

**EDUCATION
LAW CENTER**

TITLE IX DEBATE & CONTINUED PROTECTIONS FOR SEX BASED DISCRIMINATION UNDER THE PHRA

PHRC LUNCH & LEARN

SEPT. 26, 2024

**KRISTINA MOON, SENIOR ATTORNEY
EDUCATION LAW CENTER PENNSYLVANIA**

AGENDA

1. About Education Law Center PA
2. Title IX
3. 2024 Title IX Rule
4. Kansas case injunction
5. PA Human Relations Act
6. (*if time permits*) Issues presenting for trans students in schools and case law

EDUCATION LAW CENTER-PA (ELC)

We are a legal services nonprofit. Our mission is to ensure access to a quality public education for all children in Pennsylvania. We have offices in Philadelphia and Pittsburgh.

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

Our priority areas include:

Equal Access to
Quality Schools

Adequate &
Equitable School
Funding

Dismantling the
School-to-Prison
Pipeline

School Efforts to Affirm & Support Students are Life-Saving



PA schools are hostile environments for LGBTQ students, with high rates of harassment & discrimination.

Black students identifying as LGBTQ face combined racism & homophobia/transphobia.

Negative impacts on attendance, achievement, well-being

3d 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.”**

School-based supports save lives.

LGBTQ young people reported having access to at least 1 space that was affirming reduced their odds of attempting to die by suicide by 35%

Using students' correct name and pronoun decreased thoughts of dying by suicide by 29% and attempts to die by suicide by 56%

TITLE IX PROVIDES STRONG PROTECTION AGAINST SEX DISCRIMINATION IN SCHOOLS

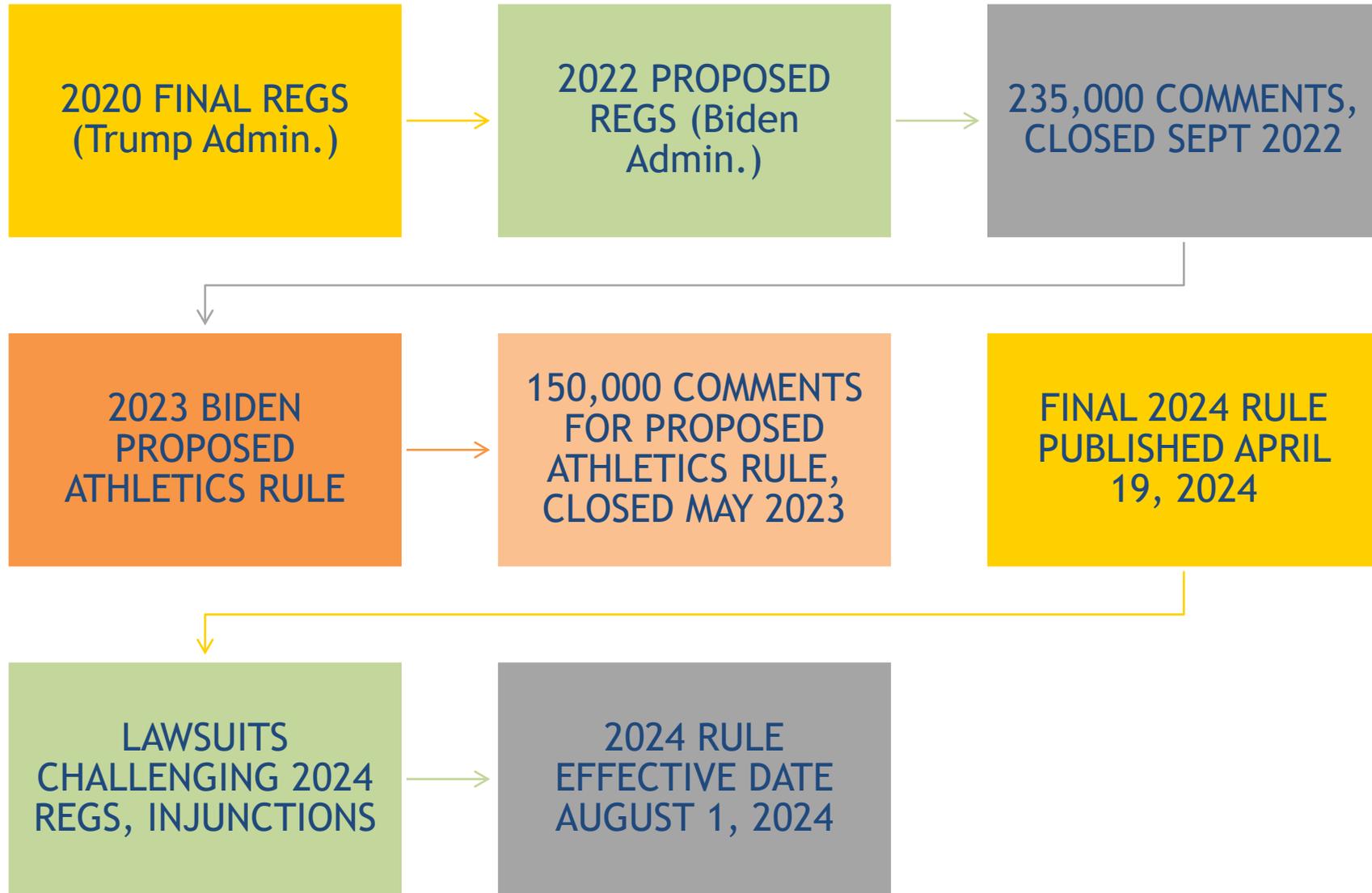
Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.

