Discrimination against LGBTQ+ people is illegal. Courts have increasingly recognized the rights of students who identify as lesbian, gay, bisexual, transgender, or queer, as well as students who are nonbinary or gender-nonconforming (sometimes referred to as “gender-expansive”). Students who are LGBTQ+ or gender-expansive have the right to be their full, authentic selves and to be free from any bullying, stigma, or harassment in school. Under the law, schools have a duty to intervene and correct policies or practices that discriminate against students based on sexual orientation, gender identity, or gender expression.

**Terms to Know**

LGBTQ+ is an acronym that stands for lesbian, gay, bisexual, transgender, queer, and others.

Sexual orientation refers to a person’s physical or emotional attraction to another person. People may define their sexual orientation as lesbian, gay, bisexual, pansexual, asexual, queer, straight, or another term.

Gender identity refers to a person’s self-conception or deeply felt understanding of their gender, such as male, female, genderqueer, nonbinary. Gender identity may vary over time. A student’s gender identity may or may not align with their chromosomes, genitalia, hormone levels, or other biological indicators of sex other than gender identity.

Gender expression refers to the ways a person outwardly displays their gender identity and how society perceives those markers as masculine, feminine, or androgynous – for example, haircuts, clothing, accessories, mannerisms, etc.

Cisgender refers to people who feel their gender identity matches the gender they were assigned at birth.

Transgender refers to many different kinds of people who do not identify with their expected gender role or whose gender identity does not match some or all of their biological indicators of sex other than their gender identity. A student who identifies as transgender may identify as a male, female, nonbinary, genderqueer, or some other term.

Gender-nonconforming (GNC) or gender-expansive refers to people whose gender expression does not conform to society’s expectations for people of a given gender or does not conform to expectations based on assigned gender.

Nonbinary is an umbrella term for people who identify as a gender that is neither entirely man nor entirely woman, or do not identify with any gender. Some people may use the term “gender fluid” or “genderqueer.”

For more information, see: [www.translanguageprimer.com](http://www.translanguageprimer.com)

**DISCRIMINATION IS AGAINST THE LAW**

The U.S. Supreme Court and many federal courts have consistently 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 preventing LGBTQ+ students from accessing
programs and facilities in schools violates Title IX and other civil rights laws. The U.S. Department of Education Office for Civil Rights has made clear that it will enforce Title IX in the same way, including via updated Title IX regulations expected to be final in October 2023.

While Pennsylvania does not have a statute expressly prohibiting discrimination against individuals who identify as LGBTQ, there are state laws prohibiting sex-based discrimination based on gender identity and expression. The Pennsylvania Human Relations Act (PHRA) prohibits discrimination in schools and other contexts on the basis of race, disability, ethnicity, national origin, ancestry, religion, family status, and sex (including gender identity and sexual orientation). The Pennsylvania Human Relations Commission (PHRC) enforces this key anti-discrimination law, which affords broad protections against sex-based discrimination in public schools. Effective Aug. 16, 2023, PHRA’s regulations were amended to more explicitly identify conduct that constitutes illegal sex-based discrimination.

The PHRA recognizes that prohibitions against sex-based discrimination are “comprehensive.” Students are protected against discrimination on the basis of sex, “including pregnancy, childbirth, breastfeeding, sex assigned at birth, gender identity or expression, affectional or sexual orientation, and differences in sex development.” PHRA’s existing guidance expansively protects gender identity, which is one’s “innermost concept of self as male, female, a blend of both or neither.” Gender expression is also broadly defined as the external “appearance of one’s gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.” All gender identities and expressions, including those held by transgender students, are protected by the PHRA. This protection is also inclusive of the ways students’ understanding of these identities evolves over time.

The revised regulations also make clear that prohibited racial discrimination is inclusive of discrimination on the basis of “traits historically associated with race including hair texture and protective hairstyles,” such as locs, braids, twists, knots, afros, and including styles created using extensions or headbands/headwraps. This change is an important step forward toward eliminating rampant race-based hair discrimination, ending the “criminalization of Black hairstyles.” To learn more about students’ rights to be free from race-based discrimination, see ELC’s The Right to Be Free from Racism at School fact sheet.

Students who face illegal sex-based discrimination at school can file a complaint with the PHRC, which can investigate and seek to resolve complaints of discrimination. To learn more, please see ELC’s new fact sheet about filing a PHRC complaint. For more information about sex discrimination against LGBTQ+ students in schools, contact ELC or see our recorded webinar and related slides.

