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Hempfield School District
Board of Education
200 Church Street
Landisville, PA 17538

Dear School Board Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents and community members in Hempfield School District (District) regarding the Board's Proposed Policy 123.1 relating to prohibitions on transgender students' participation in school sports. We urge the Board and District to reject the proposed policy because it illegally discriminates against transgender students. We urge the Board to instead undertake its duty to affirmatively protect the rights of LGBTQ students.

Proposed Policy 123.1 Discriminates Against Transgender Students in Violation of Title IX

If the District passes Policy 123.1, it will be in direct violation of Title IX and what one court called an "unbroken line of authority" from voluminous federal cases holding that Title IX's nondiscrimination mandate ensures LGBTQ students and others have equitable access to education free from sex discrimination.¹ The U.S. Supreme Court and many federal courts, including in Pennsylvania, have consistently recognized and 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.² Two circuit courts and the Department of Justice have concluded that the Supreme Court's holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) -- finding that discrimination against transgender people is discrimination based on sex under Title VII -- means that discrimination against transgender

¹ See *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021).

² See e.g. *Bostock v. Clayton County*, 590 U.S. ___, 140 S.Ct. 1731 (2020)(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)(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) cert. denied, 587 U.S. ___, 139 S.Ct. 2636, 204 L.Ed.2d 300 (2019)(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 (WD Pa. 2017)(school board resolution limiting trans students' access to bathrooms held likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F.Supp.321 (MD Pa. 2017)(trans student prohibited from using girls bathroom stated claim under Title IX and Equal Protection).

people is also discrimination on the basis of sex under Title IX.³ Additionally, the Supreme Court has twice rejected cases challenging school policies that support transgender students.⁴

The Biden-Harris administration has made clear that it will enforce Title IX consistent with the Supreme Court's holding in *Bostock*, which found that discrimination on the basis of gender identity is a form of sex discrimination.⁵ Just last week, the administration announced proposed revised regulations implementing Title IX making clear that preventing someone from participating in school programs and activities consistent with their gender identity would cause harm in violation of Title IX.⁶ Accordingly, the District may lose federal funding if the Department of Education makes a finding that a policy or practice violates Title IX, not to mention the costs of litigation emanating from a private lawsuit. Finally, the Pennsylvania Human Relations Commission also explicitly recognizes discrimination based on sexual orientation or gender identity/expression as sex discrimination.⁷

Moreover, the particular issue of trans students' participation in sports is not an untested one. Multiple courts have specifically addressed this issue and held that policies or laws excluding transgender students from sports violate the rights of transgender students. While upholding a school policy that allowed transgender students to participate in sex-segregated sports consistent with their gender identity, a district court in Connecticut reiterated that "courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. Every Court of Appeals to consider the issue has so held."⁸ A district court in West Virginia granted a preliminary injunction for a transgender girl who was prevented from trying out for a team by a state law banning transgender girls and women from participating in school sports.⁹ The same court also rejected the school defendants'

³ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Doe v Snyder*, 28 F.4th 103, 113-14 (9th Cir. 2022)(finding "a faithful application of *Bostock*" cannot be limited only to Title VII "given the similarity in language prohibiting sex discrimination in Titles VII and IX" and "[w]hile the language in Title VII is 'because of sex' and the language in Title IX is 'on the basis of sex,' *Bostock* used those phrases interchangeably throughout the decision."); U.S. D.O.J., Memorandum re: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021)).

⁴ See *Doe v. Boyertown Area School District*, 587 U.S. ___, 139 S. Ct. 2636, 204 L. Ed. 2d 300 (declining to take action, allowing Boyertown's policies supporting transgender students to stand); *Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018) cert denied (Dec. 7, 2020) (declining to hear and allowing policy to continue permitting transgender students using same restrooms and locker rooms as their peers).

⁵ Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021); see also Department of Justice, Civil Rights Division, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

⁶ See 34 CFR Part 106; U.S Dep't of Ed., *Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations* (June 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>.

⁷ 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).

⁸ *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021) (omitting citations).

