

Commonwealth of Pennsylvania



Comment and Response Document

**For the clarification of “sex” as a protected class under the
Pennsylvania Human Relations Act and Pennsylvania Fair Educational
Opportunities Act**

July 2018

**Pennsylvania Human Relations Commission
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Introduction

In April 2017 the Pennsylvania Human Relations Commission posted two documents for comment on its website: “Guidance Concerning Protections for Lesbian, Gay, Bisexual and Transgender Individuals in the Pennsylvania Human Relations Act” and “Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender and Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities Act.”

The public comment period ended on May 26, 2017. Upon consideration of the timely comments received, the Proposed Guidance was revised. The Final Guidance will be submitted to the Commissioners for consideration at the July 23, 2018 Commission Meeting.

This Comment and Response Document summarizes the 8,388 comments submitted to the Commission by individuals and organizations during the public comment period and expresses the Commission’s responses to those comments. Timely comments were assigned a number and the individual sentiments expressed therein were categorized by topic for response. A list of commenters is provided in Appendix A. 2,469 of the comments received were anonymous but are addressed in this document.

Abbreviations and Acronyms

Commission	Pennsylvania Human Relations Commission
PFEOA	Pennsylvania Fair Educational Opportunities Act
PHRA	Pennsylvania Human Relations Act
RFPA	Pennsylvania’s Religious Freedom Protection Act

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A. GENERAL COMMENTS ABOUT THE PROPOSED GUIDANCE

- 1. Comment:** Commenters who have expressed that they are opposed to the Commission adopting the Proposed Guidance, no explanation for their opposition provided.

Response: Thank you for your comment.

- 2. Comment:** Commenters who oppose the Proposed Guidance because they are anti-LGBTQ.

Response: Thank you for your comment.

- 3. Comment:** Commenters who express concerns about safety or a hypothetical danger associated with the Proposed Guidance, no explanation of the safety concerns or perceived danger provided.

Response: Thank you for your comment.

- 4. Comment:** Commenters who believe the Proposed Guidance is unconstitutional generally, no explanation of how.

Response: The Commission disagrees with the assertion that the Final Guidance violates any state or federal constitutional provisions. For further explanation, please read through the rest of the Comments for more specific responses to constitutional arguments raised by commenters. Thank you for your comment

- 5. Comment:** Commenters who believe the Proposed Guidance is part of a political agenda.

Response: The Commission did not set forth the Proposed Guidance as part of any political agenda and strongly disagrees with any assertion that the Commission is a political body. The Commission is a non-partisan, independent agency created to enforce the PHRA¹ and PFEOA.² Thank you for your comment.

- 6. Comment:** Commenters who support the Proposed Guidance, do not provide an explanation for their support.

¹ “There shall be, and there is hereby established in the Governor’s Office, a *non-partisan*, departmental administrative commission for the administration of this act, which shall be known as the “Pennsylvania Human Relations Commission[.]” 43 P.S. § 956(a)(emphasis added).

² The authority to administer the PFEOA is vested in the non-partisan Commission. 24 P.S. § 5005.

Response: Thank you for your comment.

7. **Comment:** Commenters who do not believe the Proposed Guidance would put any individuals at risk, do not elaborate on the risk or lack thereof.

Response: Thank you for your comment.

8. **Comment:** Commenters who support the Proposed Guidance but would also like to see the PHRA and PFEOA amended to explicitly provide these protections under PA law.

Response: Any comments or suggestions regarding state laws should be directed to your representatives. Thank you for your comment.

B. COMMENTS RAISING RELIGIOUS CONCERNS

1. **Comment:** Commenters who are concerned about the impact of the Proposed Guidance on religious organizations such as houses of worship and religious schools being forced to hire employees who do not comply with the anti-LGBT tenets of faith.

Response: The Final Guidance is drafted to ensure that the religious protections found in the PHRA,³ PFEOA,⁴ Commission regulations,⁵ and any related caselaw would be available to institutions that could be subject to enforcement actions. Additionally, there is a law in Pennsylvania that guarantees executive agencies don't violate the free exercise rights of the citizens: the Religious Freedom Protection Act ("RFPA"). The RFPA states that an agency shall not substantially burden the free exercise of religion⁶ unless the agency can show that their actions are the least restrictive means available to further a compelling government interest.⁷

A respondent who believes their free exercise of religion has been or would likely be burdened by the Commission can assert the violation of the RFPA as a

³ 43 P.S. §§ 954(b) and (l), 955(a), (h)(10), 955.1, and 955.2.

