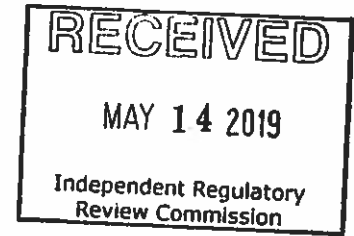


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**PENNSYLVANIA
CATHOLIC
CONFERENCE**



May 13, 2019

Shane Crosby, Executive Director
Professional Standards and Practices Commission
333 Market Street, 14th Floor
Harrisburg, PA 17126-0333

Re: Public Comment on Proposed Changes to the Code of Professional Practice and Conduct for Educators

Dear Mr. Crosby:

The Pennsylvania Catholic Conference ("PCC") appreciates this opportunity to submit comments to the Professional Standards and Practices Commission ("PSPC") on the proposed changes to the Code of Professional Practice and Conduct for Educators, 22 Pa. Code Chapter 235, that were published in the April 20, 2019, issue of the *Pennsylvania Bulletin* (IRRC #3233).

PCC is an association comprised of the eight Latin Rite Roman Catholic Dioceses of Pennsylvania and the two Byzantine Rite Catholic Dioceses whose territories include the Commonwealth of Pennsylvania. Each Diocese: is an ecclesiastical entity, charged with the responsibility, *inter alia*, of teaching the Catholic Faith within its territorial boundaries, and is governed by the Roman Catholic Code of Canon Law, and by ecclesiastical statutes and other enactments adopted by the competent ecclesiastical authorities within the Catholic Church. The Roman Catholic Church believes that its schools are the principal means for transmitting the Catholic Faith to new generations of Catholics. Catholic schools do not segment their functions into religious and secular components; at all times, the Catholic school is engaged in the process of catechesis and the formation of the Christian personality, a process which is integrated within the curriculum and activities of the Catholic schools, and each Catholic school employee has a duty to be a role-model as a faith-filled adult Christian and to give credible witness to the teachings of the Church in faith and morals.

Certificated educators and administrators who serve in Catholic schools are subject to the Code of Professional Practice and Conduct for Educators ("Code of Conduct"), and violations of the Code of Conduct can serve as the basis for discipline imposed by the PSPC and by the Pennsylvania Department of Education ("PDE"). 24 P.S. §§ 2070.1a *et seq.*

PCC recognizes that the proposed changes to the Code of Conduct are made to set expectations for educators and to inspire commitment to students, colleagues and the profession; however, PCC has concerns with the impact of several of these proposed changes on certificated educators and administrators serving in Catholic schools, specifically, with regard to discrimination claims

based on sexual orientation, gender expression, and gender identity. With this in mind, PCC offers the following comments.

While the current Code of Conduct does contain provisions related to professional educators and discrimination against students, fellow professionals, and parents, the proposed changes expand the bases for claims of discrimination.

The following proposed changes to the Code of Conduct form the basis for PCC's comments/concerns.

§ 235.4 [Practices] Professional practices.

(b) [Professional educators] Educators are expected to abide by the following:

(1) [Professional educators shall abide by the Public School Code of 1949 (24 P.S. §§ 1-101— 27-2702), other school laws of the Commonwealth, sections 1201(a)(1), (2) and (4) and (b)(1), (2) and (4) of the Public Employe Relations Act (43 P.S. §§ 1101.1201(a)(1), (2) and (4) and (b)(1), (2) and (4)) and this chapter] Educators shall comply with all Federal, State, and local laws and regulations and with written school entity policies.

(4) Educators shall respect the dignity, worth and uniqueness of each individual student, including, but not limited to, actual and perceived gender, gender expression, gender identity, civil status, family status, sexual orientation, religion, age, disability, race, ethnicity, socioeconomic status and culture.

(6) Educators shall exhibit consistent and equitable treatment of students, fellow educators and parents[. They shall respect the civil rights of all and not discriminate on the basis of race, national or ethnic origin, culture, religion, sex or sexual orientation, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest. This list of bases or discrimination is not all-inclusive] and shall respect the civil rights of all.

§ 235.5c. Commitment to the profession.

In fulfillment of the commitment to the profession, educators:

(h) Shall not discriminate against a student or colleague on any basis including race, color, National or ethnic origin, culture, religion, sex or sexual orientation, gender identification or expression, marital status, age, political beliefs, socioeconomic status, disabling condition or vocational interest.

1. *The PSPC lacks the statutory authority to expand the bases for claims of discrimination.* In Pennsylvania, the General Assembly has enacted the Pennsylvania Human Relations Act (“PHRA”), which prohibits discrimination in employment, housing, and public accommodations against individuals on the basis of their race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, or use of guide or support animals. The PHRA does not currently include sexual orientation, gender expression, or gender identity as prohibited bases for discrimination. 43 P.S. § 955; *See also Southeastern Pennsylvania Transportation Authority v. City of Philadelphia*, 159 A.3d 443, 459 (Pa. 2017).

Neither the Pennsylvania School Code nor the Educator Discipline Act compel the PSPC to enforce non-discrimination prohibitions through its Code of Conduct; the PSPC is choosing to enforce such prohibitions on its own, an action which is *ultra vires* and contrary to Pennsylvania’s current anti-discrimination laws.

