

June 1, 2023

Red Lion Area School District
Board of Education
696 Delta Road
Red Lion, PA 17356

Dear School Board Members,

Education Law Center (ELC) provides this letter in response to concerns brought to our attention by parents in Red Lion Area School District (District) regarding proposed Policies 123.3 (Sex-Based Distinctions in Athletics), 216.2 (Student Records Name, Sex and Gender Identity) and 253 (Sex-Based Distinctions in Multi-User Facilities) which discriminate against transgender and nonbinary students and open the District to litigation. We demand the Board and District uphold its nondiscrimination obligations under the law and reject these proposed policies.

I. Proposed Policy 253 (Sex-Based Distinctions in Multi-User Facilities) Violates the Law and Must Be Rejected

There is no legal basis for the District to refuse students' right to use the bathroom or locker room that aligns with their gender identity— to do so flies in the face of direct and controlling legal precedent. 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.¹ 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 people is also discrimination on

¹ 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) (trans students likely to succeed on Equal Protection challenge to school board resolution limiting trans students' access to bathrooms); *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).

the basis of sex under Title IX.² Additionally, the Supreme Court has three times in the last five years denied *certiorari* for cases challenging school policies that support transgender students.³

The Third Circuit—the controlling federal court in Pennsylvania— and three other circuit courts have clearly affirmed students’ right to use school bathroom and locker room facilities aligned with their gender identity.⁴ In their 2018 decision in the *Boyertown* case, the Third Circuit held that there was no privacy violation in having transgender and cisgender students share facility space.⁵ Two other federal cases that arose in the Middle and Western district courts in Pennsylvania resulted in the same outcome, affirming the right of transgender students to access the school facility aligned with their gender identity.⁶ Likewise in 2020, the Ninth Circuit held that a school district’s gender-inclusive bathroom and locker room policy that supports the rights of transgender students does not violate the rights of other students— and the U.S. Supreme Court declined to review that case.⁷

Moreover, President Biden, 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*: discrimination on the basis of gender identity is a form of sex discrimination.⁸ On multiple occasions, the Office of Civil Rights has found school districts

² 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.”); CIV. RTS. DIV., U.S. DEP’T OF JUST., *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>.

³ See *Grimm v. Gloucester Cnty. Sch. Bd.*, 400 F.Supp. 3d 444 (E.D. Va. 2019), *aff’d*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (June 28, 2021) (declining to take action, allowing District Court decision striking down the school board’s policy barring a transgender student from using the bathrooms that aligned with his gender identity); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018), *aff’d*, 949 F.2d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (Dec. 7, 2020) (declining to take action, allowing policy to continue permitting transgender students using same restrooms and locker rooms as their peers); *Doe v. Boyertown Area Sch. Dist.*, 276 F.Supp. 3d 324 (E.D. Pa. 2017), *aff’d*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (May 28, 2019) (declining to take action, allowing Boyertown’s policies supporting transgender students to stand).

⁴ See *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018) (finding that a school policy barring transgender students from restrooms that align with their gender identity would pose a potential Title IX violation); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020) (holding that school policies that require transgender students to use bathrooms that correspond to their “biological sex” violate Title IX and the equal protection clause); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (Mar. 5, 2018); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020).

⁵ *Boyertown*, 897 F.3d at 530-31.

⁶ See *Evancho v. Pine Richland Sch. Dist.*, 237 F. Supp.3d 267 (W.D. Pa. 2017) (holding that plaintiffs were likely to succeed on their Equal Protection challenge to a school board resolution limiting transgender students’ access to bathrooms); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp.3d 536 (M.D. Pa. 2019) (denying summary judgment for the school district after reviewing similar cases because the policy prohibiting transgender students from using restrooms corresponding to their gender identity discriminated in violation of Title IX).

⁷ See *Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020) (rejecting arguments that a school policy protecting transgender students violated other students’ rights, finding that there was not a Title IX violation because the policy treated all students the same), *cert. denied*, 141 S. Ct. 894 (Dec. 7, 2020).

