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#### **PITTSBURGH**

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To: Members of the Pennsylvania Senate

From: Undersigned Organizations and Individuals

Date: June 28, 2022

Re: Opposition to SB 1277 and SB 1278 – Don't Say Gay Bills

We, the undersigned organizations and individuals in Pennsylvania that educate, promote, and defend the civil and human rights of all persons, write to **urge your opposition to SB 1277 and SB 1278**. These bills would create a hostile environment for LGBTQ youth, drive teachers from the field under the threat of lawsuits, and create a wedge between students and the people they learn from and rely on – counselors, nurses, and teachers. In the guise of parental rights, the bills would elevate the preferences of a single parent or a small group of parents over other parents and over an entire school community. Most importantly, these bills will undermine the ability of students to learn and thrive.

Schools must be welcoming and safe places for all students, especially those who have unique needs or are marginalized. Policymakers have made students' mental health and bullying prevention top priorities and have advocated for funding and programs to support student well-being and prevent student self-harm. Policymakers have also acknowledged and taken steps to address both the short-term and long-term shortage of qualified teachers, counselors, and other school staff.

## **SB 1278**

SB 1278 is similar to, and more restrictive than, Florida's Don't Say Gay law. The bill falsely equates discussions of sexual orientation and gender identity with sex education and would effectively forbid any acknowledgement of gay or transgender students or LGBTQ families until the sixth grade. It contends that sexual orientation and gender identity are only ideas, ignoring that gay and transgender students are real people, and in doing so the bill erases and dehumanizes children and their parents.

The bill would severely limit students' First Amendment rights as well as their right to be free from discrimination based on sex. The U.S. Supreme Court and many federal courts, including in Pennsylvania, have consistently recognized and affirmed that discrimination on the basis of sexual orientation, transgender status, gender identity, or gender expression is unlawful discrimination "on the basis of sex" and is prohibited by law. This protection encompasses the right of students to be addressed by the

<sup>&</sup>lt;sup>1</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); *Adams by and through Kasper v. School Board of St. Johns County*, No. 18-13592, 2021 WL 2944396 (11th Cir. Jul. 14, 2021)(bathroom policy which prevented transgender male student from using boys bathroom violated Equal Protection Clause); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018)(allowing trans students to use facilities does not violate cisgender students' right to privacy); *Evancho v. Pine Richland Sch. Dist*, 237 F.Supp.3d 267 (WD Pa 2017)(school board resolution limiting trans students' access to bathrooms held likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch.Dist.*, 290 F.Supp.321 (MD Pa 2017)(trans student prohibited from using girls bathroom stated claim under Title IX and Equal Protection).

name and pronouns they use, even if they haven't legally changed their name or gender.<sup>2</sup> Purposefully and persistently misgendering a student has been found to constitute harassment or discrimination and may harm the mental and emotional health of students.<sup>3</sup> The same analysis protecting students from discrimination in restroom use also applies to students' rights to have their gender affirmed in how they are addressed at school.<sup>4</sup> Explaining these principles of fair treatment and equity to students would be prohibited under SB 1278.

By contrast, 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. Conversely, a hostile school climate perpetuates higher rates of truancy, absenteeism, and dropping out for LGBTQ youth.<sup>5</sup>

Student speech promoting fair and equitable treatment of LGBTQ people is also constitutionally protected speech. School officials may not prohibit students from engaging in speech out of an "urgent wish to avoid the controversy which might result from the expression." School officials may not censor peaceful expression solely because other students may have a hostile reaction. Rather, the First Amendment's guarantee of freedom of speech protects the rights of LGBTQ students to speak and express themselves openly in ways consistent with their identities. School actions that target certain

<sup>&</sup>lt;sup>2</sup> See 20 U.S.C.A. § 1232g (FERPA forbids schools from disclosing a student's private information and requires parental consent to a change in the official school record of a student). See U.S. Dep't. of Educ., Family Educational Rights and Privacy Act: Guidance for Parents (Feb. 2011) (describing the rights of parents/guardians and students under FERPA).

<sup>&</sup>lt;sup>3</sup> See e.g., Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (recognizing claims of indirect discrimination under Title IX, where school had actual notice of harassment between students but failed to address it); Whitaker By Whitaker, 858 F.3d 1034 (applying Title IX to discrimination based on transgender status). Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 617-18 (4th Cir. 2020) (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'q 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>&</sup>lt;sup>4</sup> See *Adams*, 2020 WL 4561817; *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). See 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>&</sup>lt;sup>5</sup> See *LGBTQ & Gender-Affirming Spaces*, The Trevor Project, Dec. 3, 2020, available at <a href="https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/">https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/</a>. See also *Educational Exclusion* (2016), GLSEN, available at <a href="https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/">https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/</a>. See also *Educational Exclusion* (2016), GLSEN, available at <a href="https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/">https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/</a>.

