

February 21, 2023

South Side Area School District
Board of Education and Pronoun Committee
4949 State Route 151
Hookstown, PA 15050

Dear School Board Members and Pronoun Committee Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents in South Side Area School District (District) regarding the District's failure to protect transgender and nonbinary students' right to nondiscrimination by considering a policy that permits teachers to refuse to use pronouns and names consistent with students' gender identity. We urge the Board and District to uphold its own nondiscrimination policy and reinstitute a policy and practice of requiring teachers to use the pronouns and name consistent with a transgender and nonbinary student's identity.

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, it will be in direct violation of Title IX and 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 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

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) (collecting cases addressing transgender student rights), affirmed 57 F.4th 43 (2d Cir. 2022)(policy permitting transgender students to compete in athletics does not violate Title IX).

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); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (cisgender students challenging trans students use of facilities were not likely to succeed on merits of due process, Title IX claims), cert. denied, 897 F.3d 518 (2019); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (policy denying transgender student access to bathroom violated Title IX); *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.*, 408 F.Supp.3d 536 (MD Pa. 2019)(collecting and discussing cases; district lost summary judgment because policy prohibiting transgender student from using restroom corresponding to gender identity discriminated in violation of Title IX).

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 cert for cases challenging school policies that support transgender students.⁴

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 held in 2020 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."⁵ 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.⁶

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.⁷ 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

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 *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").

⁶ 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").

⁷ 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>.

- 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.”⁸ 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 IX.⁹

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, in guidance¹⁰ and with regulations amended on December 8, 2022 that explicitly clarify sex discrimination includes gender identity or expression.¹¹ Courts have already held school districts responsible for discrimination against students based on gender identity under the PHRA. 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.¹²

K-12 Teachers Do Not Have a First Amendment Right to Discriminate Against Transgender or Non-Binary Students in the Classroom

As described above, schools have the obligation under Title IX and PHRA to prevent discrimination against students based on their sex and gender identity. A teacher’s use of pronouns that match a cisgender student’s gender identity while refusing to use pronouns that match a transgender or nonbinary student’s gender identity is discrimination on the basis of sex and gender identity.

While teachers certainly do not forfeit all First Amendment rights at the schoolhouse door,¹³ teachers cannot use the First Amendment to support discriminatory conduct when, as here,

⁸ 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>

⁹ 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>.

¹⁰ 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).

¹¹ Regulation #52-13: Protected Classes Under the PHRA and PFEOA,

<http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=3350> (creating new subchapter to define terms sex, race, religious creed).

¹² *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>.

¹³ See e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968)(upholding First Amendment rights of a teacher terminated for criticizing school board in letter to newspaper); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)(First Amendment protects complaints of racial discrimination to employer).

such speech is part of a teacher’s official job duties. When a teacher addresses a student in class, the teacher’s speech “is—for constitutional purposes at least—the government’s own speech,”¹⁴ and the public school has a right and responsibility to ensure that its students are treated equally when addressed during instruction. Talking to students, including students who are transgender, “is speech [a teacher] is expected to deliver in the course of carrying out [their] job.” *Kennedy*, 142 S.Ct. at 2424.

In contrast to the post-game prayers at issue in *Kennedy* where the Supreme Court held the speech was not “ordinarily within the scope” of the duties of a coach, a teacher’s use of pronouns as part of instruction in the classroom owes its existence to responsibilities as a public employee.¹⁵ As a result, the *Garcetti v. Ceballos*, 547 U.S. 410 (2006) line of cases controls the outcome and Third Circuit precedent here is clear that a “teacher’s in-class conduct is not protected speech.”¹⁶ “Teachers do not have a First Amendment protected right to decide the content of their lessons or how the material should be presented to their students.”¹⁷ “[N]o court has found that teachers’ First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.”¹⁸

A public school teacher “does not personally hold a First Amendment ‘teaching right’ concerning classroom management.”¹⁹ A teacher does not have a free speech right to disregard school instructions on how they should address students when providing class instruction.²⁰

A teacher cannot avoid *Garcetti* and Third Circuit precedent by claiming their challenge is to “compelled speech” because the Supreme Court has made clear that “if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.”²¹ See *infra* regarding the district’s legal obligation and policy of nondiscrimination.²²

¹⁴ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

¹⁵ *Id.* at 2424.

¹⁶ *Borden v. School Dist. of Tp. of East Brunswick*, 523, F.3d 153, 172 (3d Cir. 2008), *cert denied*, 523 F.3d 153 (2009).

¹⁷ *Ali v. Woodbridge Township School District*, 957 F.3d 174, 184 (3d Cir. 2020)(citing *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

¹⁸ *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990).

¹⁹ *Kahan v. Slippery Rock Univ. of Pa.*, 50 F.Supp.3d 667, 707 (W.D.Pa. 2014); see also *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (teacher has no First Amendment right of academic freedom extending to classroom management techniques).

²⁰ See *Kluge v. Brownsburg*, 432 F.Supp. 3d 823, 838-39 (S.D.Ind. 2020) (holding that high school teacher’s refusal to address transgender students by names consistent with their gender identity was not protected as speech by a citizen on a matter of public concern).

²¹ *Janus v. American Fed. of State, County & Municipal Employees Council 31*, 138 S.Ct. 2448, 2473 (2018)(citing *Garcetti*, 547 U.S. at 421-22).