⁸ Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021); Enforcement of Title IX in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021) (to be codified at 34 C.F.R. ch. 1); CIV. RTS. DIV., U.S. DEP’T OF JUST., *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>.

liable for refusing to allow students to use facilities aligned with their gender identity.⁹ Additionally, 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.¹⁰

II. Proposed Policy 216.2 (Student Records Name, Sex and Gender Identity) Violates the Law and Must Be Rejected.

The District May Not Require the Provision of a Birth Certificate for Enrollment or Participation in School

There is no legal basis for requiring a student to ‘prove’ their sex in order to participate in public school and the District cannot require provision of a birth certificate. Students’ right to enroll and participate in school may not be conditioned on the provision of documents other than those showing proof of child’s age, residence and immunizations as required by law.¹¹ Other documents, including a birth certificate, may not be required as a condition of enrollment.¹² Even for these required items, the Pennsylvania Department of Education is clear that “a school district can never demand only one kind of document.”¹³

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.¹⁴

⁹ See OCR Complaint No. 11-15-1348, Letter of Findings to Dorchester County School District Two (Jun. 21, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151348-a.pdf> (District violated Title IX when it prohibited transgender student in elementary school from using girls restrooms & required use office or nurse restroom); OCR Complaint 09-12-1095, Letter Resolution to Downey Unified School District (Oct. 14, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09121095-a.pdf> (District must allow trans student to use female-designated facilities and otherwise treat as a girl in all respects).

¹⁰ See 34 C.F.R. Part 106; U.S Dep’t of Educ., *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>.

¹¹ See 22 Pa. Code. 11.11.

¹² See Pa. Dep’t of Educ., Basic Education Circular: Enrollment of Students, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudents.aspx>; Basic Education Circular: Student Enrollment FAQ, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx>

¹³ PDE, Basic Education Circular: Student Enrollment FAQ, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx>

¹⁴ See *Soule v. Conn. Ass’n of Schs., Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021) (collecting cases addressing transgender student rights), *aff’d*, 57 F.4th 43 (2d Cir. 2022) (policy permitting transgender students to compete in athletics does not violate Title IX).

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."¹⁵

The U.S. 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."¹⁶ 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.¹⁷

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 guidance¹⁸ and with regulations amended on December 8, 2022 that explicitly clarify sex discrimination includes gender identity or expression.¹⁹ Courts have 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

¹⁵ *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").

¹⁶ 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>

¹⁷ 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").

¹⁸ 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).

¹⁹ 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).

student experienced from other students due to her gender presentation and not conforming to gender stereotypes.²⁰

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,²¹ teachers cannot use the First Amendment to support discriminatory conduct when, as here, 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,"²² 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."²³

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.²⁴ 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."²⁵ "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."²⁶ "[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."²⁷

²⁰ *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>.

²¹ 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).

²² *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

²³ *Kennedy*, 142 S.Ct. at 2424.

²⁴ *Id.* at 2424.

²⁵ *Borden v. School Dist. of Tp. of East Brunswick*, 523, F.3d 153, 172 (3d Cir. 2008), *cert denied*, 523 F.3d 153 (2009).

²⁶ *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).

²⁷ *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990).

A public school teacher “does not personally hold a First Amendment ‘teaching right’ concerning classroom management.”²⁸ A teacher does not have a free speech right to disregard school instructions on how they should address students when providing class instruction.²⁹

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.”³⁰ See *infra* regarding the district’s legal obligation and policy of nondiscrimination.³¹

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 a students’ gender identity, pursuant to their nondiscrimination policy, is a facially neutral and generally applicable policy.³²

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.³³ 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.”³⁴ 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.”³⁵ In short, “[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated.”³⁶

²⁸ *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).

²⁹ 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), *aff’d*, 64 F.4th 861 (7th Cir. 2023).

³⁰ *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).

³¹ 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 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.

³² 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).

³³ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

³⁴ *Boyertown Area Sch. Dist.*, 897 F.3d at 528-29.

³⁵ *Id.* at 529.

³⁶ *Id.*

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."³⁷ "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."³⁸

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.³⁹ Pennsylvania educators have a "primary professional obligation...to the students they serve" and "shall respect a student's right to privacy..."⁴⁰ Additionally, schools have a "compelling interest in protecting the physical and psychological well-being of their minor students."⁴¹ The Third Circuit has 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."⁴²

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."⁴³ 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

³⁷ *Boyertown Area Sch. Dist.*, 897 F.3d at 530.

³⁸ *Id.*

³⁹ 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).

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

⁴¹ 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).

⁴² *Doe v. Boyertown Area School Dist.*, 897 F.3d at 528.

⁴³ 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).

expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way.”⁴⁴

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.

Additionally, the proposed policy’s requirement that a student ‘substantiate’ their request for gender identity to be ‘accommodated’ by “consistently, persistently, and insistentlly express[ing] the named gender identity” sets an unreasonable standard. Any sincerity standard must be consistent with Title IX’s religious exemption criterion as the sincerity of a student’s gender identity, like one’s religious belief, is “generally not in dispute”⁴⁵ and is “generally presumed or easily established.”⁴⁶ Students must not be required to disclose a gender dysphoria diagnosis or statement from a medical provider; other methods of establishing a student’s gender identity must be accepted.⁴⁷

Moreover, imposing such unreasonable standards violates Pennsylvania’s School Code which prohibits governing school boards from adopting rules and policies which are “*arbitrary, capricious, discriminatory* or outside their grant of authority from the General Assembly.”⁴⁸

III. Proposed Policy 123.3 (Sex-Based Distinctions in Athletics) Violates the Law and Must Be Rejected

Title IX Requires that All Students Be Permitted to Enjoy the Benefits of School Athletics and There is No Evidence that the Participation of Trans Students Harms Anyone.

