

**EDUCATION
LAW CENTER**

**WEST SHORE SCHOOL DISTRICT
APRIL 30, 2024**

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DISCLAIMER

This is a presentation on the services and resources ELC provides and the current state of the law which ELC offers to the public, school board members, lawyers and parents.

This presentation was requested by West Shore board members. ELC accepted the invitation for a presentation at a public meeting.

I am not providing legal advice. Consult your solicitor.

AGENDA

1. About Education Law Center PA
2. Orientation and Values
3. Public School Legal Obligations
4. Financial Impact of Civil Rights Violations
5. Rights of Transgender & Gender Diverse Students
 - Title IX
 - PA Human Relations Act
 - Privacy and Records
 - Facilities Access
 - Sports
 - Name and Pronoun
 - Bullying, Harassment and Hostile Environment

EDUCATION LAW CENTER-PA (ELC)

We are 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 diverse 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

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.

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/>

West Shore School District

POLICY 101 PHILOSOPHY OF EDUCATION:

The educational philosophy of the West Shore School District is to prepare our students to achieve optimal success in their lives, careers, and further education and enable them to become responsible, informed, and engaged citizens.

THE WEST SHORE SCHOOL DISTRICT IS A COMMUNITY OF LEARNERS COMMITTED TO:

1. Making students the center of the educational process;
2. Providing a safe, nurturing, educational climate that meets the needs of the individual student in order to develop life-long learners;
4. Preparing students to become productive community members who are personally responsible and globally aware;

POLICY 103 NONDISCRIMINATION:

The West Shore School Board (“Board”) declares it to be the policy of the West Shore School District (“District”) to provide an equal opportunity for all students to achieve their potential through the programs offered in the schools regardless of race, age, color, creed, religion, sex, gender, gender identity, sexual orientation, ancestry, marital status, pregnancy, national origin, disability, or differently abled status. The District shall provide to all students, without discrimination, course offerings, counseling, assistance, athletics, and extracurricular activities.

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%

PUBLIC SCHOOL POLICY MUST BE BASED ON THE LAW

The Establishment Clause of the First Amendment prohibits the government from “promot[ing] or affiliat[ing] itself with any religious doctrine or organization.

Policies must be based on current federal & state law - not personal preference, ideology or religious belief and values.

It is state and federal law that directs how children must be treated in public schools - not any religion.

School boards may not enact policies consistent with a religious agenda that contradicts the law & violates students' rights. See *Kitzmiller v Dover*

FINANCIAL IMPACT OF CIVIL RIGHTS VIOLATIONS

***District pays its own lawyers + any damages award to plaintiff + attorney fees of prevailing party.**

***District pays out of pocket if insurer won't cover violations and/or costs extend beyond insured amount.**

- *Evancho v. Pine Richland* (facilities access): undisclosed monetary payment
- *Burgess v. Central Bucks* (teacher retaliation): \$100K damages to teacher; \$325K atty fees
- *OCR investigation at Central Bucks* (hostile environment): insurer paid \$250K, private firm defending district billed \$1.75M [ongoing]
- *Kitzmiller v. Dover Area SD* (creationism, Establishment Clause): plaintiff fees over \$2M, settled \$1M
- *Issa v. SD of Lancaster* (immigrant enrollment): \$370K atty fees costs
- *BH and KM v. Easton Area SD* (student speech): \$385K atty fees

PUBLIC SCHOOL POLICIES & PROCEDURES RELATING TO TRANSGENDER AND GENDER DIVERSE STUDENTS

- **US Supreme Court**
 - Bostock v Clayton County (2020): discrimination against transgender person in employment context violates Title VII
 - Courts analyze Title IX consistent with Title VII
 - Four times in the last five years, US Supreme Court has declined to review cases challenging school policies that support transgender students

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 LGBTQ+ students (sex stereotypes)
- Discriminatory discipline
- Hostile environment



TITLE IX REGULATIONS

Final Rule Published, April 19, 2024

- Effective August 1, 2024
- Sex based discrimination includes discrimination on the basis of **sex stereotypes, sex characteristics, sexual orientation, and gender identity**
- **For any sex segregated programs and activities, e.g. bathrooms, locker rooms, sex ed classes, students must be allowed to participate aligned with their gender identity.**
 - Schools can separate / treat differently only if conduct causes de minimis harm. Preventing participation consistent with gender identity is more than de minimis harm.

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

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**
 - Some challenges in PA federal courts- standing problems; still briefing
 - Courts that have considered issue directly look at balancing interest in parent information & individualized assessment potential harm to student if parents are notified
 - 3d Cir: Right of parent is not absolute in school context
- **Schools may not require provision of documents to 'prove' a student's sex for enrollment or activities**

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)

Sports cases in other courts:

West Virginia (BPJ: SCOTUS denied cert 4/2023, allowing to compete while appealed; 4th Circuit ruled for trans athlete 4/2024- ban violates Title 9);

Connecticut (2d Circuit remanded to district court on notice/damages);

Idaho (9th Circuit upheld injunction against Idaho ban; reconsidering stay)

SPORTS PARTICIPATION

US Dept of Educ Title IX proposed regs about sports, final rule forthcoming

*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)
 - Title 9 Rule (2024) reconfirms

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/>

Collection of Fact Sheets and Back to School Guide

- Affirming & Safe Schools
- Act 1: Accessing Supports
- Enrollment
- School Discipline
- Attendance & Truancy
- Bullying & Harassment
- Honest & Inclusive Schools
- Students with Disabilities
- Early Childhood Education
- KYR: Students in Care
- Juvenile Justice Involvement
- Students Experiencing
- Homelessness
- English Learners & Immigrant Students
- School Funding
- LGBTQ & Nonbinary Students