

November 26, 2024

Elizabethtown Area School District
Board of Education
600 E. High Street
Elizabethtown, PA 17022
Copy to: Saxton and Stump

Dear School Board Members,

Education Law Center of Pennsylvania (ELC) provides this letter in response to concerns brought to our attention by parents in Elizabethtown Area School District (District) regarding proposed policies 123.3 (Sex-Based Distinctions in Athletics) and 216.2 (Student Records Name, Sex and Gender Identity) and related Forms 216.2 which discriminate against transgender and nonbinary students and open the District to litigation. We demand the Board and District uphold its nondiscrimination obligations under the law and reject these proposed policies.

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 IX¹ and other civil rights laws.² Additionally, the Supreme Court has at least four times in the last five years denied *certiorari* for cases challenging school policies that support transgender students.³

¹ The analyses cited herein rely on Title IX case law and the 2020 Title IX regulations, in recognition that schools within the Elizabethtown Area School District have been identified for the injunction under the *Kansas v. Department of Education* challenge to the 2024 Title IX regulations. Notably, all schools also remain obligated to nondiscrimination under the Pennsylvania Human Relations Act as explained here.

² See, e.g., *Bostock v. Clayton Cnty.*, 590 U.S. 644, 140 S.Ct. 1731 (2020) (holding that dismissal of an employee for being gay or transgender is sex-based discrimination under Title VII); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024); *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).

³ See *A.C. by M.C. v. Sch. Dist of Martinsville*, 75 F.4th 760 (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*

Pennsylvania’s anti-discrimination statute, the Pennsylvania Human Relations Act (PHRA)⁴ 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).⁵ 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.⁶ The PHRA recognizes that prohibitions against sex-based discrimination are “comprehensive.”⁷ 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.”⁸ 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.”⁹ 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.”¹⁰ 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.

I. Proposed Policy 216.2 (Student Records Name, Sex and Gender Identity) and Related Forms Violate the Law and Must Be Rejected.

The District May Not Require the Provision of a Birth Certificate for Enrollment or Participation in School

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);

⁴ Pa. Human Relations Act, 43 PA. STAT. ANN. § 953.

⁵ *Id.*; *id.* § 954(1).

⁶ Protected Classes Under the PHRA and PFEOA, 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 PFEOA); 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).

⁷ *Id.*

⁸ *Id.*

⁹ Pa. Human Relations Comm’n, *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>.

¹⁰ *Id.*

There is no legal basis for requiring a student to ‘prove’ their sex in order to participate in public school and the District cannot require provision of a birth certificate. Students’ right to enroll and participate in school may not be conditioned on the provision of documents other than those showing proof of child’s age, residence and immunizations as required by law.¹¹ Other documents, including a birth certificate, may not be required as a condition of enrollment.¹² Even for these required items, the Pennsylvania Department of Education is clear that “a school district can never demand only one kind of document.”¹³

A Policy Permitting or Promoting the Misgendering and Deadnaming of Students is Harmful and Constitutes Discrimination Under Title IX and the PA Human Relations Act

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.¹⁴ The weight of legal authority on this issue does not support a requirement that a school must obtain parent consent before upholding their nondiscrimination obligation and affirming students’ gender identity in school.¹⁵ Affirming a student’s request for supportive gender identity policies is distinguished in case law from allegations that “school officials ... proactively coerce students.”¹⁶

Federal courts and the U.S. Department of Education have already addressed the issue of respecting a person’s identified name and pronoun directly, and clearly held that intentionally and persistently misgendering a person constitutes sex-based harassment and creates a hostile

¹¹ See 22 Pa. Code. 11.11.