<sup>&</sup>lt;sup>6</sup> Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)

speech or have the effect of stifling or discouraging identity-affirming speech or expression violate the First Amendment rights of students. Many rights and protections also apply to school teachers and staff.

The proposed legislation would have a paralyzing effect in schools, where teachers could be sued personally for answering a student's question or responding to a student's cries for help.

The bill sets a new, vague standard for parental notification based on "changes in student services or monitoring related to emotional or physical health or well-being," with exceptions only for documentary evidence that such disclosure would result in "child abuse or abandonment." Parents retain significant rights to consent to medical treatment for minor children, and schools require permission for screenings and treatment. Under the Family Educational Rights and Privacy Act (FERPA), parents are entitled to review student records, including health records of minor children.<sup>8</sup>

It is a common lament that parents want their children to talk to them. Rather than promote student/parent interactions, the bill will deprive students of the counsel of trusted adults, including nurses, counselors and teachers — whom the students have chosen to confide in and who often give students the confidence to have hard conversations with their parents. This legislation seeks to force students to talk to their parents by threatening their teachers.

### SB 1277

Senator Aument's bill, SB 1277, begins with the false premise that libraries are filled with sexually explicit materials and that parents have no rights with respect to children's access to these books. School districts already have policies that govern content and purchase of books and instructional material and rely on trained librarians to select age-appropriate materials. Students' library circulation records are considered educational records under FERPA that are open to inspection by parents. A small group of parents seeks to inflame public sentiment by extracting and attacking small sections of what they view as explicit content from widely read young adult literature. The bill uses the criminal code to define the offending sexual content, Title 18 Chapter 59, Section 5903 (e)(3), but fails to reference the fact that school libraries, public libraries, historical societies, and museums are specifically exempted from this provision.<sup>9</sup>

The bill creates an onerous process and insufficient timeline for implementation, requiring the review of thousands of books in library collections before September 2022. School boards and libraries will simply remove any books that could be viewed as inappropriate to a small number of parents, especially LGBTQ-themed books, promoting illegal discrimination.

Students have a right to receive information and ideas under the First Amendment as education "prepares students for active and effective participation in the pluralistic, often contentious society in

<sup>&</sup>lt;sup>7</sup> See *e.g., Gillman v. School Board for Holmes County*, Florida, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (a school district's censorship of T-shirts advocating fair treatment for LGBTQ people was unconstitutional).

<sup>8 20</sup> U.S.C.§1232g; 34 CFR Part 99.

<sup>&</sup>lt;sup>9</sup> 18 Pa Code 5903(j).

which they will soon be adult members."<sup>10</sup> The Constitution does not permit the official suppression of ideas based upon "narrowly partisan or political" interests.<sup>11</sup>

On June 22, the 50<sup>th</sup> anniversary of Title IX, the US Department of Education reaffirmed that discrimination based on gender identity and sexual orientation is sex discrimination. These proposed laws, which would single out and target LGBTQ youth, would clearly violate the federal law.<sup>12</sup>

In conclusion, these bills show a complete lack of compassion and understanding for thousands of students who identify as gay, bisexual, transgender, or gender diverse and will further marginalize already vulnerable students. Inclusive policies are good for ALL kids. Teaching that everyone deserves respect makes all kids safer, no matter how they identify.

We, the undersigned, urge you to oppose SB 1277 and SB 1278, as they are hostile, harmful, and discriminatory bills.

215 People's Alliance, Dr. Shivaani Selvaraj, Philadelphia County

**Abington For Peace**, Amy Martin, Montgomery County

**ACLAMO**, Nelly Jimenez-Arevalo, Executive Director and CEO, Montgomery County

AIDS Law Project of Pennsylvania, Ronda Goldfein, Philadelphia County

Allies for Children, Jamie Baxter, Executive Director, Allegheny County

**American Civil Liberties Union**, Pennsylvania Chapter, Sara Mullen, Associate Director, Statewide

**Anti-Defamation League (ADL)**, Andrew Goretsky, Regional Director and Robin Burstein, Deputy Regional Director, Eastern Pennsylvania

**Bethlehem Area School District**, Karen Beck Pooley, School Director, Lehigh & Northampton County

CASA of Philadelphia County, Happi Grillon, Executive Director, Philadelphia County

**CASA Youth Advocates, Inc.** Leigh Anne McKelvey, LSW MSW, Executive Director, Delaware County and Chester County

Centre County Youth Service Bureau, Christine Bishop, CEO, Centre County

Children First, Donna Cooper, Southeast Pennsylvania

Community Legal Services Inc., Debby Freedman, Executive Director, Philadelphia County

<sup>&</sup>lt;sup>10</sup> Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982) (plurality opinion).