LGBTQ+ YOUTH OF COLOR FACE HOSTILE ENVIRONMENTS, HIGH RATES OF DISCRIMINATION

Studies show that schools nationwide are hostile environments for LGBTQ+ youth of color in particular, and they experience victimization and discrimination based on race as well as sexual orientation, gender identity, or all of these identities. Black LGBTQ+ students are highly likely to be targeted with biased remarks, including homophobic and racist messages. They are also likely to be victims of sexual harassment and assault. Moreover, due to anti-Black racism by adults and the threat of school discipline, Black LGBTQ+ youth are less likely to report their experiences in
school and more likely to experience victimization and feel unsafe in school, leaving them with limited or no access to in-school resources that could improve school climate and students’ experiences. These high rates of victimization negatively impact school attendance and academic achievement and undermine these students’ psychological well-being.

THE RIGHT TO BE OUT

You have the right to be open about your sexual orientation and the right to express your transitioned gender. Your school cannot tell you to be silent about your sexual orientation or punish you for wearing LGBTQ-affirming clothing or accessories so long as you follow dress rules that apply to all students.

THE RIGHT TO PRIVACY

Your school cannot “out” you to anyone without your permission. The federal Family Educational Rights and Privacy Act (FERPA) forbids schools from disclosing a student’s private information, including medical information regarding a student’s gender assigned at birth, absent permission from the student or guardian. There is no legal requirement for schools to notify parents if a student asks to be called by another name or pronoun. The U.S. Department of Education has also instructed schools to support transgender and nonbinary students in part by implementing policies to safeguard students’ privacy, including maintaining the confidentiality of a student’s birth name or sex assigned at birth if the student wishes to keep this information private.

Schools cannot require students to provide a birth certificate to “prove” their sex at enrollment or for participation in sex-segregated activities. Students’ right to enroll in public school may not be conditioned on providing documents other than those showing proof of a child’s age, residence, and immunizations as required by law. Even for these required items, the Pennsylvania Department of Education is clear that a “school district can never demand only one kind of document.”

THE RIGHT TO PARTICIPATE IN SCHOOL ACTIVITIES AND SPORTS

You have the right to form and meet as a Gender Sexuality Alliance (GSA) at school if other nonacademic clubs are allowed to meet at school. Schools cannot impose a different set of student conduct rules for GSAs than for other clubs.

Your school cannot stop you from going to prom or another school activity with your date just because your date is the same gender as you.

You have the right to participate in a sports program consistent with your gender identity; to deny students this right is discrimination on the basis of sex and gender identity under Title IX and the PHRA. However, in recent years, anti-LGBTQ activists across the country, including in Pennsylvania, have introduced legislation or school policies to prohibit trans students from participating in school sports on the teams that align with their gender identity. In Pennsylvania, the General Assembly passed a bill in July 2022 that would ban transgender students from participating in school sports aligned with their gender identity, but Gov. Wolf vetoed it, so that is not the law. These discriminatory policies have been challenged in court with mixed results in different states.

The federal Department of Education has proposed a rule under Title IX – expected to be final in October 2023 – that would sharply restrict a school’s ability to exclude the participation of
transgender, nonbinary, and intersex student-athletes. Learn more in ELC’s fact sheet on Equity in School Sports. If your school limits the way transgender students can play sports, contact the Education Law Center and ACLU-PA. Learn more about efforts to challenge these policies on ELC’s webpage: Advocating for Inclusive Schools and Honest Education.

ACCESS TO FACILITIES

School districts cannot discriminate against transgender and nonbinary students by requiring them to use a bathroom or locker room that does not match their gender identity. Schools may provide a gender-neutral/all-genders bathroom option for students who identify as nonbinary or gender-expansive and others who may feel safer using that option but cannot require students to use only gender-neutral facilities.

