



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 28, 2022

RE: OPPOSITION TO SB 1278 P.N. 1739 (MARTIN)

Bill summary: [SB 1278](#) (PN 1739) would amend the [Public School Code of 1949](#) to add a new article, ARTICLE XIV-C—Student Well-Being, to provide for “parental notifications regarding a student’s mental, emotional or physical health or well-being.”

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 1278.

Briefly:

- SB 1278 falsely equates discussions of sexual orientation and gender identity with sex education.
- SB 1278 falsely asserts that sexual orientation and gender identity are tantamount to ideas, and erroneously requires “neutrality” on the “idea” of certain people merely existing.
- SB 1278 then applies that standard of “neutrality” to undefined “classroom instruction,” prohibiting any acknowledgement of gay or trans people in grades K-5 and with vague caveats in grades 6-12, which actually makes the bill more restrictive than Florida’s [Don’t Say Gay](#) bill, which was limited to K-3 instruction.
- Finally, the private right of action provided under SB 1278 will chill speech and ensure that the most censorious views on gender and sexuality are imposed on everyone else.

SB 1278 falsely equates discussions of sexual orientation and gender identity with sex education.

In their [co-sponsorship memo](#), the primary sponsors of SB 1278 assert that “*Pennsylvania’s existing academic standards do not require sexual education curriculum in pre-kindergarten through fifth grade. Therefore, there is no academic justification for a teacher to initiate conversations or classroom instruction on sexual orientation and gender identity with these young children. If these topics are important to a family, it should be up to the family to determine how and when their child is introduced to it.*”¹

Gay and transgender students and LGBTQ families exist—even in elementary school. Acknowledging their existence is not, of course, the same as sex education. This is the equivalent of saying that if Black history isn’t part of the K-5 curriculum, then students and teachers should be prohibited from acknowledging that Black people, biracial people, or mixed racial families exist.

Furthermore, the bill (and presumably the bill sponsors) fail to imagine how much content this will apply to, since discussions about sexual orientation and gender identity will have to include **heterosexuality and cisgender identity**. The only reason we are meant to presume “sexual orientation and gender identity” are intended to apply to trans or LGBTQ people is because the bill mentions “religious speech” and “religious liberty”—a **not-so-veiled way of imposing one religious belief/objection on an entire system of public education and its curriculum.**

¹ Sen. Scott Martin and Sen. Ryan Aument, Co-sponsorship memorandum: [Empowering Families in Education](#), June 8, 2022.

SB 1278 falsely asserts that sexual orientation and gender identity are tantamount to ideas, and erroneously requires “neutrality” on the “idea” of certain people merely existing.

Most troubling is the bill’s dangerous and misguided attempt to use a constitutional framework of “neutrality”—one that would presumably apply to ideas or beliefs (including religious beliefs)—and apply that “neutrality” to ... *people*. From the bill:

(a) Neutrality.--School personnel must remain neutral and use existing, familiar and well-defined constitutional framework applicable to religious beliefs in public schools for matters relating to sexual orientation and gender identity to prevent government endorsement of beliefs about sexual orientation and gender identity in public schools. First amendment speech protections for students and public employees applicable to religious speech shall be applied identically to protections for speech regarding sexual orientation and gender identity.²

What exactly does it mean to be “neutral” on gay people? Requiring schools, teachers, or staff adopt a position of “neutrality” on sexual orientation and gender identity does not change the fact that gay, trans, and non-binary people exist. **Neutrality cannot wish the gay away.**

Furthermore, SB 1278 would “cancel” gender-non-conforming people, and any discussion of them, because some people have a religious objection. SB 1278 attempts to establish that “first amendment speech protections for students and public employees applicable to religious speech shall be applied identically to protections for speech regarding sexual orientation and gender identity.” This would, in fact, violate [Epperson v. Arkansas](#), a unanimous 1968 U.S. Supreme Court decision that held that government practices cannot be conformed to fit a particular religious view. Specifically, it struck down a state law that attempted to prohibit the teaching of material objectionable to a particular religious sect because such a law amounted to an unconstitutional establishment of religion.³

SB 1278 would apply that standard of “neutrality” to undefined “classroom instruction.”

