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 CIRCUIT COURT
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE FAMILY FOUNDATION,)
FOUNDING FREEDOMS LAW CENTER, and)
SARAH VIA, Individually and as next friend of)
her children John Roe and Jane Roe)

Appellants,)

v.)

VIRGINIA DEPARTMENT OF EDUCATION)

Serve: Barbara Johnson)
James Monroe Building)
101 N 14th St.)
Richmond, VA 23219)

And)

ATIF QARNI, in His Official Capacity as)
Virginia Secretary of Education)

Serve: Atif Qarni)
Secretary of Education)
Patrick Henry Building)
1111 East Broad Street)
4th Floor)
Richmond, Virginia 23219)

Appellees.)

Case No.: CL21-1399-3

**PETITION FOR APPEAL FROM STATE DEPARTMENT OF EDUCATION
 GUIDANCE DOCUMENT**

COME NOW the Appellants The Family Foundation (hereafter "TFF"), Founding
 Freedoms Law Center (hereafter "FFLC"), and Sarah Via, individually and as next friend of her
 children John Roe and Jane Roe, by counsel, and for their Petition for Appeal pursuant to the
 Virginia Administrative Process Act ("VAPA") and Part 2A of the Rules of the Supreme Court
 of Virginia, state:

I. INTRODUCTION

Nearly one hundred years ago, the United States Supreme Court held that parents have the right “to establish a home and bring up children” and “to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). Two years later, the Court again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). The Court in *Pierce* emphasized that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Id.* at 535. Twenty years later the Court returned again to this subject, reaffirming again that parents have a constitutional right to direct the upbringing and education of their children. *Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court in *Prince* added, “It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* at 166. More recently, the plurality of the Court in *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), after reciting these cases stated, “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” This *fundamental right* is assured not only by Fourteenth Amendment, but also by a Virginia statute, which states, “A parent has a fundamental right to make decisions concerning the upbringing, *education*, and care of the parent’s child.” (Emphasis added). Va. Code § 1-240.1. According to the Supreme Court of Virginia, “Any statute that seeks to interfere with a parent's fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest.” *L.F. v. Breit*, 285 Va. 163, 182 (2013), *citing McCabe v.*

Commonwealth, 274 Va. 558, 563 (2007). To satisfy the compelling state interest test, the state must prove that its interest is “paramount,” “of the highest order,” and “vital,” and that its selected means of addressing this paramount interest is the least restrictive on the parents’ fundamental rights. See *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020).

Given the fact that fundamental rights of parents are at stake, careful consideration of the subject matter over sufficient time was necessary to ensure that constitutional rights were protected. Such carefulness was not possible given the short time given the Virginia Department of Education (“Department”) by the General Assembly to create model policies that were “evidence-based” and “best practices,” and then comply with the provisions of VAPA, which required notice of and public comment on the policies, and then specifically addressing the legal objections raised in the comments. The Department short-circuited this process, and thereby violated VAPA, by failing to address with particularity the legal objections raised to the Model Policies. These unaddressed legal objections leave the Commonwealth’s school boards in a quandary, since they were directed by the General Assembly to adopt school policies that are at least as comprehensive as found in the Model Policies by the beginning of the 2021-22 school year. In short, legal issues that may have been fixed during the required VAPA process are now forced upon school boards, which certainly will now face litigation on the same issues that may have been solved if the Department had followed VAPA. Because of these failures, this Court must set aside the effective date of the Model Policies and remand this matter back to the Department for further proceedings.

After identifying the parties and noting jurisdiction and venue, this Petition will recite the applicable facts and then will present the following Assignments of Error:

1. The Department failed to respond to comments regarding parental rights based on the Due Process Clause of the federal Constitution.
2. The Department failed to respond to comments regarding parental rights based on Va. Code § 1- 240.1.
3. The Department failed to respond to comments that the Model Policies violate students' and teachers' right to free speech.
4. The Department failed to respond to comments that the Model Policies violate students' and teachers' free exercise of religion.
5. The Department failed to respond to comments that the Model Policies violate the equal protection rights for non-transgender students.
6. The Department failed to respond to comments that the Model Policies violate the due process rights of students and teachers because the terms used are vague and the Model Policies violate family and bodily privacy.
7. The Department failed to respond to comments that the Model Policies violate various federal laws.
8. The Department in promulgating the Model Policies violated the authorization law (Va. Code § 22.1-23.3) by exceeding its scope, failing to provide a safe and supportive learning environment free from discrimination for *all* students, and failing to consider evidence other than that supporting its apparent pre-ordained conclusion.

II. PARTIES

1. TFF is a Virginia non-partisan, non-profit organization committed to promoting strong family values, including parental rights, and defending the sanctity of human life in

Virginia through its citizen advocacy and education. TFF's principal place of business is in the City of Richmond, and it owns and operates FFLC.

2. FFLC is a public interest law firm located in Richmond that seeks to protect the constitutional rights of Virginians and to serve as a check against overreaching governments.

3. Sarah Via is an adult who resides in Hanover County. Ms. Via has a 10 year old daughter in the 5th grade attending public school, who will soon be attending middle school, where she will have to undress in the school locker rooms. She also has a 15 year old son in the 10th grade attending public school, where he must use the bathroom facilities and the locker room facilities to dress and undress. Ms. Via is personally aware of several students who currently identify as transgender in both the public middle and high schools in her county. Appellant Via and her family are devout adherents and members of The Church of Jesus Christ of Latter-day Saints. She believes that God created men and women perfect (Genesis 1) with separate anatomy and DNA structure, and that gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose. Ms. Via and her family believe that sin entered the world as a result of human disobedience to God (Genesis 3) and, as the result of sin, there is much confusion in the world but there is spiritual redemption through the sacrifice of Jesus Christ. She believes that the Bible gives parents the responsibility of training and educating children (Deut. 6:7; Prov. 22:6), and that children must obey their parents (Ephesians 6:1-4). As a Christian, she also believes her children must act and dress modestly (1 Timothy 2:9-10).

4. Appellee Department of Education ("Department") is a statutorily created Virginia executive branch department with its principal office in Richmond. The Department was tasked by the General Assembly with creating the Model Policies at issue in this case.

5. Appellee Atif Qarni is the Secretary of Education (“Secretary”), and therefore serves as the statutory executive officer of the Department. His office is in Richmond, where he has overseen the formation of the challenged Model Policies.

III. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this appeal pursuant to Article 5 of the VAPA, in that each of the Appellants remains aggrieved after the effective date of the final guidance document (Va. Code § 2.2-4002.1), and each of the Appellants is affected by and claiming the unlawfulness of the Model Policies (Va. Code § 2.2-4026).

7. This Court also has subject matter jurisdiction in that the Model Policies violate the constitutional and statutory rights (including, but not limited to, Va. Code § 57.2.02(D)) of the Appellants, including Ms. Via as a parent of children in public schools and her children, who attend public schools that will be subject to the Model Policies.

8. This Court has personal jurisdiction over Appellees pursuant to Va. Code § 2.2-4026 in that each is an "agency or its officers or agents" as defined by the applicable statutory provisions.

9. Venue is temporarily proper in this Court pursuant to Va. Code §§ 2.2-4003 and 8.01-261(1)(a) in that the principal offices of Appellants TFF and FFLC are in the City of Richmond, as are the principal offices of the Appellees. This action, however, is subject to transfer because more than one appeal has been filed as to the Department’s Model Policies. Because of these multiple filings, Supreme Court Rule 2A:3 states that the appeals should be transferred to the court named in the first notice of appeal to be filed. Upon information and belief, the court named in the first filed notice of appeal was the City of Lynchburg.

10. Appellants filed the required VAPA Notice of Appeal with the Department and Secretary on March 5, 2021 at 12:46 (prior to the Model Policies' March 6 effective date) (see **Exhibit 1**) and again on March 9, 2021 at 12:46 P.M (see **Exhibit 2**).

IV. STATEMENT OF FACTS

Applicable VAPA Provisions

11. At all times material hereto, Va. Code § 2.2-4101 defined “a ‘guidance document’ [as] any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations.”

