

THE RIGHTS OF LGBTQ+ AND NONBINARY STUDENTS

August 2023

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

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.¹ 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 2023.²

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)³ 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).⁴ 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.⁵

The PHRA recognizes that prohibitions against sex-based discrimination are “comprehensive.”⁶ 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.”⁷ 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.”⁸ 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.”⁹ 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.¹⁰ This change is an important step forward toward eliminating rampant race-based hair discrimination,¹¹ which uniquely harms Black girls¹² – ending the “criminalization of Black hairstyles.”¹³ 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.¹⁴ 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.¹⁵ Black LGBTQ+ students are highly likely to be targeted with biased remarks, including homophobic and racist messages.¹⁶ They are also likely to be victims of sexual harassment and assault.¹⁷ 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.¹⁸ These high rates of victimization negatively impact school attendance¹⁹ and academic achievement and undermine these students' psychological well-being.²⁰

THE RIGHT TO BE OUT

You have the right to be open about your sexual orientation and the right to express your transitioned gender.²¹ 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.²²

THE RIGHT TO PRIVACY

Your school cannot “out” you to anyone without your permission.²³ 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.²⁴ 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.²⁵

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.²⁶ Even for these required items, the Pennsylvania Department of Education is clear that a “school district can never demand only one kind of document.”²⁷

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.²⁸ Schools cannot impose a different set of student conduct rules for GSAs than for other clubs.²⁹

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.³⁰

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.³¹ 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.³² 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.³³ These discriminatory policies have been challenged in court with mixed results in different states.³⁴

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.³⁵ 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.³⁶

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).³⁷

Purposefully and persistently misgendering a student can be harassment or discrimination.³⁸ 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.”³⁹ 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.⁴⁰ 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.⁴¹ 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...”⁴²

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.⁴³ 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.⁴⁴ 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.⁴⁵

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.⁴⁶ 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.⁴⁷

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.⁴⁸

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 [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.

¹ See, e.g., *Bostock v. Clayton Cnty.*, 590 U.S. ___, 140 S.Ct. 1731 (2020) (holding that dismissal of an employee for being gay or transgender is sex-based discrimination under Title VII); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (Title IX); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (Title IX). See also *Parents for Privacy v. Barr*, 949 F.3d 1210, 1239-40 (9th Cir. 2020) (Title IX); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 535 (3d Cir. 2018) (Title IX); *United States EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) (gay male employee stated a claim of sex discrimination based on sex stereotyping that a person should conform to heterosexuality).

² See Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021); see also Department 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>; 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>; U.S. Dep't of Educ., *A Timing Update on Title IX Rulemaking* (May 26, 2023), <https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/>. For more detailed guidelines and resources on policies and practices to support LGBTQI+ youth in schools and a guide to hate crime threats, see *U.S. Department of Education Toolkit for Creating Inclusive and Nondiscriminatory School Environments for LGBTQI+ Students* (June 21, 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/lgbtqi-student-resources-toolkit-062023.pdf>.

³ Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 953.

⁴ *Id.*; *id.* § 954(l).

⁵ Protected Classes Under the PHRA and PFOA, 16 Pa. Code § 41.201-41.207 (effective Aug. 16, 2023), <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol53/53-24/788.html> (final regulations defining terms related to sex, sexual orientation, and gender identity used in the PHRA and PFOA); Pennsylvania Human Relations Commission, *Guidance on Discrimination on the Basis of Sex under the Pennsylvania Human Relations Act 2-3* (Mar. 3, 2021), <https://www.phrc.pa.gov/AboutUs/Documents/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf> (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).

⁶ *Id.*

⁷ *Id.*

⁸ Pennsylvania Human Relations Commission, *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, 3 (Mar. 3, 2021), <https://www.phrc.pa.gov/AboutUs/Documents/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.

⁹ *Id.*

¹⁰ Protected Classes Under the PHRA and PFOA, 16 Pa. Code § 41.201-41.207; Desiree Chang & Ronnessa Edwards, Pennsylvania Human Relation Commission, *Education and Enforcement Training Presentation* (June 12, 2023).