⁴ 24 P.S. §§ 5002(c), 5003(1) and (2), 5004(a.1)(1)-(7) and (c), 5006(1)-(5).

⁵ 16 Pa. Code §§ 45.13(a)(1)-(2) and (c), 45.174(a) and (b), 47.11(a) and (b), 47.41, 47.51, 47.71-74, 51.1-51.61.

⁶ 71 Pa. Cons. Stat. Ann. § 2404(a).

⁷ 71 Pa. Cons. Stat. Ann. § 2404(b).

claim or defense before the Commission⁸ by providing written notice⁹ to the Commission. Such notice must state: (1) their free exercise of religion has been or will be substantially burdened by the Commission; (2) the act or refusal to act which is at issue; and (3) how the Commission exercising their authority burdens their free exercise of religion.¹⁰ If respondent is able to prove a violation of the RFPA, the court may award appropriate declaratory or injunctive relief.¹¹

Given the above efforts of the legislature and judiciary to ensure the free exercise rights of Pennsylvanians are protected, the Commission does not believe any further religious exemptions to the PHRA and PFEPA are required in the Guidance. Thank you for your comment.

- 2. Comment:** Commenters who believe this Proposed Guidance will punish people for their views on marriage.

Response: The Commission does not intend to punish anyone for their religious views. If a respondent believes the Commission's actions infringe upon the free exercise rights guaranteed under the PA Constitution they can avail themselves to the protections of the RFPA (as explained in Response B.1., above). Thank you for your comment.

- 3. Comment:** Commenters who raise general concerns that the Proposed Guidance infringes on religious rights, no explanation for the infringement provided.

Response: The Commission feels the religious rights of the citizens of this Commonwealth are adequately protected under the PHRA and PFEPA as well as through the RFPA (as explained in Response B.1., above). Thank you for your comment.

- 4. Comment:** Commenters who believe their religion gives them the right to discriminate against LGBTQ individuals and/or believe businesses should be able to discriminate in hiring and service based on the owner's religious beliefs.

⁸ 71 Pa. Cons. Stat. Ann. § 2405(a).

⁹ Under 71 Pa. Cos. Stat. Ann. § 24055(c), the thirty day notice requirement is waived in the following situations: (1) the burden on respondent's free exercise created by the Commission exercising its authority is imminent; (2) respondent did not receive notice of the Commission's action in time to reasonably provide the thirty day notice; (3) giving notice "would delay an action to the extent that the action would be dismissed as untimely;" or (4) violation of the RFPA is being asserted as a counterclaim in a pending proceeding.

¹⁰ 71 Pa. Cons. Stat. Ann. § 2405(b).

¹¹ 71 Pa. Cons. Stat. Ann. § 2405(f).

Response: Please refer to the protections afforded religious organizations under the PHRA and PFEOA (referenced in Response B.1., above). Thank you for your comment.

5. **Comment:** Commenters who believe religion should not be used as a basis to discriminate against LGBTQ+ individuals.

Response: There are numerous religious protections built into the PHRA and PFEOA (see Response B.1., above). Therefore, each case filed with the Commission is investigated and adjudicated on the individual facts presented. Thank you for your comment.

6. **Comment:** Commenters who do not believe the Proposed Guidance would infringe on the religious freedoms of other people.

Response: Thank you for your comment.

7. **Comment:** Commenters who support the Proposed Guidance because their religion requires them to advocate against discrimination on any basis, including sexual orientation, gender identity, and gender expression.

Response: Thank you for your comment.

C. COMMENTS RAISING PRIVACY CONCERNS

1. **Comment:** Commenters who believe the Proposed Guidance would result in an unconstitutional invasion of privacy, no explanation provided.

Response: The Commission is not aware of any privacy rights recognized by the courts that are implicated by this Guidance. Thank you for your comment.

2. **Comment:** Commenters who believe the Proposed Guidance would force schools to violate the privacy of their students in restrooms and locker rooms.

