

<h2 style="margin: 0;">Regulatory Analysis Form</h2> <p style="margin: 0;">(Completed by Promulgating Agency)</p> <p style="margin: 0;"><small>(All Comments submitted on this regulation will appear on IRRC's website)</small></p>		<p><b>INDEPENDENT REGULATORY REVIEW COMMISSION</b></p> <p><b>MAR 23 2022</b></p> <p><b>Independent Regulatory Review Commission</b></p> <p>IRRC Number: <b>3339</b></p>
<p>(1) Agency <b>Pennsylvania Human Relations Commission (PHRC)</b></p>		
<p>(2) Agency Number: <b>52</b> Identification Number: <b>013</b></p>		
<p>(3) PA Code Cite: <b>16 Pa. Code §§ 41.201 – 41.207</b></p>		
<p>(4) Short Title: <b>Protected Classes</b></p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p><b>Primary Contact: Samuel Rivera, Chief Counsel</b> Phone: (717) 787-9958 Email: <a href="mailto:rivsamu@pa.gov">rivsamu@pa.gov</a></p> <p><b>Secondary Contact: Lisa Knight, Commission Counsel</b> Phone: (215) 965-7702 Email: <a href="mailto:liknight@pa.gov">liknight@pa.gov</a></p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> <b>Proposed Regulation</b>  <input type="checkbox"/> Final Regulation  <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation;  <input type="checkbox"/> Certification by the Governor  <input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p><b>The Pennsylvania Human Relations Commission (PHRC) proposes to create Subchapter D of Chapter 41 to define terms used in the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act (PFEOA). The terms being defined include sex, religious creed, and race.</b></p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p><b>The authority for these regulations is the “Pennsylvania Human Relations Act” (PHRA), the Act of 1955, P.L. 744, No. 222, as amended June 25, 1997 by Act 34 of 1997 (43 P.S. § 957(d); 43 P.S. § 959(g)).</b></p> <p><b>The authority for these regulations is also the “Pennsylvania Fair Educational Opportunities Act” (PFEOA), the Act of July 17, 1961, P.L. 776, as amended December 22, 1992 by Act 187 of 1992 (24 P.S. § 5006(6); 24 P.S. § 5007).</b></p>		

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

**The proposed regulations are not mandated by any federal or state law, court order, or federal regulations, but are expressly authorized by the statutory authority referenced in (8) above.**

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

**The PHRA and the PFEOA grant the PHRC, as an independent agency, the power and duty to promulgate regulations to effectuate the provisions of the PHRA and the PFEOA. The PHRA and the PFEOA also require the PHRC to “establish rules of practice to govern, expedite and effectuate” the procedures outlined in the PHRA and the PFEOA and the PHRC’s actions under the PHRA and the PFEOA. 43 P.S. § 959(g). The PHRC recognizes that certain terms are not defined in the PHRA and the PFEOA. Given the lack of clarity as to the interpretation of the PHRA and the PFEOA, because certain terms are not defined, the PHRC recognizes a compelling public interest in clarifying the meaning of these terms.**

**All citizens of the Commonwealth of Pennsylvania are the primary beneficiaries of the proposed regulation. The proposed regulation is intended to define terms used in the PHRA and the PFEOA so that individuals, employees, students, and members of the public understand the protections provided by the PHRA and the PFEOA. By defining sex, religious creed, and race, individuals who are discriminated against will better understand what constitutes unlawful discrimination on the basis of sex, religious creed, or race. These definitions will also provide employers, housing providers, public accommodations, schools, and all persons required to comply with the PHRA and the PFEOA with a better understanding of the protections provided by the PHRA and the PFEOA and the manner in which they must comply with the PHRA and the PFEOA. The proposed regulation also removes any confusion as to the manner in which the terms sex, religious creed, or race may be interpreted when a complaint of discrimination is filed with the PHRC.**

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

**No provisions are more stringent than federal standards.**

**The proposed regulation provides a comprehensive definition for the term sex, including pregnancy, childbirth, breastfeeding, sex assigned at birth, gender identity or expression, affectional or sexual orientation, and differences in sex development. While comparable federal statutes and regulations do not provide a comprehensive definition for the term sex, Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e – 2000e17 (hereinafter “Title VII”), provides a definition for sex which is consistent with part of the proposed regulation. Specifically, Title VII states that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.” 42 U.S.C.S. § 2000e(k). Additionally, federal courts interpreting the term sex as used in Title VII and other comparable federal statutes have interpreted the term sex in a manner consistent with the proposed regulations. In *Bostock v. Clayton County*, 140 S. Ct.**

1731 (2020), the United States Supreme Court explained that discriminating against an individual for being homosexual or transgender is discrimination based on one's sex, as proscribed by Title VII. In Grimm v. Gloucester County School Board, 972 F.3d 586 (4<sup>th</sup> Cir. 2020), the Court applied the Bostock rationale when interpreting the term sex as used in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). The Court found that the term sex included protection based on one's gender identity. In addition, Pennsylvania state courts that have had the opportunity to interpret the PHRA held that the term sex includes pregnancy. See Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126, 130 (Pa. Commw. Ct. 1976). Thus, with regard to sex discrimination, the proposed regulation is consistent with the protections provided by comparable federal statutes.

With regard to race discrimination, the proposed regulation provides a comprehensive definition for the term race, including ancestry, national origin, ethnic characteristics, interracial marriage or association, traits historically associated with race, persons of Hispanic national origin or ancestry, and persons of any other national origin or ancestry as specified in a PHRC complaint. While comparable federal statutes and regulations do not provide a comprehensive definition for the term race, federal courts interpreting the term race as used in Title VII and other comparable federal statutes have interpreted the term race in a manner consistent with part of the proposed regulation. In St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the United States Supreme Court explained that the term race, with respect to claims of discrimination brought under 42 U.S.C. § 1981, includes protections based on one's ancestry or ethnic characteristics. St. Francis College, 481 U.S. at 613. In Parr v. Woodmen of the World Life Insurance Co., 791 F.2d 888, 892 (11<sup>th</sup> Cir. 1986), the Court explained that the term race includes discrimination based upon interracial marriage or association. Additionally, federal regulations for Title VII specify that the term race includes persons of Hispanic national origin or ancestry, including persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture. 29 CFR 1607.4(B). Thus, with regard to race discrimination, the proposed regulation is consistent with the protections provided by comparable federal statutes.

Additionally, the proposed regulation explains that the term race includes traits historically associated with race. The Commission recognizes that this definition of race has not been adopted by the few federal courts that have had the opportunity to consider this issue. See e.g., EEOC v. Catastrophe Management Solutions, 852 F.3d 1018, 1032-1033 (11<sup>th</sup> Cir. 2016) (holding that Title VII's protections against race discrimination do not extend to hairstyles culturally associated with race). However, the Commission has considered this issue and determined that the term race, as used in the PHRA and the PFEOA, should be interpreted as including hairstyles culturally associated with race. Given the Commission's understanding of the term race and the Commission's power and duty to promulgate regulations to effectuate the provisions of the PHRA and the PFEOA, the Commission defines race as including traits historically associated with race, including hair texture and protective hairstyles. This definition is consistent with other state anti-discrimination laws, including laws in New Jersey, New York, Connecticut, and California.

