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October 11, 2022

Central Bucks School District
Board of Education and Policy Committee
16 Welden Drive
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Dear School Board Members and Solicitor Garton,

Education Law Center-PA (“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 Policy 321 relating to “Political, Sociopolitical, and Other Related Communications” and an unwritten directive prohibiting teachers from using students’ preferred names and pronouns without parental consent.¹ **We urge the Board to reject Policy 321** as written because it is overbroad, discriminatory and is plainly intended to chill educators’ support for LGBTQ+ students. **The Board should reject any directive requiring parental consent before using a student’s preferred name or pronoun** because there is no such requirement in the law and the purposeful misgendering or deadnaming of a student would constitute harassment under Title IX and the PA Human Relations Act.

Proposed Policy 321 Suggests LGBTQ+ People are Political Statements

The policy from September 2022 has been significantly altered in a manner that not only signals discriminatory intent, but compels it, and does so under the guise of protecting students and respecting all beliefs. These proposed changes are in fact, discriminatory and severely out of line with the purported opening statement to “create an atmosphere where all students...are valued and supported.” For reasons outlined below, Proposed Policy 321 will have a harmful and chilling effect and we urge the Board to reject proposed revisions to Policy 321.

The original purpose of Policy 321 was to prohibit partisan political activity by teachers and to make clear that district staff was not to use work time or district resources to promote their own political actions or campaigns. The prior policy carved out exceptions for politics and political issues as permitted by the curriculum, union rep elections, and student elections or related school-based campaigns. Now, the proposed policy removes any express reference to what is clearly political – for example, district staff running for local office and using the school copier to print their campaign materials, plastering them in the hallways, inserting support for their campaign into lessons and campaigning over the loudspeaker– and inserts what the District is now calling “sociopolitical” matters. Proposed Policy 321 prohibits employees from engaging in “sociopolitical” topics, political beliefs, or beliefs specific to sexual orientation, gender identity, and religion. The policy further targets “stickers,

¹ See Chris Ullery, CB teachers concerned about risk to students vow to defy transgender policy. ‘we’re not doing it’, Bucks County Courier Times (Sept. 29, 2022), <https://www.buckscountycouriertimes.com/story/news/local/2022/09/29/central-bucks-teachers-refuse-to-follow-lgtbq-name-policy/69522244007/>

signs, flags, and other décor" that are “related to political, sociopolitical, sexual orientation, gender identity or religious beliefs” by proposing a blanket prohibition. Proposed Policy 321 goes far beyond political activities and takes aim instead at broader discussions of identity and cultural matters.

The District claims to respect a diverse school community, and wants all students to feel valued and supported, yet these revisions are initiated to remove LGBTQ+ pride flags and other acknowledgements that gay and transgender students are part of the school community. Instead, it takes a position that sexual orientation and gender identity are ideas, not people, and serves to prioritize the viewpoint of students or educators who apparently wish to discriminate against LGBTQ+ students instead of those who are targeted for discrimination. Simply put -- being gay or transgender is not a political statement that a student is making and with which others can agree or disagree; it is their identity and must be respected. The district’s suggestion that the rights of gay and transgender people is ‘political’ and up for debate, along with the targeted removal of support for marginalized students, is clear evidence of discrimination and creating a hostile environment for students.

Proposed Policy 321 is Unconstitutional Censorship

The Supreme Court has famously said, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² The Proposed Policy 321 is overbroad and likely to trample on First Amendment rights of school employees and censor valuable classroom discussions of current events.

While courts have acknowledged that schools can regulate employee political speech for legitimate educational purposes, the proposed policy is far broader. First, it adds and emphasizes a new undefined term “sociopolitical” and prohibits “political activity, sociopolitical advocacy, sexual orientation advocacy, gender identity advocacy and religious advocacy.” This could encompass exchanges between adults and could include, for example, allegations of racial discrimination or sex discrimination against the District.³ The reference to “assigned work hours” applicable to all employees is similarly overbroad and would prohibit, for example, conversations between staff regarding advocacy to benefit students.

Second, the policy directs that “discussion and study of politics and sociopolitical issues, religious issues, or sexual orientation and gender identity issues when applicable to the curriculum and appropriate to classroom studies” must be presented in a “balanced” manner. These vague and overbroad proposed changes will likely serve to censor educators from facilitating critical lessons and discussions with students about historical events and discrimination, as well as current political and cultural concerns. This proposed policy undermines democratic discourse and deprives students of a true understanding of history and deeper learning opportunities. America’s schools are vital for “prepar[ing] citizens to participate effectively and intelligently in our open political system if we are to preserve

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 505, 513 (1969).