¹² See Pa. Dep’t of Educ., Basic Education Circular: Enrollment of Students, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudents.aspx>; Basic Education Circular: Student Enrollment FAQ, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx>

¹³ PDE, Basic Education Circular: Student Enrollment FAQ, <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/EnrollmentStudentsFAQ.aspx>

¹⁴ See e.g., *Vesely v. Illinois Sch. Dist.* 45, 669 F. Supp. 3d 706 (N.D.Ill. 2023) (rejecting parent’s objection to a school district’s policy allowing students to socially transition to a different gender identity at school without one parent’s consent; finding that the district’s policy had a reasonable relation to its legitimate interest in protecting transgender students); *Short v. N.J. Dep’t of Educ.*, 2024 U.S. Dist. LEXIS 125340 (dismissing claims against the New Jersey Department of Education regarding guidelines for transgender students; The court found that the plaintiffs lacked standing as the guidelines did not impose any affirmative duty on school districts to notify parents of a student’s gender identity). 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).

¹⁵ See e.g., *Regino v. Staley*, 2023 WL 4464845 (E.D.Cal. Jul 11, 2023) (school policy to follow student request for name and pronoun and not tell parents without student consent was reactive and did not violate parental substantive due process rights); *Littlejohn v. Sch. Bd. Of Leon Cty Florida*, 647 F.Supp.3d 1271, 1282-83 (N.D.Fla. 2022) (school’s gender identity support plan requested by student did not violate liberty interests in familial privacy and upbringing of child); *Willey v. Sweetwater Cty Sch. Dist. No.1 Bd of Trustees*, 2023 WL 4297186, *12-16 (D.Wy. Jun. 30, 2023) (school addressing child by requested name and pronoun did not amount to ‘treatment’ interfering with parent right to make medical decisions); *Vesely v. Illinois Sch. Dist. 45*, 669 F. Supp. 3d 706 (N.D.Ill. Apr. 18, 2023) (school’s support of child’s gender identity did not violate parental rights under federal and state constitution).

¹⁶ See *Delaware Valley Regional*, 2024 WL 706797 at *9-10 (reviewing cases).

environment.¹⁷ A federal court here 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.”¹⁸

The U.S. Department of Education addresses this directly among the ways that schools should support transgender and nonbinary students: “Adopting 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 - and implementing policies to safeguard students’ privacy - such as maintaining the confidentiality of a student’s birth name or sex assigned at birth if the student wishes to keep this information private, unless the disclosure is legally required.”¹⁹ The Department of Education has 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.²⁰ 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...”²¹

A policy permitting or promoting the misgendering or deadnaming of students would also violate the Pennsylvania Human Relations Act. The Commission has explicitly recognized that discrimination based on gender identity/expression constitutes sex discrimination, in guidance²² and with regulations amended on December 8, 2022 that clarify sex discrimination includes

¹⁷ 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); *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).

¹⁸ *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”).

¹⁹ 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>

²⁰ 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-educations-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”).

²¹ Off. for C.R., U.S. Dep’t of Educ., *Supporting Transgender Youth in School* (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ed-factsheet-transgender-202106.pdf>.

²² 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).

gender identity or expression.²³ 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.²⁴

Furthermore, the Pennsylvania Department of Education plainly anticipates students' right to change their name and gender identification with instructions how to do so in their PIMS Manual.²⁵

K-12 Teachers Do Not Have a First Amendment Right to Discriminate Against Transgender or Non-Binary Students in the Classroom

As described above, schools have the obligation under Title IX and PHRA to prevent discrimination against students based on their sex and gender identity. A teacher's use of pronouns that match a cisgender student's gender identity while refusing to use pronouns that match a transgender or nonbinary student's gender identity is discrimination on the basis of sex and gender identity.