With regard to religious creed discrimination, the proposed regulation provides a comprehensive definition for the term religious creed which is consistent with the definition of religion in Title VII. Specifically, the proposed regulation explains that religious creed includes all aspects of religious observance and practice, as well as belief. This definition is consistent with the definition in Title VII which explains that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief ... ." 42 U.S.C.S. 2000e(j). Thus, with regard to religious creed discrimination, the proposed regulation is consistent with the protections provided by comparable

**federal statutes.**

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

**The proposed regulation for race discrimination is consistent with the definition of race as articulated in anti-discrimination laws in other states, including New Jersey, New York, Connecticut, and California. Thus, the proposed regulation provides the citizens of the Commonwealth of Pennsylvania with protections similar to the protections provided by anti-discrimination laws in other states.**

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

**The proposed regulation will not affect any other regulations of the promulgating agency or other state agencies.**

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

**The PHRC consulted with stakeholders in the LGBTQ community regarding the proposed regulation for sex discrimination. The PHRC incorporated the feedback received into the language of the proposed regulation. The PHRC also consulted with the Governor's Office regarding the proposed regulation for sex discrimination and incorporated the feedback received into the proposed regulation.**

**The PHRC also consulted with the New York City Commission on Human Rights regarding the proposed regulation for race discrimination. The PHRC received information from the New York City Commission regarding their definition of race and incorporated that information into the proposed regulation.**

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

**All persons subject to the coverage of the PHRA and the PFEOA will be affected by the proposed regulations. The proposed regulation defines terms used in the PHRA and the PFEOA and clarifies some of the protections afforded by the PHRA and PFEOA with respect to sex discrimination, religious creed discrimination, and race discrimination. Given the broad scope of the PHRA and PFEOA with respect to the protections provided in employment, housing, public accommodations, and educational institutions, individuals, independent contractors, employees, students, and all persons who are provided with protections under the PHRA and the PFEOA will be affected by the proposed regulation in that they will have a greater understanding of the protections afforded by the PHRA and the PFEOA. Additionally, all persons who are required to comply with the PHRA and the PFEOA, including employers, housing providers, public accommodations, and schools, will be affected by the proposed regulation in that they will have a**

**greater understanding of the manner in which they must comply with the PHRA and the PFEOA.**

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

**The PHRA prohibits all employers in the Commonwealth of Pennsylvania who employ four (4) or more individuals (with very limited exemptions) from engaging in discriminatory conduct. The PHRA also prohibits housing providers and public accommodations (with very limited exemptions), including schools, from engaging in discriminatory conduct. The PFEOA prohibits certain schools in the Commonwealth of Pennsylvania from engaging in discriminatory conduct. All of these entities will be required to comply with the proposed regulation.**

(17) Identify the financial, economic, and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

**The PHRC anticipates no adverse financial, economic, or social impact on individuals, small businesses and labor communities or other public and private organizations.**

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

**The PHRC foresees no costs or adverse effects associated with the proposed regulation.**

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

**The proposed regulations are expected to be cost neutral for the regulated community. No new legal, accounting, or consulting procedures are required as a result of the proposed regulations.**

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

**There is no fiscal impact to the local governments.**

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

**There is no fiscal impact to the state government.**

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

**No legal, accounting, or consulting procedures or additional reporting, recordkeeping, or other paperwork is required to implement the proposed regulations.**

(22a) Are forms required for implementation of the regulation?

**No forms are required for the implementation of the proposed regulations.**

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

**Not applicable.**

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
<b>COSTS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
<b>REVENUE LOSSES:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(23a) Provide the past three year expenditure history for programs affected by the regulation.

**There are no programs affected by the regulation.**

Program	FY -3	FY -2	FY -1	Current FY
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N/A	N/A	N/A	N/A	N/A

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

**The proposed regulations do not have an adverse impact on small businesses.**

- (a) **Small businesses which employ four (4) or more individuals or independent contractors subject to the coverage of the PHRA are subject to the proposed regulation. Small businesses which are open to, accept, or solicit the patronage of the general public and are public accommodations as defined by the PHRA are also subject to the proposed regulation. Small businesses which are housing providers as defined by the PHRA are also subject to the proposed regulation. The PHRC does not have access to the necessary data to estimate the number of employers, public accommodations, or housing providers that are small businesses.**
- (b) **There are no projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.**
- (c) **The proposed regulation does not have an adverse impact on small businesses.**
- (d) **There are no less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.**

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

**The proposed regulation defines the terms sex, religious creed, and race. These definitions were created to address the needs of individuals who belong to those protected classes. Prior to the proposed regulation, those terms were not defined in the PHRA, the PFEOA, or the PHRC's existing regulations. The proposed regulation provides clarity and consistency for the manner in which those terms should be interpreted while addressing the specific needs of individuals who belong to those protected classes.**

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No other regulatory provisions were considered. The PHRA, the PFEOA, and the PHRC's existing regulations do not define the terms sex, religious creed, or race. The purpose of the proposed regulation is to provide a definition for those terms so that they are interpreted consistently and uniformly.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

As discussed in item 24, *supra*, the PHRC anticipates no adverse impact on small businesses. The proposed regulation provides definitions for terms used in the PHRA and the PFEOA. The definitions provide greater clarity and understanding for discriminatory practices proscribed by the PHRA and the PFEOA but do not create any new burdens on small businesses. Therefore, no regulatory flexibility analysis was conducted.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

**Not applicable because data was not the basis for the proposed regulations.**

(29) Include a schedule for review of the regulation including:

- A. The length of the public comment period: **30 days**
- B. The date or dates on which any public meetings or hearings will be held: **Not applicable**
- C. The expected date of delivery of the final-form regulation: **2<sup>nd</sup> quarter 2022**
- D. The expected effective date of the final-form regulation: **Upon publication of the final-form regulation in the Pennsylvania Bulletin**

E. The expected date by which compliance with the final-form regulation will be required:

**Upon publication of the final-form regulation in the Pennsylvania Bulletin**

F. The expected date by which required permits, licenses or other approvals must be obtained:

**Not applicable**

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The proposed regulation will be reviewed periodically as appropriate to ensure continued effectiveness. Such review will occur when the PHRC prepares an annual report each year, as required by Section 7(k) of the PHRA, 43 P.S. § 957(k). Section 7(k) requires the PHRC to “describ[e] in detail the types of complaints received, the investigations, status of cases, Commission action which has been taken, how many were found to have probable cause, how many were resolved by public hearing and the length of time from initial complaint to final Commission resolution.” Section 7(k) also requires the PHRC to provide “recommendations for such further legislation, concerning abuses and discrimination because of race, color, familial status, religious creed, ancestry, national origin, age, sex, handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals.”