Response: The Commission disagrees. The United States Court of Appeals for the Third Circuit declined to hold that students have a constitutional right to privacy that is violated if a school allows transgender students to use the restroom or locker room of the gender with which they identify, pointing out that no other court has ever recognized such an expansive right to privacy.¹² Further, the Third Circuit was

¹² Doe v. Boyertown Area Sch. Dist., 2018 U.S. App. LEXIS 16323, at *23 (3d Cir. June 18, 2018).

persuaded by the medical testimony presented with regard to the detrimental effects of transgender exclusionary policies in schools:

Policies that exclude transgender individuals from privacy facilities that are consistent with their gender identities “have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.” These exclusionary policies exacerbate the risk of “anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes.” The risk of succumbing to these conditions is already very high in individuals who are transgender. In a survey of 27,000 transgender individuals, 40% reported a suicide attempt (a rate nine times higher than the general population). Yet, when transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students “reflect the same, healthy psychological profile as their peers.”¹³

The court acknowledged that some cisgender students may experience some stress or discomfort in sharing restrooms or locker rooms with transgender students but did not find the level of harm to those students comparable to the harm the transgender students would face if excluded, stating the situations are “simply not analogous.”¹⁴ Thank you for your comment.

- 3. Comment:** Commenters who do not believe there is any violations of privacy when transgender individuals use the restroom of the gender with which they identify.

Response: Thank you for your comment.

D. COMMENTS ABOUT DEFINITIONS IN THE PROPOSED GUIDANCE

- 1. Comment:** Commenters who believe “sex” under the PHRA and PFEOA should refer only to gender assigned at birth and should not include the sex stereotyping theory of discrimination.

¹³ Boyertown, 2018 U.S. App. LEXIS 16323, at *5-6.

¹⁴ *Id.* *6.

Response: Sex stereotyping has been a theory of unlawful discrimination based on sex since 1989 when the United States Supreme Court issued its decision in Price Waterhouse v. Hopkins.¹⁵ Thank you for your comment.

2. **Comment:** Commenters who believe the Proposed Guidance violates the legislative intent behind “sex” as a protected class under the PHRA and PFEOA.

Response: As explained in Response D.1. above, the legal definition of “sex” has evolved beyond our understanding of gender assigned at birth. The Commission disagrees with the assertion that the definition of “sex” under the PHRA and PFEOA is changing. The definition of “sex” has evolved out of necessity as explained in Response D.1. (above). When the Supreme Court held sex discrimination included same-sex harassment, Justice Scalia observed that even though same-sex harassment was “assuredly not the principal evil Congress” had in mind when enacting Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹⁶ Thank you for your comment.

3. **Comment:** Commenters who believe “sex” is a biological determination made at birth and can only ever refer to “male” or “female”.

Response: The Commission appreciates the science underlying our understanding of humanity but believes that interpreting what “sex” means in the context of “discrimination based on sex” is a legal question; therefore, the Commission felt it was more appropriate to look to the Courts and other administrative agencies for guidance on this matter. Thank you for your comment.

4. **Comment:** Commenters whose understanding of the definition of “sex” comes from their religion.

Response: Thank you for your comment.

5. **Comment:** Commenters who believe discrimination based on sex prohibits discrimination based on gender, sexual orientation, gender identity, and gender expression.

Response: The Commission cannot and will not state that all adverse actions alleged to have been taken because of an individual’s sexual orientation, transgender

¹⁵ 490 U.S. 228 (1989).

¹⁶ Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

identity, gender transition, gender identity, or gender expression always rise to the level of sex discrimination. Each complaint filed with the Commission will be investigated and adjudicated on a case-by-case basis. Thank you for your comment.

6. **Comment:** Commenters who believe the science explaining gender is not as straightforward as male or female.

Response: The Commission appreciates the complexity of human biology however, as stated in Response D.3. (above), we feel that our understanding of “sex” under the PHRA and PFEOA is squarely a legal question at this point that can be answered by looking to the courts and administrative actions. Thank you for your comment.

E. COMMENTS THAT RAISED CONCERNS ABOUT FACILITIES

1. **Comment:** Commenters who raise general concerns about the idea of “open facilities” such as restrooms or locker rooms but do not explain what their concerns are.

Response: Thank you for your comment.

2. **Comment:** Commenters who believe the Proposed Guidance would pose a threat to women and children in the restrooms, such as sexual assaults.

Response: The Commission is not aware of any dangers associated with the Guidance. If commenters are worried that transgender individuals using the restrooms of the gender with which they identify constitutes sexual harassment they can rest assured that neither the Commission nor the United States Court of Appeals for the Third Circuit have been able to find any authority to support such claims.¹⁷ Further, no provisions of the PHRA or PFEOA provide a legal defense to allegations of criminal wrong doing. Further, the Commission would direct you to the National Center for Transgender Equality’s webpage where they have compiled numerous articles wherein law enforcement organizations from across the country state that there has been no increase in public safety incidents in municipalities whose nondiscrimination laws apply to the use of public restrooms.¹⁸ Thank you for your comment.

