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VIA ELECTRONIC MAIL

Re: *Education Law Center’s Comments Re: Pennsylvania Human Relation Commission’s Guidance on Harassment in Educational Settings: Guidance on Evaluating Claims of Bullying and Harassment Under the Pennsylvania Human Relations Act.*

Dear Executive Director Lassiter, Deputy Chief Counsel Williams, Director Walkowiak and Director Chang:

The following comments are submitted on behalf of the [Education Law Center – PA](#) (ELC) in response to the Pennsylvania Human Relation Commission’s *Guidance on Evaluating Claims of Bullying and Harassment in Educational Settings* (the proposed guidance). ELC strongly supports the proposed guidance as an important vehicle for clarifying the rights and protections of students and ensuring that all Pennsylvanians understand how the Commission will evaluate harassment and bullying cases resulting from discrimination in the educational context pursuant to 43 P.S. § 959. However, ELC recommends that the proposed guidance be revised to delineate and further clarify the definition and nature of harassment, the scope of schools’ liability, to ensure investigations are prompt, independent and comprehensive, and ensure schools proactively implement correction action. We believe that these changes are important to prevent and address the lasting negative impact that harassment and bullying can have on a child’s education.

About Education Law Center-PA

The Education Law Center-PA (ELC) is a non-profit legal advocacy organization that uses impact litigation and individual representation to advocate on behalf of Pennsylvania’s students who are most marginalized. Over our nearly 49-year history, ELC has focused on addressing the educational needs of children living in poverty, Black and Brown students impacted by systemic racism and other forms of oppression, children who are immigrants, families experiencing homelessness, children with disabilities, those in the dependency and/or delinquency systems, children experiencing homelessness and students who identify as LBGTQ+. Over the years, ELC has handled thousands of intakes and individual matters on behalf of students and parents,

Ensuring that all of Pennsylvania’s children have equal access to a quality public education.

undertaken civil rights impact litigation, and initiated and informed legislative and regulatory reforms.¹

Over its history, ELC has drafted and proposed revisions to statewide and federal legislation, regulations, and regulatory guidance. As experts in education law, we have also trained juvenile court judges and MDJs regarding federal and state education mandates and have been active participants in several committees and workgroups at the state and local level. Our advocacy seeks to expand educational opportunities and improve life outcomes for children impacted by deep poverty and discrimination based on race, sex, ethnicity, disability and national origin. Our experiences handling matters involving bullying and harassment informs our comments and recommendations. We appreciate this opportunity to comment on PHRC's guidance which will have a direct impact on our clients' ability to vindicate their right to education.

Impacted Students

Identity-based harassment and discrimination remains a very significant problem in PreK-12 schools in Pennsylvania and across the country. Sexual harassment in K-12 schools is understudied, but “nearly half (48%) of students experience sexual harassment at school, either in person or online, and 87% of those students said that the harassment had a negative effect on them.”² In particular, Black girls and their caregivers, particularly those who identify as Black women, are often ignored or punished when they report race and sex-based harassment and discrimination to their schools, which reinforces the under-reporting of these incidents.³ It also sends the message to the school community that Black girls will not be believed or protected at school, which further chills the likelihood of students coming forward and results in climates where this type of violence is normalized. Pennsylvania's LGBTQI+ students face high rates of harassment, assault and other discrimination based on their sexual orientation and/or gender identity, through unchecked peer harassment and discriminatory school district policies.⁴ Additionally, pregnant, parenting and lactating students routinely face barriers to continuing their high school education due to lack of necessary resources and supports and discrimination.⁵

Anti-Black racism pervades the educational experience for Black girls who attend Pennsylvania public schools, underscoring the need for clear and robust protections to ensure that their legal

¹ For example, ELC engaged in and led statewide advocacy campaigns to reform Pennsylvania's Juvenile Court Rules to improve educational outcomes for children and youth in foster care, the juvenile justice system, and worked with legislators to draft Pennsylvania's truancy laws. Along with partners the American Bar Association Center on Children and the Law and the Juvenile Law Center, ELC co-founded the national Legal Center on Foster Care and Education and National Working Group on Foster Care and Education and with additional partner Southern Poverty Law Center created the Legal Center for Youth Justice and Education. These national organizations identify and promote model laws, judicial practices, policies, and reforms from across the country, and provide technical assistance to state and local policymakers to improve educational and life outcomes for children and youth.

² Hill, C., Kearl, H. (2011). *Crossing the line: Sexual harassment at school*. American Association of University Women; Hines, D. E., Wilmot, J. M. (2018). *From spirit-murdering to spirit-healing: Addressing anti-black aggressions and the inhumane discipline of Black children*. *Multicultural Perspectives*, 20(2), 62–69.