**FISCAL NOTE FOR DOCUMENTS  
FILED WITH THE LEGISLATIVE REFERENCE BUREAU**

July 7, 2021

**Agency:** Pennsylvania Human Relations Commission

**Agency Identification Number:** 52-13

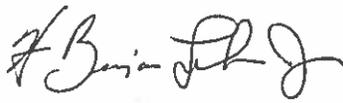
**Subject of Regulation:** Unlawful Discriminatory Practices, Unfair Educational Practices,  
Sex Discrimination, and Race Discrimination

Pursuant to Section 612 of the act of April 9, 1929 (P.L. 177, No. 175), known as the Administrative Code of 1929, I am submitting the following fiscal note for publication in the *Pennsylvania Bulletin* to accompany this notice of regulatory action or administrative procedure.

FISCAL NOTE AS REQUIRED BY SECTION 612  
Administrative Code of 1929  
(See also 4 Pennsylvania Code § 7.231, *et seq.* [9 Pennsylvania Bulletin])

This action will not result in a loss of revenue or an increase in program costs to the commonwealth or its political subdivisions.

The Secretary of the Budget recommends adoption of this regulatory action or administrative procedure.

 for

\_\_\_\_\_  
Secretary of the Budget

CDL-1

**FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU  
(Pursuant to Commonwealth Documents Law)**

**RECEIVED**

MAR 23 2022

**Independent Regulatory  
Review Commission**

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p><b>Amy M. Elliott</b> BY: <u>Amy M. Elliott</u> (DEPUTY ATTORNEY GENERAL)</p> <p><small>Digitally signed by Amy M. Elliott DN: cn=Amy M. Elliott, o=Pennsylvania Office of Attorney General, ou=Chief Deputy Attorney General, email=ae Elliott@attorneygeneral.gov, c=US Date: 2022.01.18 11:29:41 -0500</small></p> <p><u>2/18/22</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Pennsylvania Human Relations Commission</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>52-13</u></p> <p>DATE OF ADOPTION: <u>January 24, 2022</u></p> <p>BY: <u>[Signature]</u></p> <p>TITLE: <u>Chairperson</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>/s/ Samuel Rivera</u> Samuel Rivera Chief Counsel</p> <p><u>July 1, 2021</u> DATE OF APPROVAL</p> <p>(Chief Counsel, Independent Agency) (Strike Inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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**TITLE 16. COMMUNITY AFFAIRS  
PART II. GOVERNOR'S OFFICE  
Subpart A. HUMAN RELATIONS COMMISSION  
CHAPTER 41. PRELIMINARY PROVISIONS  
Subchapter D. PROTECTED CLASSES**

**Notice of Proposed Rulemaking**

**Preamble**

***Statutory Authority***

The Pennsylvania Human Relations Commission (Commission) proposes to amend 16 Pa. Code Chapter 41, *Preliminary Provisions*, by creating a new subchapter, Subchapter D, *Protected Classes*, as set forth in Annex A to this notice. The Commission is publishing these amendments as a Notice of Proposed Rulemaking under the authority of the "Pennsylvania Human Relations Act" (PHRA), the Act of 1955, P.L. 744, No. 222, *as amended* June 25, 1997 by Act 34 of 1997 (43 P.S. § 957(d); 43 P.S. § 959(g)) and the "Pennsylvania Fair Educational Opportunities Act" (PFEOA), the Act of July 17, 1961, P.L. 776, *as amended* December 22, 1992 by Act 187 of 1992 (24 P.S. § 5006(6); 24 P.S. § 5007).

***Description of the Amendments to the Regulation***

The Commission proposes to create a new subchapter, Subchapter D, to provide definitions for terms used in the PHRA and the PFEOA. Specifically, the proposed rulemaking provides definitions for the terms sex, race, and religious creed. Neither the PHRA, the PFEOA, or the Commission's existing regulations provide a definition for these terms. Although the

Commission previously issued guidance regarding the manner in which the term sex should be interpreted, that guidance has not been codified into a regulation. The Commission now proposes that the definition for the term sex be codified in 16 Pa. Code Chapter 41, Subchapter D, along with the terms race and religious creed.

The new Subchapter D contains seven (7) sections. Section 41.201 provides the purpose for the proposed regulation which is to ensure that all unlawful discriminatory practices and all unfair educational practices proscribed by the PHRA and the PFEOA are interpreted and applied consistently and that all investigations conducted by the Commission are investigated consistent with the proposed rulemaking. Section 41.202 provides that the proposed rulemaking should be liberally construed for the accomplishment of the purposes of the PHRA and the PFEOA. Section 41.202 also provides that the proposed rulemaking should be construed consistently with other Federal and State laws and regulations except when to do so would result in a narrow interpretation of the PHRA and the PFEOA. While the proposed rulemaking is meant to provide guidance regarding the interpretation of the PHRA and the PFEOA, such guidance must comply with Section 12(a) of the PHRA which states that “the provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply.” 43 P.S. § 962(a). Thus, Section 41.202 is consistent with Section 12(a) of the PHRA, which requires a liberal construction of the PHRA, by clearly explaining that federal or state law cannot be relied upon when interpreting the PHRA or the PFEOA if such reliance would result in a narrow interpretation of the PHRA or the PFEOA.

Section 41.203 explains that the proposed rulemaking will be enforced in accordance with the PHRA, the PFEOA, and the existing regulations of the Commission. Section 41.204 provides definitions for terms used in Subchapter D. Section 41.205 provides the manner in which the term religious creed, as used in the PHRA and the PFEOA, should be interpreted, as explained more fully below. Section 41.206 provides the manner in which the term sex, as used in the PHRA and the PFEOA, should be interpreted, as explained more fully below. Section 41.207 provides the manner in which the term race, as used in the PHRA and the PFEOA, should be interpreted, as explained more fully below.

***Purpose and Explanation of the Proposed Rulemaking***

The PHRA and the PFEOA explicitly authorize the Commission to “adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of the” PHRA and the PFEOA. 43 P.S. § 957(d); 24 P.S. § 5006(6). The PHRA and the PFEOA also require the Commission to “establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.” 43 P.S. § 959(g); 24 P.S. § 5007. The PHRA and the PFEOA specifically prohibit discrimination on the basis of religious creed, sex, and race. However, neither statute provides a definition for those terms nor do the Commission’s existing regulations provide a definition for those terms. The Commission proposes to adopt regulations, consistent with its authority at 43 P.S. § 957(d) and 24 P.S. § 5006(6), to explain the manner in which the terms religious creed, sex, and race, as used in the PHRA and the PFEOA, should be interpreted.

Commission's proposed rulemaking provides clarity and consistency regarding how the terms religious creed, sex, and race, as used throughout the PHRA and the PFEOA – including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations, and educational institutions – should be interpreted. The Commission recognizes that the PHRA has different provisions prohibiting discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions. The Commission also recognizes that the PFEOA has its own provisions prohibiting discrimination in certain educational institutions. However, all of the provisions regarding discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions, prohibit discrimination because of religious creed, sex, and race. Given that the Commission enforces two statutes, which prohibit discrimination in employment, housing accommodations and commercial property, and public accommodations, including educational institutions, because of religious creed, sex, and race, the Commission's proposed regulations provide the guidance necessary to ensure that the terms religious creed, sex, and race are interpreted consistently throughout the PHRA and the PFEOA.

