These rights and protections also apply to school teachers and staff.

ELC urges the School Board and the District to comply with their clear legal obligations under federal and state law, including the protections and rights guaranteed by the First Amendment, Fourteenth Amendment, and Title IX by ensuring that all schools and staff practices across the District protect and uphold the rights of LGBTQ students and members of

⁶ See LGBTQ & Gender-Affirming Spaces, The Trevor Project, Dec. 3, 2020,

<https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>

⁷ See Educational Exclusion (2016), GLSEN, https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505, 510-11 (1969). See also *Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (“Political speech involving a controversial topic such as homosexuality is likely to spur some debate, argument and conflict... The nation’s high school students, some of whom are of voting age, should not be foreclosed from that national dialogue.”).

⁹ See *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (concluding that school officials have the duty to address disruptive behavior, not prohibit the plaintiff’s speech, because “allowing a school to curtail a student’s freedom of expression based on such factors turns reason on its head”); *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty., Ky.*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003) (even “protests” and “public uproar” could not justify restricting the rights of students who were not responsible for causing the disruption).

¹⁰ See e.g., *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).

the school district community, including the rights of teachers and staff who seek to enforce those rights.

Central Bucks Should Reject Proposed Book Policies 109, 109.1, 109.2

The purpose of a school library is to help prepare young people for critical thinking and engagement in an “information-rich society” and to encourage students to “explore questions of personal and academic relevance.”¹¹ The U.S. Supreme Court has held that “the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library” and “the Constitution protects the right to receive information and ideas.”¹²

The Proposed Policies 109, 109.1 and 109.2 seek to broadly exclude books that include sexual conduct, claiming it is “generally inappropriate and/or unnecessary for minors in school.”¹³ But the Supreme Court has clearly held that a Board may not remove books “simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.’”¹⁴

As the Supreme Court held in *Board of Education, Island Trees Union Free School District No. 26 et al v. Pico*, 457 U.S. 853 (1982), the materials available in a school library – intended as a “place to test or expand upon ideas presented to [a student], in or out of the classroom” - are distinct from materials proscribed in the school’s curriculum over which the Board has greater discretion.¹⁵ The School Board in *Pico* had argued they must be allowed “unfettered discretion to ‘transmit community values’” through the school but the Court maintained “that sweeping claim overlooks the unique role of the school library.”¹⁶ The Board “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”¹⁷ by proscribing a narrow view of “community values” that limit the books available in a school library where the “opportunity at self-education and individual enrichment ... is wholly optional.”¹⁸

The Proposed Policy 109.2’s failure to require consideration of a book in its entirety and instead direct removal based on an excerpt of alleged vague ‘sexualized content’ reflects the policy’s impermissible targeting of a viewpoint that is disliked by certain members of the Board who wish to proscribe “what shall be orthodox” and available to students in the library. The Proposed Policy’s absence of a requirement to consider literary merit and whether the books at issue have received critical acclaim, and the record of the district’s own library staff objecting to the Proposed Policies further suggest that the Policies are not tailored to be objective and identify

¹¹ See Role of the School Library, American Assoc. of School Librarians, at https://www.ala.org/aasl/sites/ala.org/aasl/files/content/advocacy/statements/docs/AASL_Role_of_the_School_Library.pdf

¹² *Pico*, 457 U.S. 853, 866 (1982).

¹³ Proposed Policy 109.2

¹⁴ *Pico*, 457 U.S. at 872.

¹⁵ *Pico*, 457 U.S. at 868-69.

¹⁶ *Pico*, 457 U.S. at 869.

¹⁷ *Pico*, 457 U.S. at 866.

¹⁸ *Pico*, 457 U.S. at 869.

“educational suitability” but instead seek to impermissibly enforce a particular viewpoint. This is against the law and discriminatory.¹⁹

It is our understanding that parents already have the opportunity and a process through which to request their children not be allowed access to certain library books or to opt out of specific materials in the curriculum, so the intent and effect of the Proposed Policies is overly broad in that it will deny access to students whose parents do not object to the books at issue. Moreover, Proposed Policy 109.2 suggests restricting materials in the school library is permissible because students have access to books outside of the school library, but that’s not a fair or accurate assumption for all 17,500 students across the district.

Additionally, the requirements in Proposed Policies to post on the school website the titles of all books in the libraries and resource materials district-wide is unduly burdensome and unnecessary and will take a significant amount of time from teachers and library staff. This only serves to open up hard-working educators to harassment and attack from individuals who seek to promote their own viewpoints instead of protecting an inclusive and diverse learning environment for students.

Finally, the context of student complaints about anti-LGBTQ actions in the district and schools’ failure to provide a supportive environment for LGBTQ students must be considered when evaluating a new proposed policy regarding the selection and removal of library books and resource materials and it’s apparent fast track through the Board.²⁰

For all these reasons, we urge Board members to reject Proposed Policies 109, 109.1 and 109.2 in their current form and instead pursue policies that will protect students’ rights consistent with the law and best practices identified by national and district library professionals.

Sincerely,



Maura McInerney

Kristina Moon

EDUCATION LAW CENTER

Cc:

Mr. Jeffrey Garton, Solicitor

¹⁹ See *Pico*, 457 U.S. at 874-75.

²⁰ See e.g., *Case v. Unified School Dist. No. 233*, 895 F.Supp.1463, 1470 (D.Kans. 1995)(ordering case to proceed to trial where the school officials’ motivations for removing books with LGBTQ themes from school libraries was a genuine issue of fact).