Tellingly, SB 1278 fails to define a critical term—“classroom instruction.” Without a definition, “classroom instruction” will be interpreted to mean everything that occurs in the classroom. So, under SB 1278, in grades K-5 there can be **no discussion** of sexual orientation or gender identity issues. Does this mean that mentioning that a student has 2 moms or 2 dads prohibited? What about mentioning a student’s straight, cisgendered parents? Are teachers prohibited from mentioning their spouse (whether same or opposite sex)?

For grades 6-12, the bill language is similarly vague. Classroom instruction on sexual orientation or gender identity may not occur “in a manner that is not age-appropriate or developmentally appropriate in accordance with State standards.”⁴ What does that mean? Assuredly no teacher will know for certain what that means, so they will self-censor and essentially prohibit any such discussion.

Exposing students to unwelcome ideas does not violate their rights.

Again, in their [co-sponsorship memo](#), the primary sponsors of SB 1278 argue that “*parents have a fundamental right to decide the educational, moral, ideological, and religious upbringing of their children without unreasonable government interference in the classroom undermining that right.*”⁵

While it is certainly true that parents have a right to direct their children's upbringing, they **do not have a right to censor their children’s school curriculum to conform to their particular beliefs**. Do schools expose students to new ideas and information? Of course—*that is what schools do*. Parents have a right to teach their

² [PA Senate Bill 1278 PN 1739](#) (2022) page 3, at line 13.

³ [Epperson v. Arkansas](#) 393 US 97 (1968).

⁴ [PA Senate Bill 1278 PN 1739](#) (2022) page 3, at line 28.

⁵ Sen. Scott Martin and Sen. Ryan Aument, Co-sponsorship memorandum: [Empowering Families in Education](#), June 8, 2022.

children, however they deem appropriate, in their respective homes. But the mere possibility that their children may be exposed to unwelcome or objectionable ideas does not constitute a violation of their rights. And attempting to force public schools to conform to parochial standards is unworkable, unrealistic, and unconstitutional.

The private right of action provided under SB 1278 will chill speech and ensure that the most censorious views on gender and sexuality are imposed on everyone else.

SB 1278 provides a private right of action for injunctive relief, damages, and attorney fees and costs for violation of the “classroom instruction” provisions or the “neutrality” provision. This provision will expose school districts to liability whenever any parent thinks something related to “gender identity” or “sexual orientation” is mentioned in school.

Allowing students and parents to sue teachers for what they say, or allow to be said, in the classroom will create an environment laced with landmines that makes teaching nearly impossible for all but the most self-censoring teachers. The provisions allowing a private right of action, and shielding parents’ religious beliefs, effectively establish a framework where the most restrictive religious views on gender and sexuality can be forced on everyone else.

SB 1278 will create dangerous confusion about what teachers, staff and students are allowed to say and study in school. It will limit teachers’ ability to give students the education and support they need, and it will foster, at best, an information vacuum or worse, a hostile environment that further endangers already-vulnerable young people. And most brazenly, SB 1278 proposes a framework that operates like religious instruction attempting to masquerade as free speech, a pernicious, not to mention unconstitutional, precedent to set.⁶

For these reasons, we urge you to oppose Senate Bill 1278.

⁶ The U.S. Supreme Court and many federal courts, including in Pennsylvania, have consistently recognized and affirmed that discrimination on the basis of sexual orientation, transgender status, gender identity, or gender expression is unlawful discrimination “on the basis of sex” and is prohibited by law. See e.g. *Bostock v. Clayton County*, 590 U.S. ___, 140 S.Ct. 1731 (2020)(dismissal of an employee for being gay or transgender is sex-based discrimination under Title VII); *Adams by and through Kasper v. School Board of St. Johns County*, No. 18-13592, 2021 WL 2944396 (11th Cir. Jul. 14, 2021)(bathroom policy which prevented transgender male student from using boys bathroom violated Equal Protection Clause); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018)(allowing trans students to use facilities does not violate cisgender students right to privacy); *Evancho v. Pine Richland Sch. Dist.*, 237 F.Supp.3d 267 (WD Pa 2017)(school board resolution limiting trans students’ access to bathrooms held likely to succeed on Equal Protection claim); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F.Supp.321 (MD Pa 2017)(trans student prohibited from using girls bathroom stated claim under Title IX and Equal Protection).