While teachers certainly do not forfeit all First Amendment rights at the schoolhouse door,²⁶ teachers cannot use the First Amendment to support discriminatory conduct when, as here, such speech is part of a teacher's official job duties. When a teacher addresses a student in class, the teacher's speech "is—for constitutional purposes at least—the government's own speech,"²⁷ and the public school has a right and responsibility to ensure that its students are treated equally when addressed during instruction. Talking to students, including students who are transgender, "is speech [a teacher] is expected to deliver in the course of carrying out [their] job."²⁸

In contrast to the post-game prayers at issue in *Kennedy* where the Supreme Court held the speech was not "ordinarily within the scope" of the duties of a coach, a teacher's use of pronouns as part of instruction in the classroom owes its existence to responsibilities as a public employee.²⁹ As a result, the *Garcetti v. Ceballos*, 547 U.S. 410 (2006) line of cases controls the

²³ Regulation #52-13: Protected Classes Under the PHRA and PFEPA, <http://www.irrc.state.pa.us/regulations/RegSrchrslts.cfm?ID=3350> (creating new subchapter to define terms sex, race, religious creed).

²⁴ *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>.

²⁵ See PDE, PIMS Manual at page 15, 138 (reporting student gender), <https://www.education.pa.gov/Documents/Teachers-Administrators/PIMS/PIMS%20Manuals/2024-2025%20PIMS%20Manual%20Vol%201.pdf>

²⁶ See e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968)(upholding First Amendment rights of a teacher terminated for criticizing school board in letter to newspaper); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)(First Amendment protects complaints of racial discrimination to employer).

²⁷ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

²⁸ *Kennedy*, 142 S.Ct. at 2424.

²⁹ *Id.* at 2424.

outcome and Third Circuit precedent here is clear that a “teacher’s in-class conduct is not protected speech.”³⁰ “Teachers do not have a First Amendment protected right to decide the content of their lessons or how the material should be presented to their students.”³¹ “[N]o court has found that teachers’ First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates.”³²

A public school teacher “does not personally hold a First Amendment ‘teaching right’ concerning classroom management.”³³ A teacher cannot avoid *Garcetti* and Third Circuit precedent by claiming their challenge is to “compelled speech” because the Supreme Court has made clear that “if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.”³⁴ See *infra* regarding the district’s legal obligation and policy of nondiscrimination.³⁵

Neither is a Free Exercise claim grounds for a teacher to discriminate against transgender students by refusing to use a name and pronoun consistent with their gender identity. A district’s requirement that teachers address students with pronouns consistent a students’ gender identity, pursuant to their nondiscrimination policy, is a facially neutral and generally applicable policy.

The school district has a compelling interest - and responsibility - to provide a safe and inclusive learning environment for all students. The Supreme Court has long recognized that governments have a compelling interest in protecting individuals from discrimination on the basis of sex.³⁶ School districts also have a “compelling state interest in protecting transgender students from discrimination” and a “compelling interest in protecting the physical and psychological well-being of minors.”³⁷ Discrimination at school creates particularly severe risks for transgender students because “[m]istreatment of transgender students can exacerbate gender dysphoria, lead to negative educational outcomes, and precipitate self-injurious behavior.”³⁸ In short, “[w]hen

³⁰ *Borden v. School Dist. of Tp. of East Brunswick*, 523, F.3d 153, 172 (3d Cir. 2008), *cert denied*, 523 F.3d 153 (2009).

³¹ *Ali v. Woodbridge Township School District*, 957 F.3d 174, 184 (3d Cir. 2020)(citing *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

³² *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990).

³³ *Kahan v. Slippery Rock Univ. of Pa.*, 50 F.Supp.3d 667, 707 (W.D.Pa. 2014); see also *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).

³⁴ *Janus v. American Fed. of State, County & Municipal Employees Council 31*, 138 S.Ct. 2448, 2473 (2018)(citing *Garcetti*, 547 U.S. at 421-22).

³⁵ Neither can a teacher escape *Garcetti* by claiming their refusal to use pronouns is related to scholarship and academic freedom. Courts have continually emphasized this distinction between public K-12 schools and universities in addressing speech and other constitutional issues. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329. (2003) (recognizing that “universities occupy a special niche in our constitutional tradition”). Although the Sixth Circuit in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), upheld a university professor’s free speech objection to using a student’s name and pronouns, the court was explicit that its holding did not “extend to the in-class curricular speech of teachers in primary and secondary schools.” *Id.* at 505 n.1 (quoting *Evans-Marshall*, 624 F.3d at 334). The Third Circuit has no contrary binding decisions.

³⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

³⁷ *Boyertown Area Sch. Dist.*, 897 F.3d at 528-29.

³⁸ *Id.* at 529.

transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated.”³⁹

A policy requiring all teachers to use pronouns and names is the least restrictive means of furthering the district’s interest in nondiscrimination. Just as the 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.”⁴⁰ “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.”⁴¹

Students Have a Right to Privacy in their Gender Identity and the District is Not Required to Notify Parents of a Student’s Preferred Name or Pronoun

Courts recognize that sexual orientation and transgender status are intimately private and have found that it is a violation of a person’s right to privacy to disclose this information absent a legitimate interest.⁴² Pennsylvania educators have a “primary professional obligation...to the students they serve” and “shall respect a student’s right to privacy...”⁴³ Additionally, schools have a “compelling interest in protecting the physical and psychological well-being of their minor students.”⁴⁴ The Third Circuit has 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.”⁴⁵

While FERPA gives parents the right to view the school records of their minor children, it does not require schools to proactively contact parents about any content in or changes to student records. Nor does FERPA require a school to document a student’s use of a new name or pronoun in the official school record. There is simply no requirement in law that a school notify parents if a student requests to be called by another name or pronoun. In fact, courts have approved school policies that identify the goal of collaborating with student and their family about a student’s gender identity, while acknowledging that “in some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack

³⁹ *Id.*

⁴⁰ *Boyertown Area Sch. Dist.*, 897 F.3d at 530.

⁴¹ *Id.*

⁴² *See, e.g., 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); *Doe v. Pennsylvania Dep’t of Corrections*, 2019 WL 5683437 (M.D.Pa. Nov. 1, 2019) (stating courts have long recognized that the harms arising from disclosing a person’s transgender status are among those that make protection by pseudonym appropriate); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1192-95 (C.D. Cal. 2007) (student had a reasonable expectation of privacy about her sexual orientation, and even though she was out at school, she had protected interest in not being outed to her parents by school officials).

⁴³ 22 Pa. Code § 235.5a (PA Code of Professional Practice and Conduct for Educators).

⁴⁴ *See Doe v. Boyertown Area School Dist.*, 897 F.3d 518, 528-29 (3d Cir. 2018)(explaining risks to transgender students’ well-being when mistreated).

⁴⁵ *Doe v. Boyertown Area School Dist.*, 897 F.3d at 528.

of acceptance.”⁴⁶ A school policy must “carefully balance the interests of both the parents and students, encouraging parental input when the student consents, but avoiding it when the student expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way.”⁴⁷

A comprehensive policy that provides for individualized assessments can properly balance the rights of students and parents, and the obligations of the school district to ensure a safe, inclusive and nondiscriminatory learning environment. A policy that requires parental notification without such assessment can have severe negative effects on students who are already at greater risk of self-harm.

Additionally, the proposed policy’s requirement that a student ‘substantiate’ their request for gender identity to be ‘accommodated’ by “consistently, persistently, and insistent[ly] express[ing] the named gender identity” sets an unreasonable standard. Any sincerity standard must be consistent with Title IX’s religious exemption criterion as the sincerity of a student’s gender identity, like one’s religious belief, is “generally not in dispute”⁴⁸ and is “generally presumed or easily established.”⁴⁹ Students must not be required to disclose a gender dysphoria diagnosis or statement from a medical provider; other methods of establishing a student’s gender identity must be accepted.⁵⁰