¹¹ See *Natural Hair Discrimination: Frequently Asked Questions*, NAACP Legal Defense & Education Fund, <https://www.naacpldf.org/natural-hair-discrimination/> (last visited June 14, 2023) (detailing the many ways that hair discrimination uniquely targets and criminalizes Black hair).

¹² 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”).

¹³ Angela Tapnio, Amina Ahmetovic, Ban Alqadhi, Bernadette Costa, and Salma Abdalla *Black Beauty in Education: Media Implications and Future Actions* Univ. of Toronto (Winter, 2022), available at <https://jps.library.utoronto.ca/index.php/utmlsas/article/view/39220>.

¹⁴ Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 957(f).

¹⁵ Truong, N. L., Zongrone, A. D., & Kosciw, J. G., *Erasure and Resilience: The Experiences of LGBTQ Students of Color Black LGBTQ Youth in U.S. Schools*, GLSEN and National Black Justice Coalition (2020)

¹⁶ *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).

¹⁷ *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%).

¹⁸ *Id.* at xvii and xix. Over half of Black LGBTQ students (52.4%) who experienced harassment or assault in the reporting year never reported victimization to staff, most commonly because they did not think that staff would do anything about it (62.9%). Only a third (33.8%) reported that staff responded effectively when students reported victimization. Only two-fifths of Black LGBTQ students (40.5%) reported having somewhat or very supportive school administration.

¹⁹ *Id.* Nearly a third of Black LGBTQ students (30.4%) reported missing at least one day of school in the last month because they felt unsafe, and 10.3% missed four or more days in the past month.

²⁰ Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). *The 2017 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*. New York: GLSEN. Mueller, A. S., James, W., Abrutyn, S., Levin, M. L. (2015); *Suicide ideation and bullying among US adolescents: Examining the intersections of sexual orientation, gender, and race/ethnicity*. *American Journal of Public Health*, 106(5), 980-985. Russell, S.T. & Truong, N. (2001); *Adolescent sexual orientation, race and ethnicity, and school environments: A national study of sexual minority youth of color*. In Kumashiro, K. (Ed.), *Troubling intersections of race and sexuality: Queer students of color and anti-oppressive education* (pp. 113-130). New York: Rowman & Littlefield Publishers.

²¹ See *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970) (protecting a male student's right to wear their hair as they wish); see also Harper Seldin, *Trans Students Should Be Treated With Dignity, Not Outed by Their Schools*, ACLU (Jan. 26, 2023), <https://www.aclu.org/news/lgbtq-rights/trans-students-should-be-treated-with-dignity-not-outed-by-their-schools>.

²² See *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (student may not be punished for expressing views unless the school has reason to believe the speech or expression will "materially and substantially disrupt the work and discipline of the school"); *Gillman v. School Board for Holmes County, Florida*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (a school district's censorship of T-shirts advocating fair treatment for LGBT people was unconstitutional).

²³ *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).

²⁴ FERPA is the Family Educational Rights and Privacy Act. See 20 U.S.C.A. § 1232g (West).

²⁵ 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>.

²⁶ See 22 Pa. Code § 11.11.

²⁷ See Pa. Dep't of Educ., *Basic Education Circular: Student Enrollment FAQ*, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx>; Pa. Dep't of Educ., *Basic Education Circular: Enrollment of Students*, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudents.aspx>.

²⁸ See 20 U.S.C. 4071 (Equal Access Act); *Straights & Gays for Equality v. Osseo Area Sch. Dist. No. 279*, 540 F.3d 911 (8th Cir. 2008) (Equal Access Act prohibited school from denying non-curricular gay equality group meeting when other noncurricular groups can meet). For more detailed discussion on GSAs and the Equal Access Act's requirements, see *U.S. Department of Education Toolkit for Creating Inclusive and Nondiscriminatory School Environments for LGBTQ+ Students* (June 21, 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/lgbtqi-student-resources-toolkit-062023.pdf>.

²⁹ 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, 1147-49 (C.D. Cal. 2000) (holding that the "limited open forum" principle must apply to all school groups equally).