³ Crenshaw, K., Ocen, P., Nanda, J. (2015). *Black girls matter: Pushed out, overpoliced, and underprotected*. Center for Intersectionality and Social Policy Studies, Columbia University. https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf

⁴ GLSEN, 2019 State Snapshot: School Climate for LGBTQ Students in Pennsylvania, Jan. 2021, <https://www.glsen.org/sites/default/files/2021-01/Pennsylvania-Snapshot-2019.pdf>

⁵ See Educ. L. Ctr.-PA, *Clearing the Path: Creating School Success For Pregnant and Parenting Students and Their Children 5-7* (2019).

rights can be protected and enforced.⁶ Research has consistently demonstrated Black girls are suspended at a rate of six times that of white girls without exemplifying any differences in behavior, due to discriminatory school rules and enforcement of such rules.⁷ Black girls have the highest rate of overrepresentation in exclusionary discipline compared to white youth of any other race and gender group.⁸ In Pennsylvania, Black girls are five times more likely to be arrested in schools for identical, and in many cases age-appropriate, behavior compared to white girls and Pennsylvania ranks second in the nation in the arrest rates for Latinx students and Black students alike.⁹ Research reflects that Black girls are stereotyped, sexualized, punished, and criminalized by adults in schools due to racism, sexism, and body discrimination and are presumed to be more “adult-like,” “sexually provocative” and sexually active, compared to same-aged white peers.¹⁰ Such racist beliefs and thought patterns have their roots in American slavery and perpetuate racialized sexual harassment.¹¹ Educators and school decision-makers may erroneously perceive Black girls as “encouraging” or “deserving of” sexual and sexualized racial harassment by the way they dress and act, even when they are behaving in developmentally appropriate ways and complying with their school’s dress code, which is used to justify illegal discrimination.¹² Moreover, adultification bias results in Black girls being misperceived as “less innocent” and “more dangerous” than their white counterparts.¹³ As a result of such racist stereotyping, rather than being recognized as victims of racial and sexual harassment, Black girls are often construed as the aggressor and disciplined for defending themselves or making reports to their schools.¹⁴ ELC has witnessed this first-hand in several individual cases we have handled on behalf of Black girls. This pattern is especially devastating because of the severity of racial and sexual harassment that Black girls experience in school: unlike white girls who report experiencing more indirect harassment (e.g., being subject to harassing remarks, gestures, name-

⁶ Education Law Center-PA, *We Need Supportive Spaces that Celebrate Us: Black Girls Speak Out About Public Schools*, May 2023, available at <https://www.elc-pa.org/wp-content/uploads/2023/05/FINAL-Supportive-Spaces-for-web.pdf>.

⁷ Data Snapshot: 2017-2018 National Data on School Discipline by Race and Gender (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf>. (Analysis by Georgetown Law Center on Poverty and Inequality’s Initiative on Gender Justice & Opportunity and the RISE Research team at New York University based on Civil Rights Data Collection, U.S. Department of Education Office for Civil Rights (2020))

⁸ *Id.*

⁹ *Disparate and Punitive Impact of Exclusionary Practices on Students of Color, Students with Disabilities and LGBTQ Students in Pennsylvania Public Schools A Report of the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights* (April 2021) at p. 131 at [04-09-Pennsylvania-Public-Schools.pdf \(usccr.gov\)](https://www.usccr.gov/publications/04-09-Pennsylvania-Public-Schools.pdf)

¹⁰ Epstein, R., Blake, J. J., González, T. (2017). *Girlhood interrupted: The erasure of Black girls’ childhood*. Georgetown Law School Center on Poverty and Inequality.

¹¹ REBECCA EPSTEIN ET AL., *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOODS* 5 (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>

¹² Rahimi, R., Liston, D. (2011). Race, class, and emerging sexuality: Teacher perceptions and sexual harassment in schools. *Gender and Education*, 23(7), 799–810.

¹³ Epstein, R., Blake, J. J., González, T. (2017). *Girlhood interrupted: The erasure of Black girls’ childhood*, Georgetown Law School Center on Poverty and Inequality; Evans-Winters, V. E. , with Girls for Gender Equity (2017), *Flipping the script: The dangerous bodies of girls of color*. *Cultural Studies ↔ Critical Methodologies*, 17(5), 415–423.