⁴⁶ See e.g., *Regino v. Staley*, 2023 WL 4464845 (E.D.Cal. Jul 11, 2023) (school policy to follow student request for name and pronoun and not tell parents without student consent was reactive and did not violate parental substantive due process rights); *Littlejohn v. Sch. Bd. Of Leon Cty Florida*, 647 F.Supp.3d 1271, 1282-83 (N.D.Fla. 2022) (school’s gender identity support plan requested by student did not violate liberty interests in familial privacy and upbringing of child); *Willey v. Sweetwater Cty Sch. Dist. No.1 Bd of Trustees*, 2023 WL 4297186, *12-16 (D.Wy. Jun. 30, 2023) (school addressing child by requested name and pronoun did not amount to ‘treatment’ interfering with parent right to make medical decisions); *Vesely v. Illinois Sch. Dist. 45*, 669 F. Supp. 3d 706 (N.D.Ill. Apr. 18, 2023) (school’s support of child’s gender identity did not violate parental rights under federal and state constitution); *John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 (D. Md. Aug. 18, 2022).

⁴⁷ *John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256 at *6.

⁴⁸ *Moussazadeh v. Tx. Dep’t of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012) (applying Religious Land Use and Institutionalized Persons Act (RLUIPA)).

⁴⁹ Equal Employment Opportunity Comm'n, Compliance Manual Section 12: Religious Discrimination, <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

⁵⁰ See, e.g., Mass. G.L. c. 4, § 7 (“Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person’s core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.”); California Dep’t of Educ., School Success and Opportunity Act (AB 1266) FAQ, <https://www.cde.ca.gov/re/di/eo/faqs.asp> (“Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should 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. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.”).

Moreover, imposing such unreasonable standards violates Pennsylvania’s School Code which prohibits governing school boards from adopting rules and policies which are “*arbitrary, capricious*,” discriminatory or outside their grant of authority from the General Assembly.⁵¹

II. Proposed Policy 123.3 (Sex-Based Distinctions in Athletics) Violates the Law and Must Be Rejected

Title IX Requires that All Students Be Permitted to Enjoy the Benefits of School Athletics and There is No Evidence that the Participation of Trans Students Harms Anyone.

Policies and laws prohibiting or restricting the right of students to participate in school sports based on their gender identity have been successfully challenged in court as violations of Title IX and the Equal Protection Clause.⁵²

The educational benefits of playing sports are promised to all students under Title IX. Playing sports is associated with higher grades and standardized test scores, as well as higher rates of school completion.⁵³ It teaches students about teamwork, helps build their leadership skills, and confers psychological benefits, such as feelings of well-being, a sense of belonging among peers, and connectedness to the school community.⁵⁴ All students deserve equal access to these benefits. Preventing transgender, intersex,⁵⁵ and nonbinary students from playing school sports based solely on the fact that they are transgender or nonbinary is a form of sex discrimination that exacerbates the poor educational and mental health outcomes for which they

⁵¹ 22 Pa. Code § 12.3 (emphasis in original).

⁵² See, e.g., *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 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), *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024) (affirming likelihood of success on Equal Protection claims; remanded to clarify scope of preliminary injunction); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024) (state law restricting trans girl from participating on girls teams violated Title IX); *Doe v. Horne*, 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) (granting preliminary injunction for trans student denied access to girls sports team because “[t]he 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.”), *vacated for mootness*, 2023 WL 11852464 (S.D.Ind. Jan. 19, 2023).

⁵³ Nat’l Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

⁵⁴ See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. OF SPORT MANAGEMENT 349, 349–50 (2013); R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 J. OF SCHOOL HEALTH 397–401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 INT’L J. OF BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 98 (2013).

⁵⁵ Because of the absence of inclusive data, less is known about intersex students’ experiences with school sports. However, recent reporting from the Washington Post indicates that intersex students often avoid or are discouraged from participating in sports for fear of scrutiny. See Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, WASHINGTON POST (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>.

are already at risk due to the significant rates of in-school and out-of-school victimization they face.⁵⁶ But when transgender and nonbinary students are allowed to play sports, they tend to receive higher grades⁵⁷ and experience increased feelings of belonging, higher self-esteem, and lower levels of depression.⁵⁸ These benefits are significant and could even be lifesaving for transgender and nonbinary students.⁵⁹