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

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



TITLE IX REGULATIONS



2024 TITLE IX REGULATIONS

Sex discrimination includes discrimination on the basis of **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity**. This expanded definition shifts the focus from sexual harassment to sex-based harassment more broadly.
34 C.F.R. § 106.10 (effective Aug. 1, 2024).



LGBTQ STUDENTS



PREGNANT &
PARENTING STUDENTS



DUE PROCESS
PROTECTIONS

2024 TITLE IX RULES - LGBTQ STUDENTS

The redefinition of sexual harassment as sex-based harassment and discrimination encompasses the broader range of prohibited conduct that impacts LGBTQ+ youth with a requirement that schools take action to address.

34 C.F.R. § 106.10 (effective Aug. 1, 2024).

Sex discrimination includes discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes under Title IX.



Schools must address anti-LGBTQI+ harassment.

34 C.F.R. §§ 106.2, 106.10.

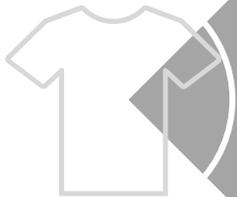
GENDER IDENTITY



Schools must allow students to participate in classes and activities, use bathrooms and locker rooms, and dress & groom themselves consistent with their gender identity



Rule requires schools to provide access to sex-separate facilities in a way that does not cause more than *de minimus* harm. The rule is clear that denying students access to facilities that align with their gender identity is more than *de minimis* harm and prohibited by Title IX. 34 C.F.R. § 106.31(a)(2)



If uniforms: must allow students to align with gender identity



Student name & pronoun: harassment is fact-specific. 89 F.R. 33474, 33516

THE 2024 TITLE IX REGS: LEGAL CHALLENGES AND IMPLEMENTATION IN PENNSYLVANIA

LEGAL CHALLENGES TO 2024 TITLE IX RULE

- 8 lawsuits have been initiated by other states seeking to prevent the 2024 final regulations from taking effect. Courts in each ordered an injunction, on entire rule. The rule is enjoined in 26 states.
- Pennsylvania is NOT a party to any of these lawsuits challenging the 2024 final regulations.
- There is no “universal” injunction effective nationally.
- The rule is also blocked from effect in any school attended by members of: Moms For Liberty, Young America’s Foundation; Female Athletes United
- All appealed
- SCOTUS denied ED’s request for emergency relief for non-GI provisions



SOURCE: Education Week reporting

EdW

A Flourish map

KANSAS VS. US DEP'T OF EDUCATION

Plaintiffs: Kansas, Alaska, Utah, and Wyoming; national orgs Moms For Liberty, Young America's Foundation, Female Athletes United

HOLDING: Injunction on 2024 Title IX rule (in entirety) for plaintiff states, and org plaintiffs including Moms For Liberty

- **Application for PA:** the U.S. Department of Education cannot enforce the 2024 Title IX rule in individual public schools that have students attending with parents who are members of “Moms for Liberty” - see list of schools: <https://www.elc-pa.org/wp-content/uploads/2024/07/2024-07-Title-IX-Rule-Challenges-ELC-Analysis.pdf>.
- **APPEALED:** US Dept of Education has filed interlocutory appeal to 10th Circuit

Kansas v. U.S. Dep't of Educ., --F.Supp. 3d--, 2024 WL 3273285, *20-21 (D.Kan. Jul. 2, 2024).