12. At all times material hereto, Va. Code § 2.2-4002.1 provided in relevant part:

B. The agency that develops a guidance document shall certify that the document conforms to the definition of a guidance document in § 2.2-4101. The guidance document shall be subject to a 30-day public comment period, to include public comment through the Virginia Regulatory Town Hall website, after publication in the Virginia Register of Regulations and prior to its effective date. The agency shall provide notice of the opportunity for public comment to interested parties as identified under § 2.2-4007.02 prior to the start of the 30-day public comment period.

C. If a written comment is received during a public comment period asserting that the guidance document is contrary to state law or regulation, or that the document should not be exempted from the provisions of this chapter, the effective date of the guidance document by the agency shall be delayed for an additional 30-day period. *During this additional period, the agency shall respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter. Any person who remains aggrieved after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ 2.2-4025 et seq.) (emphasis added).*

13. Va. Code § 2.2-4002.1(C) specifically requires that, when legal objections are made to a proposed Guidance Document, “the effective date of the guidance document by the agency shall be delayed for an additional 30-day period. During this additional period, the agency **shall respond to any such comments** in writing by certified mail **to the commenter** or by **posting** the response electronically....” (Emphasis added.) Directly after that sentence, subsection C states: “Any person **who remains aggrieved** after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ 2.2-4025 et seq.).” (Emphasis added.)

14. The context of Va. Code § 2.2-4002.1(C) indicates that the Department is required to respond, in a particularized manner, to those commenters who have claimed in writing the guidance document violates the law (i.e. “any such comments”, where “any” acknowledges the mere possibility, and “such comments” refers back to those kind specifically being addressed). This interpretation is supported by the subsequent sentence providing a remedy for anyone “who remains aggrieved” after the effective date. The Department’s failure to address the Model Policies’ legal insufficiencies noted by Appellants in their comments, and to communicate its response, violates Va. Code § 2.2-4002.1(C) and leaves Appellants aggrieved.

15. The Department further failed to respond to Appellants’ comments according to the response modes directed in § 2.2-4002.1(C). The options given the Department are via certified mail to the commenter or by “**posting** the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter.” (Emphasis added.) Every time the VAPA chapter mentions “posting,” it *always* refers to a public posting, either directly on the Town Hall website, the Virginia Register of Regulations, or the Department’s public website. The generic identical messages sent to Appellants’ private email

inboxed mere hours before the Model Policies took final effect do not meet this statutory requirement.

16. The Department's failure to comply with the mandatory duty set forth in Va. Code § 2.2-4002.1 is not mere harmless error. The Department's compliance with this duty could lead to a dialogue either to clarify or resolve the perceived problems, or it could persuade commenters that the guidance document does not in fact violate any law or constitutional rights, thus discouraging commenters from going to the significant effort and expense of obtaining direct judicial review authorized by Va. Code § 2.2-4002.1.

Development and Publication of the Model Policies

17. In 2020, the General Assembly passed House Bill 145 and Senate Bill 161, which created Va. Code § 22.1-23.3 directing the Department of Education to “develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to” eight enumerated categories. The bills further directed the Department to “develop and make available to each school board model policies pursuant to subsection A of § 22.1-23.3 ...no later than December 31, 2020.” Finally, the bills required each school board in Virginia to “adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education pursuant to subsection A” no later than the beginning of the 2021–2022 school year. See Model Policies for the Treatment of Transgender Students in Virginia's Public Schools (“Model_Policies” (Exh. 3) at 5).

18. The Model Policies were developed and then published by the Department in the Virginia Register of Regulations on January 4, 2021 (37 Va. Reg. Regs. 1,003-64 (January 4, 2021)), followed by a 30-day public comment period that ended on February 3, 2021, with an initial planned effective date of February 4, 2021. (See <https://www.townhall.virginia.gov/l/GDocForum.cfm?GDocForumID=452>). Upon information and belief, this action by the Department was pursuant to Va. Code § 2.2-4002.1(B) (par. 12 *supra*).

19. During the 30-day public comment period, 9084 individuals and groups submitted comments on the Model Policies on the Virginia Town Hall website. (See <https://www.townhall.virginia.gov/l/Comments.cfm?GdocForumID=452>) Very close to two-thirds of those comments expressed criticism or opposition to the Model Policies.

20. Appellant TFF submitted comments on the Town Hall website on February 2, 2021 at 12:10 P.M., entitled “Model ‘Transgender’ Policies Threaten Student Safety, Parental Authority and Freedom of Speech,” citing numerous ways in which the draft Model Policies violated the rights of students, teachers, and parents. (See **Exh. 4**)

21. Appellant FFLC submitted comments on the Town Hall website on February 3, 2021 at 11:22 P.M., entitled “Legal Flaws in the Model Policies,” citing numerous legal violations inherent in the Model Policies, including several constitutional violations, as well as violations of FERPA and various state statutes. (See **Exh. 5**)

22. Appellant Sarah Via submitted comments on the Town Hall website on February 2, 2021 at 11:39 A.M., entitled “Strongly Oppose bc Policy is extremely flawed.” (See **Exh. 6**)

23. After Appellants and others submitted comments asserting the Model Policies contained numerous provisions contrary to law, the Department, on information and belief

pursuant to Va. Code § 2.2-4002.1(C), delayed the effective date of the guidance document for an additional 30 days.

24. On March 4, 2021, the Department on information and belief responded to all 9084 comments (including TFF, FFLC, and Sarah Via) by email (all Appellants between 4:00 P.M. and 5:00 P.M.) with the following identical message:

Thank you again for your participation in the Virginia Regulatory Town Hall Comment Forum. We appreciate the feedback you provided in response to the Model Policies for the Treatment of Transgender Students in Virginia's Public Schools. Due to the volume of comments received during the 30-day public comment period from January 4, 2021 to February 4, 2021, the implementation date of this guidance document was delayed 30 days to allow Virginia Department of Education (VDOE) staff to thoroughly review and consider comments for any necessary changes. Based on public comment, changes have been made to streamline language or clarify existing recommendations. This document was developed to assist local school boards in creating policies regarding the fair treatment and privacy of transgender students in an effort to promote a positive school climate where all students feel safe and supported. The final version has been uploaded and will be disseminated to local school divisions in the coming days. The effective date of this document is March 6, 2021. Again, the VDOE appreciates your participation in the public comment process.

25. No particularized response was provided to TFF, FFLC, or Sarah Via or otherwise posted by the Department regarding any claims that the guidance document is contrary to law.

26. The Department's email attached the final Model Policies dated March 4, 2021 (see **Exh. 7**). None of the objections or concerns raised by Appellants in their comments were addressed by any of the Department's changes to the Model Policies (see **Exh. 8**, which is the red-lined version showing the changes between the original draft Model Policies and the final draft Model Policies issued by the Department).

V. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR #1 – The Department Failed to Respond to Comments Regarding Parental Rights Based on the Due Process Clause of the Federal Constitution.

27. Appellants adopt and incorporate by reference their allegations in paragraphs 1-26 as their allegations in this paragraph 27.

28. At all times material hereto, the parents of children in Virginia had a fundamental right, as guaranteed by the Due Process Clause of the Fourteenth Amendment, to control the upbringing and education of their children, including those children attending public schools.

29. Although this fundamental right is not absolute when children attend Virginia public schools (parents, for instance, cannot dictate which math book the teacher must use), parents do not relinquish their fundamental right to educate and bring up their child when the child enters the door of a public school.

30. One of the areas most needed for parental instruction and control is a child's sexuality. The sensitivity of this area was recognized by the General Assembly in Virginia Code § 22.1-207.2, which requires schools to distribute to parents a summary of the family life curriculum (which, per Va. Code § 22.1-207.1 includes human sexuality, human reproduction, dating violence and sexually transmitted diseases), permits parents to review this curriculum, requires the school to give notice that parents "have the right to excuse their child from all or part of family life education instruction," and encourages parents to provide "guidance and involvement in the instruction of the students." This statute is, quite frankly, an excellent model for VDOE to follow with respect to transgender students, involving parents in the discussion and decision-making.

31. The Model Policies on page 11 state that "regardless of the circumstances, the school should support the student's need for privacy and not disclose a student's gender identity to other students or parents." Similarly, on page 12 the Model Policies direct school personnel not to disclose a student's transgender status to parents.

