

**EDUCATION
LAW CENTER**

**HOT TOPICS FOR SCHOOL BOARDS
LEARN THE LAW & BEST PRACTICES FOR LGBTQ+
STUDENTS, BOOK BANS & INCLUSIVE CURRICULUM**

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AGENDA

1. About ELC-Pa
2. School Board Authority
3. Book Bans
4. Censorship of Curriculum & Discussion
5. Rights of LGBTQ+ Students

WHO WE ARE

[Education Law Center-PA \(“ELC”\)](#) is a legal services nonprofit. Our mission is to ensure access to a quality public education for all children in Pennsylvania. We have offices in Philadelphia and Pittsburgh.

We pursue this mission by focusing on the most underserved students: children living in poverty, children of color, children with disabilities, children in the foster care and juvenile justice systems, children experiencing homelessness, English learners, LGBTQ and gender-nonconforming students - and many who are at the intersection of these identities.

Our priority areas include:

Equal Access to
Quality Schools

Adequate &
Equitable School
Funding

Dismantling the
School-to-Prison
Pipeline

Every child deserves an education that prepares them for success, provides a safe place for learning, and honors their history and experiences.

Welcoming and inclusive schools that provide accurate information to our children give them the freedom to pursue their dreams and prepare them to fully participate in our democracy and society.

See ELC's resources at <https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/>

SCHOOL BOARDS, GENERALLY

Boards must follow state and federal laws, including laws that protect students and staff from discrimination on the basis of race, national origin, disability, sex, gender identity, and sexual orientation.

Policies cannot be vague

Board actions may not be arbitrary and capricious (unreasonable)

SCHOOL BOARDS, PUBLIC PARTICIPATION



All "official actions" of school boards must comply with Pennsylvania's open meetings law, known as the Sunshine Act.

Making recommendations
Establishing policies
Making decisions
Taking a vote on any motion or proposal



All meetings with "official action" must be open to the public.



Must allow a "reasonable opportunity" for public comment at each general meeting before it can take official action, such as vote on a proposal or motion.



Notice and Agenda

Must give notice and make an agenda listing each matter of agency business available to public at least 24 hours before meeting
No additions to agenda unless one of the narrow exceptions

BOOK BANS

Defined: A book ban occurs when a school administrator or other personnel removes or restricts student access to a book that was previously available, based on the content of that book

Attempts to ban books are on the rise nationally, including Pennsylvania.

From July 2021 - June 2023: more than 5,800 instances of book bans in public schools nationally & 644 instances of book bans in Pennsylvania (see PEN America)

Targets:

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graph LR; A[Targets:] --- B["Sexual conduct" or "implied depictions of sexual acts"]; A --- C[Language some people find offensive]; A --- D[Focus on few incidents of certain words, or passages describing sensitive topics]
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“Sexual conduct” or “implied depictions of sexual acts”

Language some people find offensive

Focus on few incidents of certain words, or passages describing sensitive topics

IN PRACTICE...

Books are targeted for references to **race and racism** or books that focus on **LGBTQ+ characters or themes**.

Among the books that have been banned nationwide from July 2021 - June 2023:

37% directly address issues of race and racism

36% explicitly address LGBTQ+ themes

34% contain topics on the health and wellbeing of students

The second most banned book during this period, for example, was *The Bluest Eye* by the Pulitzer and Nobel-prize winning author Toni Morrison, a novel that addresses, among other themes, the intergenerational harm caused by racism and sexual assault.

SCHOOL BOARD AUTHORITY & LIMITS: BOOK BAN

BOOKS ASSIGNED AS PART OF THE CURRICULUM

- PA law gives school boards broad discretion over curricular decisions: responsible to adopt a “course of study” adapted to the “age, development and needs of the pupils”
 - Typically delegated to superintendent who works with teachers & curriculum experts
 - Authority to select textbooks & curricular materials
- Not much case law, but earlier federal courts have largely affirmed discretion of school boards under First Amendment
 - U.S. Supreme Court recognized school board “duty to inculcate community values” via curricular decisions
 - Discretion is broad but NOT limitless - may not impose “an identifiable religious creed” or “otherwise impair permanently the student’s ability to investigate matters that arise in the natural course of intellectual inquiry”
 - Can remove curricular materials if decision is “reasonably related” to “legitimate pedagogical concern” of denying students access to “potentially sensitive topics”