THE RIGHT TO AFFIRMING NAME AND GENDER IDENTITY IN SCHOOL INTERACTIONS

If a student who is transgender, gender-nonconforming, or nonbinary identifies a chosen name and pronouns, school staff must use that name and pronoun for all interactions (written, digital, and verbal) except where required by law to use a child’s legal name (i.e., official school record), but daily roll call and display name on Google Classroom should use chosen name). Purposefully and persistently misgendering a student can be harassment or discrimination. Federal courts and the U.S. Department of Education have clearly held that intentionally and persistently misgendering a person constitutes sex-based harassment and creates a hostile environment. A federal court 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.” The Department of Education has also 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. Both the Department of Education and Department of Justice have made clear that these agencies will enforce Title IX consistent with the Supreme Court’s 2020 ruling in Bostock—that discrimination on the basis of gender identity is a form of sex discrimination. The Department of Education has also instructed schools to support transgender and nonbinary students by “[a]dopting 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...” Some teachers may claim they do not have to use a student’s name and pronoun if they do not personally believe in transgender people’s civil rights. There are some cases still developing on this issue, but existing case law is clear that speech in the classroom by teachers in K-12 public schools is not personal; it is part of their job duties as a government actor. Therefore, teachers in K-12 public schools do not have a First Amendment right to discriminate against transgender or nonbinary students in the classroom.

EXPRESSING YOUR GENDER IDENTITY

Your school cannot discipline you for expressing your gender identity. Your school should not stop transgender, nonbinary, or gender-nonconforming students from wearing clothes that they let cisgender students wear. This area of case law is underdeveloped, but there are strong arguments that gendered dress codes constitute illegal sex discrimination.
INTERACTING WITH SCHOOL POLICE OR SCHOOL RESOURCE OFFICERS

Police have historically targeted LGBTQ+ and nonbinary people – and those who identify as Black or Brown in particular – for disproportionate stops, searches, and harassment. This is discrimination and should not be happening in schools. School police officers cannot search you or your bag without a reasonable suspicion of wrongdoing. They cannot search you just because of your sexual orientation, gender identity/expression, or race.

You should email or write a complaint to your principal and your city’s police review board if a school police or resource officer is inappropriate with you. In the School District of Philadelphia, you can submit an anonymous complaint online.

THE RIGHT TO BE SAFE AT SCHOOL

You have the same right to be safe in school as every other student. Unfortunately, LGBTQ+ students – and LGBTQ+ students of color in particular – are disproportionately subjected to bullying and harassment, with insufficient intervention by school staff. Behavior may qualify as harassment if the offensive conduct relates to gender, sex, sexual orientation, gender identity or expression, race, color, national origin/ethnicity, age, disability, or religion. Your school’s actions may qualify as discrimination if a school staff member is treating you badly because of your sexual orientation, gender identity, or gender expression, or another student is treating you badly because of your sexual orientation, gender identity, or gender expression, and your school does nothing to stop it.

Your school has an affirmative duty to address harassment against LGBTQ+ students the same way it would address harassment against any other student. In addition, Title IX prohibits your school from ignoring harassment based on gender stereotyping.

If you are being bullied or harassed, follow ELC’s complaint form checklist for tips about recording and reporting incidents, and see our full guide for more information: What Can I Do If My Child Is Bullied or Harassed? A Parent’s Guide to Advocacy in Pennsylvania Public Schools.

Consider using this reporting tool if your school does not have its own reporting form: Request for Bullying/Harassment Investigation.

The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, multilingual learners, LGBTQ students, and children experiencing homelessness.

ELC’s publications provide a general statement of the law. However, each situation is different. If questions remain about how the law applies to a particular situation, contact ELC’s Helpline for information and advice — visit NULL, www.elc-pa.org/contact or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) — or contact another attorney of your choice.


3 Id.; id. § 954(l).

4 Id. at p. xvi (reporting that 97.9% of Black LGBTQ students heard “gay” used in a negative way; nearly three-fourths (71.5%) heard this type of language often or frequently. 94.7% of Black LGBTQ students heard other homophobic remarks and over half (58.7%) heard this type of language often or frequently.


6 Id.

7 Id.


9 Id.


11 See Rebecca Epstein et al., Georgetown Law Center on Poverty & Inequality, Girlhood Interrupted: The Erasure of Black Girls’ Childhood 5 (2017), https://genderjusticeandopportunity.georgetown.edu/wpcontent/uploads/2020/06/girlhood-interrupted.pdf (explaining that dress codes are one example of the ways policing of Black girls’ bodies harkens back to “paradigms of Black femininity that originated in the South during the period of slavery [and] have persisted into present-day culture”).


15 Id. at p. xvi (reporting that 97.9% of Black LGBTQ students heard “gay” used in a negative way; nearly three-fourths (71.5%) heard this type of language often or frequently. 94.7% of Black LGBTQ students heard other homophobic remarks and over half (58.7%) heard this type of language often or frequently.

16 Id. Black LGBTQ students also experience high rates of harassment or assault at school based on personal characteristics, including sexual orientation (65.1%), gender expression (57.2%), and race/ethnicity (51.9%).

