

## Sex- and Gender-Based Discrimination in Students' Facilities Access Violates State and Federal Law

January 2024

### *ELC Urges Schools to Uphold the Rights Of LGBTQ+ Students and Reject Facilities Policies That Unlawfully Discriminate Against Students*

There is no legal basis for a school district to prohibit students from using the school 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<sup>1</sup> status, gender identity, or gender expression is unlawful discrimination “on the basis of sex” and is prohibited by law.<sup>2</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, which applies to public schools.<sup>3</sup> Additionally, the Supreme Court has four times in the last five years declined to review cases upholding the rights of transgender students.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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; the U.S. Supreme Court declined to review that case.<sup>8</sup>

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.<sup>9</sup> On multiple occasions, the Office of Civil Rights has found school districts liable for refusing to allow students to use facilities aligned with their gender identity.<sup>10</sup> In March 2024,<sup>11</sup> the Department of Education is scheduled to issue their final 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.<sup>12</sup>

Pennsylvania state law also prohibits discrimination in schools on the basis of sex, gender identity, and sexual orientation. A policy prohibiting a student's facilities access based on their gender identity would also violate the Pennsylvania Human Relations Act (PHRA). The Pennsylvania Human Relations Commission, charged with enforcement of the act, has explicitly recognized that discrimination based on gender identity/expression constitutes sex discrimination, in guidance<sup>13</sup> and with regulations amended on December 8, 2022, that explicitly clarify sex discrimination includes gender identity or expression.<sup>14</sup> 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 student experienced from other students due to her gender presentation and not conforming to gender stereotypes.<sup>15</sup>

### *Discriminatory Policies Create a Hostile Environment that Harms Students*

Numerous courts have recognized that a school's policy or actions that treat gay, lesbian, non-binary, or transgender students differently from other students can cause serious harm.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> For example, 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.<sup>19</sup>

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.<sup>20</sup>

“These values serve an important educational function for both transgender and cisgender students.”<sup>21</sup>

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 because of the discrimination they face. Equitable policies also make our classrooms safer while empowering LGBTQ+ students. Education Law Center urges all school districts to uphold their obligations under the law to protect students from discrimination and reject policies or practices that restrict students’ access to facilities based on sex or gender identity.

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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> 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).

<sup>3</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.”); 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>.

<sup>4</sup> See *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), cert denied sub nom., --- S.Ct. ----, 2024 WL 156480 (Jan. 16, 2024) (declining to review preliminary injunction awarded in favor of transgender

student challenging denial of bathroom access due to strong likelihood of success of sex-based claim); *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).

<sup>5</sup> 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); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th at 772 (granting preliminary injunction in favor of transgender student challenging denial of bathroom access based on findings of ongoing, debilitating, and irreparable harm); *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); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020); *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).

<sup>6</sup> *Boyertown*, 897 F.3d at 530-31.

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> 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>.

<sup>10</sup> 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).

<sup>11</sup> See Notice re July 2022 NPRM, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1870-AA16>; Notice re April 2023 NPRM (Athletics), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1870-AA19>

<sup>12</sup> 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>.

<sup>13</sup> 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).

<sup>14</sup> 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).

<sup>15</sup> *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>.

<sup>16</sup> 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”).

<sup>17</sup> See, e.g., *Adams*, 968 F.3d at 1306-07; *Dodds*, 845 F.3d at 221-22.

<sup>18</sup> See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project (Dec. 3, 2020). <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

<sup>19</sup> 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).

<sup>20</sup> *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).

<sup>21</sup> *Id.*