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

May 20, 2019

OPPOSITION TO PROPOSED RULEMAKING AMENDING 22 PA. CODE CHAPTER 235 RELATING TO THE PROFESSIONAL PRACTICE AND CONDUCT FOR EDUCATORS

Dear Executive Director Crosby and Commissioners:

The Independence Law Center is a civil rights law firm that works to protect civil rights of students, parents, and teachers in Pennsylvania. We appreciate the opportunity to comment on the referenced proposed amendments. The Pennsylvania Professional Standards and Practices Commission is considering proposed amendments that would, among other things, completely remove protections based on "sex" in certain areas, and add the terms "gender identity" and "gender expression" in certain areas.

Well-meaning attempts to demonstrate commitment to civility and respect to all members of our school communities through legislation, policy, or proposed amendments such as this have not resulted in communities that respect differences, but instead consistently exacerbate problems and divisions. There is a false notion that LGBTQ rights can only be satisfactorily secured by the diminution of other liberties. We can promote both respect for all stakeholders in the education community and prevent real discrimination, but amendments like this do neither and actually result in less respect and more discrimination. The proposed amendment is extremely harmful to the rights of both teachers and their students, including those who are in the LGBTQ community.

I. The Proposed Amendment to Section 235.4(b)(4) Creates Harmful Hierarchies of Dignity and Worth of Students.

Educators ought to respect the dignity, worth, and uniqueness of each individual student, full stop. However, section 235.4(b)(4) and the amendments to that section both recognize a list of special classes. Such a list, despite acknowledging that the list is not exhaustive, operates to create harmful hierarchies of students whose dignity, worth, and uniqueness are valued more than others.

Unlike protected classes in employment where individuals can be fired for many reasons but not for a protected reason, there is NO circumstance where educators should not respect the dignity, worth, and uniqueness of each student. As such, enumerating special categories in this context is not only counterproductive, but operates to create harmful

hierarchies of dignity and value.[1]

II. The Proposed Amendment to Section 235.4(b)(4) Removes Recognition of "Sex" as a Basis for Respecting the Dignity, Worth, and Uniqueness of Each Student.

Within the list of special categories itself, it is glaring that the proposed amendment to section 235.4(b)(4) *deleted* the recognition that educators should be respecting the dignity, worth, and uniqueness of students based on their sex. While "sex" is deleted in the amendment, gender identity and expression, is added. Sex and gender (or "gender identity") are distinct concepts. The word "sex" has meaning – specifically, sex refers to the two halves of humanity, male and female. Sex can be discerned even before birth, and it is simply recorded (not "assigned") at birth.

In stark contrast to sex, gender identity relates to the feeling or desire to identify with cultural ideas about what is masculine or feminine, both, or something else. Gender identity expresses itself through adopting stereotypes about the opposite sex, such as stereotypical roles, behavioral traits, and clothing fashions that are socially imposed on men and women. Although sex and gender historically were sometimes used interchangeably, sex and gender, as used today, are not at all interchangeable. Even the term "transgender" itself *cannot* exist without recognizing binary sex, nor is it coherent outside of the existence of the two sexes. This is because when an individual identifies as "transgender", they necessarily and by definition are proclaiming that 1) the individual has a sex which is 2) somehow different from their asserted gender.

The proposed deletion of sex in the amendment proclaims very clearly that women and girls are no longer recognized as a discrete category worthy of civil rights protection, but men and boys who claim to have a female "gender identity" are. If allowed to stand, it will mark a truly fundamental shift that strips girls and women of their right to privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women and girls under the law. It not only revokes the very rights and protections that specifically secure women's access to education, but does so in order to transfer those rights and protections to men claiming to be women.

The proposed amendment's erasure of women and girls is unjust. The dignity, worth, and uniqueness of every student should be respected, and the amendment to 235.4(b)(4) does the opposite by erasing the dignity, worth and uniqueness of students.

III. The Amendment to Section 235.5c(h) Adding Gender Identification or Expression to the Discrimination Provisions Causes Harassment and Discrimination.