⁹ *B.P.J. v. West Virginia State Board of Educ. et al*, 550 F.Supp.3d 347 (S.D.W.V. 2021).

motions to dismiss, finding that the student stated viable claims of discrimination under Title IX and the Equal Protection Clause.¹⁰

Additionally, any requirement in Policy 123.1 that a parent submit a birth certificate in order to enroll their child in school would violate state law as interpreted by the Pennsylvania Department of Education.¹¹

Policy 123.1 would create a hostile environment and harm students

As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, non-binary or transgender students differently from other students can cause serious harm.¹² Federal courts have found against school districts where students experience "emotional damage, stigmatization and shame" as a result of being subjected to differential treatment and have struck policies that cause "substantial and immediate adverse effects on the daily life and well-being" of transgender students.¹³ Just as purposefully and persistently misgendering a student has been found to constitute harassment or discrimination and to harm the mental and emotional health of students,¹⁴ requiring a transgender girl to participate in a boys' sports team is discrimination and certain to cause harm as well as a hostile school climate that perpetuates higher rates of truancy, absenteeism, and school pushout out for LGBT youth.¹⁵

¹⁰ *B.P.J. v. West Virginia State Board of Educ. et al*, No. 2:21-cv-00316, 2021 WL 5711543 (S.D.W.V. Dec. 1, 2021).

¹¹ See 22 Pa. Code 11.11(b); Pa. Dep't of Educ., *Enrollment of Students*, Basic Education Circular (July 1, 2022), <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudents.aspx>; Pa. Dep't of Educ., *Student Enrollment FAQ*, Basic Education Circular, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx> (last visited June 28, 2022).

¹² See, e.g., *Grimm*, 972 F.3d at 617-18 (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").

¹³ See e.g., *Adams*, 968 F.3d at 1306-07; *Dodds*, 845 F.3d at 221-22.

¹⁴ See e.g., *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*, 858 F.3d at 1034 (applying Title IX to discrimination based on transgender status). *Grimm*, 972 F.3d at 617-18; *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); *Dodds*, 845 F.3d at 221-22; *Doe v. Univ. of Scranton*, 2020 WL 5993766 (M.D.Pa. Oct. 9, 2020), at **1-3; *Harrington ex rel. Harrington v. City of Attleboro*, No. 15-CV-12769-DJC, 2018 WL 475000, at **6-7 (D. Mass. Jan. 17, 2018).

¹⁵ See Educational Exclusion (2016), GLSEN, https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

Policy 123.1’s foundational premise – that trans girls are not ‘real’ girls and trans boys are not ‘real’ boys – is based on faulty science and harmful discriminatory stereotypes.¹⁶ A person’s sex is made up of multiple biological characteristics that may not all align as typically male or female in a given person. Hormone levels for all people – including those who are cisgender – exist on a spectrum, and trans athletes vary in athletic ability just as cisgender athletes do.

Policy 123.1 is antithetical to the District’s mission to “provide safe environments, experiences and opportunities” to all students.¹⁷ Even before implementation, the Policy has already had a negative impact on LGBTQ students in the District. The Policy’s suggestion that “Hempfield students and adults are expected to be respectful and welcoming to all students regardless of gender identity” is disingenuous and an empty promise when the preceding pages of the proposed policy are a direct affront to transgender students and clearly tell cisgender students that trans people are to be treated differently and not treated as ‘real’ girls or boys.¹⁸ Preventing transgender students from participating in school athletics aligned with their gender identity is a recipe for more trauma, heightened harassment and violence.

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.¹⁹ Affirming trans youth in their gender for sports participation is a critical part of improving physical and mental health outcomes for these students and allowing them to learn and thrive in school.

ELC urges Board members to comply with their clear legal obligations under federal and state law and reject Proposed Policy 123.1.

Sincerely,



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EDUCATION LAW CENTER

¹⁶ Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (April 30, 2020) <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked>.

¹⁷ Hempfield Sch. Dist., *About Us*, <https://www.hempfieldsd.org/domain/6> (last visited June 28, 2022).

¹⁸ Hempfield Sch. Dist., *Policy 123.1: Sex-Based Distinctions in Athletics*, Pol’y & Legal Committee, [https://www.hempfieldsd.org/site/handlers/filedownload.ashx?moduleinstanceid=691&dataid=23938&FileName=Policy%20123.1 Sex-Based%20Distinctions%20in%20Athletics.pdf](https://www.hempfieldsd.org/site/handlers/filedownload.ashx?moduleinstanceid=691&dataid=23938&FileName=Policy%20123.1%20Sex-Based%20Distinctions%20in%20Athletics.pdf) (last visited June 28, 2022).

¹⁹ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project (Dec. 3, 2020) <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

Cc:

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