The educational benefits of playing sports are promised to all students under Title IX. Playing sports is associated with higher grades and standardized test scores, as well as higher

⁴⁴ *Id.* at *6.

⁴⁵ *Moussazadeh v. Tx. Dep’t of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012) (applying Religious Land Use and Institutionalized Persons Act (RLUIPA)).

⁴⁶ Equal Employment Opportunity Comm’n, Compliance Manual Section 12: Religious Discrimination, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

⁴⁷ *See, e.g.*, Mass. G.L. c. 4, § 7 (“Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.”); California Dep’t of Educ., School Success and Opportunity Act (AB 1266) FAQ, <https://www.cde.ca.gov/re/di/eo/faqs.asp> (“Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should accept and respect a student’s assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student’s core identity. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.”).

⁴⁸ 22 Pa. Code § 12.3 (emphasis in original).

rates of school completion.⁴⁹ It teaches students about teamwork, helps build their leadership skills, and confers psychological benefits, such as feelings of well-being, a sense of belonging among peers, and connectedness to the school community.⁵⁰ All students deserve equal access to these benefits. Preventing transgender, intersex,⁵¹ and nonbinary students from playing school sports based solely on the fact that they are transgender or nonbinary is a form of sex discrimination that exacerbates the poor educational and mental health outcomes for which they are already at risk due to the significant rates of in-school and out-of-school victimization they face.⁵² But when transgender and nonbinary students are allowed to play sports, they tend to receive higher grades⁵³ and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.⁵⁴ These benefits are significant and could even be lifesaving for transgender and nonbinary students.⁵⁵

⁴⁹ Nat'l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

⁵⁰ See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349–50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397–401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT'L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

⁵¹ Because of the absence of inclusive data, less is known about intersex students' experiences with school sports. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny. See Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, WASHINGTON POST (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

⁵² In a national survey of LGBTQ+ students, an alarming number of students reported being harassed because of their LGBTQ+ status, with an overwhelming majority of all students (76.1%) reporting experiencing verbal harassment on this basis, and over one-third of students (31.2%) reporting physical harassment on this basis. This hostility in turn impacts students' academic outcomes: many students reported not having plans to finish school, with 51.5% of students reporting hostile school climate (e.g., harassment and transphobic policies) as the reason they did not plan to graduate. See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19, 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

⁵³ GLSEN, *The Experiences of LGBT Students in School Athletics*, (2013) <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>; The Trevor Project, *The Well-Being of LGBTQ Youth Athletes* (Aug. 2020), <https://www.thetrevorproject.org/wp-content/uploads/2020/08/LGBTQ-Youth-Sports-and-Well-Being-Research-Brief.pdf>.

⁵⁴ Russell B. Toomey & Stephen T. Russell, *An initial investigation of sexual minority youth involvement in school-based extracurricular activities*, 23 J. OF RESEARCH ON ADOLESCENCE 304, <https://doi.org/10.1111%2Fj.1532-7795.2012.00830.x>; GLSEN, *LGBTQ Students and School Sports Participation* (2021), <https://www.glsen.org/sites/default/files/2022-02/LGBTQ-Students-and-School-Sports-Participation-Research-Brief.pdf>.

⁵⁵ Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

Anti-trans sports bans and restrictions do nothing to “protect girls rights” or address the actual, ongoing gender inequities in athletics⁵⁶ - indeed, they only heighten the risk of sex discrimination for all girls who play sports. There is no evidence that permitting transgender and intersex students to play on sports teams aligned with their gender identity harms anyone. A recent analysis of CDC data found that there was no negative impact on the participation of girls and women in school sports in states that had implemented trans-inclusive state athletics policies.⁵⁷ In fact, early evidence from California and Connecticut suggests that trans-inclusive policies are correlated with increased participation of girls in school sports.⁵⁸ In contrast, where states enacted trans-exclusionary policies, girls’ overall participation in high school sports declined.⁵⁹ Moreover, anti-trans sports bans and restrictions such as the one proposed here only codify sexist stereotypes of how girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity.

The Proposed Policy Would Violate the U.S. Department of Education’s Proposed Rule on Sex-Based Distinctions in Athletics

In April 2023, the U.S. Department of Education proposed a new rule affirming that Title IX requires that transgender, nonbinary and intersex students be permitted to play school sports free from discrimination.⁶⁰ The comment period for the proposed rule closed in May 2023 and a final rule will be forthcoming.