³ See e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979), (reinstating the First Amendment claim of a public school teacher in Mississippi who was discharged after complaining to her principal about racial discrimination); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (ruling often applied to teachers which held that public school officials can regulate school-sponsored student speech as long as there is a legitimate educational purpose for their action).

freedom and independence.”⁴ Students and teachers must be free “to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”⁵ The proposed policy’s vague mandate for “balance” in all instruction would also suggest overbroad requirements like a history teacher providing a Nazi’s justification for the genocide of Jewish Americans, and a KKK member’s support for lynchings. Instruction that devalues human beings based on their identity or certain characteristics – whether it is race, gender identity, or religion – in service of “balance” or “neutrality” has no value or purpose in our public schools and serves only to discriminate against historically marginalized students. The proposed policy will stifle normal discussion about political issues that are integral to student learning and critical thinking but will have its most chilling effect on issues related to race, gender and sexual orientation and expression.

For these reasons, Policy 321 should be rejected as written.

A Policy Permitting or Promoting the Misgendering and Deadnaming of Students is Harmful and Constitutes Discrimination Under Title IX and the PA Human Relations Act

If the District institutes a policy or practice permitting or promoting the misgendering and deadnaming of students,⁶ 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.⁷ 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.⁸ 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

⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁶ See Chris Ullery, CB teachers concerned about risk to students vow to defy transgender policy. ‘we’re not doing it’, Bucks County Courier Times (Sept. 29, 2022), <https://www.buckscountycouriertimes.com/story/news/local/2022/09/29/central-bucks-teachers-refuse-to-follow-lgtbq-name-policy/69522244007/>

⁷ 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).

⁸ 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).

against transgender people is also discrimination on the basis of sex under Title IX.⁹ Additionally, the Supreme Court has twice rejected cases challenging school policies that support transgender students.¹⁰

Federal courts and the U.S. Department of Education have already addressed the issue of a person's preferred name and pronoun directly, and clearly held that intentionally and persistently misgendering a person constitutes sex-based harassment and creates a hostile environment. A federal court here in Pennsylvania in 2020 held that "in addition to being misgendered," calling a transgender woman by her prior name ("deadnaming") "was sufficiently severe or pervasive to support her [hostile work environment] claim."¹¹ The Department of Education has made multiple findings against school districts across the country where the school failed to prevent and intervene in harassment of students that included refusing to use a student's preferred name or pronouns.¹²

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.¹³ The Department of Education addresses this directly among the ways that schools should support transgender and nonbinary students: "Adopting policies that respect all students' gender identities - such as [using] the name a student goes by, which may be different than their legal name, and pronouns that reflect a student's gender identity - and implementing policies to safeguard students' privacy - such as maintaining the confidentiality of a student's birth name or sex assigned at birth if the student wishes to keep this information private, unless the disclosure is legally required."¹⁴ The Department of Education is currently reviewing comments on its proposed revised regulations implementing Title IX which make clear that preventing someone from

⁹ 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)).

¹⁰ 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).

¹¹ *Doe v. Triangle Doughnuts, LLC.*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (citing *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (applying *Bostock*, the court held that, "in addition to being misgendered," an employer deadnaming a transgender woman "was sufficiently severe or pervasive to support her [hostile work environment] claim").

¹² See Dep't of Educ., Office for Civil Rights, Office for Civil Rights Announces Resolution of Sex Based Harassment Investigation of Tamalpais Union High School District (June 24, 2022), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sexbased-harassment-investigation-tamalpais-union-high-school-district>; Willits Unified School District Resolution Agreement, Case No. No. 09-16-1384 (2017) (district will ensure "referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct"); City College of San Francisco, Resolution Agreement, Case No. 09-16-2123 (2017) (school policy should reflect that harassment "can include refusing to use a student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes").

¹³ 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>.

