

October 13, 2022

Manheim Township School District
Board of Education
450A Candlewyck Rd.
Lancaster PA 17606

Dear School Board Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents in Manheim Township School District (District) regarding the Board's New Business item from the September 15 board meeting regarding a proposed 6-9 month plan for developing a policy to address gender-based distinctions in athletics, including an agreement to obtain outside legal counsel in the matter. We urge the Board and District to reject this proposal, which contemplates illegal discrimination against transgender students. The US Department of Education has made it clear it will vigorously enforce a U.S. Supreme Court decision affirming that discrimination against transgender students is unlawful sex-based discrimination. This vote will invite federal scrutiny and harm already vulnerable students. We urge the Board to instead undertake its duty to affirmatively protect the rights of LGBTQ+ students.

Sports Exclusion Based on Sex Assigned at Birth Discriminates Against Transgender Students in Violation of Title IX

If the District excludes students from school sports teams based on their gender identity or sex assigned at birth, 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

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).

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 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 U.S. Department of Education and the Department of Justice have made clear that they will enforce Title IX consistent with the Supreme Court’s holding in *Bostock* - that discrimination on the basis of gender identity is a form of sex discrimination.⁵ The Department of Education identifies this among the ways that schools should support transgender and nonbinary students: “Ensur[e] that school policies clearly affirm students’ right to be free from discrimination based on sexual orientation or gender identity in all aspects of school, including...equal access to school programs and activities.”⁶ The Department of Education is currently reviewing comments on its proposed revised regulations implementing Title IX -- which make clear that preventing someone from equitable participation in school programs and activities consistent with their gender identity would cause harm in violation of Title IX⁷ -- and has announced it will issue a notice of proposed rulemaking regarding Title IX implications for a students’ eligibility to participate on a particular male or female athletics team.⁸ 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.

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

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 Dep’t 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 U.S. Dep’t of Educ. Office of Civil Rights, Supporting Transgender Youth in School (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf>

⁷ 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>.

⁸ 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>.

so held.”⁹ 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.¹⁰ The same court also rejected the school defendants’ motions to dismiss, finding that the student stated viable claims of discrimination under Title IX and the Equal Protection Clause.¹¹

Finally, a policy that excludes the equal participation of transgender students would also violate the Pennsylvania Human Relations Act. The Commission has explicitly recognized that discrimination based on gender identity/expression constitutes sex discrimination.¹² In 2018, a Pennsylvania state court entered a \$500,000 damages award against a school district for violating the Human Relations Act by failing to intervene and address the bullying and harassment a student experienced from other students due to her gender presentation and not conforming to gender stereotypes.¹³ Similar claims could be made against a school that created policies for athletics exclusion based on gender identity and sex stereotypes.

A Trans-Exclusion Policy Would Create a Hostile Environment and Harm Students

The foundational premise of a trans-exclusion policy – that trans girls are not ‘real’ girls and trans boys are not ‘real’ boys – is based on faulty science and harmful discriminatory stereotypes.¹⁴ 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.

Manheim Township has committed to providing a “nurturing learning community that provides safety and mutual respect”¹⁵ and providing equal opportunity without regard to sex or gender identity/expression.¹⁶ But the proposed exclusion of transgender students is antithetical to that mission. Even before implementation, the proposed policy change has already had a negative impact on LGBTQ+ students in the District. There can be no “mutual respect” or

⁹ *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).

¹⁰ *B.P.J. v. West Virginia State Board of Educ. et al*, 550 F.Supp.3d 347 (S.D.W.V. 2021).

¹¹ *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).

¹² 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).

¹³ *Wible v. School District of Philadelphia*, No. 15-043169, 1392 CD 2018 (Phila. Cty. Ct. of Comm. Pls. 2018)(judgment entered for student plaintiff in the amount of \$500,000 damages and an additional \$578,000 in attorney fees), <https://www.berneylaw.com/wp-content/uploads/2017/10/Opinion-Rule-1925.pdf> .

¹⁴ 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>.

¹⁵ Manheim Township School District, Policy 101 (Mission Statement/ Vision Statement/ Shared Values).

¹⁶ Manheim Township School District, Policy 103 (Discrimination and Title IX /Sexual Harassment Affecting Students).

“safety” when discrimination on the basis of sex and gender identity is the explicit point of the proposed policy. Instead, the proposed policy serves as a direct affront to transgender students and clearly tells cisgender students that trans people are to be treated differently and not treated as ‘real’ girls or boys.¹⁷ Preventing transgender students from participating in school athletics aligned with their gender identity is a recipe for more trauma, heightened harassment and violence.

Numerous courts have recognized that a school’s policy or actions that treat gay, lesbian, non-binary or transgender students differently from other students can cause serious harm.¹⁸ 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.¹⁹

It doesn’t have to be this way. 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.²⁰ The Third Circuit has recognized that school districts have a “compelling interest in protecting transgender students” and described,

When a school promotes diversity and inclusion, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting [because] the students have the greatest possible variety of backgrounds.” Students in diverse learning environments have higher academic achievement leading to better outcomes for all students. Public education “must prepare pupils for citizenship in the Republic,” and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.²¹

¹⁸ 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”).

¹⁹ See e.g., *Adams*, 968 F.3d at 1306–07; *Dodds*, 845 F.3d at 221–22.

²⁰ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project(Dec. 3, 2020) <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

²¹ *Doe v. Boyertown Area School Dist.*, 897 F.3d at 529.

“These values serve an important educational function for both transgender and cisgender students.”²²

Education Law Center urges Board members to comply with their clear legal obligations under federal and state law and reject any proposal to exclude transgender students from participating in sports aligned with their gender identity.

Sincerely,

A handwritten signature in black ink that reads "Kristina Moon". The signature is written in a cursive, slightly slanted style.

Kristina Moon
Maura McInerney
EDUCATION LAW CENTER

Cc:

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²² *Id.*