¹⁴ Wun., C. (2016). *Against captivity: Black girls and school discipline policies in the afterlife of slavery*. *Educational Policy*, 30(1), 171–196; Tonnesen, S. C. (2013), *Commentary: “Hit it and quit it”: Responses to Black girls’ victimization in school*, *Berkeley Journal of Gender, Law & Justice*, 28(1), 1–29.

calling), Black girls face far more direct harassment and assaults in schools.¹⁵ Additionally, ELC has noticed a troubling pattern of Black female caregivers being banned after reporting unlawful racial and/or sexual harassment experienced by Black girls for whom they care which serves to prevent, and in some cases, criminalize caregivers for making such reports.¹⁶ In these matters, harassment goes unaddressed and often escalates which can result in Black girls, and their Black caregivers being pushed out of school altogether.

These intertwining factors create hostile school environments for Black girls who are punished and disciplined rather than supported and affirmed for reporting racial, sexual, and racialized sexual harassment. The PHRC's guidance should ensure a fair, equitable, non-discriminatory, and prompt complaint process to address documented systemic racism and increase support for Black girls to challenge harassment.

This is also a frightening time for LGBTQ+ students in our schools, a trend that has only become more pronounced over recent years. Pennsylvania's LGBTQ+ students face high rates of harassment, assault, and other discrimination based on their sexual orientation and/or gender identity, through unchecked peer harassment, discriminatory school district policies, and harmful state proposed legislation.¹⁷

Over the past two years in Pennsylvania, as across the country, school communities have faced unprecedented, coordinated political attacks against LGBTQ+ students, and in particular transgender and nonbinary students. The 2021 responses to GLSEN's survey of Pennsylvania students reported significant discrimination and harassment in our schools:¹⁸

- The vast majority of LGBTQ+ students in Pennsylvania regularly (sometimes, often, or frequently) heard anti-LGBTQ+ remarks in schools, including 95% of students who heard negative remarks in school about gender expression and 77% of students who heard negative remarks about transgender people.
- 57% of LGBTQ+ students experienced verbal harassment based on their gender expression in Pennsylvania schools, 30% experienced online harassment during school, and 18% experienced physical harassment in school based on their gender expression.
- Transgender and nonbinary students experienced gender-based discrimination in Pennsylvania schools, specifically being prevented from: using their chosen name or pronouns (39%), using the bathroom that aligns with their gender (34%), using the locker room that aligns with their gender (32%), wearing clothing deemed "inappropriate" based on gender (19%), and playing on the school sports team that was consistent with their gender (18%).

¹⁵ Espelage, D. L., Hong, J. S., Rinehart, S., Doshi, N. (2016), Understanding types, locations, & perpetrators of peer-to-peer sexual harassment in US middle schools: A focus on sex, racial, and grade differences, *Children and Youth Services Review*, 71, 174–183.

¹⁶ See González, Thalia, Joki, P, Discipline Outside the Schoolhouse Doors: Anti-Black Racism and the Exclusion of Black Care Givers, *UCLA L. Rev. Disc.* 40, 42, 45-47, Sept. 13, 2022. Available at <https://www.uclalawreview.org/discipline-outside-the-schoolhouse-doors-anti-black-racism-and-the-exclusion-of-black-caregivers/>

¹⁷ See, e.g., GLSEN, 2021 State Snapshot: School Climate for LGBTQ Students in Pennsylvania (Feb. 2023), https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_PA.pdf

¹⁸ GLSEN, 2021 State Snapshot: School Climate for LGBTQ Students in Pennsylvania (Feb. 2023), https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_PA.pdf

These kinds of homophobic, biphobic, and transphobic school climates lead to negative educational and personal outcomes for LGBTQ+ students.¹⁹

Guidance from analogous federal antidiscrimination statutes and administrative agencies

Pennsylvania courts construe the parallel provisions of the PHRA to be coextensive with their federal counterparts. PHRA claims are analyzed using the same standards as analogous federal statutes and Pennsylvania courts look to federal court decisions to inform interpretations of the PHRA.²⁰ The PHRA should be interpreted “as identical to federal anti-discrimination laws except where there is something specifically different in its language” justifying a different construction.²¹ It follows therefore that the federal Department of Education’s regulations and guidance as to the meaning and implementation of federal antidiscrimination laws in school contexts is important and compelling guidance for the PHRC’s evaluation of claims of harassment in the school context as well.

Recommendation 1: Clarify the definition of harassment

Section 5 of the proposed guidance would be strengthened with the following revisions and additions to ensure a comprehensive understanding of the definition of harassment.