#### **Religious Creed Discrimination**

With respect to religious creed discrimination, the PHRA prohibits discrimination, on the basis of religious creed, in employment, housing, commercial property, public accommodations, and educational institutions. The PFEOA prohibits discrimination, on the basis of religious creed, in certain educational institutions. Similar to the PHRA's protections regarding religious

creed discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e – 2000e17 (hereinafter “Title VII”), declares that it is “an unlawful employment practice for an employer to . . . otherwise discriminate against any individual . . . because of such individual’s . . . religion.” 42 U.S.C.S. 2000e-2(a)(1).

In interpreting the PHRA, Pennsylvania courts have recognized that claims of religious creed discrimination may be brought under the PHRA as claims of disparate treatment, failure to accommodate a religious creed, and harassment. Brown Transport Corp. v. PHRC, 578 A.2d 555 (Pa. Commw. Ct. 1990) (overruled on other grounds in Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745) (Pa. 1998); *see also* Winn v. Trans World Airlines, Inc., 484 A.2d 392, 400 n.9 (Pa. 1984). However, there is minimal case law in Pennsylvania which explains the manner in which the term religious creed, as used in the PHRA and the PFEOA, should be interpreted. In Knepp v. Colonial Metals Co., 2005 Pa. Dist. & Cnty. Dec. LEXIS 3, \*15-17 (Court of Common Pleas of Lancaster County, PA July 6, 2005), the Court relied upon federal court decisions interpreting Title VII to determine whether the plaintiff’s asserted religious beliefs were sufficient to allege a claim of religious creed discrimination under the PHRA. Likewise, Pennsylvania courts have explained that although they are not bound by federal court decisions interpreting federal statutes similar to the PHRA, in interpreting the PHRA where no applicable state law exists, “it is appropriate to look to federal decisions involving similar federal statutes for guidance.” McGlawn v. PHRC, 891 A.2d 757, 768 (Pa. Commw. Ct. 2006) *quoting* City of Pittsburgh Commission on Human Relations v. DeFelice, 782 A.2d 586, 592, n.8 (Pa. Commw. Ct. 2001); *see also* General Electric Corp. v. PHRC, 469 Pa. 292, 303, 365 A.2d 649, 654-655 (Pa. 1976).

Thus, in crafting the proposed rulemaking, the Commission turned to Title VII for guidance regarding the definition of religious creed, as Pennsylvania courts often do when interpreting the PHRA and the PFEOA. Title VII explains that “[t]he term ‘religion’ includes all aspects of religious observance and practice, as well as belief ... .” 42 U.S.C.S. 2000e(j). The regulations adopted by the Equal Employment Opportunity Commission (EEOC) explain that “religious practices include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” 29 CFR § 1605.1. The EEOC regulations further provide that “the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.” 29 CFR § 1605.1. The EEOC regulations also provide that “the phrase ‘religious practice’ as used in these Guidelines includes both religious observances and practices.” 29 CFR § 1605.1. As such, by using the language regarding religious discrimination contained in Title VII and its implementing regulations, the Commission’s proposed rulemaking provides an interpretation for the term religious creed, as used in the PHRA and the PFEOA, which is consistent with Title VII and its implementing regulations. The proposed rulemaking also provides clarity that the interpretation of the term religious creed, as used throughout the PHRA and the PFEOA – including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations, and educational institutions – is interpreted consistently.

In addition to the proposed rulemaking regarding religious creed discrimination, the Commission recognizes that persons who are subject to the provisions of the PHRA and the PFEOA

may believe that enforcement of the PHRA or the PFEOA against them would violate their free exercise of religion. The proposed rulemaking does not address those concerns because Pennsylvania's Religious Freedom Protection Act (RFPA), 71 P.S. §§ 2401-2407, provides the mechanism for asserting such claims. Thus, if a person subject to the provisions of the PHRA or the PFEOA believes that enforcement of the PHRA or the PFEOA against them would violate their free exercise of religion, those persons may avail themselves of the protections in the RPRA by following the procedures outlined in the RPRA.

### **Sex Discrimination**

With respect to sex discrimination, the PHRA prohibits discrimination, on the basis of sex, in employment, housing, commercial property, public accommodations, and educational institutions. The PFEOA prohibits discrimination, on the basis of sex, in certain educational institutions. Similar to the PHRA's protections regarding sex discrimination in employment, Title VII declares that it is "an unlawful employment practice for an employer to . . . otherwise discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C.S. § 2000e-2(a)(1). Additionally, similar to the protections regarding sex discrimination in educational institutions provided by the PHRA and the PFEOA, Title IX of the Civil Rights Act of 1972, 20 U.S.C.S. § 1681 (hereinafter "Title IX"), prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance. Thus, while the PHRA and the PFEOA do not define the term sex, the Commission's proposed rulemaking provides a definition for the term sex which is consistent with the manner in which the term sex, as used in Title VII and Title IX, has been interpreted by federal courts. The Commission's proposed rulemaking is also consistent with

the manner in which the term sex has been interpreted by state courts and by the Commission's regulations enacted in 1975, found at 16 Pa. Code §§ 41.101-41.104. The proposed rulemaking is also consistent with the manner in which the term sex has been defined by Title VII.

The Commission's proposed rulemaking explains that the term sex includes pregnancy, childbirth, and breastfeeding. This portion of the proposed rulemaking is consistent with the Title VII definition for sex. Title VII states that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes." 42 U.S.C.S. § 2000e(k). This portion of the proposed rulemaking is also consistent with the manner in which the term sex has been interpreted by Pennsylvania courts. Pennsylvania courts have explained that "pregnancy based discrimination constitutes sex discrimination proscribed by Section 5(a) of the PHRA." Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126, 130 (Pa. Commw. Ct. 1976). Additionally, this definition is consistent with the protections provided by the Commission's regulations regarding pregnancy, childbirth, and childrearing, found at 16 Pa. Code §§ 41.101-41.104. The Commission's pregnancy, childbirth, and childrearing regulations, enacted in 1975, explain that certain conduct related to pregnancy, childbirth, and childrearing constitutes unlawful discriminatory practices prohibited by the PHRA.

The Commission's proposed rulemaking also explains that the term sex includes sex assigned at birth, gender identity/expression, differences in sex development, and affectional/sexual orientation. This portion of the proposed rulemaking is consistent with the

manner in which the term sex, as used in Title VII and Title IX, has been interpreted by federal courts, including the United States Supreme Court. Specifically, the recent U.S. Supreme Court case, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020), provided an expansive definition for the term sex, as used in Title VII, with respect to employment discrimination on the basis of sex. The Court explained that discriminating against an individual for being homosexual or transgender is discrimination based on one's sex, as proscribed by Title VII. Bostock, 140 S. Ct. at 1753.