Section 235.5(c)(h) adds categories of gender identification and expression to the provision that prohibits discrimination by educators. However, as touched on above and as explained further below, such well-meaning attempts to protect members of our school communities

[1] For an example of the right way to proceed, one need look no further than the proposed amendments to section 235.4(b)(6), which deletes specific special classes and simply explains the expectation that educators exhibit consistent and equitable treatment of all students, fellow educators, and parents and respect the civil rights of all.

by simply adding the ill-defined category of gender identification and expression such as this have not resulted in communities that respect differences, but instead consistently exacerbate divisions and lead to more harassment and discrimination.

i. **The Proposed Amendment Establishes a Sexual Orthodoxy and Harms a Real Culture of Non-Discrimination and Civility.**

Society has long understood that whether under Title VII in federal law or the Pennsylvania Human Relations Act, public schools should not hire, fire, or discipline educators on the basis of differing deeply held beliefs. Educators, whether they be an Atheist, Buddhist, Catholic, Unitarian, Democrat, or Republican, take care not to coerce or disparage students of differing beliefs or to treat them poorly based on their differences of beliefs. Their job as an educator should never be conditioned on affirming the truth of the beliefs of any other co-employee or student. Instead, civility and respect despite differences of beliefs should be the standard. Unfortunately, where gender identity and expression has been added to non-discrimination policies, that is not the case. Educators are being forced to affirm the truth of co-worker or student's belief about the nature of gender, or lose their jobs.

Educators must continue to be free to treat everyone with respect without abandoning their scientific and/or religious beliefs about sex which might differ from a student or co-worker's beliefs about the nature of gender identity. Educators are capable of treating students respectfully and fairly without adopting the truth of a student's beliefs or practices. This is extremely important for educating students to live in peace and civility in a pluralistic society.

Lest we quickly jump to the conclusion that anything implicated by gender identity and expression is akin to racial bigotry, Justice Kennedy wisely pointed out in the recent marriage decision that "Marriage, in [the view of respondents], is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—*in good faith by reasonable and sincere people* here and throughout the world." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (emphasis added).

Space should continue to be given to have differing views of marriage, human sexuality, and gender ideology. However, implementation of gender identity discrimination provisions have allowed no room for those "reasonable and sincere people" that Justice Kennedy made reference to. Discrimination laws historically have provided their great benefit by breaking down widespread systemic actions that subjugated a whole group of people for centuries. Our present situation is different. There is a nearly universal belief and practice that people who identify themselves with the opposite sex should be treated with dignity and respect, and this is good.

The risk is not to those that the majority treats with respect, the risk is to those who are

treated as the cultural outliers. And in this debate, those with traditional beliefs about marriage, sexuality, and gender fall in that category. Peter Flaming's story, Dr. Nicholas Meriwether's story, and Julia Beck's story gives evidence to the cultural insensitivity, hostility, and real discrimination that non-discrimination laws adding gender identity and expression ironically bring.

Peter Vlaming spent the last seven years as a high school teacher at West Point High School in Virginia until he was fired in December of 2018. For over twenty years, Dr. Nicholas Meriwether has served as a philosophy professor at Shawnee State University. But in the fall of 2018, he was formally disciplined.

Mr. Vlaming declined to call a woman a man and Dr. Meriwether declined to call a man a woman. Mr. Vlaming had the student in class the year before when she was still identifying as her female sex. Neither man went out of their way to actively refer to students using names the students were opposed to. Both men treated their students with kindness and dignity. They attempted to compromise, finding a solution that respects both the student and their own beliefs. They called their students by whatever name the students chose and to simply avoid pronouns. Neither compromise was enough, because the inclusion of the term "gender identity and expression" in the non-discrimination provisions (which the proposed amendment seeks to do), were utilized to punish teachers, not to rectify discrimination.

Both Vlaming and Meriwether hold religious beliefs that God has created human beings in His image, as male or female (which is also biological reality). To call a man a woman or vice-versa would be to endorse an ideology that denies the truth and that conflicts with their religious beliefs. Forcing either instructor to do this would be to force them to say something they do not believe. But Mr. Vlaming and Dr. Meriwether did not seek to impose that on others, they wished not to have others beliefs about the nature of gender imposed on them.

The school board voted 5-0 to fire Vlaming. Officials at Shawnee State placed a written warning in Dr. Meriwether's personnel file that threatens "further corrective actions" if he does not refer to students using pronouns that reflect their self-asserted gender identity.