³⁰ *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (school violated female lesbian student's First Amendment rights when they prevented the student from attending prom wearing a tuxedo and with her girlfriend as her date); *Aaron Fricke v. Richard B. Lynch*, 491 F.Supp. 381 (D.R.I. 1980) (school violated male gay student's First Amendment rights when they tried to prevent the student from attending prom with his male date).

³¹ See *Soule by Stanescu v. Conn. Ass'n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021) ("Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. Every Court of Appeals to consider the issue has so held."), *aff'd*, 57 F.4th 43, 56 (2d Cir. 2022) ("Although these cases from our sister circuits do not address the exact issue of participation of transgender athletes on gender specific sports teams, such authority nonetheless establishes that discrimination based on transgender status is generally prohibited under federal law. ...").

³² 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](#).

³³ Gov. Tom Wolf, *Gov. Wolf Vetoes Discriminatory Transphobic Legislation* (July 8, 2022); “Fairness in Women’s Sports Act”, 2021 PA HB972 (2022), <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2021&kind=0&body=H&type=B&bn=972>.

³⁴ See, e.g., *Hecox v. Little*, No. 20-35813, 2023 WL 5283127, at *21 (9th Cir. Aug. 17, 2023) (Idaho statute which categorically banned transgender women and girls from participating in student athletics and subjected all female athletes to intrusive sex verification process “likely” violated Equal Protection Clause and Title IX and hence enforcement of the Act was properly enjoined); *W. Va. v. B. P. J.*, by *Jackson*, --- U.S. ---, 143 S. Ct. 889, --- L.Ed.2d --- (2023) (denying application to vacate injunction where Fourth Circuit stayed order that would have prohibited a 12-year-old transgender girl from participating in school athletics); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *1 (D. Ariz. July 20, 2023) (granting a preliminary injunction against Arizona’s transgender sports ban under the Equal Protection Clause and Title IX); *A.M. v. Indianapolis Pub. Sch.*, 617 F.Supp. 3d 950, 966 (S.D. Ind. 2022) (“The singling out of transgender females is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made.”); *Soule by Stanescu v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201, 2021 WL 1617206 at *10 (D. Conn. Apr. 25, 2021) (upholding school policy that allowed transgender students to participate in sex-segregated sports consistent with their gender identity); see also *Human Rights Campaign Files Lawsuit Against Florida’s Transgender Sports Ban & Announces Future Litigation in Arkansas, Mississippi and Tennessee*, Jun. 30, 2021, <https://www.hrc.org/press-releases/human-rights-campaign-files-lawsuit-against-floridas-transgender-sports-ban-announces-future-litigation-in-arkansas-mississippi-and-tennessee>.

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 *Evancho 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. Brownsburg 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. Brownsburg 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”).

⁴⁰ 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-education-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").

⁴¹ 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>.

⁴² 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>.

⁴³ 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.").

⁴⁴ See *Tinker*, 393 U.S. 503 (1969); *Gillman*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008); *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (lesbian student's desire to wear a tuxedo to her prom is protected by the First Amendment).

⁴⁵ See *Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *1 (S.D. Miss. Sept. 15, 2011) (refusing to dismiss a gender-nonconforming student's Equal Protection and Title IX challenges of her school's policy that differentiated what students may wear in yearbook pictures on the basis of sex); see also *Peltier v. Charter Day Sch.*, 37 F.4th 104 (4th Cir. 2022) (finding school dress code requiring girls wear skirts to violate Equal Protection and remanded to assess Title IX claim); Galen Sherwin et al., 4 Things Public Schools Can and Can't Do When It Comes to Dress Codes, ACLU (Sept. 21, 2022), <https://www.aclu.org/news/womens-rights/4-things-public-schools-can-and-cant-do-dress-codes>; Letter from James D. Esseks, Director of ACLU's Lesbian Gay Bisexual Transgender & HIV Project (Aug. 26, 2020), <https://www.aclu.org/letter/open-letter-schools-about-gendered-dress-codes>, (last visited May 30, 2023).

⁴⁶ *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).

⁴⁷ See e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. at 633 (1999).

⁴⁸ 20 U.S.C. 1681 et seq; Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (interpreting *Bostock v. Clayton County*,) (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.