32. The Model Policies thereby violate the fundamental rights of parents by circumventing parental involvement in a pivotal decision affecting their minor children's care, health, education, and future. The Model Policies enable minor children, of any age, to “transition” socially to a different gender identity at school without parental notice or consent, and require school personnel to enable this transition. The Model Policies also prohibit school personnel from communicating with parents about this potentially life-altering and dangerous choice if the parents have not agreed with the child’s wishes. Finally, allowing a minor, deemed by state laws incapable of making legally binding decisions because of a lack of capacity, to make a decision concerning gender reflected on school records is again a violation of constitutionally protected parental rights.

33. Each of the Appellants commented upon the Model Policies’ violation of parental rights. Despite Va. Code § 2.2-4002.1(C)’s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond.

ASSIGNMENT OF ERROR #2 – The Department Failed to Respond to Comments Regarding Parental Rights Based on Virginia Code § 1- 240.1.

34. Appellants adopt and incorporate by reference their allegations in paragraphs 1-33 as their allegations in this paragraph 34.

35. At all times material hereto, Virginia Code § 1- 240.1 stated in full, “A parent has a fundamental right to make decisions concerning the upbringing, *education*, and care of the parent’s child.” (Emphasis added).

36. At all times material hereto, Virginia Code § 1- 240.1 stated as an enactment clause that “it is the expressed intent of the General Assembly that this act codify the opinion of the Supreme Court of Virginia in *L.F. v. Breit*, . . . as it relates to parental rights.” The Virginia Supreme Court’s discussion of parental rights in *Breit* states:

The relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. . . . Indeed, the Supreme Court of the United States has characterized a parent's right to raise his or her child as “perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel*, 530 U.S. at 65. Any statute that seeks to interfere with a parent's fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *McCabe v. Commonwealth*, 274 Va. 558, 563 (2007); . . .” *L.F. v. Breit*, 285 Va. 163, 182 (2013). (Some citations omitted).

37. Under the compelling state interest test, the Commonwealth must prove that its interest in helping a child “transition” his or her gender is “paramount,” “of the highest order,” and “vital” compared to the interests of the parents. See *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020). The Commonwealth must also prove that there is no other narrower means to achieve the student’s gender “transition” than by withholding information from and deceiving the student’s parents. The school, in such an instance, usurps the role of the parent and becomes the student’s protector and guide in direct contravention to the parents’ fundamental right.

38. The Appellants commented upon the Model Policies’ violation of parental rights guaranteed under Virginia Code § 1- 240.1. Despite Va. Code § 2.2-4002.1(C)’s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond.

ASSIGNMENT OF ERROR #3 – The Department Failed to Respond to Comments that the Model Policies Violate the Free Speech Rights of Students and Teachers.

39. Appellants adopt and incorporate by reference their allegations in paragraphs 1-39 as their allegations in this paragraph 40.

40. At all times material hereto, the First Amendment to the U.S. Constitution and Article I, Section 12 of the Virginia Constitution guaranteed free speech, the Virginia Constitution specifically stating “that any citizen may freely speak, write, and publish his sentiments on all subjects . . .”

41. The Model Policies on page 13 under “Student Identification” state:

A transgender student may adopt a name that is different from their legal name on their birth certificate and use pronouns reflective of their gender identity. Many transgender students will adopt the gender pronouns typically associated with their gender identity. For example, most transgender girls will use she/her/hers pronouns, while most transgender boys will use he/him/his pronouns. There may be a less common pattern of pronoun usage among nonbinary students. Nonbinary students, as well as transgender students, may use gendered pronouns like she/her/hers or he/him/his, use gender-neutral pronouns such as they/them/their or ze/hir/hirs, **use multiple sets of pronouns interchangeably**, or use their name in place of any pronoun. School divisions should accept a student’s assertion of their gender identity without requiring any particular substantiating evidence, including diagnosis, treatment, or legal documents. (Emphasis added to point out the arbitrary nature.)

42. Under the Model Policies on pages 10 and 13, the failure to affirmatively speak a student’s “preferred pronouns” is considered both “harassment” and “discrimination” subjecting faculty and students to disciplinary action. These “preferred pronouns” can change from day to day, are arbitrary (e.g., “ze/hir/hirs” or any other words with apparently no limitations), and even defy basic rules of grammar (“they/them/their” when referred to a single person, or “he/they”). This violates students’ and school faculty’s and staff’s right to free speech by compelling them to speak an ideological message with which they fundamentally disagree.

43. The Model Policies permit speech by a transgender student and supporters, but do not permit rebuttal speech on the same subject. This constitutes content and viewpoint discrimination, which is a violation of the Free Speech Clauses in both the U.S. and Virginia Constitutions.

44. The Appellants commented upon the Model Policies' violation of Appellants' freedom of speech. Despite Va. Code § 2.2-4002.1(C)'s requirement that the Department "respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter," the Department failed to respond.

ASSIGNMENT OF ERROR #4 – The Department Failed to Respond to Comments that the Model Policies Violate the Free Exercise of Religion Rights of Students and Teachers.

45. Appellants adopt and incorporate by reference their allegations in paragraphs 1-44 as their allegations in this paragraph 45.

46. At all times material hereto, the First Amendment to the U.S. Constitution guaranteed Americans their free exercise of religion.

47. At all times material hereto, Article I, Section 16 of the Virginia Constitution guaranteed Virginia citizens their free exercise of religion.

48. At all times material hereto, the Virginia Religious Freedom Restoration Act (Va. Code § 57-2.02(B)) provided that "[n]o governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest."

49. At all times material hereto, the Virginia Religious Freedom Restoration Act (Va. Code § 57-2.02(A)) defined “demonstrates” as meaning “meets the burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence.” Accordingly, the Department must prove by clear and convincing evidence that the Model Policies are “essential” to accomplish its compelling state interest.

50. The Model Policies violate Appellants’ federal and state constitutional right to the free exercise of religion by compelling them to conform with practices that are antithetical to millennia-old religious precepts of several major faiths.

51. The Model Policies are void of any religious exceptions or accommodations for faculty and students who maintain orthodox religious precepts about the distinct and complementary nature of male and female. For traditional Christians, Muslims, and Jews (among others), treating a male as a female and vice versa in certain settings is something they simply cannot do as a matter of conscientious conviction. That includes calling someone by pronouns that do not correspond to that person’s known biological identity as either male or female, or sharing restrooms and locker rooms with members of the opposite sex. For many students, faculty, staff and parents, their religious identity precludes them from taking part in certain actions, affirmations, and speech that these Model Policies would now require. Moreover, these policies foster the pervasive promotion of a one-sided, politicized ideology/faith within schools that would actually create a hostile environment for students, faculty, and families with certain deeply held, faith-based convictions.

52. The Appellants commented upon the Model Policies’ violation of Appellants’ free exercise of religion. Despite Va. Code § 2.2-4002.1(C)’s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the

response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond.

ASSIGNMENT OF ERROR #5 – The Department Failed to Respond to Comments that the Model Policies Violate the Equal Protection Rights for Non-transgender Students.

53. Appellants adopt and incorporate by reference their allegations in paragraphs 1-52 as their allegations in this paragraph 53.

54. At all times material hereto, the Fourteenth Amendment to the U.S. Constitution guaranteed the equal protection of U.S. citizens, including Virginians.

55. In its comments on the Model Policies, FFLC stated, “Under the Fourteenth Amendment, specifically gendered washrooms must be limited to the designated gender. Boys should not be allowed to use washrooms and/or locker rooms designated for girls, and vice versa. Allowing some boys to use girls’ washrooms, and some girls to use boys’ washrooms is unequal treatment, thereby triggering the Equal Protection Clause.”

56. Despite Va. Code § 2.2-4002.1(C)’s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond to FFLC’s comment on the Model Policies’ violation of Equal Protection.

ASSIGNMENT OF ERROR #6 – The Department Failed to Respond to Comments that the Model Policies Violate the Due Process Rights of Students and Teachers Because the Terms Used are Vague and the Policies Violate the Right to Privacy.

57. Appellants adopt and incorporate by reference their allegations in paragraphs 1-56 as their allegations in this paragraph 57.