KANSAS VS. US DEP'T OF EDUCATION

While the scope of this relief is broad, it follows the traditional approach of limiting injunctive relief to the parties to this litigation. Moreover, there is no obvious reason to limit the relief sought by Plaintiff Organizations to the geographic limits of the co-plaintiff States. The Plaintiff Organizations demonstrated standing in their own right; thus, they could have brought this suit on their own without joining with Plaintiff States. Accordingly, it makes no sense to penalize Plaintiff Organizations by circumscribing the scope of relief to which they are otherwise entitled by limiting it to the States represented by their co-plaintiffs. To rule otherwise would risk rendering the participation of the Plaintiff Organizations a legal nullity because they would have obtained the same relief through the participation of Plaintiff States.

Finally, nothing in this order limits the ability of any school to adopt or follow its own policies, or otherwise comply with applicable state or local laws or rules regarding the subjects addressed herein. Rather, it simply prohibits Defendants from demanding compliance with the Final Rule by the schools affected by this order, or imposing any consequences for such schools' failure to comply with the Final Rule.

The Kansas decision does not have any effect whatsoever on state laws. The Pennsylvania Human Relations Act (PHRA) and its regulations prohibit discrimination in schools based on gender identity and expression and sexual orientation & pregnancy, and all PA public schools, including charter schools, remain liable under these provisions to prevent discrimination against LGBTQ+ students & pregnant students.

Pre-existing case law in 3d Cir, e.g. Boyertown

The Kansas decision does not require any school to stop or change policies or practices that affirm the rights of LGBTQ+ students and cannot bar compliance with applicable state or local laws.

Kansas v. U.S. Dep't of Educ., --F.Supp. 3d--, 2024 WL 3273285, *20-21 (D.Kan. Jul. 2, 2024).

KANSAS PROCEDURAL HISTORY

Injunction Ordered July 2, 2024 - plaintiff states & members of org plaintiffs

Plaintiffs ordered to submit list of impacted schools, noting future members also entitled to injunction.

Through multiple filings, plaintiffs have identified a total of 509 Pennsylvania schools in 160 school districts and 4 charter schools, as of 9/16/24. Updated lists attached to ELC fact sheet (<https://www.elc-pa.org/wp-content/uploads/2024/07/2024-07-Title-IX-Rule-Challenges-ELC-Analysis.pdf>) and ED website (<https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>).

Interlocutory appeal by US Dept of Ed.

Court has not issued an injunction order incorporating listed schools.

Plaintiffs filed motion for summary judgment in late August.

Defendants to file an answer September 26, 2024.

IF YOU'RE ON THE KANSAS M4L LIST & THE 2024 TITLE IX RULE IS ENJOINED

Dept of Educ website

(<https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/sex-discrimination-overview-of-the-law>):

The April 2024 Title IX regulation, which is codified in the Code of Federal Regulations at 34 CFR Part 106, is enforced by the Department's Office for Civil Rights (OCR) and is effective on August 1, 2024. As of August 28, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools.

Pending further court orders, the Department's Title IX Regulations, as amended in 2020 remain in effect in those states and schools

(<https://www.federalregister.gov/documents/2020/05/19/20-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>).

LGBTQ student rights & pregnant student rights →

Title IX and case law;
2020 Title IX rules;
PHRA requirements

Due process protections →

Title IX and case law;
2020 Title IX rules

KEY TAKEAWAY FROM *KANSAS* CASE

Pennsylvania schools have the same obligations to nondiscrimination for LGBTQ students under state law (the Pennsylvania Human Relations Act) so a school on the [*Kansas M4L list*](#) is still legally responsible to prevent discrimination and provide equitable access to education for LGBTQ students.

