

**EDUCATION
LAW CENTER**

**CAN THEY REALLY DO THAT?
KNOW YOUR RIGHTS ABOUT SCHOOL BOARD POLICIES
FOR INCLUSIVE SCHOOLS & HONEST EDUCATION**

EDUCATION VOTERS OF PA; CAMPAIGN FOR OUR SHARED FUTURE

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AGENDA

1. About ELC-Pa
2. Some Context
3. School Board Authority
4. Book Bans
5. Censorship of Curriculum & Discussion
6. Exclusion & Discrimination of LGBTQ+ Students

WHO WE ARE

[Education Law Center-PA \(“ELC”\)](#) is a legal services nonprofit. Our mission is to ensure access to a quality public education for all children in Pennsylvania. We have offices in Philadelphia and Pittsburgh.

We pursue this mission by focusing on the most underserved students: children living in poverty, children of color, children with disabilities, children in the foster care and juvenile justice systems, children experiencing homelessness, English learners, LGBTQ and gender-nonconforming students - and many who are at the intersection of these identities.

Our priority areas include:

Equal Access to
Quality Schools

Adequate &
Equitable School
Funding

Dismantling the
School-to-Prison
Pipeline

Every child deserves an education that prepares them for success, provides a safe place for learning, and honors their history and experiences.

Welcoming and inclusive schools that provide accurate information to our children give them the freedom to pursue their dreams and prepare them to fully participate in our democracy and society.

See ELC's resources at <https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/>

SOME CONTEXT

Some progress of corporations & education institutions acknowledging white privilege & systemic racism; DEI trainings

9/2020 President Trump called out Critical Race Theory & issued Executive Ban on racial equity trainings

1/2021 President Biden reversed Trump ban on federally-funded trainings; Statements against anti-LGBTQ discrimination

2021 Backlash - national right-wing media inspired local protests accusing schools of CRT & sexual content in books

2021-22 Historic numbers of anti-LGBTQ bills at state legislatures

SCHOOL BOARDS, GENERALLY

Boards must follow state and federal laws, including laws that protect students and staff from discrimination on the basis of race, national origin, disability, sex, gender identity, and sexual orientation.

Policies cannot be vague

Board actions may not be arbitrary and capricious (unreasonable)

BOOK BANS

Defined: A book ban occurs when a school administrator or other personnel removes or restricts student access to a book that was previously available, based on the content of that book

Attempts to ban books are on the rise nationally, including Pennsylvania.

Since 2021: more than 1,500 decisions to ban books in public schools nationally & 456 book bans in Pennsylvania (see PEN America)

Targets:

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graph LR; A[Targets:] --- B["Sexual conduct or implied depictions of sexual acts"]; A --- C[Language some people find offensive]; A --- D[Focus on few incidents of certain words, or passages describing sensitive topics];
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“Sexual conduct” or “implied depictions of sexual acts”

Language some people find offensive

Focus on few incidents of certain words, or passages describing sensitive topics

IN PRACTICE...

Books are targeted for references to **race and racism** or books that focus on **LGBTQ+ characters or themes**.

Among the 1,500 books that have been banned nationwide since July 2021:

41% contain protagonists or prominent secondary characters of color,

22% directly address issues of race and racism, and

33% explicitly address LGBTQ+ themes.

The fifth most banned book during this period, for example, was *The Bluest Eye* by the Pulitzer and Nobel-prize winning author Toni Morrison, a novel that addresses, among other themes, the intergenerational harm caused by racism and sexual assault.

SCHOOL BOARD AUTHORITY & LIMITS: BOOK BAN

BOOKS ASSIGNED AS PART OF THE CURRICULUM

- PA law gives school boards broad discretion over curricular decisions: responsible to adopt a “course of study” adapted to the “age, development and needs of the pupils”
 - Typically delegated to superintendent who works with teachers & curriculum experts
 - Authority to select textbooks & curricular materials
- Not much case law, but earlier federal courts have largely affirmed discretion of school boards under First Amendment
 - U.S. Supreme Court recognized school board “duty to inculcate community values” via curricular decisions
 - Discretion is broad but NOT limitless - may not impose “an identifiable religious creed” or “otherwise impair permanently the student’s ability to investigate matters that arise in the natural course of intellectual inquiry”
 - Can remove curricular materials if decision is “reasonably related” to “legitimate pedagogical concern” of denying students access to “potentially sensitive topics”