58. The Model Policies define “Transgender” as [in part] “A *self-identifying* term that describes a person whose gender identity is different from their [sic] sex assigned at birth.” (Emphasis added.) Hence, the Model Policies make clear definitionally, and throughout the document, that the essence of “transgender” and “gender identity” is *subjective* and *internal* to the person who *believes* that “they” are, or who may merely *self-identify* as, one or more “genders.” The definition of “transgender” further states: “there is a wide range of gender identities in addition to transgender male and transgender female, such as nonbinary.”

59. By the Model Policies’ own terms, therefore, it seemingly is *impossible* for anyone to know another person’s “gender identity” at any given moment, and consequently, how to physically accommodate and verbally address “them” in a manner consistent with the Model Policies. A solution may be for a person to ask *every* student their gender identity and preferred pronouns at the beginning of *every* interaction in order to ascertain what can only be specifically communicated; however, this may jeopardize the Model Policies for “Student Privacy/Confidentiality,” which states that “school personnel shall treat information relating to a student’s transgender status as being particularly sensitive, shall not disclose it to other students and parents, and shall only disclose to other school personnel with a legitimate educational interest.”

60. The confusing nature of the Model Policies was further complicated when the Department in the final Model Policies issued in March added the following definition to the Model Policies: “Nonbinary: a term used to refer to people whose gender identity is not exclusively male or female, including those who identify with a different gender, a combination of genders, or no gender. Nonbinary may be considered a subset of transgender or a distinct

identity. Other similar terms may include genderqueer, gender fluid, agender, or Two-Spirit (for Native American Indian, Alaska Native, First Nation, or Indigenous communities).” (pp.6-7)

61. The Model Policies violate Appellants’ constitutional right to Due Process because they are arbitrary, incoherent, subjective by their very nature, and thereby fail to sufficiently provide any requisite notice that would enable a person to understand and comply with them as a matter of law.

62. Regarding the issue of privacy, the Model Policies for “Student Participation in School Activities and Events” on p.18 states: “Schools shall eliminate the practice of segregating students by gender to the extent possible. For any school program, event, or activity, including extra-curricular activities that are segregated by gender, [School Division] shall allow students to participate in a manner consistent with their gender identity.”

63. The model policy for “Access to Facilities” on p.19 states: “Access to facilities such as restrooms and locker rooms that correspond to a student’s gender identity shall be available to all students.” In other words, there can no longer be any meaningful distinctions between male and female bathrooms and locker rooms in schools. This policy plainly states: If facilities are designated as distinguishing between genders, they must be available to ALL students.

64. Under the Model Policies, girls who are completely undressed in the locker room have no grounds to object or complain if any or ALL the boys enter the locker room at that very moment. It does not even matter if the boys do not identify as a female. But even if they merely claim to identify as females that day, the Model Policies ensure they are not to be questioned. On p. 18, the Model Policies state: “It can be emotionally harmful for a transgender student to be

questioned regarding the use of restrooms and facilities. School staff should not confront students about their gender identity upon entry into the restroom.”

65. At all times material hereto, the United States Supreme Court has recognized that a right to privacy exists.

66. This right to privacy includes not only a right to personal privacy, but also family privacy.

67. The Model Policies violate individual students’ constitutional right to personal privacy in situations where their unclothed bodies could be viewed by members of the opposite sex.

68. The Model Policies violate individual students’ constitutional right to personal privacy in situations where they must share bathrooms with members of the opposite sex.

69. The Model Policies violate families’ constitutional right to family privacy by interfering with family discussions about sensitive discussions like gender identity, and by withholding information from parents while the school counsels a child on gender identity. On page 14, the Model Policies actually *require* school staff to report “to Child Protective Services immediately” any parents whom they merely “suspect” may not be supportive enough of their child “due to their transgender identity.”

70. Despite Va. Code § 2.2-4002.1(C)’s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond to Appellants’ comments on the Model Policies’ violation of Due Process.

ASSIGNMENT OF ERROR #7 --The Department Failed to Respond to Comments that the Model Policies Violate Various Federal Laws.

71. Appellants adopt and incorporate by reference their allegations in paragraphs 1-70 as their allegations in this paragraph 71.

72. In the Model Policies, the Department in part justified its action on Title IX of the Education Amendments of 1972, which generally states that federal law that prohibits schools that receive federal financial assistance from limiting or denying a student's participation in any school program on the basis of sex. The Model Policies then state that Title IX "may be understood to prohibit discrimination . . . based on . . . sexual orientation, and gender identity or transgender status." (Exh. 7 at 7).

73. This assertion by the Department is wrong. On January 8, 2021, the U.S. Department of Education's ("USDOE") Office of General Counsel issued an opinion as to whether the Court's interpretation of "sex" in *Bostock v. Clayton County*, 104 S. Ct. 1731 (2020) affected the interpretation of "sex" for purposes of Title IX. USDOE's lawyers answered "no." See <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf?bcs-agent-scanner=4c930bc7-a8a1-3442-907a-a81eb781dfea> at 2. Regarding whether *Bostock* applied to school washrooms, locker rooms, and other sex-segregated programs addressed under Title IX, DOE's lawyers wrote that *Bostock* does not apply because (1) *Bostock* applies only to Title VII of the Civil Rights Act, not Title IX; (2) the ordinary public meaning of "sex" at the time of Title IX's enactment was biological sex, male or female, not transgender status or sexual orientation; and (3) the Department's regulations recognizing the male/female biological binary carry interpretative authority because they were the product of uniquely robust and direct Congressional review. *Id.* at 6.

74. FERPA is a federal law that, with certain exceptions not applicable here, protects the privacy of student records from persons other than students and their parents. In fact, FERPA

provides a statutory right for parents to access their child's educational records. See 20 U.S.C. § 1232g et seq.

75. Page 20 of the Model Policies states that when a student informs the school about his/her gender transition, the school should have a point-of-contact to “meet with the student (and parents/guardians if the parents/guardians are affirming of the student's gender identity) to develop a plan to accommodate the student's needs and requests.” It further states that a template may be helpful to address matters like names, use of pronouns, privacy concerns, communication plans, student records, and access to facilities and activities. The Model Policies obviously recognize the need for documentation. Stating that information will be shared with affirming parents implies that this information will not be shared with non-affirming parents. Assuming document(s) are created and then not provided to the parents upon their request, the school commits a FERPA violation. Withholding these documents is also a violation of Virginia Code § 20-124.6, which states that a parent shall not be denied access to his/her child's academic record.

76. Despite Va. Code § 2.2-4002.1(C)'s requirement that the Department “respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter,” the Department failed to respond to Appellants' comments on the Model Policies' violation of federal laws.

ASSIGNMENT OF ERROR #8 -- The Department in Promulgating the Model Policies Violated the Authorization Law (Va. Code 22.1-23.3) by Exceeding its Scope, Failing to Provide a Safe and Supportive Learning Environment Free from Discrimination for *All* Students, and Failing to Consider Evidence Other than that Supporting Its Apparent Pre-ordained Conclusion.

77. Appellants adopt and incorporate by reference their allegations in paragraphs 1-76 as their allegations in this paragraph 77.

78. Many of the terms used and topics addressed in the Model Policies fall outside Va. Code § 22.1-23.3's specific directive to provide model policies for "transgender students."

79. For example, the terms "LGBT" "LGBTQ" and "LGBTQ+" are used 46 times in the Model Policies document. But these terms clearly go beyond the scope of the statute, except for the "T", which stands for "transgender." Therefore, anything related to "sexual orientation" (i.e. "LGB" – for Lesbian, Gay, or Bisexual) is beyond the scope of the authorizing legislation (*see, e.g.*, policy titled "Professional Development and Training" which directs that "All school mental health professionals shall be trained annually on topics relating to LGBTQ+ students, including safety and support for LGBTQ+ students.")