¹⁷ Boyertown, 2018 U.S. App. LEXIS 16323, at *32-33.

¹⁸ *Police Departments Across the Country Agree: There’s been no increase in public safety incidents in cities and states with nondiscrimination laws*, TransEquality.org, <https://transequality.org/police-departments> (last visited July 19, 2018).

- 3. Comment:** Commenters who believe that the Jerry Sandusky case proves that allowing transgender individuals to use the locker room of the gender they identify with will result in children being sexually assaulted.

Response: The Jerry Sandusky case was a criminal matter and at no point did any of the individuals involved purport to be transgender. Thank you for your comment.

- 4. Comment:** Commenters who believe transgender individuals should use the restroom corresponding to their gender assigned at birth until such time those individuals undergo reassignment surgery.

Response: The definition of “transgender” in the Guidance is not dependent on whether the individual has undergone gender reassignment surgery. A transgender individual that files a complaint will need to demonstrate that the alleged discrimination was based on sex, as set forth in the Guidance. Thank you for your comment.

- 5. Comment:** Commenters who believe the Proposed Guidance would create issues for public restrooms generally but do not explain what those issues are.

Response: Thank you for your comment.

F. COMMENTS RELATING TO THE COMMISSION’S AUTHORITY TO ISSUE GUIDANCE

- 1. Comment:** Commenters who believe the job of defining “sex” under the PHRA and PFOA is the responsibility of the legislature therefore the Commission’s interpretations of “sex” in the Proposed Guidance violates the constitutional doctrine of separation of powers.

Response: The Commission disagrees with the assertion that the Guidance creates a separation of powers issue. The Legislature vested the Commission with the power

and the duty to “formulate policies to effectuate the purposes” of the PHRA¹⁹ and PFEOA.²⁰

The Legislature declined to provide a definition for “sex” when they added it as a protected class under the PHRA and PFEOA.²¹ When interpreting these Acts the Commission routinely looks to federal case law interpreting similar anti-discrimination provisions. In 1989 the United States Supreme Court held that “[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²² This same theory was adopted by the Western District Court of Pennsylvania in their application of Title VII to a sexual orientation discrimination complaint.²³ As the District Court explained:

There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality. . . .This discriminatory evil is more than reasonably comparable to the evil identified by the Supreme Court in Price Waterhouse. Indeed, the Court finds discrimination on the basis of sexual

¹⁹ “The Commission shall have the following powers and duties: . . . [t]o formulate policies to effectuate the purposes of this act[.]” 43 P.S. 957(e). The Legislature defined the purpose of the PHRA as:

It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . sex . . . and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights to public accommodation and to secure housing accommodation and commercial property regardless of . . . sex

43 P.S. § 952(b).

²⁰ The “Commission is hereby vested with the following powers and duties – . . . “[t]o formulate policies to carry out the functions of the Commission and to effectuate the purposes and provisions of this act.” 24 P.S. § 5006(5). The Legislature defined the purposes and provisions of the PFEOA as:

- “It is hereby declared to be the public policy of this Commonwealth that all persons shall have equal opportunities for education regardless of their . . . sex” 24 P.S. § 5002(a).
- “Equality of educational opportunities requires that students, otherwise qualified, be admitted to certain educational institutions without regard to . . . sex” 24 P.S. § 5002(b).

²¹ Act of July 9, 1969, P.L. 133.

²² Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

²³ United States EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834 (W.D.Pa. 2016).

orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two. . . . It is, in the view of the undersigned, a distinction without a difference. Forcing an employee to fit into a gendered expectation – whether that expectation involves physical traits, clothing, mannerisms or sexual attraction – constitutes sex stereotyping and, under Price Waterhouse, violates Title VII.²⁴

As stated above and as explained in the Proposed Guidance when posted for comment, issuing this Guidance does not indicate any prejudgment on the part of the Commission regarding any of the myriad of scenarios that could result in complaints filed under the PHRA or PFEOA. This Guidance merely clarifies that the Commission is open to all arguments on both sides of the issue being utilized in the courts today. Any complaints filed as a result of this Guidance being issued will be handled on a case-by-case basis, the same as any other complaint filed with the Commission. Thank you for your comment.

G. COMMENTS RELATED TO THE NECESSITY OF THE GUIDANCE

1. **Comment:** Commenters who believe the Proposed Guidance is unnecessary because only a small percentage of Pennsylvanians identify as LGBTQ.

Response: The Commission believes that the protections found within the PHRA and PFEOA apply to all Pennsylvanians regardless of the number of individuals who comprise any particular class. Thank you for your comment.