But this is not limited to religious people. Feminists and lesbians are also targeted for discipline and lose positions because they will not affirm sexual orthodoxy pertaining to gender identity. Julia Beck, *former* Law and Policy Co-Chair, Baltimore City's LGBTQ Commission, Baltimore, MD was the only lesbian in a leadership position in Baltimore's "LGBTQ" commission, but was expelled from the commission.[2] As a lesbian, she refused to say that a male rapist is a woman. She refuses to call herself "cisgender."

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[2] Julia Beck Testimony before U.S. House Judiciary Committee written testimony at: https://docs.house.gov/meetings/JU/JU08/20190307/109021/HHRG-116-JU08-Wstate-BeckJ-20190307.pdf; video testimony at 52:10 minute mark - https://judiciary.house.gov/legislation/hearings/reauthorization-violence-against-women-act; and testimony about the Federal Equality Act at the 59:15 minute mark: https://youtu.be/UOOF6GJl8A0?t=3547; see also Kara Dansky, Esq., Women's Liberation Front, January 28, 2019 at minute mark 44:38 https://www.youtube.com/watch?v=HMj9MOuRswc

If passed, subjective feelings of a student or co-worker will now constitute independent basis for discipline of educators. The implication of amendments, like the one being proposed by the Professional Standards and Practices Commission is loud and clear: gone are the days where educators could respect the differences of beliefs without being forced to adhere to them. Live and let live is no longer an option – amendments like this invariably lead to this result: conform or be disciplined.

The harmful result of the amendment is not limited to forcing disciplinary actions upon teachers who do not agree with the sexual orthodoxy. Teachers who set up rooming situations for overnight class trips will be disciplined for rooming children based on sex, rather than gender identity. In fact, a teacher would be disciplined for even giving students the ability to opt out of a roommate assignment for what would be deemed a "discriminatory" reason. A teacher who knows that a girl has been assigned to room with a male who identifies as a girl would be disciplined for even letting the girl know so that they can avoid any privacy violation. Thus, women and girls who believed that they would have personal privacy of living only with other females will be surprised to discover that males will be their roommates and will be joining them in changing and sleeping. Those girls and their parents will only discover this after the fact because schools are interpreting the simple addition of "gender identity" to policies to mean no advance notification can occur to other students, on the theory that students have a right to conceal their vital characteristics and to compel schools to instead recognize their subjective "gender identity." It is an immense injustice that informing girls that males will be sharing a bedroom with them would be an "invasion of privacy," but it would somehow not be an invasion of privacy to invite those males into the girls' bedrooms in the first place.

Adding gender identity and gender expression to the discrimination provision means that the administrators and teachers will have to treat a boy identifying as a girl, in every respect, as a girl. A male's belief about anything, including his own gender, does not cause a woman's rights to either exist or stop existing. A woman's privacy rights are hers, and should not spring into existence or cease existing based on what a male believes about anything. But this is precisely the effect of proposed amendments, such as this one, that add gender identity and expression.

Legally redefining "female" as anyone who claims to be female results in the erasure of female people as a class.[3] If, as a matter of law, anyone can be a woman, then no one is a woman, and Title IX has no meaning whatsoever. The ruling below effectively erases Title IX. If "gender identity" is used to interpret Title IX, women and girls will lose preferences addressing historical and systemic discrimination. After centuries of second-class treatment in all matters educational, the very preferences used to remedy that history and encourage women's education – from scholarships for women to athletic opportunities – will, if the word "sex" is redefined to mean "gender identity," be reduced by the demands of any males who "identify as female."

In *West Virginia v. Barnette*, 319 U.S. 624 (1943), the Supreme Court recognized that the:

> freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is

[3] See Barrett, Ruth, ed., Female Erasure (Tidal Time Publishing, L.L.C. 2016).

> the right to differ as to things that touch the heart of the existing order. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

It is extremely important that the Commission refrain from adopting amendments that would penalize differences of beliefs about human sexuality. We usually understand this in the speech context and the religion context. We may disagree with a person's viewpoint, but we'd fight for their right to live consistently with it. Disagreement—even on profound and personal principles—does not imply disparagement or discrimination. We can, and must, maintain space for that freedom of conscience which is essential for a robustly tolerant society. These rights are essential both for religious people with traditional viewpoints on human sexuality and also for the LGBTQ community.