80. According to Virginia Code § 22.1-23.3, the Department is to develop model policies concerning the treatment of transgender students, to "include information, guidance, procedures, and standards relating to" eight specific items, including "Maintenance of a safe and supportive learning environment free from discrimination and harassment **for all students.**" (Emphasis added.) Yet, while purporting to formulate a safe and supportive learning environment free from discrimination and harassment for "transgender" students, the Model Policies effectively guarantee an *unsafe* and *unsupportive* learning environment for many *other* students. Because of the Model Policies other students will face the loss of their privacy, safety, and dignity when undressing or using the bathroom potentially in the presence of members of the opposite biological sex with different anatomy. Those who express discomfort or objection to this or other policies will be subjected to discrimination and harassment, not to mention formal punishment.

81. Similarly, one of the eight items in § 22.1-23.31 – "Compliance with applicable nondiscrimination laws" – is not addressed by the Model Policies because it fails to provide any

protection for many religious students and teachers whose faith prevents them from being able to comply with the Model Policies' directives.

82. At all times material herein, Va. Code § 22.1-23.3 stated: "A. The Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices[.]" (Emphasis added.) However, the Model Policies appear to consider studies that favor one side of the gender dysphoria issue and fail to consider contrary studies. By failing to consider all studies, the Model Policies are not evidenced-based.

83. An example of questionable "evidence" in the Model Policies is found on page 9 under "Bullying, Harassment, and Discrimination," which states: "A 2019 national survey by GLSEN found that 84 percent of transgender youth feel unsafe at school[.]" Beyond the fact that this inherently subjective figure was produced by a well-known transgender advocacy group, the claim does not address *whether* those students *actually are* unsafe, or whether they are justified in feeling that way. Nor does it attempt to account for the *cause* of that feeling, so as to know what a "best practice" might be.

84. Much of the data claims relied upon in the Model Policies have no discernable connection to crafting rules for the treatment of "transgender" students in school settings, or they otherwise represent issues beyond the scope of what a school can by nature control. For example, page 9 of the Model Policies states that "95 percent of surveyed LGBTQ+ youth report trouble sleeping at night," and on page 12 there is this statement: "According to a recent study, LGBT youth have a 120 percent increased risk of experiencing homelessness compared to youth who identified as heterosexual and cisgender." Symptoms of sleeplessness and homelessness can be

caused by a variety of factors, but certainly a troubled psyche of whatever origin would be included in the differential diagnosis. Yet, the Department has shown no studies that show sharing bathrooms and locker rooms with the opposite sex leads to more restful sleep or less homelessness. In fact, it is likely that shared bathrooms and locker rooms would result in more students having more anxiety and less restful sleep.

85. Perhaps most significantly, the Model Policies do not present, discuss, or address *any* evidence related to the feelings, concerns, or interests of non-transgender (or non-“LGBTQ”) students, who represent the vast majority of public school students, or the kinds of impacts these policies would inevitably have on their privacy, dignity, security, conscience, mental health, or equal access in their school experience. Without any consideration of the impacts of the policies on the roughly 99% of non-transgender students, these Model Policies cannot possibly be “evidence-based,” let alone “best practices.”

86. Appellant Ms. Via in her comments noted the work of Walt Heyer and Dr. Paul McHugh that provide a counter-perspective to the work cited in the Model Policies.¹ Dr. McHugh, the former Chief of Psychiatry at Johns Hopkins University, and his co-author Dr. Lawrence Mayer, surveyed the social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress. In their report, they noted the following:

- The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be “a man trapped in a

¹ Walt Heyer’s story as a transexual is found at **Walt Heyer, *I Know What Happens To The Kids in ‘Transhood’, Because It Happened To Me***, *The Federalist*, available at <https://thefederalist.com/2021/02/05/i-know-what-happens-to-the-kids-in-transhood-because-it-happened-to-me/> (February 5, 2021)

woman’s body” or “a woman trapped in a man’s body”—is not supported by scientific evidence.

- Studies comparing the brain structures of transgender and non-transgender individuals have demonstrated weak correlations between brain structure and cross-gender identification. These correlations do not provide any evidence for a neurobiological basis for cross-gender identification.
- Children are a special case when addressing transgender issues. Only a minority of children who experience cross-gender identification will continue to do so into adolescence or adulthood; and
- There is little scientific evidence for the therapeutic value of interventions that delay puberty or modify the secondary sex characteristics of adolescents. Although some children may have improved psychological well-being if they are encouraged and supported in their cross-gender identification, there is no evidence that all children who express gender-atypical thoughts or behavior should be encouraged to become transgender. Lawrence S. Mayer & Paul R. McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 8 (Fall 2016), available at http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf

87. Another source ignored by the Department in crafting the Model Policies was the American College of Pediatricians (“ACP”). In November 2018 it published an article entitled “Gender Dysphoria in Children,” that is available at <https://acped.org/position-statements/gender-dysphoria-in-children>. In this article, ACP made the following observations:

The debate over how to treat children with GD [gender dysphoria] is primarily an ethical dispute; one that concerns physician worldview as much as science. Medicine does not occur in a moral vacuum; every therapeutic action or inaction is the result of a moral judgment of some kind that arises from the physician’s

philosophical worldview. Medicine also does not occur in a political vacuum and being on the wrong side of sexual politics can have severe consequences for individuals who hold the politically incorrect view. . . .

The literature regarding the etiology and psychotherapeutic treatment of childhood GD is heavily based upon clinical case studies. These studies suggest that social reinforcement, parental psychopathology, family dynamics, and social contagion -facilitated by mainstream and social media, all contribute to the development and/or persistence of GD in some vulnerable children. There may be other as yet unrecognized contributing factors as well.

Most parents of children with GD recall their initial reactions to their child's cross-sex dressing and other cross-sex behaviors to have been tolerance and/or encouragement. Sometimes parental psychopathology is at the root of the social reinforcement. For example, among mothers of boys with GD who had desired daughters, a small subgroup experienced what has been termed "pathologic gender mourning." Within this subgroup the mother's desire for a daughter was acted out by the mother actively cross-dressing her son as a girl. These mothers typically suffered from severe depression that was relieved when their sons dressed and acted in a feminine manner.

A large body of clinical literature documents that fathers of feminine boys report spending less time with their sons between the ages of two and five as compared with fathers of control boys. This is consistent with data that shows feminine boys feel closer to their mothers than to their fathers. In his clinical studies of boys with GD, Stoller observed that most had an overly close relationship with their mother and a distant, peripheral relationship with their father. He postulated that GD in boys was a "developmental arrest . . . in which an excessively close and gratifying mother-infant symbiosis, undisturbed by father's presence, prevents a boy from adequately separating himself from his mother's female body and feminine behavior." . . .

A recent study has documented an increasing trend among adolescents to self-diagnose as transgender after binges on social media sites such as Tumblr, Reddit, and YouTube. This suggests that social contagion may be at play. In many schools and communities, there are entire peer groups "coming out" as trans at the same time. Finally, strong consideration should be given to investigating a causal association between adverse childhood events, including sexual abuse, and transgenderism. The overlap between childhood gender discordance and an adult homosexual orientation has long been acknowledged.²⁶ There is also a large body of literature documenting a significantly greater prevalence of childhood adverse events and sexual abuse among homosexual adults as compared to heterosexual adults. Andrea Roberts and colleagues published a study in 2013 that found "half to all of the elevated risk of childhood abuse among persons with same-sex sexuality compared to heterosexuals was due to the effects of abuse on sexuality." It is therefore possible that some individuals develop GD and later

claim a transgender identity as a result of childhood maltreatment and/or sexual abuse. This is an area in need of research. . . .

The norm for human development is for an individual's thoughts to align with physical reality; for an individual's gender identity to align with biologic sex. People who identify as "feeling like the opposite sex" or "somewhere in between" or some other category do not comprise a third sex. They remain biological men or biological women. GD is a problem that resides in the mind not in the body. Children with GD do not have a disordered body—even though they feel as if they do. Similarly, a child's distress over developing secondary sex characteristics does not mean that puberty should be treated as a disease to be halted, because puberty is not, in fact, a disease. Likewise, although many men with GD express the belief that they are a "feminine essence" trapped in a male body, this belief has no scientific basis.