Although the Bostock Court acknowledged that they were not deciding issues related to sex-segregated bathrooms, locker rooms, or dress codes under other federal or state laws nor were they deciding issues related to bathrooms or locker rooms under Title VII, because such issues were not properly before them, other courts have addressed those issues. See, Bostock, 140 S. Ct. at 1753; Grimm v. Gloucester County School Board, 972 F.3d 586 (4<sup>th</sup> Cir. 2020). Federal courts addressing the issues of sex discrimination not addressed in Bostock, including sex discrimination in educational institutions and the use of bathrooms based on one's sex, have extended the broad definition of sex, as articulated in Bostock, beyond the issues of employment discrimination the Bostock Court addressed. Specifically, Federal courts in Pennsylvania and outside of Pennsylvania have applied the reasoning in Bostock to education discrimination under Title IX, employment discrimination under Title VII and the PHRA, and employment discrimination under the Equal Protection Clause. See *e.g.*, Grimm, 972 F.3d 586.

For example, in Grimm, the Court applied the Bostock rationale when considering whether a school district violated Title IX's prohibition against sex discrimination by implementing a policy which required students to use the sex-separated bathroom corresponding with their sex assigned

at birth and prohibited students from using the sex-separated bathroom corresponding with their gender identity. Grimm, 972 F.3d at 616. The Court held that the policy violated Title IX's prohibition against sex discrimination. Grimm, 972 F.3d at 616. Additionally, several *amicus* briefs were filed in Grimm which supported the position that the school district policy at issue violated Title IX's prohibition against sex discrimination. The *amicus* briefs further supported a broad definition for the term sex, as used in Title IX.

While the Third Circuit has not yet had an opportunity to address the application of Bostock beyond employment discrimination under Title VII, district courts in Pennsylvania have recognized that, absent Third Circuit precedent to the contrary, the rationale in Bostock should be applied to claims of sex discrimination beyond employment discrimination under Title VII. See e.g., Doe v. Univ. of Scranton, 2020 U.S. Dist. LEXIS 187526, \*12-13, n.61 (M.D. Pa. October 9, 2020) (finding that in the absence of express Third Circuit precedent to the contrary, a claim of education discrimination based on sexual orientation is actionable under Title IX). Additionally, in Stankiewicz v. Pump N' Pantry, Inc., 2022 U.S. Dist. LEXIS 1452, \*12-13 (M.D. Pa. January 4, 2022), the Court recognized that a claim of harassment based on one's association with a member of a protected class, including sexual orientation, is unlawful discriminatory conduct proscribed by Title VII and the PHRA. Similarly, in Izzard v. County of Montgomery, 2021 U.S. Dist. LEXIS 228090, \*28-29 (E.D. Pa. Nov. 29, 2021), the Court found that a claim of employment discrimination because of sexual orientation may be brought under the Equal Protection Clause. Thus, although the Bostock decision was limited to claims of employment discrimination under Title VII, because they were the only claims before the Court, other courts have applied the Bostock rationale beyond claims of

employment discrimination under Title VII. Courts are now broadly defining the term sex under Title IX, with respect to claims of sex discrimination in educational programs. Courts are also broadly defining the term sex under the PHRA, with respect to claims of sex discrimination in employment. Courts are also broadly defining the term sex with respect to claims of employment discrimination brought under the Equal Protection Clause.

Given these recent federal court decisions and the support for these decisions, as expressed in the *amicus* briefs filed in Grimm, the Commission decided, based upon the power and duty afforded by the PHRA, to promulgate a regulation defining the term sex consistent with the manner in which the term sex has been interpreted by federal courts interpreting comparable federal statutes. The Commission's proposed rulemaking also ensures that the term sex, as used throughout the PHRA and the PFEOA – including in the provisions prohibiting discrimination in employment, housing, commercial property, public accommodations, and educational institutions – is interpreted consistently.

#### **Race Discrimination**

With respect to race discrimination, the PHRA prohibits discrimination, on the basis of race, in employment, housing, commercial property, public accommodations, and educational institutions. The PFEOA prohibits discrimination, on the basis of race, in certain educational institutions. Similar to the PHRA's protections regarding race discrimination in employment, Title VII declares that it is "an unlawful employment practice for an employer to . . . otherwise discriminate against any individual . . . because of such individual's race." 42 U.S.C.S. § 2000e-2(a)(1). Although Pennsylvania courts have addressed claims of race discrimination under the

PHRA, they have not yet had an opportunity to address the manner in which the term race, as used in the PHRA and the PFEOA, should be interpreted.

Thus, in crafting the proposed rulemaking, the Commission turned to Title VII for guidance regarding the definition of race, as Pennsylvania courts often do when interpreting the PHRA and the PFEOA. The Commission's proposed rulemaking explains that the term race includes ancestry, national origin, and ethnic characteristics. The proposed rulemaking also explains that the term race includes interracial marriage or association. This definition for race is consistent with the manner in which the term race has been interpreted by federal courts interpreting similar federal statutes. Specifically, in St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the United States Supreme Court explained that the term race, with respect to claims of discrimination brought under 42 U.S.C. § 1981, includes protections based on one's ancestry or ethnic characteristics. St. Francis College, 481 U.S. at 613. Likewise, in Village of Freeport v. Barrella, 814 F.3d 594 (2<sup>nd</sup> Cir. 2016), the Court explained that the term race includes ethnicity for purposes of § 1981 and Title VII. Barrella, 814 F.3d at 598. Courts have also held that the term race includes discrimination based upon interracial marriage or association. *See e.g.*, Parr v. Woodmen of the World Life Insurance Co., 791 F.2d 888, 892 (11<sup>th</sup> Cir. 1986). Thus, the Commission's proposed rulemaking provides clarity that the term race, as used in the PHRA and the PFEOA, should be interpreted consistent with the interpretation of the term race by federal courts interpreting similar federal statutes. The Commission's proposed rulemaking also ensures that the term race, as used throughout the PHRA and the PFEOA – including in the provisions

prohibiting discrimination in employment, housing, commercial property, public accommodations, and educational institutions – is interpreted consistently.

Additionally, the proposed rulemaking specifies that race includes persons of Hispanic national origin or ancestry, including persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture. This definition is consistent with federal regulations relating to the term race. *See* 29 CFR 1607.4(B) (explaining Hispanic includes persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture). The proposed rulemaking also specifies that race includes persons of any other national origin or ancestry, as specified by a complainant in a complaint. This definition alleviates any confusion regarding the term race and clarifies that race should be interpreted as including a person’s origin or culture.

Finally, the proposed rulemaking explains that the term race includes traits historically associated with race, including hair texture and protective hairstyles, such as braids, locks, and twists. This definition is consistent with other state anti-discrimination laws, including laws in New Jersey, New York, Connecticut, and California. *See e.g.*, New Jersey’s Law Against Discrimination, N.J.S.A. §§ 10:5-5(vv) and (ww) (the term race includes traits historically associated with race, including hair texture and protective hairstyles, such as braids, locks, and twists). While the Commission recognizes that this definition of race has not been adopted by the few federal courts that have had the opportunity to consider this issue, the Commission has considered this issue and determined that the term race, as used in the PHRA and the PFEOA, should be interpreted as including hairstyles culturally associated with race. *See e.g.*, *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018, 1032-1033 (11<sup>th</sup> Cir. 2016) (holding that Title VII’s protections against

race discrimination do not extend to hairstyles culturally associated with race). Given the Commission's understanding of the term race and the Commission's power and duty to promulgate regulations to effectuate the provisions of the PHRA and the PFOA, the Commission defines race as including traits historically associated with race, including hair texture and protective hairstyles. The proposed regulation provides the citizens of the Commonwealth of Pennsylvania with protections similar to the protections provided by anti-discrimination laws in other states. *See e.g.*, NY CLS Exec §§ 292(37) and (38); Cal. Gov. Code 12926(w) and (x).