The proposed guidance substantially broadens the definition and application of discrimination in a manner that would force citizens, both in and out of the LGBTQ community, into violations of their rights, their privacy, and their consciences.

ii. Redefining "Sex" to Mean Gender Identity for Purposes of Privacy Facilities Such as Bathrooms, Locker Rooms and Showers is Incompatible with Prohibitions on Sex Stereotyping.

The prohibition of sex stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), exists in significant tension with any interpretation claiming that sex and gender identity are synonymous, freely interchangeable concepts. It is impossible that both of these things could be true. A woman's right to bodily privacy does not spring into existence, or cease to exist, depending on what a man believes about the nature of his own internal sense of gender. Her right to bodily privacy is hers and hers alone. Likewise, a man's right to bodily privacy does not exist or cease existing depending on the beliefs or intentions of a woman who seeks to use the men's restroom.

In 1975, when writing a commentary for the Washington Post regarding the proposed Equal Rights Amendment, Justice Ginsburg stated with regard to the contention that restrooms would be opened to both men and women: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, The Washington Post, April 7, 1975. Simply put, a person's prerogative to live out their beliefs about gender does not justify violating other people's right to privacy in bathrooms and locker rooms from members of the opposite sex.

Just as a person of the opposite sex cannot, by virtue of their beliefs about their own

gender, cause the privacy rights of another person to disappear, neither does a person's privacy rights depend on whether a person of the opposite sex using a privacy facility with them has adopted stereotypes about the opposite sex. It not only distorts *Price Waterhouse*, but directly violates *Price Waterhouse* for privacy facilities to be segregated based on how a person "presents" their gender. A man, by virtue of the fact that he adopts stereotypical female behavior or attributes cannot be treated differently and told he cannot use facilities that a man who adopts stereotypical male behavior or attributes is permitted to use, because such differential treatment is based on adherence to sex-stereotypes.

However, privacy facilities that are based on sex, do not concern themselves with what stereotypes a person most closely adheres to. Sex-distinct privacy facilities do not take into account any stereotypes whatsoever. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-25 (10th Cir. 2007) (holding that *Price Waterhouse* does not allow biological males to use women's restrooms, and that "use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.") Redefining sex to include gender identity creates an irreconcilable conflict because segregating people based on which stereotypes about males or females they adopt is the very definition of sex-stereotyping.

Opening up privacy facilities on the basis of gender identity rather than sex not only violates privacy and stands in contrast to *Price Waterhouse*, but it also suffers from absolute unworkability since gender identity is non-binary and often fluid, therefore further deconstructing any logically consistent understanding of male and female.

If privacy facilities are to be provided on the basis of gender identity, it necessarily excludes those who describe themselves as neither male nor female or both or fluid or somewhere in between. Furthermore, it also destroys any possibility of maintaining any distinctions in privacy facility use because one person would have the legal right to use any locker room, shower, or restroom based on their self-perception at any given time, since to deny them use of a facility consistent with their sex would be "sex discrimination," but to deny them the use of the opposite-sex's facility would be to engage in "gender identity" discrimination. Rather than constituting a binary replacement for biological sex that conveniently dictates which of the two separate facilities we use, gender identity theory defies binary categories and is entirely unworkable for maintaining distinct privacy facilities.

iii. <u>The PSPC Reliance on Pennsylvania Human Relations Commission Guidance is Flawed. The Text of the PHRA and its Structure Demonstrate That "Sex" Does Not Encompass Gender Identities</u>

Although the proposed rulemaking relies on PHRC "guidelines" to add gender identity, it acknowledges that the PHRA does not explicitly enumerate either sexual orientation or gender identity or expression. Relying on such guidance is flawed, because the guidance itself is flawed and inconsistent. The prohibition on sex discrimination is remarkably succinct and clear in Pennsylvania law in employment, housing, and public accommodations. It also identifies instances where its ban on sex discrimination does not apply, further shedding light on the proper meaning of sex discrimination.

