PROPOSED RULEMAKING

HUMAN RELATIONS COMMISSION

[16 PA. CODE CH. 41]

Protected Classes Under the PHRA and PFEOA

Statutory Authority

The Human Relations Commission (Commission) proposes to amend Chapter 41 (relating to preliminary provisions) by creating new Subchapter D (relating to protected classes), as set forth in Annex A. The Commission is publishing these amendments under the authority of the Pennsylvania Human Relations Act (PHRA) (43 P.S. §§ 951—963), as amended by the act of June 25, 1997 (P.L. 326, No. 34) and the Pennsylvania Fair Educational Opportunities Act (PFEOA) (24 P.S. §§ 5001—5010), as amended by the act of December 22, 1992 (P.L. 1688, No. 187).

Description of the Amendments to this Proposed Rulemaking

The Commission proposes to create Subchapter D, to provide definitions for terms used in the PHRA and the PFEOA. Specifically, this 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 proposes that the definition for the term "sex" be codified in Subchapter D, along with the terms "race" and "religious creed."

Proposed Subchapter D contains seven sections. Proposed § 41.201 (relating to purpose) provides the purpose for this proposed rulemaking 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 this proposed rulemaking. Proposed § 41.202 (relating to construction) provides that this proposed rulemaking should be liberally construed for the accomplishment of the purposes of the PHRA and the PFEOA. Section 41.202 also provides that this 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 this proposed rulemaking is meant to provide guidance regarding the interpretation of the PHRA and the PFEOA, the guidance must comply with section 12(a) of the PHRA (43 P.S. § 962(a)) 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." Thus, § 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 the reliance would result in a narrow interpretation of the PHRA or the PFEOA.

Proposed § 41.203 (relating to enforcement) explains that this proposed rulemaking will be enforced in accordance with the PHRA, the PFEOA and the existing regulations of the Commission. Proposed § 41.204 (relating to definitions) provides definitions for terms used in Subchapter D. Proposed § 41.205 (relating to religious creed discrimination) provides the manner in which the term "religious creed," as used in the PHRA and the PFEOA, should be interpreted, as explained more fully as follows. Proposed § 41.206 (relating to sex discrimination) provides the manner in which the term "sex," as used in the PHRA and the PFEOA, should be interpreted, as explained more fully as follows. Proposed § 41.207 (relating to race discrimination) provides the manner in which the term "race," as used in the PHRA and the PFEOA, should be interpreted, as explained more fully as follows.

Purpose and Explanation of this Proposed Rulemaking

Section 7(d) of the PHRA (43 P.S. § 957(d)) and section 6(6) of the PFEOA (24 P.S. § 5006(6)) 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. Section 9(g) of the PHRA (43 P.S. § 959(g)) and section 7 of the PFEOA (24 P.S. § 5007) also require the Commission to "establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder." 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 in section 7(d) of the PHRA and section 6(6) of the PFEOA, to explain the manner in which the terms "religious creed," "sex" and "race" should be interpreted.

This 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 (Title VII) (42 U.S.C.A. §§ 2000e—2000e-17), 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.A. § 2000e-2(a)(1).

In interpreting the PHRA, Commonwealth 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. Cmwlth. 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 this Commonwealth 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, Commonwealth 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. Cmwlth. 2006) quoting *City of Pittsburgh Commission on Human Relations v. DeFelice*, 782 A.2d 586, 592, n.8 (Pa. Cmwlth. 2001); see also *General Electric Corp. v. PHRC*, 469 Pa. 292, 303, 365 A.2d 649, 654-655 (Pa. 1976).

Thus, in crafting this proposed rulemaking, the Commission turned to Title VII for guidance regarding the definition of "religious creed," as Commonwealth courts often do when interpreting the PHRA and the PFEOA. Section 701(j) of Title VII (42 U.S.C.A. § 2000e(j)) explains that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief. . . ." The regulations adopted by the Equal Employment Opportunity Commission (EEOC) in 29 CFR 1605.1 (relating to "religious" nature of a practice or belief) 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." The EEOC regulations in 29 CFR 1605.1 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." The EEOC regulations in 29 CFR 1605.1 also provide that "the phrase 'religious practice' as used in these Guidelines includes both religious observances and practices." As such, by using the language regarding religious discrimination contained in Title VII and its implementing regulations, this 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. This 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 this 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. This proposed rulemaking does not address those concerns because the Religious Freedom Protection Act (RFPA) (71 P.S. §§ 2401—2408), provides the mechanism for asserting these 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 RFPA by following the procedures outlined in the RFPA.