- 1.1 The PHRC proposed guidance uses the terms “bullying and harassment” throughout the document but in ELC’s experience it is very important for families and students to understand the legal distinctions between the two. We recommend the PHRC include a clear definition distinguishing the two and an explanation that clarifies for families that while schools have the obligation to prevent and interrupt bullying as well, the PHRC complaint process is only for harassment and discrimination based on a protected class included in the statute. It is imperative that the guidance explain this distinction in order for families to know what they need to allege in their complaint and how their complaint will be investigated.
- 1.2 The proposed guidance should explicitly reference the recent regulations that explain discrimination on the basis of race includes discrimination on the basis of hair texture and protective hairstyles (such as braids, twists, locs), sex includes sexual orientation, gender identity, gender expression and familial status including pregnancy, and religion includes religious practice, observance, or belief, as set forth in 16 Pa. Code Chapter 43 Sections 41.204- 41.207 Paragraph 2 on Scope. Explicit mention of the ways that PHRC’s regulations have clarified definitions of, race, sex, and religion are important to continue to raise awareness about prohibited forms of discrimination under the PHRA and ensure that students and caregivers are aware of their rights and that all public accommodations, including public schools, are aware of their legal obligations around included protected classes and prohibited conduct.

¹⁹ See GLSEN, The 2021 National School Climate Survey 41–45 (stating that, in their national survey of LGBTQ+ youth, higher rates of peer victimization and experiencing discrimination were correlated with lower levels of academic achievement, lower self-esteem, and higher rates of depression).

²⁰ See *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996); *Ferraro v. Temple Univ.*, 185 A.3d 396, 402 n.3 (Pa. Super. 2018); *Kroptavich v. Pa. Power & Light Co.*, 795 A.2d 1048, 1055 (Pa. Super. 2002).

²¹ *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 (3d Cir. 2002).

- 1.3 Federal antidiscrimination protections extend to discrimination based on *perceived* membership in a protected class (e.g. student is harassed because they are perceived to be gay or Black or Jewish, though they are not), and that is an important element to include in the proposed PHRC guidance as well.²²
- 1.4 The guidance should state that unlawful conduct can be intersectional and implicate one or more protected identities (e.g. harassing comments include both racial and gender-based slurs). In ELC’s experience, students often experience discrimination or harassment across identity categories but may not understand they can submit complaints and receive relief based on multiple protected identities.
- 1.5 The proposed guidance describes that “discrimination may be verbal or physical” and should be revised to also include that harassment and discrimination may be graphic or written, virtual or online. This is a pervasive problem and many of the calls ELC receives about harassment and bullying contain some element of graphic, virtual or online activity.

Section 8 of the proposed guidance mentions “cyberbullying” but it is critical to ensure families and students understand that conduct occurring in multiple online formats can be harassment, so listing examples is very helpful. Harassment can occur in different contexts including cyber/virtual harassment, social media, text messages, direct messages, or graphic communications (e.g., texting or other messaging apps, social media like Snapchat, Instagram, TikTok, email, or gaming, and online forums where people can view, participate in, or share content and includes sending, posting, or sharing negative, harmful, false, or mean content about someone else or sharing personal information about someone, causing embarrassment or humiliation).

- 1.6 ELC strongly supports the proposed guidance explaining that discriminatory conduct “need not be directed at a particular student to be unlawful.” As the U.S. Department of Education Office of Civil Rights (OCR) explained about Title VI in a July 2024 *Fact Sheet: Harassment based on Race, Color, or National Origin on School Campuses*, “The conduct may be directed at anyone, and the harassment may also be based on association with others of a different race, color, or national origin (e.g., the harassment might reference the race of a sibling or parent/guardian because it is different from the race of the person being harassed whose access to the school’s program is limited or denied). Additionally, a single victim may experience a hostile environment when the conduct of multiple offenders, taken together, meets the definition above.”²³

²² See e.g. U.S. Dep’t of Educ. Office for Civil Rights (OCR), *Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, including Shared Ancestry or Ethnic Characteristics 2* (May 2024), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202405-shared-ancestry.pdf> (hereinafter May 2024 Title VI Dear Colleague).

²³ U.S. Dep’t of Educ., Office of Civil Rights, *Fact Sheet: Harassment based on Race, Color, or National Origin on School Campuses 2* (July 2, 2024), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-race-color-national-origin-202407.pdf> (hereinafter “OCR July 2024 Fact Sheet”).

