

Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender and
Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities
Act

Prepared by the Pennsylvania Human Relations Commission

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Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender and Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities Act

Introduction-The Pennsylvania Human Relations Commission (hereinafter PHRC or Commission), establishes the following Guidance in recognition of the fundamental guarantee found in the Pennsylvania Fair Educational Opportunities Act (hereinafter PFEOA) that:

[A]ll persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.¹

This guidance shall be used by the PHRC in interpreting the PFEOA and for those responsible for providing education within the Commission's jurisdiction.

Those responsible for providing opportunities include, but are not limited to, those defined in Section 3 of the PFEOA². The Commission, in proposing this Guidance, begins with the recognition that it is the expressed public policy of the Commonwealth that:

all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability.³

Parameters and Purpose of Policy Guidance

The PFEOA grants the PHRC the authority to formulate policies to effectuate the purposes of the Act.⁴ In proposing this Guidance, the Commission has set forth factors that it considers to be important in determining whether, in any given case, a party has engaged in sex discrimination against an individual who is lesbian, gay, bisexual, transgender, or queer/questioning (LGBTQ). In so doing, the Commission reiterates its longstanding position that this Guidance is not intended to impose hard and fast rules that must be absolutely applied without regard to the specific facts involved. The Guidance is intended to provide both guidance and assistance to those who come under the jurisdiction of the Commission as it continues its effort to ensure that the right to equal educational opportunities, as set forth in the PFEOA, is achieved.

¹ Section 2 of the PFEOA is entitled "Findings and Declaration of Policy"; See 24 P.S. §5002.

² Section 3 of the PFEOA includes definitions for educational institution, and religious or denominational institution; See 24 P.S. §5003.

³ Section 2(a) of the PFEOA, 24 P.S. §5002(a) the declaration of policy further provides that "Equality of educational opportunities requires that students, otherwise qualified, be admitted to certain educational institutions without regard to race, religion, color, ancestry, national origin, sex, handicap or disability." *Id* at 5002(b).

⁴ Section 6(5) of the PFEOA; See 24 P.S. §5006 (5).

Nothing in this guidance shall affect statutory or regulatory requirements. The Guidance is neither an adjudication nor a regulation. There is no intent on the part of the PHRC to give the Guidance that type of binding force or effect. This guidance indicates that manner in which the Commission intends to exercise its administrative discretion, unless it is convinced otherwise during the course of a specific proceeding. The Commission, as in the past, remains committed to ensuring that its adjudicative determinations are made on a case by case basis after consideration of all evidence of record in the given matter.

To this end, the Guidance may be deviated from when the PHRC believes that any statute or regulation requires it, or that it is otherwise appropriate to do so. The Guidance may not be cited as binding legal authority for any PHRC ruling, adjudication or other legally binding action. The legal rationales set forth in a policy may be cited as the basis for PHRC action to the extent that the Commission believes the rationale is valid in the context of the specific proceeding.

The Policy Guidance

Regarding **discrimination in education**, the PFEOA states it shall be a discriminatory practice for an educational institution:

- (1) To exclude or limit, or otherwise discriminate, because of race, religion, color, ancestry, national origin, sex, handicap or disability, against any student or students seeking admission as students to such institutions: Provided, That it shall not be unfair educational practice for any educational institution to use criteria other than race, religion, color, ancestry, national origin, sex, handicap or disability in the admission of students.
- (2) To make any written or oral inquiry prior to admission concerning or designed to elicit information as to the race, religion, color, ancestry, national origin, sex, handicap or disability of a student seeking admission to such institution.
- (3) To expel, suspend, punish, deny facilities or otherwise discriminate against any student because of race, religion, color, ancestry, national origin, sex, handicap or disability.⁵

In another section, the PFEOA contains prohibitions against discriminatory practices by religious or denominational educational institutions.⁶

Currently, the PFEOA does not set forth specific protections against discrimination for people who are Lesbian Gay, Bisexual, Transgender or Queer/Questioning (LGBTQ). However, the PFEOA, as set forth above, does specifically prohibit discrimination based on sex.

Federal courts and federal administrative agencies have held that discrimination claims filed by LGBTQ individuals may be taken, investigated, and analyzed as sex discrimination claims.

The gist of these claims is that LGBTQ individuals do not comply with sexual stereotypes and that adverse action(s) against an LGBTQ individual due to that person's failure to comply with sexual stereotypes amounts to discrimination based on sex.

Accordingly, it is the position of the Pennsylvania Human Relations Commission that it will take and investigate sex stereotyping claims filed by LGBTQ individuals.

Note: The PHRC has not yet had an LGBTQ discrimination case that progressed to a public hearing and is decided by PHRC's commissioners. Also, currently there are no Pennsylvania appellate state court decisions applying the sex stereotyping analysis to a discrimination complaint under the PFEOA filed by an LGBTQ individual.

Also note: As it has in the past, the PHRC continues to support legislation seeking to expand the PFEOA to specifically cover claims filed by LGBTQ individuals.⁷

⁵ Section 4 of the PFEOA; See 24 P.S. §5004

⁶ Section 4 (a.1) of the PFEOA; See 24 P.S. §5004 (a.1)

⁷ Most recently, on June 27, 2016, the Commission voted to support then Senate Bill 1307, which amended the PHRA to specifically cover claims by LGBTQ individuals.