Anti-trans sports bans and restrictions do nothing to “protect girls rights” or address the actual, ongoing gender inequities in athletics⁶⁰ - indeed, they only heighten the risk of sex discrimination for all girls who play sports. There is no evidence that permitting transgender and intersex students to play on sports teams aligned with their gender identity harms anyone. A recent analysis of CDC data found that there was no negative impact on the participation of girls and women in school sports in states that had implemented trans-inclusive state athletics policies.⁶¹ In fact, early evidence from California and Connecticut suggests that trans-inclusive

⁵⁶ In a national survey of LGBTQ+ students, an alarming number of students reported being harassed because of their LGBTQ+ status, with an overwhelming majority of all students (76.1%) reporting experiencing verbal harassment on this basis, and over one-third of students (31.2%) reporting physical harassment on this basis. This hostility in turn impacts students’ academic outcomes: many students reported not having plans to finish school, with 51.5% of students reporting hostile school climate (e.g., harassment and transphobic policies) as the reason they did not plan to graduate. See GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* 19, 34 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

⁵⁷ 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>.

⁵⁸ 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>.

⁵⁹ Among LGBTQI+ youth, transgender, nonbinary, and intersex students have elevated suicide risk. More than half (53%) of transgender and nonbinary youth seriously considered attempting suicide in the past year, compared to 45% of LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), <https://www.thetrevorproject.org/survey-2022/>.

⁶⁰ 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; Nat’l Women’s Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), <https://nwl.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/>.

⁶¹ Shoshana K. Goldberg, “Fair Play: The Importance of Sports Participation for Transgender Youth,” Center for American Progress (February 8, 2021), 14-16, <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>. Florida and South Carolina have since passed anti-trans youth athlete laws, however, these were not implemented at the time of this analysis and would not affect the findings of this study. See GLSEN and TransAthlete.com (2022). Navigator: Trans and Nonbinary Athletic Inclusion Policies. <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

policies are correlated with increased participation of girls in school sports.⁶² In contrast, where states enacted trans-exclusionary policies, girls' overall participation in high school sports declined.⁶³ Moreover, anti-trans sports bans and restrictions such as the one proposed here only codify sexist stereotypes of how girl athletes *should* look or play, which promotes body policing of any student that deviates from this ideal of femininity.

III. Enacting the Proposed Policies Will Create a Hostile Environment that Harms Students

Using correct pronouns or 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. More than half of transgender youth contemplated suicide in the past year, and over 60% of transgender and nonbinary youth engaged in self-harm.⁶⁴ The National Education Association (NEA) has explained that using pronouns consistent with a student's gender identity is "critical to the health and well-being of transgender and gender-diverse people."⁶⁵ It also makes our classrooms safer while empowering LGBTQ 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.⁶⁶ 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.⁶⁷

⁶² Goldberg, "Fair Play," 14-16 (Feb. 8, 2021).

⁶³ *Id.* at 14-15.

⁶⁴ The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf; see also Johns MM, Lowry R, Andrzejewski J, et al. Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017. MMWR Morb Mortal Wkly Rep 2019;68:67–71. DOI: <http://dx.doi.org/10.15585/mmwr.mm6803a3>

⁶⁵ See *Why Pronouns Matter* available at <https://www.nea.org/advocating-for-change/new-from-nea/why-pronouns-matter>.

⁶⁶ 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").

⁶⁷ See e.g., *Adams*, 968 F.3d at 1306–07; *Dodds*, 845 F.3d at 221–22.

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.⁶⁸ 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.⁶⁹

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.⁷⁰

"These values serve an important educational function for both transgender and cisgender students."⁷¹

Education Law Center urges the District and Board members to comply with their clear legal obligations under federal and state law and reject these Proposed Policies that will significantly harm students.

Sincerely,



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⁶⁸ See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project (Dec. 3, 2020)

<https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

⁶⁹ 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).

⁷⁰ *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).

⁷¹ *Id.*