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, section 703(a)(1) of Title VII (42 U.S.C.A. § 2000e-2(a)(1)) declares that it is "an unlawful employment practice for an employer to. . .otherwise discriminate against any individual. . .because of such individual's. . .sex." 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 (Title IX) (20 U.S.C.A. §§ 1681—1688), 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," this 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. This 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 in §§ 41.101—41.104 (relating to pregnancy, childbirth and childrearing). This proposed rulemaking is also consistent with the manner in which the term "sex" has been defined by Title VII.

This proposed rulemaking explains that the term "sex" includes pregnancy, childbirth and breastfeeding. This portion of this proposed rulemaking is consistent with the Title VII definition for sex. Section 701(k) of 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." This portion of this proposed rulemaking is also consistent with the manner in which the term "sex" has been interpreted by Commonwealth courts. Commonwealth 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. Cmwlth. 1976). Additionally, this definition is consistent with the protections provided by the Commission's regulations regarding pregnancy, childbirth and childrearing, found in §§ 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.

This 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 this 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 United States 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 these 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 (4th 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 this Commonwealth and outside of this Commonwealth 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 this Commonwealth 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. This 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, section 703(a)(1) of 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." Although Commonwealth 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 this proposed rulemaking, the Commission turned to Title VII for guidance regarding the definition of "race," as Commonwealth courts often do when interpreting the PHRA and the PFEOA. This proposed rulemaking explains that the term "race" includes ancestry, national origin and ethnic characteristics. This 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.A § 1981 regarding equal rights under the law, 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 (2nd Cir. 2016), the Court explained that the term "race" includes ethnicity for purposes of 42 U.S.C.A. § 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 (11th Cir. 1986). Thus, this 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, this 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) (relating to information on impact) explaining Hispanic includes persons of Mexican, Puerto Rican, Central or South American, or other Spanish origin or culture. This 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, this 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 California, Connecticut, New Jersey and New York. 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 (11th 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 PFEOA, the Commission defines "race" as including traits historically associated with race, including hair texture and protective hairstyles. This proposed rulemaking provides the citizens of this Commonwealth 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 proposed rulemaking will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Public Comment

Within 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 this proposed rulemaking to the Commission at 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.

M. JOEL BOLSTEIN,
Chairperson

Fiscal Note: 52-13. No fiscal impact; (8) recommends adoption.

(*Editor's Note*: The following subchapter is proposed to be added and is printed in regular type to enhance readability.)

Annex A

TITLE 16. COMMUNITY AFFAIRS

PART II. GOVERNOR'S OFFICE

Subpart A. HUMAN RELATIONS COMMISSION

CHAPTER 41. PRELIMINARY PROVISIONS

Subchapter D. PROTECTED CLASSES

Sec.
41.201. Purpose.
41.202. Construction.
41.203. Enforcement.
41.204. Definitions.
41.205. Religious creed discrimination.
41.206. Sex discrimination.
41.207. Race discrimination.

§ 41.201. Purpose.

This subpart ensures that unlawful discriminatory practices proscribed by the PHRA and unfair educational practices proscribed by the PFEOA are interpreted and applied consistently. This subpart also ensures that complaints filed with the PHRC 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 PHRA and the PFEOA.

(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 PHRA or the PFEOA.

§ 41.203. Enforcement.

This subpart shall be subject to and enforced in accordance with the PHRA, the PFEOA, 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:

Complainant—A person, including the PHRC or the Attorney General, who files a complaint with the PHRC under the PHRA or the PFEOA.

Complaint—A complaint filed with the PHRC under the PHRA or the PFEOA.

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.

Person—As defined in section 4(a) of the PHRA (43 P.S. § 954(a)).

Respondent—The person against whom a complaint was filed with the PHRC under 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 these beliefs or the fact that the religious group to which the individual professes to belong may not accept this 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. The following apply:

(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. The following apply:

(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 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. The following apply:

(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. The following apply:

(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 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 PFEOA, 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.

[Pa.B. Doc. No. 22-519. Filed for public inspection April 8, 2022, 9:00 a.m.]