***Fiscal Impact***

There is no fiscal impact.

***Effective Date***

This rulemaking will be effective upon publication of the final-form regulation in the *Pennsylvania Bulletin*.

***Public Comment***

Within thirty (30) calendar days after the date of publication of this proposed rulemaking in the *Pennsylvania Bulletin*, interested persons are invited to submit written comments, suggestions, or objections regarding the proposed rulemaking to the Commission at the following email address: [RA-HRREGSCOMMENT@pa.gov](mailto:RA-HRREGSCOMMENT@pa.gov). Reference Regulation No. 52-013 when submitting comments.

Persons with a disability who require an auxiliary aid or service may submit comments by using the Relay Service at 711 or 717-787-7279 (TTY). Persons with a disability who require an accommodation, may do so by contacting [RA-HRREGSCOMMENT@pa.gov](mailto:RA-HRREGSCOMMENT@pa.gov).

ANNEX A  
TITLE 16. COMMUNITY AFFAIRS  
PART II. GOVERNOR'S OFFICE  
Subpart A. HUMAN RELATIONS COMMISSION  
CHAPTER 41. PRELIMINARY PROVISIONS  
Subchapter D. PROTECTED CLASSES

§ 41.201      Purpose.

This subpart ensures that all unlawful discriminatory practices proscribed by the Pennsylvania Human Relations Act and all unfair educational practices proscribed by the Pennsylvania Fair Educational Opportunities Act are interpreted and applied consistently. This subpart also ensures that all complaints filed with the Pennsylvania Human Relations Commission are investigated consistent with the rules outlined herein.

§ 41.202      Construction.

(a) This subpart shall be construed liberally for the accomplishment of the purposes of the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

(b) This subpart shall be interpreted consistently with other Federal and State laws and regulations except when to do so would result in a narrow interpretation of the Pennsylvania Human Relations Act or the Pennsylvania Fair Educational Opportunities Act.

§ 41.203.      Enforcement.

This subpart shall be subject to and enforced in accordance with the Pennsylvania Human Relations Act, the Pennsylvania Fair Educational Opportunities Act, 16 Pa. Code Chapter 42 (relating to special rules of administrative practice and procedure) and 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

§ 41.204.      Definitions.

The following words and terms, when used in this subpart, have the following meanings, unless the context clearly indicates otherwise:

*Complaint* – a complaint filed with the Pennsylvania Human Relations Commission pursuant to the PHRA or the PFEOA.

**Complainant** – any person, including the PHRC or the Attorney General, who files a complaint with the PHRC pursuant to the PHRA or the PFEOA.

**Person** – has the same meaning as Section 4(a) of the PHRA (43 P.S. § 954(a)).

**PFEOA** – the Pennsylvania Fair Educational Opportunities Act (24 P.S. §§ 5001-5010).

**PHRA** – the Pennsylvania Human Relations Act (43 P.S. §§ 951-963).

**PHRC** – the Pennsylvania Human Relations Commission.

**Respondent** – the person against whom a complaint was filed with the PHRC pursuant to the PHRA or the PFEOA.

**§ 41.205. Religious creed discrimination.**

- (a) **The term religious creed, as used in the PHRA and the PFEOA, includes all aspects of religious observance and practice, as well as belief.**
- (b) **Religious beliefs include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. The fact that no group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of a complainant.**
- (c) **This section is not intended to be exhaustive. However, the term religious creed, as used in the PHRA and the PFEOA, should be interpreted consistent with this section.**

**§ 41.206. Sex discrimination.**

- (a) **The term sex, when used in connection with the unlawful discriminatory practices proscribed by the PHRA, includes, but is not limited to, the following:**
  - (1) **Pregnancy, including medical conditions related to pregnancy.**
  - (2) **Childbirth, including medical conditions related to childbirth.**
  - (3) **Breastfeeding, including medical conditions related to breastfeeding.**

- (4) Sex assigned at birth, including, but not limited to, male, female, or intersex.**
- (5) A person's gender, including a person's gender identity or gender expression.**

  - (i) Gender identity or expression means having or being perceived as having a gender-related identity, appearance, expression, or behavior, which may or may not be stereotypically associated with the person's sex assigned at birth.**
  - (ii) Gender identity or expression may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person's core identity.**
- (6) Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality, and asexuality.**

  - (i) Affectional or sexual orientation means male, female, or nonbinary heterosexuality, homosexuality, bisexuality, or asexuality by inclination, practice, identity, or expression, having a history thereof, or being perceived, presumed, or identified by others as having such an orientation.**
  - (ii) Heterosexuality means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the other gender.**
  - (iii) Homosexuality means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the same gender.**
  - (iv) Bisexuality means affectional, emotional, or physical attraction or behavior which is directed towards persons of either gender.**
  - (v) Asexuality means the lack of sexual attraction to others, or low or absent interest in or desire for sexual or romantic activity.**
- (7) Differences of sex development, variations of sex characteristics, or other intersex characteristics.**
- (b) The term sex, when used in connection with the unfair educational practices proscribed by the PFEOA, includes, but is not limited to, the following:**

  - (1) Pregnancy, including medical conditions related to pregnancy.**

- (2) Childbirth, including medical conditions related to childbirth.**
- (3) Breastfeeding, including medical conditions related to breastfeeding.**
- (4) Sex assigned at birth, including, but not limited to, male, female, or intersex.**
- (5) A person's gender, including a person's gender identity or gender expression.**

  - (i) Gender identity or expression means having or being perceived as having a gender-related identity, appearance, expression, or behavior, which may or may not be stereotypically associated with the person's sex assigned at birth.**
  - (ii) Gender identity or expression may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person's core identity.**
- (6) Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality, and asexuality.**

  - (i) Affectional or sexual orientation means male, female, or nonbinary heterosexuality, homosexuality, bisexuality, or asexuality by inclination, practice, identity, or expression, having a history thereof, or being perceived, presumed, or identified by others as having such an orientation.**
  - (ii) Heterosexuality means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the other gender.**
  - (iii) Homosexuality means affectional, emotional, or physical attraction or behavior which is primarily directed towards persons of the same gender.**
  - (iv) Bisexuality means affectional, emotional, or physical attraction or behavior which is directed towards persons of either gender.**
  - (v) Asexuality means the lack of sexual attraction to others, or low or absent interest in or desire for sexual or romantic activity.**
- (7) Differences of sex development, variations of sex characteristics, or other intersex characteristics.**