In an analogous situation, Pennsylvania courts have been critical of attempts by the Pennsylvania Human Relations Commission (“PHRC”) to expand its authority or jurisdiction to redress discrimination on grounds which have not been specifically established by the General Assembly. *See Pennsylvania Human Relations Commission v. Mars Community Boys Baseball Association*, 410 A.2d 1246 (Pa. 1980)(noting the intent of the legislature to limit the PHRC’s jurisdiction to those areas of statutorily defined unlawful discriminatory practices); *Southeastern Pennsylvania Transportation Authority*, 159 A.3d at 459-60 (“This Court may not override [the General Assembly’s omission of protections for those discriminated against based upon gender identity and sexual orientation] by seeking to improve or read into the PHRA what cannot fairly be inferred under our rules of statutory construction. Absent further developments in constitutional or federal law, only our General Assembly has the power ... to provide legal protections to persons who suffer discrimination on the basis of their gender identity or sexual orientation.”).

2. *The proposed amendment to the Code of Conduct also sets forth an expectation that educators in Catholic schools comply with local ordinances.* Section 235.4(b)(1) of the proposed Code of Conduct states that certified educators are expected to comply with local laws. Consequently, although Catholic schools have been judicially determined not to be places of public accommodation under the PHRA, there is always the potential that there could be attempts to subject them to non-discrimination prohibitions under local ordinances. *See Roman Catholic Archdiocese of Philadelphia v. Pennsylvania Human Relations Commission*, 548 A.2d 328 (Pa. Cmwlth. 1988), *appeal denied*, 574 A.2d 76 (Pa. 1989). Local ordinances vary in their content, definitions, and applicable exemptions, and may also be in conflict with neighboring ordinances, making compliance unwieldy, not to mention that these local ordinances may also be subject to constitutional or other challenges.

3. *These prohibitions, if applied to Catholic educators, would violate constitutionally-protected religious liberties.* To the extent that Section 235.5c(h) purports to prohibit certificated educators, including administrators and teachers, employed in Catholic schools from discriminating against students or employees on the basis of religion, sexual orientation, marital status, political beliefs (e.g., favoring pro-abortion candidates) or gender identity or expression, that provision clearly may come into conflict with the doctrines and tenets of the Catholic faith

and/or with the requirement to act in accordance with Catholic beliefs and practices within an educational ministry of the Church. Moreover, this prohibition, if applied to Catholic educators, would violate the constitutionally-protected religious liberties of the Church and of its educational personnel.

For example, if a certificated administrator in a Catholic school terminates a teacher's employment contract because the teacher has engaged in efforts to chemically and/or surgically alter his or her given biology, the certificated administrator may be subject to public or private reprimand under the Educator Discipline Act for violating the Code of Conduct's prohibition against discrimination against a colleague on the basis of his/her gender identity. Even though the termination is religiously-motivated, i.e., in Catholic moral terms efforts to chemically and/or surgically alter an individual's given gender is understood as self-mutilation and is therefore immoral, and not unlawful discrimination, nothing in the Code of Conduct shields the administrator from a discrimination complaint for allegedly violating the Code of Conduct.

Or, take the example of a certificated administrator in a Catholic school who denies a student admission, asks a student to leave the school, or disciplines a student because the student or the student's family has disagreed – by stated belief or conduct – with the teachings or beliefs of the Catholic Church with regard to biological sex, human life, marriage, or human sexuality.

Requiring the certificated administrator in these situations to choose between a public or private reprimand or furthering a message that violates his/her religious beliefs and the beliefs of the faith-based school violates the administrator's constitutionally-protected religious liberties and those of the school and its sponsoring church.

4. *These prohibitions also violate the Pennsylvania Religious Freedom Protection Act.* The Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 P.S. §§ 2401-2407, states that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." 71 P.S. § 2404. The PSPC is an agency within the meaning of the RFPA; and therefore, is forbidden to impose this type of burdensome exercise of the coercive force of government on individuals who are acting in furtherance of their religious beliefs.

This threat is not lessened by the presence, in Section 235.4(b)(1) of the proposed Code of Conduct, of the "expectation" (but not the mandate) that educators comply with "written school policies," since the PSPC has committed nothing to writing that stipulates that this ambiguous provision offers any protection to any Catholic educator who adheres to the religiously-based policies of his/her Catholic school, especially when those policies might be in conflict with the express prohibitions set forth in Section 235.5c(h) of the Code of Conduct.

5. *Inclusion of an express disclaimer in the Code of Conduct for religiously-affiliated schools is necessary.* When a proposed regulatory mandate would even potentially impose a burden on the free exercise of religion, the U.S. Supreme Court has directed that, as a preliminary matter, a governmental agency must demonstrate to a court "the affirmative intention of the [Legislature] clearly expressed" to subject religious schools to the proposed mandate before a court will move past the predicate issue of whether the mandate should be construed as lacking in *statutory*

authorization. See *NLRB v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (U.S. 1979). This rule of law follows an equally longstanding rule of interpretation that a court will give a statute a construction that will avoid a constitutional conflict.

Given that neither the Educator Discipline Act nor the Human Relations Act expressly compels the PSPC to impose the religiously-burdensome prohibitions on Catholic educators and Catholic schools, and given further that the Pennsylvania Religious Freedom Protection Act expressly requires the PSPC to avoid imposing religiously-burdensome prohibitions, the rule of interpretation announced in the *Catholic Bishop of Chicago* case should be honored by the PSPC by incorporating an express disclaimer that the offending provisions of its Code of Conduct must not conflict with the lawful policies of religiously-affiliated schools.

Again, we appreciate the opportunity to comment on the proposed changes to the Code of Conduct, and we look forward to any opportunity to address our concerns further.

Sincerely,



Eric A. Farling
Executive Director

cc : Sen. Andrew Dinniman
Sen. Wayne Langherholc
Rep. Curtis J. Sonney, Chair House Education Committee
Rep. James Roebuck
Independent Regulatory Review Commission