Parents and students can submit [complaints to PHRC](#) if a student experiences discrimination on the basis of sex including sexual orientation, gender identity and pregnancy.

PA HUMAN RELATIONS ACT: STATE ANTI-DISCRIMINATION LAW

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

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



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

PHRA & PHRC: SEX DISCRIMINATION

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

Updated PHRC Regulations 2022:

Dec 2022 IRRC adopted final regs,
16 Pa Code 41.204, 41.206:

- ✓ **Discrimination based on sex includes sexual orientation and gender identity; pregnancy, childbirth and breastfeeding**

PHRC statements

- July 2024, Limited application of Kansas decision: PHRA applies
- Jan 2023, monitoring Central Bucks policies, LGBT concerns

In the courts:

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

PHRC - FILING A COMPLAINT

THE BASICS

Discrimination on the basis of:

- ✓ race,
- ✓ color,
- ✓ sex (including SOGIE),
- ✓ religion,
- ✓ national origin,
- ✓ ancestry
- ✓ disability,
- ✓ retaliation for filing a complaint

- PHRA covers public accommodation including public schools (and also housing, employment)
- Within 180 calendar days of the last act of discrimination; unless legally justifiable reason
- Filed by one who is the victim of alleged discrimination
- Attorney not required but permitted
- Complaint Format:
https://www.phrc.pa.gov/AboutUs/Documents/ComplaintProcess_7-2017_Final.pdf
 - Call 717-787-4410 or visit regional office (Harrisburg, Philadelphia, Pittsburgh)
 - Complete fillable Education Intake [PDF](#) & email to PHRC@pa.gov or mail to regional office

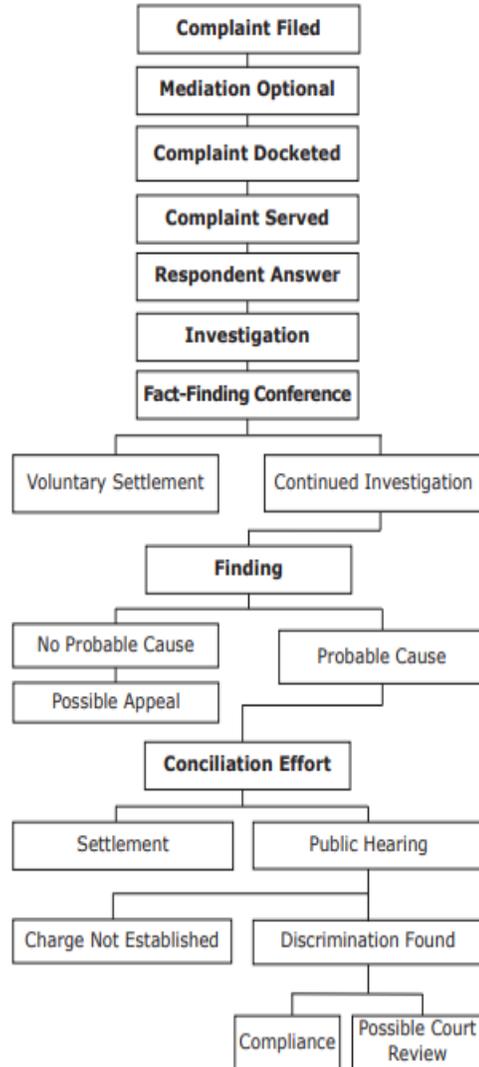
PHRC COMPLAINT REQUIREMENTS

You will be asked to provide:

- Your name and contact info
- The name and address of the person discriminated against
- The name, address of school you're alleging discriminated
- What kind of discrimination (e.g. based on race, sex)
- County where discrimination occurred
- Dates of discrimination, whether continuing
- Description of conduct you believe is discriminatory
 - BE SPECIFIC, PROVIDE DETAILS OF IMPACT
 - Dates, names of people involved, why you believe discrimination was because of race/sex/etc, witnesses present or those who received complaints
 - Documents that illustrate, explain: medical, communications
- [Remedy is not required on the complaint, but you could add]
- **Signed Verification** (false statements subject to penalties under law) if identity of the complainant is necessary to resolve the complaint