- (c) This section is not intended to be exhaustive. However, the term sex, as used in the PHRA and the PFEOA, should be interpreted consistent with this section.**

**§ 41.207. Race discrimination.**

- (a) The term race, when used in connection with the unlawful discriminatory practices proscribed by the PHRA, includes, but is not limited to, the following:**

- (1) Ancestry, national origin, or ethnic characteristics;**
- (2) Interracial marriage or association;**
- (3) Traits historically associated with race, including, but not limited to:**
  - (i) Hair texture;**
  - (ii) Protective hairstyles, such as braids, locks, and twists;**
- (4) Persons of Hispanic national origin or ancestry, including, but not limited to, persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture.**
- (5) Persons of any other national origin or ancestry as specified by a complainant in a complaint.**

- (b) The term race, when used in connection with the unfair educational practices proscribed by the Pennsylvania Fair Educational Opportunities Act, includes, but is not limited to, the following:**

- (1) Ancestry, national origin, or ethnic characteristics;**
- (2) Interracial marriage or association;**
- (3) Traits historically associated with race, including, but not limited to:**
  - (i) Hair texture;**
  - (ii) Protective hairstyles, such as braids, locks, and twists;**
- (4) Persons of Hispanic national origin or ancestry, including, but not limited to, persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture.**

**(5) Persons of any other national origin or ancestry as specified by a complainant in a complaint.**

**(c) This section is not intended to be exhaustive. However, the term race, as used in the PHRA and the PFEOA, should be interpreted consistent with this section.**



COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

March 23, 2022

**Via Electronic Mail**

David Sumner, Executive Director  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act  
and the Pennsylvania Fair Educational Opportunities Act,  
16 Pa. Code §§ 41.201-41.207, #52-13

Via email only: Steve Hoffman at [shoffman@irrc.state.pa.us](mailto:shoffman@irrc.state.pa.us); [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)

Dear Mr. Sumner:

Pursuant to Section 5(a) of the Regulatory Review Act, enclosed is a copy of a proposed rulemaking package of the Pennsylvania Human Relations Commission, including the Face Sheet, Preamble, Annex A, Regulatory Analysis Form, and Fiscal Note. The proposed rulemaking pertains to definitions for terms used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

Copies of the aforementioned documents were also delivered today via e-mail to the majority and minority chairpersons of the Pennsylvania House and Senate Committees and to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

The Commission will provide the Independent Regulatory Review Commission with any assistance required to facilitate a thorough review of these proposed regulations.

Thank you for your consideration.

Sincerely,

/s/ Samuel Rivera

Samuel Rivera  
Chief Counsel

Enclosures



COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

March 23, 2022

Via Electronic Mail: [seberly@pahousegop.com](mailto:seberly@pahousegop.com)  
The Honorable Seth M. Grove  
Majority Chair, House State Government Committee  
Harrisburg, PA 17120

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act, 16 Pa. Code §§ 41.201-41.207, #52-13

Dear Representative Grove:

Enclosed is a copy of a proposed rulemaking package of the Pennsylvania Human Relations Commission, including the Face Sheet, Preamble, Annex A, Regulatory Analysis Form, and Fiscal Note. The proposed rulemaking pertains to definitions for terms used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

The proposed rulemaking is needed because neither the PHRA, PFEOA, or the Commission's existing regulations define certain terms used in the PHRA and the PFEOA. Specifically, the PHRA uses the terms "sex," "religious creed," and "race" but does not define those terms. The PFEOA uses the same terms but does not define those terms. The proposed regulations would promulgate a consistent and uniform manner for interpreting these terms.

This proposed rulemaking, which amends Pennsylvania Code, Title 16, Chapter 41, Preliminary Provisions, by adding Subchapter D, is submitted for review by your committee pursuant to the Regulatory Review Act.

The Commission will provide your committee with any assistance required to facilitate a thorough review of this proposal.

Sincerely,

*/s/ Samuel Rivera*

Samuel Rivera  
Chief Counsel

Enclosures



COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

March 23, 2022

Via Electronic Mail: [nhimebaugh@pahouse.net](mailto:nhimebaugh@pahouse.net); [sconklin@pahouse.net](mailto:sconklin@pahouse.net)  
The Honorable Scott Conklin  
Minority Chair, House State Government Committee  
Harrisburg, PA 17120

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act  
and the Pennsylvania Fair Educational Opportunities Act,  
16 Pa. Code §§ 41.201-41.207, #52-13

Dear Representative Conklin:

Enclosed is a copy of a proposed rulemaking package of the Pennsylvania Human Relations Commission, including the Face Sheet, Preamble, Annex A, Regulatory Analysis Form, and Fiscal Note. The proposed rulemaking pertains to definitions for terms used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

The proposed rulemaking is needed because neither the PHRA, PFE OA, or the Commission's existing regulations define certain terms used in the PHRA and the PFE OA. Specifically, the PHRA uses the terms "sex," "religious creed," and "race" but does not define those terms. The PFE OA uses the same terms but does not define those terms. The proposed regulations would promulgate a consistent and uniform manner for interpreting these terms.

This proposed rulemaking, which amends Pennsylvania Code, Title 16, Chapter 41, Preliminary Provisions, by adding Subchapter D, is submitted for review by your committee pursuant to the Regulatory Review Act.

The Commission will provide your committee with any assistance required to facilitate a thorough review of this proposal.

Sincerely,

*/s/ Samuel Rivera*

Samuel Rivera  
Chief Counsel

Enclosures



COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

March 23, 2022

Via Electronic Mail: [jdavis@pasen.gov](mailto:jdavis@pasen.gov)  
The Honorable Camera Bartolotta  
Majority Chair, Senate Labor and Industry Committee  
Harrisburg, PA 17120

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act  
and the Pennsylvania Fair Educational Opportunities Act,  
16 Pa. Code §§ 41.201-41.207, #52-13

Dear Senator Bartolotta:

Enclosed is a copy of a proposed rulemaking package of the Pennsylvania Human Relations Commission, including the Face Sheet, Preamble, Annex A, Regulatory Analysis Form, and Fiscal Note. The proposed rulemaking pertains to definitions for terms used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

The proposed rulemaking is needed because neither the PHRA, PFEOA, or the Commission's existing regulations define certain terms used in the PHRA and the PFEOA. Specifically, the PHRA uses the terms "sex," "religious creed," and "race" but does not define those terms. The PFEOA uses the same terms but does not define those terms. The proposed regulations would promulgate a consistent and uniform manner for interpreting these terms.

This proposed rulemaking, which amends Pennsylvania Code, Title 16, Chapter 41, Preliminary Provisions, by adding Subchapter D, is submitted for review by your committee pursuant to the Regulatory Review Act.

The Commission will provide your committee with any assistance required to facilitate a thorough review of this proposal.