2. **Comment:** Commenters who believe the Proposed Guidance is unnecessary because they have not seen any proof that LGBTQ individuals are being discriminated against.

Response: The Commission believes the protections found within the PHRA and PFEOA apply to all Pennsylvanians regardless of the frequency with which alleged discriminatory acts occur. Further, there is ample case law indicating that discrimination on the basis of sexual orientation, transgender identity, gender

²⁴ *Id.* at 841.

transition, gender identity, and gender expression does take place within Pennsylvania and across the country.²⁵ Thank you for your comment.

3. **Comment:** Commenters identifying as members of the LGBTQ+ community as well as family members, friends, and allies of LGBTQ+ individuals who insist the Proposed Guidance is necessary because they have witnessed or fear discrimination on the basis of sexual orientation, gender identity, and gender expression.

Response: Any individual who believes they have experienced discrimination on the basis of sex can file a complaint with the Commission. All complaints filed with the Commission are handled on a case-by-case basis depending on the unique facts each case presents. Thank you for your comment.

4. **Comment:** Commenters who believe the Proposed Guidance is necessary because it provides uniformity across the state, as some but not all municipalities have adopted explicit protections for individuals based on sexual orientation, gender identity, and gender expression.

Response: The Guidance provides uniformity as related to claims of sex discrimination under the PHRA and PFEOA. The Guidance does not impact any remedies available under local ordinances. Thank you for your comment.

5. **Comment:** Commenters who agree with the Commission following the lead of the courts and the EEOC in interpreting “sex” as a protected class.

Response: Thank you for your comment.

6. **Comment:** Commenters who believe discrimination against members of the LGBTQ+ community is a public health issue as the chronic stress of dealing with discrimination leads to a litany of physical and emotional issues.

Response: Thank you for your comment.

7. **Comment:** Commenters who believe explicit anti-discrimination protections for individuals based on sexual orientation, gender identity, and gender expression would be good for the Commonwealth’s economy as it makes Pennsylvania a more attractive state for businesses.

²⁵ *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited July 19, 2018).

Response: The Commission has always firmly believed that ensuring equal opportunity in employment regardless of protected class status is one way to attract new businesses and bright minds to the Commonwealth. As the Legislature found when the created the Commission:

The practice or policy of discrimination against individuals or groups by reason of the [protected class status] is a matter of concern of the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants.²⁶

Thank you for your comment.

H. SUGGESTIONS TO THE COMMISSION REGARDING THE PROPOSED GUIDANCE

1. **Comment:** Commenters who believe the Commission should be defunded and closed.

Response: Thank you for your comment.

2. **Comment:** Commenters who believe the Guidance should contain a definition of what constitutes discrimination based on sex under the PHRA and PFEOA.

²⁶ 43 P.S. § 952(a).

Response: The Commission agrees that this point could be clearer in the Guidance. Please refer to the Final Guidance for a more complete definition of “sex” under the PHRA and PFEOA. Thank you for your comment.

3. **Comment:** Commenters who believe our questionnaires for filing a complaint should be updated to reflect sexual orientation, gender identity and gender expression as protected classes.

Response: The Commission will determine if the questionnaires will need to be updated if a reason to do so becomes clear. Individuals filing a complaint alleging they were discriminated against on the basis of their sexual orientation, transgender identity, gender transition, gender identity, or gender expression should indicate “sex” as the protected class and then further clarify which aspect of the broad definition of “sex” is implicated in the matter. Thank you for your comment.

4. **Comment:** Commenters who believe the Proposed Guidance should be expanded to include all theories of sex discrimination, not just sex stereotyping.

Response: The Commission thanks these commenters for explaining there are a variety of legal theories being recognized by courts across the country that go beyond a simple sex stereotyping consideration when determining whether discrimination because of one’s sexual orientation, transgender identity, gender transition, gender identity or gender expression constitutes sex discrimination. We agree with the observation that the Proposed Guidance was limiting. In order to decide each complaint on a case-by-case basis, the Final Guidance allows the Commission be open to all theories of sex discrimination. Please see the changes in the Final Guidance. Thank you for your comment.

5. **Comment:** Commentator looking for clarification on what the Commission is now requiring of locker rooms in gyms and health clubs.

Response: The Commission cannot provide legal advice but would encourage businesses to look to recent case law on the matter for how to proceed. The Guidance was not intended to serve as a best practices guide but the Commission is open to considering such a document in the future should the need arise. Thank you for your comment.

APPENDIX OF COMMENTS