Until recently, the prevailing worldview with respect to childhood GD was that it reflected abnormal thinking or confusion on the part of the child that may or may not be transient. Consequently, the standard approach was either watchful waiting or pursuit of family and individual psychotherapy. The goals of therapy were to address familial pathology if it was present, treat any psychosocial morbidities in the child, and aid the child in aligning gender identity with biological sex. Experts on both sides of the pubertal suppression debate agree that within this context, 80 percent to 95 percent of children with GD accepted their biological sex by late adolescence (footnotes omitted).

88. Listing and quoting from these works by the American College of Pediatricians, and Drs. McHugh and Mayer, is not meant to be exhaustive, but to show there are two sides in this important debate, and the Model Policies appear to be only one-sided. Important questions appear unanswered by the Model Policies, including: Will special status for transgender students under the Model Policies result in a growth of transgenderism? Will this growth bring a similar rise in distressed youth with a marked suicide ideation above the national population? What effect, if any, will these Model Policies have upon non-transgender students? Should the Department study this further before making a policy that potentially results in further harm to youth?

89. Appellant Ms. Via commented upon the Model Policies' failure to look objectively at the literature in determining what constitutes "evidence based." Despite Va. Code

§ 2.2-4002.1(C)'s requirement that the Department "respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter," the Department failed to respond.

RELIEF REQUESTED

90. If Appellants prevail on any issue, the statutory remedy for a guidance document "not in accordance with law" is set forth in Va. Code § 2.2-4029 (made applicable to guidance documents in Va. Code § 2.2-4002.1). "The court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law." Accordingly, Appellants respectfully request that this Court:

- A. Set aside the effective date of the Model Policies and remand the Model Policies back to the Appellees to address each of the Assignments of Error cited above;
- B. Retain jurisdiction of this matter to determine whether the Department has subsequently adopted Model Policies that comport with the authorizing statute, Va. Code § 22.1-23.3, and do not violate the constitutional and statutory provisions cited above by Appellants;
- C. Award Appellants their reasonable costs and attorneys' fees pursuant to Va. Code §§ 2.2-4030(A) and 57-2.02; and
- D. Award Appellants such further relief as this Court deems just and proper.

Dated: March 30, 2021

Respectfully submitted,

Founding Freedoms Law Center
The Family Foundation
Sarah Via, Individually and as next friend of her
children John Roe and Jane Roe

By


Counsel

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Counsel for Appellants

EXHIBIT 1

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Received by
Holly Coy
3/5/2021
at 12:40pm

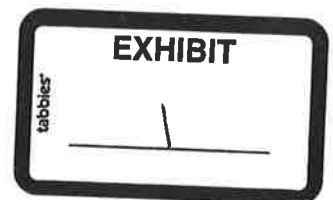
**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION**

In Re: “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools”

NOTICE OF APPEAL

COME NOW the Appellants, Founding Freedoms Law Center, The Family Foundation, and Sarah Via, individually and as next friend of her children John Doe 3 and Jane Doe 4, by counsel, and pursuant to Rule 2A:2 of the Rules of the Supreme Court of Virginia, file this Notice of Appeal challenging the lawfulness of the recently published Guidance Document entitled “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools” (hereinafter “Model Policies”), which sets out model policies that each local school board is mandated, pursuant to Va. Code § 22.1-23.3, to adopt consistent therewith.

The Model Policies were developed and then published by the Virginia Department of Education (“Department”) in the Virginia Register of Regulations on January 4, 2021 (37 Va. Reg. Regs. 1,003-64 (January 4, 2021)), followed by a 30-day public comment period that ended on February 3, 2021, with an initial planned effective date of February 4, 2021. (See <https://www.townhall.virginia.gov/l/GDocForum.cfm?GDocForumID=452>). After Appellants and others submitted comments asserting the Model Policies contained numerous provisions contrary to law, the effective date of the guidance document was delayed for an additional 30-day period to March 6, 2021, which Va. Code § 2.2-4002 requires if and when any commenter asserts that the guidance document is contrary to law or regulation.



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The identities and addresses of the other parties are:

Virginia Department of Education
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Patrick Henry Building
1111 East Broad Street
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Richmond, Virginia 23219

Atif Qarni
Secretary of Education
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4th Floor
Richmond, Virginia 23219

Upon information and belief, the other parties will be represented by the following counsel:

Deb Love, Esq.
Senior Assistant Attorney General/Chief
Education Section
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219

The appeal will be taken to the Circuit Court of the City of Richmond.

Dated: March 5, 2021

Respectfully submitted,

By:


Counsel

EXHIBIT 2

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Received by Holly Cay
3/19/2021 at
12:46pm

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools”

NOTICE OF APPEAL

COME NOW the Appellants, Founding Freedoms Law Center, The Family Foundation, and Sarah Via, individually and as next friend of her children John Doe 3 and Jane Doe 4, by counsel, and pursuant to Rule 2A:2 of the Rules of the Supreme Court of Virginia, file this Notice of Appeal challenging the lawfulness of the recently published Guidance Document entitled “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools” (hereinafter “Model Policies”), which sets out model policies that each local school board is mandated, pursuant to Va. Code § 22.1-23.3, to adopt consistent therewith.

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The identities and addresses of the other parties are:

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Upon information and belief, the other parties will be represented by the following counsel:

Deb Love, Esq.
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The appeal will be taken to the Circuit Court of the City of Richmond.

Dated: March 9, 2021

Respectfully submitted,

By: 
Counsel

James A. Davids (VA Bar 69997)

EXHIBIT 3

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

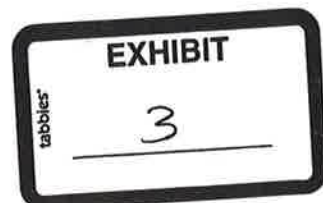
**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Model Policies for the Treatment of Transgender Students in Virginia's Public Schools



VIRGINIA
IS FOR
LEARNERS



Acknowledgements

The Virginia Department of Education (VDOE) would like to extend appreciation to those who provided input and offered expertise throughout the development of these model policies.

Rebecca Askew (she/her), Senior Policy Analyst, Office of Policy, Virginia Department of Education

Amy Aussiker (she/her), Ph.D., School Psychologist, Carroll County Public Schools,

Jane Ball (she/her), School Social Worker, Hanover County Public Schools

Anthony Belotti (he/they), Student Representative

Jennifer Boysko (she/her), State Senator, Virginia Senate

Erica Brown-Meredith (she/her), Ph.D., Assistant Professor, Longwood University, Virginia Association of School Social Workers

L. Frances Brown (she/her), School Psychologist (retired), Henrico County Public Schools

Zoe Campa (she/her), Student Representative

Shannon Campbell (she/her), School Nurse, Montgomery County Public Schools, Virginia Association of School Nurses

Holly Coy (she/her), Assistant Superintendent, Department of Policy, Equity & Communications, Virginia Department of Education

Daniel Dunham (he/him), Military Student and Family Specialist, Office of Student Services, Virginia Department of Education

Quyen Duong (she/her), Student Services Specialist, Office of Student Services, Virginia Department of Education

Tammy D. Gilligan (she/her), Ph.D., Professor and Director of School Psychology Program, James Madison University, Board Member, Virginia Academy of School Psychologists

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Katheryn Harrison (she/her), Treasurer, Virginia PTA

Samantha Hollins (she/her), Ph.D., Assistant Superintendent, Department of Special Education and Student Services, Division of School Quality, Instruction, and Performance, Virginia Department of Education

Barbara Kanninen (she/her), School Board Member, Arlington County Public Schools, Virginia School Boards Association

Introduction

The **Model Policies for the Treatment of Transgender Students in Public Elementary and Secondary Schools** document was developed in response to House Bill 145 and Senate Bill 161, enacted by the 2020 Virginia General Assembly:

“1. That the Code of Virginia is amended by adding a section numbered 22.1-23.3 as follows § 22.1-23.3. Treatment of transgender students; policies.

A. The Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to:

1. Compliance with applicable nondiscrimination laws;
2. Maintenance of a safe and supportive learning environment free from discrimination and harassment for all students;
3. Prevention of and response to bullying and harassment;
4. Maintenance of student records;
5. Identification of students;
6. Protection of student privacy and the confidentiality of sensitive information;
7. Enforcement of sex-based dress codes; and
8. Student participation in sex-specific school activities, events, and use of school facilities.