PHRC - PROCESSING COMPLAINTS

The Complaint Process



- Complaint is served on PHRC and Respondent within 30 days of docketing
- Initial Contact from PHRC
 - Assigned to intake representative, assigned docket number
 - Mediation by PHRC may be offered (both parties must agree)
- Respondent has 30-60 days to answer after served; you are copied on response
- Investigation
 - Provide information, witness info, any relevant documents
 - Investigator will interview complainant, respondent, witnesses; review docs
 - Fact Finding Conference may be offered
- Results of Investigation
 - No probable cause - did not find sufficient evidence of discrimination. Notified by mail, informed of appeal rights.
 - Probable cause - sufficient evidence of discrimination.
- Conciliation/Settlement efforts - PHRC will ask respondent to stop illegal conduct; provide appropriate remedies (payment damages, policy changes)
- Public hearing
- Timeline - **If your complaint has not been dismissed or resolved in one year after it was filed, you have the right to file in court.**

TRANS & GENDER DIVERSE STUDENTS: ISSUES PRESENTED & CASE LAW

More details & case cites in ELC's fact sheet: [The Rights of LGBTQ & Gender Diverse Students](#)

GENDER IDENTITY IS A DEEPLY ROOTED ELEMENT OF A PERSON'S IDENTITY.

- The sincerity of one's gender identity, like one's religious belief, is not to be disputed and should be generally presumed or easily established
- School districts must accept and respect a student's assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student's core identity.

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

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

BATHROOM & LOCKER ROOM ACCESS

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

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

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

Other court findings for trans students right to bathroom access:

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

BATHROOM, LOCKER ROOM CONT'D

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

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

PRIVACY & SCHOOL RECORDS

- **Right to privacy; No requirement to notify parent under FERPA**
- **Parent assertion school must notify for consent before using name/pronoun**
 - Some challenges in PA federal courts- standing problems; still briefing
 - The weight of legal authority does not support a requirement that a school must obtain parent consent before upholding their nondiscrimination obligation and affirming students' gender identity in school
 - Courts that have considered issue directly look at balancing interest in parent information & individualized assessment potential harm to student if parents are notified
 - 3d Cir: Right of parent is not absolute in school context
- **Schools may not require provision of documents to 'prove' a student's sex for enrollment or activities**

NAME AND PRONOUN

- Schools cannot selectively deny trans students' preferred name while agreeing to cisgender student requests
- Intentionally & persistently misgendering constitutes sex-based harassment & creates hostile environment
 - See *Doe v. Triangle Doughnuts, LLC.*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (applying *Bostock*, the court held that, “in addition to being misgendered,” an employer deadnaming a transgender woman “was sufficiently severe or pervasive to support her [hostile work environment] claim”).
 - ED OCR: Tamalpais Union High School District (June 24, 2022); Willits Unified School District Resolution Agreement, Case No. No. 09-16-1384 (2017); City College of San Francisco, Resolution Agreement, Case No. 09-16-2123 (2017)
 - Title 9 Rule (2024) reconfirms

NAME AND PRONOUN CONT'D

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

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

SPORTS PARTICIPATION

BENEFITS OF PLAYING SPORTS

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

BANS DO NOTHING TO “PROTECT” GIRLS

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

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

NOT COVERED IN 2024 RULE - TRANS KIDS IN SPORTS

2023 US Dept of Educ Title IX proposed regs about sports, final rule forthcoming.

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

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

SPORTS PARTICIPATION - IN THE COURTS

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

- *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); 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); SCOTUS had denied cert 4/2023 allowing BPJ to compete while appeal moved forward
- *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).
- *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), affirmed 2024 WL 4113838 (9th Cir 9/9/24)

ELC RESOURCES & CONTACT INFORMATION

Individual Requests For Assistance & Advice

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

Email: intake@elc-pa.org

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

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

Collection of Fact Sheets and Back to School Guide

- Affirming & Safe Schools
- LGBTQ & Gender Diverse Students
- Sports Equity
- Transparency in Schools: Sunshine Act & Right to Know
- School Boards' Authority
- Act 1: Accessing Supports
- Enrollment
- School Discipline
- Attendance & Truancy
- Bullying & Harassment
- Students with Disabilities
- Early Childhood Education
- Students in Foster Care
- Juvenile Justice Involvement
- Students Experiencing Homelessness
- English Learners & Immigrant Students