For instance, Pennsylvania law outlaws sex discrimination in housing, but recognizes the

necessity of privacy and safety rights by permitting "sex" to be excluded in single-sex dormitory housing situations. Section 5(h)(10). This is why a school, college, homeless shelter, or camp can currently and legally maintain separate male and female housing options for the two sexes. In addition, the law currently excludes from "housing discrimination" situations where a person uses sex as a criteria to rent or lease rooms "in one's personal residence in which common living areas are shared." *Id.*

By redefining the meaning of "sex" the proposed guidance would remove protections the legislature explicitly sought to include. It creates incoherence because the categories of "sex" and "gender identity" conflict. Protections for sex inevitably lose because the two terms are mutually exclusive, and where gender identity is added, protections for sex are eliminated. An elderly woman renting out space (based on Section 5(h)10) of the PHRA) in her "personal residence in which common living areas are shared" would lose her protections, and be forced to rent to a person of the opposite sex who identifies or expresses as a woman. A female student assigned a roommate on an overnight school trip would lose her right to be solely roomed with a person of the same sex. A female student competing for a spot to race the 100 meter for her school on the girls' team loses her Title IX protections based on sex if the coach permits a male who identifies as female to compete against her.

Other provisions in Pennsylvania law recognize the legitimate interest in separating people based on physical differences in intimate settings or when privacy may be compromised.[4] Current exemptions from the definition of sex discrimination and laws providing for separation in privacy facilities, show that our non-discrimination laws sought to eradicate invidious sex discrimination yet still allow for legitimate, biologically-based distinctions.

In order to show respect to all members of our society, the legislature has passed laws to protect the reasonable expectation of bodily privacy from members of the opposite sex in those very few areas where the differences between the sexes is all that matters, such as in privacy facilities. At the same time, where sex is irrelevant, they have passed laws to curb

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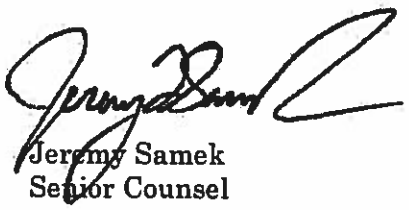
[4] *See* Public School Code of 1949, 24 P.S. § 7-740 (requiring that privacy facilities "shall be suitably constructed for, and used separately by the sexes"). *See also* 43 P.S. § 109 (requiring application of industrial sanitation code to all employers, which involves separate restrooms); 7 Pa. Code § 1.57 (requiring separate facilities for meat packers); 7 Pa. Code § 78.75 (separate restrooms at eating establishments); 7 Pa. Code § 82.9 (requiring separate facilities on the basis of sex for seasonal farm labor, "distinctly marked 'for men' and 'for women' by signs printed in English and in the native languages of the persons" using those facilities); 28 Pa. Code § 18.62 (requiring "separate dressing facilities, showers, lavatories, toilets and appurtenances for each sex" at swimming pools); 25 Pa. Code § 171.16 (requiring schools to follow the provisions of the Public Bathing Law (35 P. S. § § 672—680d) and 28 Pa. Code Chapter 18 (requiring separate privacy facilities at swimming and bathing places); 28 Pa. Code §19.21 (requiring separate restrooms on the basis of sex at camps); 28 Pa. Code § 205.38 (requiring separate restrooms at long term care facilities); 31 Pa. Code § 41.121 (requiring separate privacy facilities for each sex on railroads); 31 Pa. Code § 41.122 (requiring separate bathrooms to be provided for each sex and clearly designated and forbidding any person to use or frequent a toilet room assigned to the opposite sex); 31 Pa. Code § 47.127 (same); 34 Pa. Code § 403.28 (requiring restrooms for each sex); 43 Pa. Code § 41.24 (designating the entrance of "retiring rooms" to be clearly marked by sex and preventing opposite sex entry); 43 Pa. Code § 41.31 (requiring separate toilet rooms "for each sex" which shall be clearly designated and that "no person shall be permitted to use or frequent a toilet room assigned to the opposite sex"); 43 Pa. Code § 41.32 (requiring partitions separating toilet rooms on account of sex, which shall be "soundproof").

unjust discrimination. The ideal of stamping out discrimination is undermined when we disregard the important differences between men and women with guidance that jeopardizes privacy. Therefore, the text and structure of our current non-discrimination law show that discrimination on the basis of "sex" does not—and was not intended to—encompass gender identity.

IV. Conclusion

While intended to further society's shared goal of greater civility and respect, the proposed amendments actually undermine those ends. We all want to live lives true to our core beliefs -- true to who we are. Unfortunately, laws creating special protections on the basis of gender identity, applied broadly and without common-sense limitations, have taken away liberties and protections that affect all of us, the LGBTQ community and others alike. We can do better for all of us. Please do not enact the aforementioned amendments.

Respectfully submitted,



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