Activities and events do not include athletics:

B. Each school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Virginia Department of Education (VDOE) pursuant to subsection A:

1. That the Virginia Department of Education shall develop and make available to each school board model policies pursuant to subsection A of § 22.1-23.3 of the *Code of Virginia*, as created by this act, no later than December 31, 2020.
2. That each school board shall adopt policies pursuant to subsection B of § 22.1-23.3 of the *Code of Virginia*, as created by this act, no later than the beginning of the 2021–2022 school year.”

In June 2020, an advisory committee was formed to review model policies, local policies throughout the nation, and resources pertaining to the treatment of transgender students in public schools. The committee included school-based personnel representing diverse Superintendent’s Regions and disciplines, representatives from state professional associations, parent representatives, student representatives, representatives from advocacy organizations, and specialists from the Virginia Department of Education (VDOE). The development of these model policies is a result of consultation and collaboration with multiple stakeholders throughout the Commonwealth with a variety of backgrounds and expertise.

female when he was born. Note that there is a wide range of gender identities in addition to transgender male and transgender female, such as nonbinary.

Related Laws

A brief summary of federal and state laws is included for informational purposes and to aid in the development of model policies for the treatment of transgender students. The summary provided in this section does not constitute legal interpretation nor advice. Given the changing legal landscape, including on-going litigation and different interpretations, school divisions should consult with their school board attorney.

First Amendment: The First Amendment protects freedom of speech and expression. Schools may not prevent students from expressing their identity.

Equal Protection Clause of the 14th Amendment: This clause guarantees every citizen equal protection under the law. It protects LGBTQ+ youth in schools from unfair or discriminatory school actions.

Title VII of the Civil Rights Act of 1964: The US Supreme Court ruled in June 2020 that this federal law includes protection based on sexual orientation and gender identity in its prohibition of employment discrimination.

Title IX of the Education Amendments of 1972: Title IX is a federal law that prohibits schools that receive federal financial assistance from limiting or denying a student's participation in any school program on the basis of sex. This may be understood to prohibit discrimination, including sexual harassment, based on sex stereotypes, sexual orientation, and gender identity or transgender status.

Family Educational Rights and Privacy Act (FERPA): This is a federal law that protects the privacy of student educational records. It prohibits the improper disclosure of personally identifiable information from student records. Information relating to gender identity or sexual orientation may constitute personally identifiable information.

Health Insurance Portability and Accountability Act of 1996 (HIPAA): This is a federal law that mandates the privacy protections for individually identifiable health information. Demographic information such as gender may be considered protected health information under HIPAA.

Conversion Therapy Prohibited: § 54.1-2409.5. This Virginia state law prohibits licensed professionals from engaging in conversion therapy with youth under 18 years of age. Note that conversion therapy is opposed by most major professional organizations such as the American Psychiatric Association (APA, 2018), the American Counseling Association (ACA, n.d.), and the American Medical Association (AMA, 2019).

Virginia Values Act: This state law expands the *Virginia Human Rights Act* to prohibit discrimination in employment, housing, and public accommodations on the basis of sexual orientation and gender identity.

To comply with HB 145 (2020) and SB 161 (2020), local school boards shall adopt policies consistent with model policies contained in this document no later than the 2021-2022 school year. They may adopt more comprehensive policies than these model policies relating to the treatment of transgender students. The goal is to develop policies that are informed by the law and ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. Local school boards should consult with their school board attorney in the development of policies and regulations relating to the treatment of transgender students.

The purpose of this document is to present model policies for use during the local school board's policy development process. Given the broad range of topics to be addressed by local school boards relating to the treatment of transgender students, it is likely that multiple policies will be needed in different categories rather than a single policy. Existing policies and regulations may also need to be expanded or clarified to be more gender-inclusive or to emphasize specific protections for transgender, nonbinary, and gender-expansive students. This document provides information, best practices, guidance, procedures, and standards for each topic, and model policies are highlighted and distinctive from the discussions. Local school boards may adopt example language in the model policies or use it as a guide to draft policies that meet the unique needs of their school division.

Bullying, Harassment, and Discrimination

Because of societal prejudice and lack of awareness or understanding, transgender students may experience rejection, criticism, or bullying, that affect their emotional health and academic achievement. A 2019 national survey by GLSEN found that 84 percent of transgender youth feel unsafe at school, and those who experience victimization have significantly lower GPAs, are more likely to miss school out of concern for their safety, and are less likely to plan on continuing their education (Kosciw, Clark, Truong, & Zongrone, 2020). Compared to their cisgender and heterosexual peers, LGBTQ+ youth report much higher rates of depression, anxiety, alcohol and drug use, and lower self-esteem. LGBTQ+ youth of color may experience additional stress and adverse effects as a result of their intersecting identities, facing both bias against their gender identity or expression as well as racism. Research has shown that LGBTQ+ students experience higher levels of victimization because of their gender identity and/or gender expression and have more adverse outcomes compared to their cisgender and heterosexual peers (Human Rights Campaign Foundation, 2018):

- 73 percent of surveyed LGBTQ+ youth have experienced verbal threats because of their actual or perceived LGBTQ+ identity.
- 77 percent of surveyed LGBTQ+ youth report feeling depressed or down over the past week, and more than 70 percent report feelings of worthlessness and hopelessness in the past week.
- 95 percent of surveyed LGBTQ+ youth report trouble sleeping at night.

Furthermore, a recent study found that socially transitioned transgender children who are supported in their gender identity have no elevations in depression and only minimal elevations in anxiety relative to population averages (Olson, Durwood, DeMeules, & McLaughlin, 2016).

Designated Contact] shall be available to hear concerns from students or parents when complaints are not resolved at the school level.

Student Privacy/Confidentiality

Many transgender students undergo the process of gender transition to confirm and live as the gender consistent with their gender identity. School divisions are encouraged to communicate openly, albeit confidentially, with students and families regarding the student's transgender status to ensure that appropriate steps are taken to determine a student's needs and address any privacy concerns and associated risks to the student's well-being. Protecting transgender students' privacy is critical to ensuring that they are treated consistent with their gender identity and minimizing the risk of harm to the students.

Regarding student privacy within the school community, gender transitions, or gender identity confirmation, may be public or private, and the degree to which others are aware of the student's gender identity will influence plans to support the student. Given the potential for discrimination, sharing this information could expose a student to harassment and abuse from peers or adults within the school community. School staff should discuss with the student about how they prefer information about their transgender status to be shared. Some students may wish the information to remain private while others may prefer that the status is shared or even discussed in class. If the student is in a setting where they have been known by their assigned sex at birth, options for privacy may be limited. In some situations, the student's move to a new school setting (e.g., starting middle school, transferring to a different school) affords the opportunity to confirm their gender identity with more privacy. Regardless of the circumstances, the school should support the student's need for privacy and not disclose a student's gender identity to other students or parents. Additionally, school staff should treat a student's transgender status as being particularly sensitive information that should not be shared even internally among school personnel except to those with a legitimate educational interest or need to know. When a student undergoes a public gender transition, schools should work proactively to set clear boundaries about being gender inclusive and respond to negative reactions from the school community should they arise. Refer to additional discussions in the Other Considerations section regarding the process for school personnel when a student or parent informs the school about the student's transition.

Regarding student privacy outside of the school community, a student's transgender status, legal name, or sex assigned at birth may be considered confidential medical information and protected Personally Identifiable Information (PII). Disclosure of that information may violate the school's obligations under the *Family Educational Rights and Privacy Act* (FERPA) and the *Health Insurance Portability and Accountability Act of 1996* (HIPAA). Although school divisions may disclose a student's name and gender as directory information, parents and eligible students have the right to refuse the designation of that information as directory information, pursuant to [§ 22.1-287.1](#) of the *Code of Virginia*. Absent an explicit legal obligation, permission, or authorization from the appropriate party, such information should not be shared with anyone, and the local policy should explicitly prevent such disclosures. In order to maintain confidentiality, school divisions may need to consider additional policies related to record keeping. Refer to additional discussions on the separation of confidential information under the Student Records section. Any unauthorized disclosure of protected student information should be addressed according to existing policies and regulations in accordance with FERPA and HIPAA.

including anti-discrimination, harassment, and bullying policies, may need to be adjusted or clarified relating to processes that address when a school staff member fails to comply with the student's request or an administrator's directive to use the asserted name and pronoun.

