

# Federal and State Law Mandate Equitable Access to Sports for Transgender, Nonbinary, and Intersex Students

December 2023

## *ELC Urges School Boards and Districts to Uphold the Rights Of LGBTQ+ Students and Reject Policies That Unlawfully Discriminate Against Students*

### *Impact of School Policies on Students Who Identify as LGBTQ+*

As numerous courts have recognized, a school’s policy or actions that treat gay, lesbian, nonbinary or transgender<sup>1</sup> students differently from other students can cause serious harm.<sup>2</sup> Federal courts have found against school districts where LGBTQ+ 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.<sup>3</sup> Just as purposefully and persistently misgendering a student has been found to constitute harassment or discrimination that harms the mental and emotional health of students,<sup>4</sup> requiring a transgender girl to participate in a boys’ sports team also constitutes discrimination and creates a hostile school climate that perpetuates higher rates of truancy, absenteeism, and school pushout out for LGBTQ+ youth.<sup>5</sup> A policy based on the premise that trans girls are not ‘real’ girls and trans boys are not ‘real’ boys is based on faulty science and harmful discriminatory stereotypes.<sup>6</sup> Moreover, anti-trans sports bans and restrictions do nothing to “protect girls’ rights” or address the actual, ongoing gender inequities in athletics.<sup>7</sup>

In sharp contrast, affirming the gender of trans youth in sports participation is a critical part of improving physical and mental health outcomes for these students and allowing them to learn and thrive in school. Research shows that when transgender and nonbinary students are allowed to play sports, they tend to receive higher grades<sup>8</sup> and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.<sup>9</sup>

### *Federal and State Law Mandate Equitable Access to Sports for Transgender, Nonbinary, and Intersex Students.*

Policies that discriminate against transgender students by prohibiting them to engage in sports in accordance with their gender identity violate Title IX’s prohibition against discrimination based on sex.<sup>10</sup> Numerous federal cases have held that Title IX’s nondiscrimination mandate ensures LGBTQ+ students and others have equitable access to education, free from sex discrimination.<sup>11</sup> 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.<sup>12</sup> 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 the basis of sex under Title IX.<sup>13</sup>

The Biden-Harris administration has made clear that it will enforce the provisions of Title IX consistent with the Supreme Court's holding in *Bostock*, which found that discrimination on the basis of gender identity is a form of sex discrimination.<sup>14</sup> 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.<sup>15</sup> The proposed rule, which is expected to be final this Fall, makes clear that a categorical ban on trans students participating in sports consistent with their gender identity would not be permitted under Title IX.<sup>16</sup> A school would only be permitted to limit a student's eligibility to participate 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 ground that it is "substantially related to achievement of an important educational objective," and must "minimize harm" to the transgender, nonbinary, and intersex students who face additional barriers to participation (and potentially exclusion).<sup>17</sup>

Importantly, the Department stated that *impermissible* educational objectives would include "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 would be in reality "a pretext for an impermissible interest in singling out transgender students for disapproval or harm."<sup>18</sup>

To date, the particular issue of trans students' participation in sports is not an untested one. For example, a federal appellate court affirmed a lower court's ruling that policies or laws excluding transgender students from sports violate the rights of transgender students.<sup>19</sup> In that case, a district court in Connecticut upheld a school policy that allowed transgender students to participate in sex-segregated sports consistent with their gender identity. As the court explained, "courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity."<sup>20</sup> A district court in Arizona also granted a preliminary injunction regarding two transgender girls to enjoin the enforcement of a state law banning transgender women and girls from participating in school sports.<sup>21</sup> Recently, the Ninth Circuit Court of Appeals upheld an injunction barring the enforcement of an Idaho law that categorically bans transgender women and girls from participating in school athletics and introduces an invasive sex verification process.<sup>22</sup>

Moreover, in August 2023, a new state regulation was adopted under the Pennsylvania Human Relations Act (PHRA) which explicitly prohibits discrimination on the basis of gender identity. Pursuant to this provision, students are protected against discrimination on the basis of sex, including "sex assigned at birth, gender identity or expression, affectional or sexual orientation, and differences in sex development."<sup>23</sup> 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 may evolve over time.

## ***Federal and State Laws Require Districts to Treat Students in Accordance With Their Gender Identity and Prohibit Districts From Compelling Students to “Certify” Their Sex***

Policies which require parents or students to submit birth certificates to verify a student’s gender at birth also violate federal and state laws. First, all students must be treated in accordance with their gender identity as required under Title IX. The Department of Education has made multiple findings against school districts across the country where schools failed to prevent or intervene in harassment of students that included refusing to use a student’s preferred name or pronouns.<sup>24</sup> 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.<sup>25</sup> 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...”<sup>26</sup>

Second, the federal Family Educational Rights and Privacy Act 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.<sup>27</sup> Third, it is a violation of state law as interpreted by the Pennsylvania Department of Education for schools to require a parent to submit an original birth certificate to enroll their child in school.<sup>28</sup>

ELC urges school boards to comply with their clear legal obligations under federal and state law to reject policies that discriminate against transgender students and to affirmatively and proactively promote healthy, welcoming, and inclusive school environments where all our students can thrive.