<sup>&</sup>lt;sup>11</sup> Pico, 457 U.S. at 870-72.

<sup>&</sup>lt;sup>12</sup> Pennsylvania Human Relations Commission Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act at 3 available at <a href="https://www.phrc.pa.gov/LegalResources/Policy-and-Law/Documents/Sex%20Discrimination%20Guidance%20PHRA-3-3-2021.pdf">https://www.phrc.pa.gov/LegalResources/Policy-and-Law/Documents/Sex%20Discrimination%20Guidance%20PHRA-3-3-2021.pdf</a>

**Defender Association of Philadelphia**, Marni Gangel, Director of Policy for the Child Advocacy Unit of the Defender Association of Philadelphia, Philadelphia County

**American Philosophical Society Museum**, Merrill Mason, Director Emerita, Philadelphia County

Delta Family Services, Kerry Krieger, LSW, Executive Director, Montgomery County

Disability Rights Pennsylvania, Peri Jude Radecic, Chief Executive Officer, Statewide

Education Law Center-PA, Deborah Gordon Klehr, Executive Director, Statewide

Education Voters of PA, Susan Spicka, Statewide

Educational Studies Department of Swarthmore College, Edwin Mayorga, Delaware County

**Empowering Lives Foundation**, John S. Seely, Head Coach and Executive Director, Blair County

First Law Strategy Group, Hillary Weinstein, Philadelphia County

**Health Education & Legal Assistance Project at Widener University**, Susanna Greenberg, Managing Attorney, Philadelphia County and Delaware County

Institute on Disabilities, Sally Gould-Taylor, PhD, Executive Director, Philadelphia County

**Juvenile Law Center**, Susan Mangold, CEO, Philadelphia County

La Puerta Abierta, Inc., Cathi Tillman, Executive Director, Montgomery County

League of Women Voters of Pennsylvania, Sarah Miller, Statewide

Mazzoni Center, Thomas W. Ude, Jr., Statewide

NAACP Pennsylvania State Conference, Diana Robertson, Second Vice President, Statewide

Pennsylvania Association of Rural and Small Schools (PARSS), Edward Albert, Statewide

**Pennsylvania Association of School Nurses and Practitioners**, Jeanette Slimmer, CSN, President, Statewide

**Pennsylvania Budget and Policy Center**, Marc Stier, Director, PA Budget and Policy Center, Dauphin County

Pennsylvania Education Scholars, Susan DeJarnatt, Philadelphia County

**Pennsylvania Educator Diversity Consortium (PEDC)**, Donna-Marie Cole-Malott, Chester County

**Pennsylvania Family Support Alliance**, Angela M. Liddle, President and CEO, Cumberland County and Dauphin County

Pennsylvania Institutional Law Project, Su Ming Yeh, Statewide

Pennsylvania Parent and Family Alliance, Statewide

Pennsylvania School Counselors Association, Emilia Peiffer, Executive Director, Statewide

Pennsylvania School Librarians Association, Laura Ward, President, Statewide

Pennsylvania State Education Association, Rich Askey, President, Statewide

Pennsylvania Youth Congress, Jason Landau Goodman, Statewide

Pennsylvanians for Fair Funding, Laura Johnson, Montgomery County

Philadelphia Diversity Law Group, Leslie E. John, Philadelphia County

Philadelphia Federation of Teachers, Jerry Jordan, President, Philadelphia County

Philadelphia Participatory Research Collective, Kristen Goessling, PhD, Delaware County

Philly Children's Movement, Jen Bradley, Core Member, Philadelphia County

Red Wine and Blue, Ronna Dewey, Pennsylvania Program Director, Statewide

Research for Action, Kate Callahan, Executive Director, Philadelphia County

Serenity Solutions, LLC, Alisa Kamis-Brinda, Philadelphia County

Sociale, Elizabeth McNevin, Chester County

**Support Center for Child Advocates**, Frank P. Cervone, Executive Director, Philadelphia County

Teach Plus Pennsylvania, Laura Boyce, Executive Director, Statewide

The Field Center for Children's Policy, Practice & Research, Philadelphia County

The Homeless Advocacy Project, Dean M. Beer, Philadelphia County

The Public Interest Law Center, Brenda L. Marrero, Executive Director, Philadelphia County

**Vision for Equality, Inc.**, Maureen Devaney, Co-Executive Director, Statewide

Youth Art & Self-Empowerment Project, Sarah Morris, Co-Director, Philadelphia County

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