17
have passed or attempted to pass transphobic policies to prevent transgender students from equitable participation in sports. See https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans rights across country.

32. Courts have made clear that any school rules relating to order and discipline on school property, student and staff well-being and attendance must be applied to all student groups. School officials cannot censor groups because they express unpopular viewpoints. See, e.g., Gonzalez v. School Board of Okeechobee County, 571 F. Supp. 2d 1257, 1268 (S.D. Fla. 2008) (holding that a school failed to show that the GSA’s discussions would cause material disruption to the school); Colin v. Orange Unified School District, 83 F. Supp. 2d 1135, 1147 (C.D. Cal. 2000) (holding that the “limited open forum” principle must apply to all school groups equally).

33. See Legislation Affecting LGBTQ Rights Across the Country, ACLU, https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country; Bans on Transgender Youth Participation in Sports, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans. Several school districts in Pennsylvania have passed or attempted to pass transphobic policies to prevent transgender students from equitable participation in
school sports. See ELC’s open letters to the boards of the Hempfield School District, Central Bucks School District, and Manheim Township School District advocating against these policies. Learn more on our webpages, Advocating for Inclusive Schools and Honest Education and Supporting & Affirming Gay, Transgender, and Non-Binary Students.


35 The Third Circuit, controlling federal court for Pennsylvania, in 2018 held that a school district’s policy allowing transgender students to use the bathroom consistent with their gender identity does not violate cisgender students’ right to privacy or rights under Title IX. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018). The US Supreme Court declined to review this case, leaving the decision to stand. Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019). Other federal courts in Pennsylvania have also affirmed the rights of transgender students to use school facilities. See Evanco v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (school board resolution limiting transgender students’ access to bathrooms was found likely to succeed on Equal Protection claim); A.H. v. Minersville Area Sch. Dist., 290 F.Supp.3d 321 (M.D. Pa. 2017) (transgender student prohibited from using girls’ bathroom stated a claim for violation of Title IX and Equal Protection Clause). The vast majority of other federal courts have also affirmed transgender students’ right to use school facilities. See Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020), cert denied, 141 S.Ct. 2878 (2021) (District Court and Fourth Circuit held that school violated Title IX and Equal Protection Clause when they prohibited Grimm from using the same restrooms as other boys and forced him to use separate restrooms because of his transgender identity; US Supreme Court denied cert); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1055 (7th Cir. 2017) (transgender student denied access to facilities that matched their gender identity was likely to succeed as claim of sex discrimination under Title IX).

36 The cases that focus on the issue of transgender students and bathroom policies have found that the option for students to use a single-user, gender-neutral bathroom is not sufficient and not an appropriate remedy. A better policy example is to provide a gender-neutral bathroom in every school building, like the School District of Philadelphia. See https://www.inquirer.com/education/gender-neutral-bathrooms-philadelphia-schools-lgbtq-students-20210712.html.

37 The same analysis protecting students from discrimination in restroom use also applies to students’ rights to have their gender affirmed in how they are addressed at school. See Kluge v. Browsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2023) (upholding a school board’s decision to ask a teacher to resign after he refused to call transgender students by their chosen names in alignment with a school policy, finding that it harmed trans students and negatively impacted their learning environment). See 20 U.S.C.A. § 1232g (FERPA forbids schools from disclosing a student’s private information). FERPA requires parental consent to a change in the official school record of a student. See U.S. Dep’t. of Educ., A Parent Guide to the Family Educational Rights and Privacy Act (FERPA) (July 2021) (describing the rights of parents/guardians and students under FERPA).

38 See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (recognizing claims of indirect discrimination under Title IX where school had actual notice of harassment between students but failed to address it); Kluge v. Browsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2023) (finding persistent misgendering of transgender students to be harmful); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (applying Title IX to discrimination based on transgender status).

39 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”).
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”).


See 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); Kahan v. Slippery Rock Univ. of Pa., 50 F.Supp.3d 667, 707 (W.D.Pa 2014) (applying 3d Circuit precedent and finding teacher “does not personally hold a First Amendment ‘teaching right’ concerning classroom management, class content, student conduct, and use of testing materials. A teacher’s ‘in-class’ conduct concerning what may be taught and how it will be taught is not protected by the First Amendment.”).


New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of student generally permissible if there are reasonable grounds for suspecting the search will turn up evidence that student is violating the law or school rules and the search is no more intrusive than necessary).