SCHOOL BOARD AUTHORITY & LIMITS: BOOK BAN

LIBRARY BOOKS NOT PART OF THE CURRICULUM

- PA school boards have LESS discretion in restricting noncurricular materials, such as library books
- U.S. Supreme Court: **libraries have a unique role** different from mandatory curriculum - a place to test or expand upon ideas presented in the classroom (Pico, 1982)
 - A school board “**may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge**” by proscribing a narrow view of “community values” that limit the books available in a school library where the “opportunity at self-education and individual enrichment ... is wholly optional.” The First Amendment requires that “**students must always remain free to inquire**” and “**the school library is the principal locus of such freedom.**”
- **Cannot remove books “simply because they dislike the ideas contained”** within or in an effort “**to prescribe what must be orthodox in politics, nationalism, religion, or other matters of opinion.**”
 - Courts have rejected book removals on the basis: “too concerned with racial matters and too controversial”; simply because depicts gay relationships; concern might promote disobedience or disrespect for authority
- A 2023 Office for Civil Rights resolution letter noted that communications at board meetings gave the impression that books were being screened to exclude diverse characters and authors, which led to student fears and possibly harassment. (Forsyth County Schools Resolution)

GUARDRAILS FOR CHALLENGING BOOKS

Did the board follow standard, required procedures?

Policies may be unlawful if they are

- Impermissibly vague or overbroad
- Failure to consider book in its entirety, including critical acclaim, may be evidence policy is not tailored to be objective & identify “educational suitability” but instead enforce or exclude a particular viewpoint
- Arbitrary and capricious

Practical Considerations

- Disliked viewpoint as learning opportunity
- “Sensitive issues” are relative to each of us
- Parents already have opt-out provisions
- Librarian expertise for grade-level appropriate books

CURRICULUM & CLASSROOM DISCUSSION, BOARD AUTHORITY

CURRICULUM AUTHORITY

School boards have the power to “adopt and arrange courses of study” for their schools.

E.g. whether to fund a new robotics program or whether to approve a new African American History class

SCHOOL BOARDS CANNOT

Contradict the state’s learning standards (see State Board of Education)

Violate the First Amendment by imposing what U.S. Supreme Court called a “pall of orthodoxy” in the classroom

CURRICULUM & CLASSROOM DISCUSSION, CENSORSHIP CONSIDERATIONS

Red Flags for Classroom Censorship

- Targeting specific viewpoints violates the First Amendment
- Limiting the teaching accurate history or social studies
- Chilling effect on classroom discussion
- Vague or Overbroad
- Ability to sue teachers

Examples of Problematic Policies and Bills

- Ban on "divisive concepts"
- Ban on acknowledging LGBTQ+ students and families
- Shifting opt-out policies to opt-in
- Requiring curriculum and classroom studies to be "viewpoint neutral" or "balanced"
- Banning "advocacy" relating to religion, gender identity, social, political and geo-political matters; sexual orientation, socio-political

LGBTQ+ STUDENTS

Schools must be welcoming & inclusive for all students.

Every child deserves an education that prepares them for success, provides a safe place for learning, and honors their history and experiences.

MISSION:

The mission of the XXX School District is to prepare ALL students, K-12, to be successful for their future.

All members of the XXX community - students, parents, community members and educators - focus on constant improvement in order to create a positive, meaningful overall learning experience.

POLICY NONDISCRIMINATION:

The Board declares it to be the policy of this district to provide an equal opportunity for all students to achieve their maximum potential through the programs offered in the schools without discrimination on the basis of race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy or handicap/disability.

The district strives to maintain a safe, positive learning environment for all students that is free from discrimination. Discrimination is inconsistent with the educational and programmatic goals of the district and is prohibited on school grounds, at school-sponsored activities and on any conveyance providing transportation to or from a school entity or school-sponsored activity.

SCHOOL EFFORTS TO AFFIRM & SUPPORT STUDENTS ARE LIFE-SAVING

In the Boyertown case, the Third Circuit expressly recognized that “transgender students face extraordinary social, psychological and medical risks and the school district clearly had a compelling state interest in shielding them from discrimination.”



School-based supports save lives

- LGBTQ young people reported having access to at least 1 space that was affirming reduced their odds of attempting to die by suicide by 35%
- Using students' correct name and pronoun decreased thoughts of dying by suicide by 29% and attempts to die by suicide by 56%

TITLE IX PROVIDES STRONG PROTECTION AGAINST SEX DISCRIMINATION IN SCHOOLS

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.