Sincerely,

*/s/ Samuel Rivera*

Samuel Rivera  
Chief Counsel

Enclosures



COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

March 23, 2022

Via Electronic Mail: [kathy.benton@pasenate.com](mailto:kathy.benton@pasenate.com)  
The Honorable Christine M. Tartaglione  
Minority Chair, Senate Labor and Industry Committee  
Harrisburg, PA 17120

Re: Proposed Rulemaking to Define Terms in the Pennsylvania Human Relations Act  
and the Pennsylvania Fair Educational Opportunities Act,  
16 Pa. Code §§ 41.201-41.207, #52-13

Dear Senator Tartaglione:

Enclosed is a copy of a proposed rulemaking package of the Pennsylvania Human Relations Commission, including the Face Sheet, Preamble, Annex A, Regulatory Analysis Form, and Fiscal Note. The proposed rulemaking pertains to definitions for terms used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

The proposed rulemaking is needed because neither the PHRA, PFEOA, or the Commission's existing regulations define certain terms used in the PHRA and the PFEOA. Specifically, the PHRA uses the terms "sex," "religious creed," and "race" but does not define those terms. The PFEOA uses the same terms but does not define those terms. The proposed regulations would promulgate a consistent and uniform manner for interpreting these terms.

This proposed rulemaking, which amends Pennsylvania Code, Title 16, Chapter 41, Preliminary Provisions, by adding Subchapter D, is submitted for review by your committee pursuant to the Regulatory Review Act.

The Commission will provide your committee with any assistance required to facilitate a thorough review of this proposal.

Sincerely,

*/s/ Samuel Rivera*

Samuel Rivera  
Chief Counsel

Enclosures

**From:** Davis, Jean  
**To:** [Knight, Lisa](mailto:Lisa.Knight@pa.gov)  
**Subject:** RE: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA  
**Date:** Thursday, March 24, 2022 12:04:31 PM

---

Lisa,

Received. I will forward this to the Executive Director of Labor & Industry.

Have a nice day.

*Jean M. Davis*

*Administrative Assistant*

Office of Senator Camera Bartolotta  
Pennsylvania's 46th Senatorial District  
19 East Wing  
Harrisburg, PA 17120  
717.787-1463  
[www.senatorbartolotta.com](http://www.senatorbartolotta.com)

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**MAR 23 2022**

**Independent Regulatory  
Review Commission**

**From:** Knight, Lisa <[liknight@pa.gov](mailto:liknight@pa.gov)>  
**Sent:** Thursday, March 24, 2022 11:58 AM  
**To:** Davis, Jean <[jdavis@pasen.gov](mailto:jdavis@pasen.gov)>  
**Subject:** FW: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA

Ⓢ CAUTION : External Email Ⓢ

**From:** Knight, Lisa  
**Sent:** Wednesday, March 23, 2022 4:39 PM  
**To:** [jdavis@pasen.gov](mailto:jdavis@pasen.gov)  
**Subject:** Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA

Good Afternoon,

Attached is a proposed regulatory package from the Pennsylvania Human Relations Commission. The Regulatory Review Act requires delivery of the proposed regulatory package to the Standing Committees of the General Assembly, the Legislative Reference Bureau (LRB), and the Independent Regulatory Review Commission (IRRC) on the same day, with IRRC receiving the package last. Confirmation of receipt by the Standing Committees and LRB is required for delivery to IRRC.

Please respond as soon as possible to this email indicating that you have received the attached proposed regulatory package so that it can be delivered to IRRRC today, March 23, 2022.

Thank you,

Lisa

Lisa M. Knight | Commission Counsel  
PA Human Relations Commission  
110 North 8th Street | Suite 501  
Philadelphia, PA 19107  
Phone: 215.965.7702 | Fax: 215.560.3682  
[www.phrc.pa.gov](http://www.phrc.pa.gov)

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**From:** Benton, Kathy  
**To:** [Knight, Lisa](mailto:Lisa.Knight@pa.gov)  
**Subject:** RE: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA  
**Date:** Wednesday, March 23, 2022 5:10:49 PM

---

Received, thank you

**From:** Knight, Lisa <[liknight@pa.gov](mailto:liknight@pa.gov)>  
**Sent:** Wednesday, March 23, 2022 4:40 PM  
**To:** Benton, Kathy <[kathy.benton@pasenate.com](mailto:kathy.benton@pasenate.com)>  
**Subject:** Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA

| EXTERNAL EMAIL |

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Good Afternoon,

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**From:** Sherry Eberly  
**To:** [Knight, Lisa](#)  
**Cc:** [Micheale Totino](#)  
**Subject:** RE: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA  
**Date:** Thursday, March 24, 2022 9:08:38 AM

---

Good morning,

I have received this email and forwarded it to the Chair and committee staff.

Thank you,

*Sherry Eberly*  
*Legislative Administrative Assistant*  
*Office of Representative Seth Grove*  
*Room 7 East Wing*  
*717-783-2655*

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**MAR 23 2022**

**Independent Regulatory  
Review Commission**

**From:** Knight, Lisa <[liknight@pa.gov](mailto:liknight@pa.gov)>  
**Sent:** Wednesday, March 23, 2022 4:36 PM  
**To:** Sherry Eberly <[Seberly@pahousegop.com](mailto:Seberly@pahousegop.com)>  
**Subject:** Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA

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Lisa

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**From:** Himebaugh, Nicholas A.  
**To:** [Knight, Lisa](#)  
**Cc:** [Conklin, Scott](#)  
**Subject:** Re: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFEOA  
**Date:** Wednesday, March 23, 2022 4:41:23 PM  
**Attachments:** [PHRC Reg Package to LRB-52-013-3-23-2022.pdf](#)

---

Received thank you

Nicholas Himebaugh  
Committee Executive Director  
House Democratic State Government Committee  
C: 717-654-8715

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**MAR 23 2022**

**Independent Regulatory  
Review Commission**

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On Mar 23, 2022, at 4:38 PM, Knight, Lisa <[liknight@pa.gov](mailto:liknight@pa.gov)> wrote:

Good Afternoon,

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Lisa

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PA Human Relations Commission  
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Philadelphia, PA 19107  
Phone: 215.965.7702 | Fax: 215.560.3682  
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**From:** Bulletin  
**To:** [Knight, Lisa](#)  
**Cc:** [Code&Bulletin](#)  
**Subject:** [External] RE: Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFOA  
**Date:** Wednesday, March 23, 2022 4:49:58 PM

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Good afternoon Lisa,

Thank you for sending this proposed rulemaking. Someone from our office will contact you regarding publication in the Pennsylvania Bulletin.

In the meantime, could you please send us the word versions of the preamble and the annex? We will not be able to process .pdf versions.

Thank you!

**Ernest L. Engvall | Legal Assistant**  
[eengvall@pairb.us](mailto:eengvall@pairb.us) | 717.783.1531  
Legislative Reference Bureau  
*Code and Bulletin Office*

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**MAR 23 2022**

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**From:** Knight, Lisa <[liknight@pa.gov](mailto:liknight@pa.gov)>  
**Sent:** Wednesday, March 23, 2022 4:43 PM  
**To:** Bulletin <[bulletin@pairb.us](mailto:bulletin@pairb.us)>  
**Subject:** Proposed Regulations #52-13 - Protected Classes Under the PHRA and PFOA

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Thank you,

Lisa

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PA Human Relations Commission  
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