Visit [our resource page](#) for additional information about ELC’s efforts in advocating for inclusive schools and honest education.

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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](http://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.

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<sup>1</sup> Transgender refers to 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. 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.” Intersex is an umbrella term used to refer to people who are born with or naturally develop variations in sex characteristics, such as genitals, chromosomes, hormones, and/or internal organs that may be perceived as not fitting binary definitions of male or female

<sup>2</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)

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); *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”).

<sup>3</sup> See, e.g., *Dodds*, 845 F.3d at 221-22.

<sup>4</sup> See, e.g., *Davis Next Friend LaShonda D. v. Monroe Cty. 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); *Whitaker*, 858 F.3d at 1034 (applying Title IX to discrimination based on transgender status). *Grimm*, 972 F.3d at 617-18; *Dodds*, 845 F.3d at 221-22; *Doe v. Univ. of Scranton*, 2020 WL 5993766 (M.D.Pa. Oct. 9, 2020), at \*\*1-3; *Harrington ex rel. Harrington v. City of Attleboro*, No. 15-CV-12769-DJC, 2018 WL 475000, at \*\*6-7 (D. Mass. Jan. 17, 2018).

<sup>5</sup> See Educational Exclusion (2016), GLSEN, [https://www.glsen.org/sites/default/files/2019-11/Educational\\_Exclusion\\_2013.pdf](https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf).

<sup>6</sup> Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (April 30, 2020) <https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked>.

<sup>7</sup> 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](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/>.

<sup>8</sup> 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>.

<sup>9</sup> 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>.

<sup>10</sup> 20 U.S.C. §1681-§1688; 20 U.S.C. 1681(a) (prohibiting discrimination on the basis of sex under any education program or activity receiving Federal financial assistance.)

<sup>11</sup> See e.g., *Soule by Stanescu v. Conn.Ass’n of Schs.*, No. 3:20-cv-00201, 2021 WL 1617206 at \*10 (D. Conn., 2021), aff’d, 57 F.4th 43 (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. ...”).

<sup>12</sup> 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), cert. denied, 587 U.S. \_\_\_, 139 S. Ct. 2636, 204 L.Ed.2d 300 (2019) (allowing trans students to use facilities does not violate cisgender students' right to privacy); *Evancho v. Pine Richland Sch. Dist.*, 237 F.Supp.3d 267 (WD Pa. 2017) (school board resolution limiting trans students' access to bathrooms held likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (MD Pa. 2017) (trans student prohibited from using girls bathroom stated claim under Title IX and Equal Protection).

<sup>13</sup> See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Doe v. Snyder*, 28 F.4th 103, 113-14 (9th Cir. 2022) (finding "a faithful application of Bostock" cannot be limited only to Title VII "given the similarity in language prohibiting sex discrimination in Titles VII and IX" and "[w]hile the language in Title VII is 'because of sex' and the language in Title IX is 'on the basis of sex,' Bostock used those phrases interchangeably throughout the decision."); U.S. D.O.J., Memorandum re: Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

<sup>14</sup> 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>.

<sup>15</sup> 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>; U.S. Dep't of Ed., *Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams* (April 2023), <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

<sup>16</sup> 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*, at 22873.

<sup>17</sup> *Id.* at 22891.

<sup>18</sup> *Id.* at 22872.

<sup>19</sup> *Soule v. Conn. Ass'n of Schs.*, 57 F.4th 43.

<sup>20</sup> *Soule v. Conn. Ass'n of Schs.*, 2021 WL 1617206 at \*10

<sup>21</sup> *Doe v. Horne*, No. CV-23-00185, 2023 WL 4661831 at \*21 (D. Ariz. July 20, 2023); see also *Doe v. Horne*, No. CV-23-00185, 2023 WL 5017231 (D. Ariz. July 31, 2023) (denying Intervenor-Defendants' Motion for Stay of Preliminary Injunction because they failed to meet the likelihood of harm factors necessary for a stay of injunctive relief).

<sup>22</sup> *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023).

<sup>23</sup> 16 Pa. Code 41.206; see also *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>.

<sup>24</sup> 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/usdepartment-educations-office-civil-rights-announces-resolution-sexbased-harassment-investigation-tamalpais-unionhigh-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").

<sup>25</sup> 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>.

<sup>26</sup> 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>.

<sup>27</sup> Family Educational Rights and Privacy Act. See 20 U.S.C.A. § 1232g (West); 34 CFR 99.3 (defining directory information which would not generally be considered harmful or an invasion of privacy if disclosed and designating other information confidential.)

<sup>28</sup> See 22 Pa. Code 11.11(b); Pa. Dep't of Educ., *Enrollment of Students*, Basic Education Circular (July 1, 2022), <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudents.aspx>; Pa. Dep't of Educ., *Student Enrollment FAQ*, Basic Education Circular, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx> (last visited June 28, 2022).