¹⁴ 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>

equitable participation in school programs and activities consistent with their gender identity would cause harm in violation of Title IX.¹⁵

A policy permitting or promoting the misgendering or deadnaming of students would also violate the Pennsylvania Human Relations Act. The Commission has explicitly recognized that discrimination based on gender identity/expression constitutes sex discrimination.¹⁶ 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.¹⁷

Students Have a Right to Privacy in their Gender Identity and the District is Not Required to Notify Parents of a Student's Preferred Name or Pronoun

Courts recognize that sexual orientation and transgender status are intimately private and have found that it is a violation of a person's right to privacy to disclose this information absent a legitimate interest.¹⁸ Pennsylvania educators have a "primary professional obligation...to the students they serve" and "shall respect a student's right to privacy..."¹⁹ Additionally, schools have a "compelling interest in protecting the physical and psychological well-being of their minor students."²⁰ In a recent case, the Third Circuit expressly recognized that "transgender students face extraordinary social, psychological and medical risks and the school district clearly had a compelling state interest in shielding them from discrimination."²¹

While FERPA gives parents the right to view the school records of their minor children, it does not require schools to proactively contact parents about any content in or changes to student records. Nor does FERPA require a school to document a student's use of a new name or pronoun in the official school record. There is simply no requirement in law that a school notify parents if a student requests to be called by another name or pronoun. In fact, courts have approved school policies that identify the goal of collaborating with student and their family about a student's gender identity, while acknowledging that

¹⁵ 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>.

¹⁶ 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).

¹⁷ *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>.

¹⁸ See, e.g., *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); *Doe v. Pennsylvania Dep't of Corrections*, 2019 WL 5683437 (M.D.Pa. Nov. 1, 2019) (stating courts have long recognized that the harms arising from disclosing a person's transgender status are among those that make protection by pseudonym appropriate); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1192-95 (C.D. Cal. 2007) (student had a reasonable expectation of privacy about her sexual orientation, and even though she was out at school, she had protected interest in not being outed to her parents by school officials).

¹⁹ 22 Pa. Code § 235.5a (PA Code of Professional Practice and Conduct for Educators).

²⁰ See *Doe v. Boyertown Area School Dist.*, 897 F.3d 518, 528-29 (3d Cir. 2018)(explaining risks to transgender students' well-being when mistreated).

²¹ *Doe v. Boyertown Area School Dist.*, 897 F.3d at 528.

“in some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance.”²² A school policy must “carefully balance the interests of both the parents and students, encouraging parental input when the student consents, but avoiding it when the student expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way.”²³

A comprehensive policy that provides for individualized assessments can properly balance the rights of students and parents, and the obligations of the school district to ensure a safe, inclusive and nondiscriminatory learning environment. A policy that requires parental notification without such assessment can have severe negative effects on students who are already at greater risk of self-harm.

The District Has Created a Hostile Environment that Harms Students, and Will be Held Accountable

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.²⁴ 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.²⁵

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.²⁶ 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

²² See, e.g. *John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 (D. Md. Aug. 18, 2022).

²³ *Id.* at *6.

²⁴ 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”).

²⁵ See e.g., *Adams*, 968 F.3d at 1306–07; *Dodds*, 845 F.3d at 221–22.

²⁶ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project (Dec. 3, 2020) <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

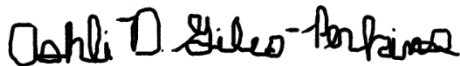
students. Public education “must prepare pupils for citizenship in the Republic,” and inclusive classrooms reduce prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.²⁷

“These values serve an important educational function for both transgender and cisgender students.”²⁸
The students of Central Bucks School District deserve better.

Education Law Center supports the students and educators who recently filed a systemic complaint with the Department of Education and the Department of Justice identifying a continuing crisis of leadership and series of harmful failures by district leaders and board members who refuse to protect the rights of LGBTQ+ students at Central Bucks School District.²⁹ Proposed Policy 321 and any directive to misgender or deadname students and out them to their parents are further evidence of the hostile environment and discrimination against LGBTQ+ students that the Board and administration have created.

For all these reasons, we urge the Board to reject each of these proposed policies and instead commit to policies that protect the rights of students and educators without the harm described by the violations described herein. We remain available to discuss these issues further.

Sincerely,



Kristina Moon
Ashli Giles-Perkins
Maura McInerney

EDUCATION LAW CENTER-PA

Cc: Mr. Jeffrey Garton, Solicitor

²⁷ *Doe v. Boyertown Area School Dist.*, 897 F.3d at 529.

²⁸ *Id.*

²⁹ ACLU-PA Files Federal Complaint Alleging Widespread Discrimination in Central Bucks School District, Oct. 6, 2022, <https://www.aclupa.org/en/press-releases/aclu-pa-files-federal-complaint-alleging-widespread-discrimination-central-bucks>