The proposed rule makes clear that a categorical ban on trans students participating in sports consistent with their gender identity - like the District’s proposed policy - is not permitted under Title IX.⁶¹ A school would only be permitted to limit a student’s eligibility to participate

⁵⁶ Women and girls still lack significant opportunities to play sports as compared to men and boys, with Black and brown women and girls being disproportionately denied opportunities to play; schools still prioritize funding and resourcing men’s and boys’ teams while giving women’s and girls’ teams second-class treatment; and sexual harassment and abuse of student athletes still persists. Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women; Nat’l Women’s Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwlc.org/resources/finishing-last>; Dean Golembeski, *Gender Equality Remains Elusive in College Sports*, *Best Colleges* (Nov. 10, 2021), <https://www.bestcolleges.com/news/2021/07/01/gender-equality-remains-elusive-in-college-sports/>.

⁵⁷ Shoshana K. Goldberg, “Fair Play: The Importance of Sports Participation for Transgender Youth,” *Center for American Progress* (February 8, 2021), 14-16, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>. Florida and South Carolina have since passed anti-trans youth athlete laws, however, these were not implemented at the time of this analysis and would not affect the findings of this study. See GLSEN and TransAthlete.com (2022). Navigator: Trans and Nonbinary Athletic Inclusion Policies. <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

⁵⁸ Goldberg, “Fair Play,” 14-16 (Feb. 8, 2021).

⁵⁹ *Id.* at 14-15.

⁶⁰ U.S. Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams*, *Federal Register* 88, no. 71 (Apr. 13, 2023), <https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

⁶¹ U.S. Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams,” at 22873.

consistent with their gender identity in rare circumstances where they satisfy a test for “each sport, level of competition, and grade or education level,” requiring that any restriction must be justified on the grounds that it is “substantially related to achievement of an important educational objective,”⁶² and must “minimize harm” to the transgender, nonbinary, and intersex students who face additional barriers to participation (and potentially exclusion).⁶³

The Department described several objectives that would not count as being substantially related to achievement of an important educational objective, including “administrative convenience” and transphobic and sexist objectives such as “communicating or codifying disapproval of a student or a student’s gender identity,” “excluding transgender students from sports,” “requir[ing] adherence to sex stereotypes,” as well as any stated objective that is in reality “a pretext for an impermissible interest in singling out transgender students for disapproval or harm.”⁶⁴ The proposed rule also requires that any restriction on participation consistent with gender identity “minimize harm” to the transgender, nonbinary and intersex students who would face exclusion or additional barriers to participation.⁶⁵

The District’s Proposed Policy 123.3 operates as a categorical ban for all levels and sports and relies on sex stereotypes with no consideration for the harm caused to transgender students, and would therefore fail to satisfy the tests adopted by the proposed rule and this policy would be struck as violating Title IX.

IV. Enacting the Proposed Policies Will Create a Hostile Environment that Harms Students

Using correct pronouns or providing equitable access to affirming facilities 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.⁶⁶ The National Education Association (NEA) has explained, using pronouns consistent with a student’s gender identity is “critical to the health and well-being of transgender and gender-diverse people.”⁶⁷ It also makes our classrooms safer while empowering LGBTQ students.

⁶² U.S. Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams,” at 22891.

⁶³ *Id.* at 22891.

⁶⁴ *Id.* at 22872.

⁶⁵ *Id.* at 22891.

⁶⁶ 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 Districts, 2017. *MMWR Morb Mortal Wkly Rep* 2019;68:67–71. DOI: <http://dx.doi.org/10.15585/mmwr.mm6803a3>

⁶⁷ See *Why Pronouns Matter* available at <https://www.nea.org/advocating-for-change/new-from-nea/why-pronouns-matter>.

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.⁶⁸ 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.⁶⁹

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.⁷⁰ 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.⁷¹

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.⁷²

⁶⁸ 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”).

⁶⁹ See e.g., *Adams*, 968 F.3d at 1306–07; *Dodds*, 845 F.3d at 221–22.

⁷⁰ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project (Dec. 3, 2020) <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

⁷¹ 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).

⁷² *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).

“These values serve an important educational function for both transgender and cisgender students.”⁷³

Education Law Center urges the District and Board members to comply with their clear legal obligations under federal and state law and reject these Proposed Policies that will significantly harm students.

Sincerely,

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

Kristina Moon, Esq.
EDUCATION LAW CENTER

Cc: Johnson Duffie; Michael Cassidy, Esq.; Richard Stewart, Esq.

⁷³ *Id.*