Applies to public schools (including charters) and Approved Private School (APS) placements through an IEP process, local and state educational agencies, and other institutions that receive federal financial assistance from ED

- Sexual harassment
- Failure to provide equal athletic opportunity
- Sex based discrimination in courses, programs
- Treatment of pregnant or parenting students
- Treatment of LGBTQI students (sex stereotypes)
- Discriminatory discipline
- Hostile environment



TITLE IX RULE-MAKING

2022 Proposed Rulemaking

- Sex based discrimination includes all forms of sex discrimination, including discrimination on the basis of **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity**

2023 Proposed Rulemaking re Athletics

- Does not require that schools limit trans students' participation in athletics in any way
- Prohibit schools from categorically banning trans students from participating in sports consistent with their gender identity

Ed Dept announced the final regulations should be published in March 2024

PA HUMAN RELATIONS ACT: STATE ANTI-DISCRIMINATION LAW

PHRA prohibits discrimination in public K-12 schools (public accommodations) on the basis of:

- Race - includes hair texture and protective hairstyle e.g. braids, twists, and locs
- Color
- Sex - includes gender identity/expression and sexual orientation
- Religion
- Ancestry
- National origin
- Handicap or disability
 - record of a handicap or disability
 - relationship or association with an individual with a handicap or disability
 - use of a guide or support animal
 - and/or handling or training of support or guide animals.



Generally, PA courts construe the parallel provisions of the PHRA to be coextensive with their federal counterparts, unless specific differences in language justify a different construction.

PHRA & PHRC: LGBTQ+ STUDENTS

PHRC Guidance 2018: sex discrimination includes gender identity, transgender status

Updated PHRC Regulations

Dec 2022 IRRC adopted final regs, at 16 Pa Code 41.201-41.207:

- ✓ **Discrimination based on sex includes sexual orientation and gender identity**

In the courts:

- **Wible v. SDPhila (2018)** - PA court held school responsible under PHRA for indirect discrimination, failing to intervene with peer harassment due to gender presentation, entered \$500k damages award against school

PHRC statement

- **Jan 2023, monitoring Central Bucks policies, LGBT concerns**

Legislation

- **April 2023, HB 300 PA Fairness Act** - amend PHRA to add explicit, statutory protections from discrimination based on sexual orientation and gender identity and expression

PUBLIC SCHOOL POLICIES & PROCEDURES RELATING TO TRANSGENDER STUDENTS

- **Policies must be based on current federal & state law - not personal preference or ideology**
- **US Supreme Court**
 - Bostock: discrimination against transgender person in employment context violates Title VII
 - Rejected cases challenging school policies supporting trans students

PRIVACY & SCHOOL RECORDS

- **Gender identity is a deeply rooted element of a person's identity.**
 - The sincerity of one's gender identity, like one's religious belief, is not to be disputed and should be generally presumed or easily established
 - School districts must accept and respect a student's assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student's core identity.
- **Right to privacy; No requirement to notify parent under FERPA**
 - Courts that have considered issue look at balancing interest in parent information & individualized assessment potential harm to student if parents are notified
- **Schools may not require provision of documents to 'prove' a student's sex**

BATHROOM & LOCKER ROOM ACCESS

Schools cannot discriminate against trans students by requiring them to use bathroom/locker room that does not match their gender identity.

May provide gender-neutral bathroom but cannot require they use a different facility based on their sex, gender/identity

3d Cir Boyertown (2018) : rejected arguments that a school policy protecting transgender students equal access violated other students' rights

Other court findings for trans students right to bathroom access:

- M.D.Pa., AH v Minersville (2019) - policy limiting trans girl from using girls school restrooms - awarded summary judgment on the violation of Title IX and EP
- W.D.Pa., Evancho v Pine Richland (2017) - policy restricting trans students from using restrooms consistent with gender identity likely to succeed on EP challenge
- All circuits except 11th Circuit which recently reversed
- SCOTUS denied cert, Parents for Privacy v. Dallas SD, Oregon (Dec 2020)

BATHROOM, LOCKER ROOM CONT'D

ED OCR has made clear they will enforce Title IX interpreting sex discrimination to include gender identity and expression.

- **OCR complaint resolution No. 11-15-1348 (2016), found Dorchester County School District violated Title IX when prohibited trans student in elementary school from using girls restrooms & required use office or nurse restroom.**
 - Resolution required revision of policies & procedures, access for students, training for staff, monitoring & reporting to OCR.
- **OCR complaint resolution 09-12-1095 (2014), agreement establishing that Downey Unified School District must allow trans student to use female-designated facilities and otherwise treat as a girl in all respects.**
 - Resolution included amending policies & procedures, training staff, age-appropriate instruction to students, ensuring supports for students who experience harassment based on gender.

SPORTS PARTICIPATION

BENEFITS OF PLAYING SPORTS

- Higher test scores
- Higher rates of school completion
- Teaches teamwork, leadership skills, belonging, connectedness to school community

BANS DO NOTHING TO “PROTECT” GIRLS

- CDC study: no negative impact on participation of girls in school sports in states implemented inclusive athletics policies
- Sexist stereotypes about how girl athletes should look or play promotes body policing

The foundational premise of sports ban policies - that trans girls are not ‘real’ girls and trans boys are not ‘real’ boys - is based on discriminatory stereotypes prohibited by Title IX /PHRA, and antithetical to the mission of public schools to provide safe environments and equitable opportunities to all students.