- 1.7 Providing specific examples of sex- and gender-based harassment is also vitally important to ensure students and families do not mistakenly assume only a narrow stereotypical view of sexual harassment is actionable. Examples could include:
- a. repeated and/or unwanted text messages or emails;²⁴
 - b. threats, insults, or slurs;²⁵
 - c. purposely and consistently misgendering or dead-naming a student;²⁶
 - d. stalking;²⁷
 - e. sexually touching students;²⁸
 - f. slapping, kicking, punching, pushing, hitting, or otherwise assaulting;²⁹
 - g. obscene jokes or comments related to gender or sexuality;³⁰
 - h. spreading sexual rumors or passing around sexual photos of someone;
 - i. pressuring, forcing, or intimidating students into sexual activities.³¹
- 1.8 The proposed guidance would benefit from additional emphasis that harassment can be severe *or* pervasive. For example, such explanatory language is found in the July 2024 Title VI Fact Sheet and a restatement would be really helpful for families and students: “Generally, the less pervasive the harassing conduct, the more severe it must be to establish a hostile environment under Title VI. For example, in most cases, a single

²⁴ *Torres v. Sugar-Salem School District #332*, No. 4:17-cv-00178-DCN, 2019 WL 4784598 (D. Idaho Sept. 30, 2019) (awarding a settlement against a school district after a school counselor groomed, sexually abused, and sent flirtatious text messages to students).

²⁵ For examples of successful gender-based violence and harassment claims involving insults, threats, or slurs, see *K. S-A. v. State of Hawaii, Department of Education*, No. 16-00115 ACK-KJM (D. Haw. 2018) (awarding a settlement against the state department of education relating to the bullying two boys endured, including being called homophobic slurs); *Nugent v. Carl Junction R-1 School District*, No. 3:13-cv-05089-MJW (W.D. Mo. 2015) (awarding a settlement against a school district after a student committed suicide following bullying including sexual orientation slurs, physical threats, theft, and destruction of property); North Bend School District (Oregon Department of Education Complaint) (awarding injunctive relief partly on the basis of the homophobic slurs two LGBTQ+ students endured); *Riccio ex rel. Andree v. New Haven Board of Education*, 467 F. Supp. 2d 219 (D. Conn. 2006) (awarding a settlement against a board of education after an eighth-grade student endured physical harassment and anti-gay verbal harassment based on her perceived sexual orientation).

²⁶ See *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); Title IX Protections for LGBTQ Students, Know Your IX, <https://knowyourix.org/college-resources/title-ix-protections-lgbtq-students/#:~:text=Transgender%20students%20are%20still,sex%2Dbased%20discrimination%20in%20education> (explaining that Title IX requires that schools respect transgender students’ gender identity in their policies regarding dress code, names, and pronouns).

²⁷ Stalking and Title IX: The Basics, Stalking Prevention, Awareness, and Resource Center (2021), <https://www.stalkingawareness.org/wp-content/uploads/2021/11/Campus-Stalking-Title-IX-Basics.pdf>.

²⁸ *Brinkley v. Waters*, No. 2:18-CV-89, 2021 WL 1233352 (S.D. Ga. Mar. 31, 2021) (awarding a settlement against a school after the school failed to comply with mandatory reporting laws after students were sexually abused by a teacher); *Belcher v. Robertson County, Tenn.*, No. 3-13-0161, 2014 WL 6686741 (M.D. Tenn. Nov. 26, 2014) (awarding a settlement against the county after a child sexually touched and harassed other students).

²⁹ *Shively v. Green Local School District Board of Education*, No. 5:11-cv-02398-BYP (N.D. Ohio 2015) (awarding a settlement against a school after the school failed to take action after a student was taunted with gender-based slurs and assaulted).

³⁰ *Doe v. Georgetown County School District* (D. S.C. 2015) (awarding a settlement against a school district after a high school cheerleading coach repeatedly bullied, harassed, and belittled a cheerleader in front of her teammates, including derogatory comments about her body).

³¹ *Burke v. Brentwood Union School Dist.*, No. 3:15-cv-00286 (N.D. Cal. 2015) (awarding a settlement against a school after a student was pressured into performing sexual acts and taking sexual pictures by another student, which led to a “sexting ring”).

isolated incident would not be sufficient to establish a Title VI violation. However, in some instances, a hostile environment based on race, color, or national origin may result from a single severe incident if the conduct is subjectively and objectively offensive and so severe that it limits or denies a student’s access to the education program or activity.”³²

- 1.9 While the definition refers to a “reasonable student of the same protected class” being detrimentally affected by the harassment, the guidance should underscore that there are many different ways a student’s education may be “detrimentally affected” and therefore this is broadly construed. The guidance should reference in this definition conduct that “denies or limits” an individual’s ability to participate in a school program or activity, as delineated in the new 2024 Title IX regulations.³³
- 1.10 Section 8 of the guidance refers to potential tensions with First Amendment protections under the heading of “Harassment and Bullying Online” but the guidance should make clear that an evaluation of speech protections and harassing conduct applies to all communications, not only cyberbullying or other speech that happens online.