²² Neither can a teacher escape *Garcetti* by claiming their refusal to use pronouns is related to scholarship and academic freedom. Courts have continually emphasized this distinction between public K-12 schools and universities in addressing speech and other constitutional issues. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329. (2003) (recognizing that “universities occupy a special niche in our constitutional tradition”). Although the Sixth Circuit in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), upheld a university professor’s free speech objection to using a student’s name and pronouns, the court was explicit that its holding did not “extend to the in-class

Neither is a Free Exercise claim grounds for a teacher to discriminate against transgender students by refusing to use a name and pronoun consistent with their gender identity. A district's requirement that teachers address students with pronouns consistent with a student's gender identity, pursuant to their nondiscrimination policy, is a facially neutral and generally applicable policy.²³

The school district has a compelling interest - and responsibility - to provide a safe and inclusive learning environment for all students. The Supreme Court has long recognized that governments have a compelling interest in protecting individuals from discrimination on the basis of sex.²⁴ School districts also have a "compelling state interest in protecting transgender students from discrimination" and a "compelling interest in protecting the physical and psychological well-being of minors."²⁵ Discrimination at school creates particularly severe risks for transgender students because "[m]istreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior."²⁶ In short, "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated."²⁷

A policy requiring all teachers to use pronouns and names is the least restrictive means of furthering the district's interest in nondiscrimination. Just as the Third Circuit already found in a case about transgender students' bathroom access, "[n]ot only would" a policy permitting refusal to use transgender students' pronouns "not serve the compelling interest that the School District has identified here, it would significantly undermine it."²⁸ "Adopting [a contrary] position would very publicly brand all transgender students with a scarlet 'T,' and they should not have to endure that as the price of attending their public school."²⁹

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.³⁰ Pennsylvania educators have a "primary professional obligation...to the

curricular speech of teachers in primary and secondary schools." *Id.* at 505 n.1 (quoting *Evans-Marshall*, 624 F.3d at 334). The Third Circuit has no contrary binding decisions.

²³ See *Kluge*, 432 F. Supp. 3d at 836 (holding that policy requiring teachers to address transgender students by new names consistent with their gender identity was neutral and generally applicable).

²⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

²⁵ *Boyertown Area Sch. Dist.*, 897 F.3d at 528-29.

²⁶ *Id.* at 529.

²⁷ *Id.*

²⁸ *Boyertown Area Sch. Dist.*, 897 F.3d at 530.

²⁹ *Id.*

³⁰ 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

students they serve” and “shall respect a student’s right to privacy...”³¹ Additionally, schools have a “compelling interest in protecting the physical and psychological well-being of their minor students.”³² 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.”³³

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 “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.”³⁴ 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.”³⁵

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.

Failing to Respect Pronouns Creates a Hostile Environment that Harms Students

Using correct pronouns could be the difference between life and death for transgender and nonbinary youth, who are more vulnerable to suicidal ideations and self-harm. More than half of transgender youth contemplated suicide in the past year, and over 60% of transgender and nonbinary youth engaged in self-harm.³⁶ The National Education Association (NEA) has

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).

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

³² 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).

³³ *Doe v. Boyertown Area School Dist.*, 897 F.3d at 528.

³⁴ See, e.g. *John & Jane Parents I v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 (D. Md. Aug. 18, 2022).

³⁵ *Id.* at *6.

³⁶ The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf; see also Johns MM, Lowry R, Andrzejewski J, et al. Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School

explained, using pronouns consistent with a student’s gender identity is “critical to the health and well-being of transgender and gender-diverse people.”³⁷ It also makes our classrooms safer while empowering LGBTQ students.

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.³⁸ 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.³⁹

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.⁴⁰ A recent study documented that respecting transgender students’ names and pronouns was associated with a 56 percent decrease in suicide attempts and a 29 percent decrease in suicidal thoughts.⁴¹

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

Districts, 2017. MMWR Morb Mortal Wkly Rep 2019;68:67–71. DOI:

<http://dx.doi.org/10.15585/mmwr.mm6803a3>

³⁷ See *Why Pronouns Matter* available at <https://www.nea.org/advocating-for-change/new-from-nea/why-pronouns-matter>.

³⁸ 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”).

³⁹ See e.g., *Adams*, 968 F.3d at 1306–07; *Dodds*, 845 F.3d at 221–22.

⁴⁰ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project(Dec. 3, 2020) <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

⁴¹ See Stephen T. Russell et al., Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Suicidal Behavior among Transgender Youth, 63 J. Adolescent Health 503, 505 (2018).

prejudices and promote diverse relationships which later benefit students in the workplace and in their communities.⁴²

“These values serve an important educational function for both transgender and cisgender students.”⁴³

Education Law Center urges the District and Board members to comply with their clear legal obligations under federal and state law and reject any proposal to permit teachers to discriminate against transgender and nonbinary students and return to its nondiscrimination policy requiring the use of pronouns and name consistent with their gender identity.

Sincerely,

A handwritten signature in black ink that reads "KRISTINA MOON". The letters are in all caps and have a cursive, slightly slanted style.

Kristina Moon, Esq.
EDUCATION LAW CENTER

Cc: Ira Weiss, Esq., iweiss@wbklegal.com

⁴² *Doe v. Boyertown Area School Dist.*, 897 F.3d at 529 (holding cisgender students could not establish likelihood of success on constitutional privacy claim and upholding school policy permitting transgender students to use bathroom facilities aligned with their gender identity).

⁴³ *Id.*