SCHOOL BOARD AUTHORITY & LIMITS: BOOK BAN

LIBRARY BOOKS NOT PART OF THE CURRICULUM

- PA school boards have LESS discretion in restricting noncurricular materials, such as library books
- U.S. Supreme Court: libraries have a unique role different from mandatory curriculum - a place to test or expand upon ideas presented in the classroom (Pico, 1982)
 - A school board “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge” 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.” The First Amendment requires that “students must always remain free to inquire” and “the school library is the principal locus of such freedom.”
- Cannot remove books “simply because they dislike the ideas contained” within or in an effort “to prescribe what must be orthodox in politics, nationalism, religion, or other matters of opinion.”
 - Courts have rejected book removals on the basis: “too concerned with racial matters and too controversial”; simply because depicts gay relationships; concern might promote disobedience or disrespect for authority

CHALLENGING BOOK BANS

Did the board follow standard, required procedures?

Policies may be unlawful if they are

- Impermissibly vague or overbroad
- Failure to consider book in its entirety, including critical acclaim, may be evidence policy is not tailored to be objective & identify “educational suitability” but instead enforce a particular viewpoint
- Arbitrary and capricious

Advocacy points

- Disliked viewpoint as learning opportunity
- “Sensitive issues” according to whom?
- Parents already have opt-out provisions
- Check for policy 109

CENSORSHIP OF CURRICULUM & CLASSROOM DISCUSSION

CURRICULUM AUTHORITY

School boards have the power to “adopt and arrange courses of study” for their schools.

E.g. whether to fund a new robotics program or whether to approve a new African American History class

SCHOOL BOARDS CANNOT

- Contradict the state’s learning standards (see State Board of Ed)
- Violate the First Amendment by imposing what U.S. Supreme Court called a “pall of orthodoxy” in the classroom

CENSORSHIP OF CURRICULUM & CLASSROOM DISCUSSION

Ban on “divisive concepts”, CRT, instruction/ acknowledgment of gay & transgender people

- State bills proposed HB 1532, HB 2521
- Shift from opt-out to opt-in, policy 105
- “Don’t Say Gay” bills (eg SB 1278) and district policies

Ban on educator “advocacy” , policy 321

- Relating to religion, gender identity, social, political and geo-political matters; sexual orientation, socio-political
- when applicable to the curriculum and appropriate to classroom studies” must be presented in a “balanced” or “neutral” manner

Classroom Censorship - Red Flags

- Right to sue teachers
- Chilling effect
- Vague, overbroad
- Targeting viewpoint speech violates 1st Amendment

EXCLUSION & DISCRIMINATION OF LGBTQ+ STUDENTS

The law: An “unbroken line of authority” from voluminous federal cases holding that Title IX’s nondiscrimination mandate ensures LGBTQ students have equitable access to education free from sex discrimination.

Courts and U.S. Dept of Educ recognize discrimination on the basis of sex includes sexual orientation and gender identity.

US Dept of Educ: “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.”

EXCLUSION & DISCRIMINATION OF LGBTQ+ STUDENTS

Exclusion of transgender students from sports team aligned with their gender identity

- Discrimination on the basis of sex and gender identity, violates Title IX
- Multiple courts addressed this issue & held excluding trans students from sports violates the law
- US Dept of Educ expected to announce specific Title IX regs soon
- Violates PA Human Relations Act which recognizes gender identity/expression within sex discrimination

Pronoun, name

- Policy or practice misgendering and deadnaming students violates Title IX & PA Human Relations Act
- Multiple courts: intentionally & persistently misgendering constitutes sex-based harassment & creates hostile environment
- Right to privacy; No requirement to notify parent
- Targets trans & nonbinary students by denying them same courtesy afforded other students who request preferred name

Removal pride flags

- No requirement to allow all displays if allow some
- Creates hostile environment to direct removal of support flag

RESOURCES & REPORTING

ELC's webpage about Inclusive Schools & Honest Education,

<https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/>

Materials include: Factsheets about School Board Authority; Book Bans; LGBTQ Student Rights, and ELC advocacy letters

Contact ELC with inquiries & to report concerns at your school district

ELC helpline: 215-238-6970, intake@elc-pa.org

Report Discrimination and Harassment

- Report harassment and discrimination based on sex, sexual orientation, gender identity/expression to your school's Title IX Coordinator
- Complaints of individual or systemic discrimination and harassment based on sex, sexual orientation, gender identity, or race can be submitted to the [U.S. Department of Education's Office of Civil Rights](#)