Recommendation 2: Clarify the scope of a school’s liability

Section 6 of the proposed guidance would be strengthened with the following revisions and additions to ensure a clear understanding of when the school can be held liable.

- 2.1 The requirement that school officials had “actual knowledge” of the harassment is too burdensome a standard and not aligned with guidance for federal antidiscrimination statutes. The 2024 Title IX rules explain that a school must respond when any employee has knowledge of conduct that “reasonably may constitute” harassment,³⁴ which is also more consistent with a constructive knowledge standard used in PHRC workplace harassment claims.³⁵
- 2.2 The guidance should be revised to add that schools must take immediate *and effective* action to respond to claims of harassment. This would be consistent with the shift in the 2024 Title IX regulations.³⁶ Schools cannot be discharged of their duty for taking *some* action that is not actually effective.
- 2.3 Section 8’s description of the boundaries between protected speech and harassing speech should be expanded to include the description of schools’ duty to respond and address any hostile environment even if particular offensive speech is protected. In the May 2024 Title IX Dear Colleague Letter OCR explains, “The fact that harassment may involve conduct that includes speech in a public setting or speech that is also motivated by political or religious beliefs, however, does not relieve a school of its obligation to

³² OCR July 2024 Fact Sheet at 2.

³³ See 34 C.F.R. § 106.2 (effective Aug. 1, 2024).

³⁴ See 34 C.F.R. § 106.44(a) (effective Aug. 1, 2024).

³⁵ See *e.g. Hoy v. Angelone*, 456 Pa. Super. 596, 608 (Sup.Ct. Mar. 12, 1997)(describing a plaintiff may establish knowledge by showing harassment was so pervasive that the employer will be charged with constructive knowledge).

³⁶ See 34 C.F.R. § 106.44(a) (effective Aug. 1, 2024).

respond under Title VI as described below, if the harassment creates a hostile environment in school for a student or students.”³⁷

- 2.4 The language in Section 5 that references conduct in a school setting or perpetuated by individual(s) that the school “has control over” needs further explanation. We urge the PHRC to make clear that the PHRA applies to harassing conduct that occurs in a school program or online or otherwise under the school’s “disciplinary authority,” and regardless of where the incident(s) occurred, schools must address hostile environments that arise in school.³⁸
- 2.5 In the context of students with disabilities, the guidance should be clear that schools may be liable for harassment based on a student’s disability and for harassment not related to disability but which results in a hostile environment that detrimentally affects the student’s access to a free, appropriate, public education (“FAPE”).³⁹ Such denials of a FAPE are addressed through administrative due process procedures under IDEA, Section 504, or Title II. Like OCR, PHRC addresses complaints that allege a denial of FAPE that results from disability harassment.⁴⁰ A school district’s liability is implicated in both scenarios.

Recommendation 3: Clarify a school’s obligations for receiving complaints

Section 7 of the proposed guidance would be strengthened with the following revisions and additions to ensure a school effectively discharges its duty to receive complaints of harassment.

- 3.1 ELC supports the requirements in the guidance for wide distribution of the harassment policy to the school community. To ensure equitable access, the guidance should explicitly state that school policies and information about harassment complaints and investigations must be provided to families in a language they understand and interpreters provided for school interactions.
- 3.2 In ELC’s experience, many families believe that complaints must take a school- specific or LEA-specific format to be actionable and to serve as notice to a school entity about prohibited conduct have to use a complaint format specific to their local school building. PHRC guidance should explicitly state that in addition to a school’s template form for complaints, schools are responsible for complaints that are submitted in any format including verbal, written and informal. All complaints must be treated in the same way regardless of the method in which they are received.
- 3.3 ELC urges the PHRC to require or strongly recommend that each school identify and publicize a staff person responsible for receiving complaints of harassment. Any school staff who receives a complaint of harassment must immediately provide it to a designated harassment officer.

³⁷ OCR May 2024 Dear Colleague Letter at 5.

³⁸ See e.g. 34 C.F.R. § 106.11 (effective Aug. 1, 2024).

³⁹ See e.g. U.S. Dep’t of Educ, Office of Civil Rights, *Dear Colleague Letter: Reminder of Responsibilities under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act* (July 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>

⁴⁰ *Id.*

Recommendation 4: Ensure that investigations are independent, sufficiently comprehensive, and promptly conducted

In ELC’s experience talking with caregivers calling our Helpline and advocating for students across Pennsylvania, many schools do not have any written policy describing for families a robust investigation process and committing to a timeline to complete investigations and clearly communicate their outcome. Section 7 of the proposed guidance should include additional details to ensure schools meet their obligations to respond to harassment with an independent, comprehensive and prompt investigation.