SPORTS PARTICIPATION

Closest case on point in 3d Circuit is Boyertown (discomfort is not acceptable reason to deny equitable access; no violation of cisgender students' rights to share space)

- Some cases in other courts: West Virginia (SCOTUS denied cert 4/2023, allowing to compete while appealed); Connecticut (remanded to district court on notice/damages); Idaho (9th Circuit upheld injunction against Idaho ban)

US Dept of Educ Title IX proposed regs about sports, final rule expected March 2024

*Schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity

- Must assess each team's particular sport, level of competition, grade/education level
 - Effectively prohibit elementary schools, middle schools, and in most cases, high schools from adopting rules that prevent trans students from participating in school sports consistent with their gender identity
- Criteria could not be premised on disapproval of transgender students or a desire to harm a particular student. The criteria also would have to minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied

NAME AND PRONOUN

- Schools cannot selectively deny trans students' preferred name while agreeing to cisgender student requests
- Intentionally & persistently misgendering constitutes sex-based harassment & creates hostile environment
 - See *Doe v. Triangle Doughnuts, LLC.*, 472 F. Supp. 3d 115 (E.D. Pa. 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”).
 - ED OCR: Tamalpais Union High School District (June 24, 2022); Willits Unified School District Resolution Agreement, Case No. No. 09-16-1384 (2017); City College of San Francisco, Resolution Agreement, Case No. 09-16-2123 (2017)

NAME AND PRONOUN CONT'D

- **Public K12 teacher does not have 1st A right to discriminate in classroom**
 - Addressing student in class is part of teacher's job = *Garcetti* controls
 - No right concerning classroom management, or to disregard school instructions & nondiscrimination policy
 - Not “compelled speech” bc employer can insist on lawful message
- **School has compelling interest & responsibility to protect students from discrimination**

Third Circuit already found in a case about transgender students' bathroom access, “[n]ot only would” a policy permitting refusal to use transgender students' pronouns “not serve the compelling interest that the School District has identified here, it would significantly undermine it.” “Adopting [a contrary] position would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school.” *Boyertown Area Sch. Dist.*, 897 F.3d at 530.

BULLYING, HARASSMENT & HOSTILE ENVIRONMENT

Discrimination, bullying, and harassment on the basis of sex, sexual orientation, gender identity, or gender expression is prohibited within public schools in the Commonwealth.

It is the responsibility of each school and all staff to ensure that all students, including LGBTQ students, enjoy a safe school environment in which to learn.

- Schools must ensure that any incident of discrimination, harassment, or bullying is immediately addressed, including investigating the incident, taking age- and developmentally-appropriate action, and providing students and staff with appropriate resources and supports.
- Complaints alleging discrimination or harassment based on a student's actual or perceived status as LGBTQ or nonbinary are to be taken seriously and handled in the same manner as other discrimination or harassment complaints.

Hostile Environment = Severe, pervasive, persistent -> interfere or limit student's ability to participate & benefit from school

- Discriminatory policies
- Prohibiting pride flags
- Unaddressed peer harassment/bullying

SCHOOL EFFORTS TO AFFIRM AND SUPPORT STUDENTS ARE LIFE-SAVING

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.**

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

ELC RESOURCES & CONTACT INFORMATION

Individual Requests For Assistance & Advice

Call: 215-238-6970 (Philadelphia) 412-258-2120 (Pittsburgh)

Email: intake@elc-pa.org

[ELC's webpage about Inclusive Schools & Honest Education](https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/)

<https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/>

- Factsheets about School Board Authority; Book Bans; LGBTQ Student Rights
 - ELC open letters to school boards about problem policies

[Back to School Guide for 2023](#)

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| <input type="checkbox"/> Affirming & Safe Schools | <input type="checkbox"/> Honest & Inclusive Schools | Homelessness |
| <input type="checkbox"/> Act 1: Accessing Supports | <input type="checkbox"/> Students with Disabilities | <input type="checkbox"/> English Learners & Immigrant Students |
| <input type="checkbox"/> Enrollment | <input type="checkbox"/> Early Childhood Education | <input type="checkbox"/> School Funding |
| <input type="checkbox"/> School Discipline | <input type="checkbox"/> KYR: Students in Care | <input type="checkbox"/> LGBTQ & Nonbinary Students |
| <input type="checkbox"/> Attendance & Truancy | <input type="checkbox"/> Juvenile Justice Involvement | |
| <input type="checkbox"/> Bullying & Harassment | <input type="checkbox"/> Students Experiencing | |