- 4.1 Consistent with the language addition suggested above, Section 7(c) should be revised to require schools to take prompt *and effective* action to investigate allegations once the school is aware of an allegation. Too often ELC hears from families that school staff did very little in response to their complaints of harassment.
- 4.2 Complainants are entitled to a robust and comprehensive investigation and information about the processing of their complaint. We urge the PHRC to provide a suggested timeline for processing complaints and require schools to provide a description of the process (who conducts the investigation, who will be interviewed, etc.) and the timeline to complainants. The guidance should require that the school provide a complainant with written confirmation that a complaint has been received and provide notice of the date by which complainants will receive the findings of the school’s investigation.⁴¹ For example, an investigation of allegations of harassment/discrimination should commence as soon as circumstances allow, but not later than three (3) school days of receipt of the original complaint, regardless of the manner in which the complaint is communicated. A written report of all findings of the investigation must be completed within thirty (30) calendar days, unless additional time is necessary due to the matter being investigated by a law enforcement or governmental agency.⁴²
- 4.3 In order to ensure investigations are conducted with integrity, we urge the PHRC to include in the guidance the basic requirement that school staff must be excused from the investigation and decision-making process if they have any conflict with or bias against the complainant or the accused or if they are involved as a witness or implicated in the allegations.⁴³
- 4.4 In order to ensure investigations are conducted in a robust and comprehensive manner that reflects the serious impact harassment can have on a student’s education, we strongly support the inclusion of evidence-based training for investigators in the

⁴¹ See e.g., 34 C.F.R § 106.45(b)(4) (effective Aug. 1, 2024).

⁴² See e.g., Kentucky, <https://www.education.ky.gov/school/sdfs/Documents/A09.42811%20Harassment%20Discrimination.pdf>. See also California, https://www.aclunc.org/sites/default/files/how_to_file_a_complaint_with_your_school.pdf; Illinois, <https://www.cps.edu/sites/cps-policy-rules/policies/700/705/705-5a/> (providing 5 days for initial acknowledgment of complaint; 15 day status update; 30 day status update or final determination; 45-60 days maximum to share investigation findings in writing); Connecticut, <https://portal.ct.gov/sde/publications/parents-guide-to-bullying-and-harassment-in-connecticut/about-the-law>.

⁴³ See e.g., 34 C.F.R. § 106.45(b)(2) (effective Aug. 1, 2024).

guidance. Too many schools are entrusting so-called investigations to staff with no training or protocol, which leaves students open to continued harassment when investigations are poorly conducted and wrongly conclude that the allegations are unsubstantiated. This occurs with great frequency in the cases we see: students have often alleged harassment for prolonged periods of time and the harassment only intensifies when schools conclude that the allegations are unsubstantiated.⁴⁴ We support the guidance language that an “investigation must be broad enough to capture all the allegations raised by the student” and suggest the PHRC provide more details about what an appropriate investigation should encompass, including consideration of all evidence and interviews of all potential witnesses.⁴⁵ Students should also be interviewed individually in a private location using questions with age-appropriate language that specifically asks about reported unlawful conduct. Finally, it is imperative to ensure that school staff who conduct investigations receive training on racial bias.

- 4.5 The guidance should include a requirement for schools to inform families and students of their right to be free from retaliation for making a complaint or participating in an investigation. Peer retaliation by other students is also included in the prohibition of retaliation for which the school is responsible.⁴⁶ The guidance should include explicit language that “the school is prohibited from intimidating, threatening, coercing, or otherwise retaliating against them because of their complaint or participation” and is responsible for ensuring peers do not retaliate.⁴⁷
- 4.6 We strongly support the imperative in the guidance that the school “must take steps to protect the victim of harassment or bullying while this investigation is occurring. The victim of harassment must not be impacted by any transfer or change in status.”
- 4.7 We urge the PHRC to add guidance that the outcome or findings of the investigation and the basis or reasoning for that determination must be provided in writing to the complainant.⁴⁸ Students and families need to be given sufficient information in order to understand the outcome of a school’s investigation and the basis of why a school has or has not determined that harassment or bullying occurred. Absent this information, families are not able to determine if additional action is needed or if a school has fulfilled its obligations under the law.
- 4.8 We support the guidance language that schools “should keep copies of the investigation materials” and suggest also including a recommendation for an additional review or appeal within the school district if a family is unsatisfied with the resolution of the investigation.

⁴⁴ For example, ELC filed an [OCR complaint against the School District of Philadelphia](#) in 2017 describing uninterrupted bullying and harassment of students with disabilities. OCR [opened an investigation](#) and facilitated a [resolution agreement](#) to address the harassment of students with disabilities.

⁴⁵ See, e.g. 34 C.F.R. §§ 106.45(b)(6), 106.45(f) (effective Aug. 1, 2024).

⁴⁶ See, e.g., 34 C.F.R. § 106.71 (effective Aug. 1, 2024).

⁴⁷ See OCR July 2024 Fact Sheet at 3.

⁴⁸ See, e.g., 34 C.F.R. § 106.45(h)(2) (effective Aug. 1, 2024).

- 4.9 We urge the PHRC to include in the guidance that each of these factors and recommended actions will be considered in the evaluation of whether the school met its obligation for prompt and effective action to investigate and respond to harassment.

Recommendation 5: Clarify a school’s obligation to proactively implement corrective action

ELC strongly supports the guidance in Section 7(D) and consideration of the full list of important factors to assess whether a school has met its obligation for prompt and effective action in response to harassment complaints. Section 7 would be improved with the following additions and revisions.

- 5.1 ELC urges the PHRC to provide additional guidance about the supportive services schools must offer to all students who report harassment, even if an investigation does not substantiate the allegations. Supportive measures must be developmentally appropriate, non-punitive and not unreasonably burdensome on the respondent.⁴⁹ To support students who have experienced harassment or violence, schools can put many supportive measures in place, including no-contact orders, free counseling, modifications of work, and changes to class schedules.⁵⁰ The school can also implement a safety plan and pick a specific person at the school to check in with the student and communicate with the family about how the safety plan is going. Additionally, schools can change the location of the perpetrator’s locker or class seat, increase supervision during times that the student and perpetrator could come into contact, change the perpetrator’s bus route or arrival time, assign an adult escort to the alleged perpetrator (if a student), or consider a transfer to another school if necessary.⁵¹
- 5.2 The guidance would benefit from some additional examples to illustrate an effective response from the school. “In the case of multiple harassers, for example, it likely is not sufficient to take responsive actions relating to only one harasser when the totality of the circumstances indicate that the school has a broader, environmental issue, and the remedial response should be adjusted appropriately.”⁵² In this guidance or subsequent resources, PHRC could offer illustrative examples in the format of the July 2024 OCR Title VI Fact Sheet.⁵³
- 5.3 The guidance should provide additional specific examples and resources for schools to provide campus-wide education and prevention training to address the root causes of a hostile environment and school climate concerns. Some resources for consideration include:

⁴⁹ See, e.g., 34 C.F.R. § 106.30.

⁵⁰ See, e.g., 34 C.F.R. § 106.30; Know Your IX and Nat’l Women’s L. Ctr., *Frequently Asked Questions on Title IX and Supportive Measures for K-12 Students*, NAT’L WOMEN’S L. CTR. (2021), <https://nwl.org/wp-content/uploads/2021/11/Supportive-Measures-FAQ-K12-vF.pdf>.

⁵¹ *What to Do When Your Child is Bullied or Harassed*, EDUC. L. CTR.-PA (Sept. 2019), <https://www.elc-pa.org/wp-content/uploads/2019/07/Parents-Guide-on-Bullying-Harassment-in-Schools-Final-w-App072619.pdf>.

⁵² OCR July 2024 Fact Sheet at 2.

⁵³ OCR July 2024 Fact Sheet at 3-6.

**Guiding Principles for Creating Safe Inclusive Supportive Fair School
Climates** (U.S. Department of Education) -
<https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

National Center on Safe Supportive Learning Environments (U.S.
Department of Education), <https://safesupportivelearning.ed.gov/>

Equity Assistance Centers (U.S. Department of Education),
<https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/>

Mid-Atlantic Equity Consortium (MAEC) -
Provides technical assistance and support to school districts on School Climate
and Culture, https://maec.org/our_work/school-culture-climate/ and Equity
Audits, <https://maec.org/equity-audit/>

**Intercultural Development Research Association (IDRA), Interrupting
Bullying & Harassment in Schools Equity Assistance,**
<https://www.idra.org/support/interrupting-bullying-harassment-in-schools-technical-assistance-toolkit/>

The proposed guidance is an important step toward ensuring schools across Pennsylvania respond appropriately and effectively to harassment. We appreciate the opportunity to provide additional recommendations based on our experience with students and families on these issues. Please feel free to contact us with any questions you may have.

Respectfully submitted,



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