Schools shall allow students to assert a name and gender pronouns that reflect their gender identity without any substantiating evidence. School staff shall, at the request of a student or parent, address the student using the asserted name and pronoun that correspond to their gender identity.

In the situation when parents or guardians of a minor student (under 18 years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request, abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents. This process will require consideration of short-term solutions to address the student's emotional needs to be affirmed at school as well as the long-term goal of assisting the family in developing solutions in their child's best interest. For example, a plan may include addressing the student at school with their asserted name and pronoun while using the legal name and pronoun associated with the sex assigned at birth when communicating with parents or guardians. Research has shown that transgender youth with supportive families experience a 52 percent decrease in recent suicidal thoughts and 46 percent decrease in suicide attempts (Ryan, Russell, Huebner, Diaz, & Sanchez, 2010) and that "chosen name used in more contexts was associated with lower depression, suicidal ideation, and suicidal behavior" (Russell, Pollitt, Li, & Grossman, 2018). Thus, school staff should be prepared to support the safety and welfare of transgender students when their families are not affirming. School staff should provide information and referral to resources to support the student in coping with the lack of support at home, provide information and resources to families about transgender issues, seek opportunities to foster a better relationship between the student and their family, and provide close follow-ups with the family and student. Refer to Appendix A for resources to support families of transgender students. Whenever school personnel suspects or becomes aware that a student is being abused, neglected, or at risk of abuse or neglect by their parent due to their transgender identity, they should report those concerns to Child Protective Services immediately. Before making a decision on policies relating to situations when parents or guardians are not accepting of the student's gender identity, school divisions should consult their school board attorney.

School Records

Schools' student information systems typically use the student's legal name and sex assigned at birth as reflected on their birth certificate, and some documents attached to student records may require the use of the legal name and sex assigned at birth. Information in the student information systems is then used for a variety of documents and processes such as a unique student identification number needed for proper student accounting (i.e., for purposes of funding and accountability indicators), communication with parents, class rosters, attendance records, student identification cards, library cards, standardized tests, year books, and school photos. Not all transgender students update legal documents to align with their new name and gender, but they may wish to use the asserted name and gender consistent with their gender identity in their

[School Division] is required to maintain a record that includes a student's legal name and sex assigned at birth and may be required to use or report the legal name and sex assigned at birth in some situations. In situations where school staff is required to use or to report a transgender student's legal name or sex assigned at birth, such as for purposes of standardized testing, school staff and administrators should adopt practices to avoid the inadvertent disclosure of such information.

Upon the request of a student or parent, schools shall use the asserted name and gender on other school records or documents.

Schools shall change a student's name and gender designation upon verification or submission of a legal document such as a birth certificate, state- or federal-issued identifications, passport, or court order. Records of former students may also be re-issued with the submission of legal documents substantiating the amended name and gender.

Dress Code

Local school board policies regarding dress code should serve to support equitable educational access for all students. The goal of dress or grooming codes should be to ensure the health and safety of students and not contribute to a hostile or intimidating atmosphere for any student. Dress codes, including hairstyles, should encompass broad guidelines that are not gender-specific and free of gender stereotypes. For example, gender-inclusive language such as “clothing must be worn in a way such that genitals, buttocks, and nipples are covered with opaque material” should be used rather than prohibiting certain types of clothing typically associated with one gender (e.g., “a mini skirt” or “camisole”). Transgender students have the right to dress in a manner consistent with their gender identity or gender expression, and any student has the right to expression free from gender expectations, as long as the student’s attire complies with the school’s dress code. Dress codes should be written, enforced, and applied consistently and equally to all students regardless of gender. In addition, [§ 22.1-279.6](#) of the *Code of Virginia* permits any school board to include in its code of student conduct a dress or grooming code. For school divisions who do include dress and grooming standards for students, the amendment explicitly states that any dress or grooming code shall “maintain gender neutrality by subjecting any student to the same set of rules and standards regardless of gender;...not have a disparate impact on students of a particular gender.”

School divisions should further examine and eliminate provisions for gender-specific attire relating to school activities and events such as physical education uniforms, school ceremony attires, sex-segregated graduation gowns, band uniforms, or orchestra uniforms when these provisions are not necessary for educational purposes. For example, schools may require formal attire for all students at a choral concert but should not specify that girls must wear dresses and boys must wear ties.

Schools shall eliminate or reduce the practice of segregating students by gender to the extent possible.

For any school program, event, or activity, including extra-curricular activities that are segregated by gender, [School Division] shall allow students to participate in a manner consistent with their gender identity.

Athletic participation regulated by the Virginia High School League (VHSL) or another organization such as the Virginia Scholastic Rowing Association (VASRA), as well as middle school athletics, shall be in compliance with policies and rules outlined by those organizations.

Access to Facilities

All students are entitled to have access to restrooms, locker rooms, and changing facilities that are sanitary, safe, and adequate, so that they can comfortably and fully engage in their school programs and activities. Schools frequently maintain separate restrooms, locker rooms or other facilities for males and females. Students should be allowed to use the facility that corresponds to their consistently asserted gender identity. While some transgender students will want that access, others may want alternatives that afford more privacy. Taking into account existing school facilities, administrators should take steps to designate gender-inclusive or single-user restrooms commensurate with the size of the school. When schools have available gender-inclusive or single-user restrooms or private changing areas, these restrooms or areas should be accessible to all students without special codes or keys. This would allow for any students seeking privacy to access single-user restrooms and private changing areas voluntarily. For locker room facilities without private changing areas, school divisions should make reasonable accommodations for requests for increased privacy. At the request of any student, schools should offer alternative arrangements such as a separate changing schedule, use of a nearby private area, access to a staff member's office, not requiring students to dress in uniform for physical education, or offering alternatives to in-person physical education. Any accommodations offered should be non-stigmatizing and minimize lost instructional time. Also, note that any information related to accommodations should be handled in such a way as to protect the student's privacy relating to their transgender status.

It can be emotionally harmful for a transgender student to be questioned regarding the use of restrooms and facilities. School staff should not confront students about their gender identity upon entry into the restroom. Furthermore, as school divisions plan for new school facilities or renovations, they should consider generally accommodating students who want more privacy such as designing additional single-user, gender-inclusive restrooms or changing areas. Additionally, § 22.1-6.1 of the *Code of Virginia* requires each school board to make menstrual supplies available at all times and at no cost to students in accessible locations in each elementary school and in the bathrooms of each middle and high school. Accordingly, these supplies should be made available in all bathrooms to be gender-inclusive.

- Knowledge of LGBTQ+ affirming resources for students and families.
- Strategies to engage parents and other stakeholders regarding an inclusive school community that affirms LGBTQ+ students.

These components may overlap with or intersect other professional development topics such as bullying prevention, mental health awareness and suicide prevention, equity, positive school climate, or trauma-sensitive practices. Local school divisions should coordinate the various professional development activities for consistency, including incorporating LGBTQ+ student considerations into training opportunities of other topics. Additionally, to ensure effective training, school divisions should use evidence-based curricula or consult with experts for the development and delivery of LGBTQ+ cultural competency training. The inclusion of content experts, including those with lived experiences, in the training may be vital in developing allies for LGBTQ+ students. Refer to Appendix A for resources related to professional development and training.

All school mental health professionals shall be trained annually on topics relating to LGBTQ+ students, including safety and support for LGBTQ+ students.

Other Considerations

Students and staff each have their own unique religious and personal experiences, views, and opinions. Local school boards have an opportunity to lead discussions on issues of gender identity. It will be important to engage communities regarding policies, regulations, and procedures to ensure equal access to education. Involving appropriate community members should help to reconcile sometimes deeply conflicting community views. For example, engaging students and parents will be critical in developing policies and procedures relating to student privacy and addressing situations where parents are not affirming their child's gender identity. Additionally, local school boards may need to review agreements and processes with community partners for any activities taking place on school grounds to ensure consistency in practices. For example, local school boards may consider the applicability of policies relating to dress code and access to activities and events for programs such as Junior Reserve Officers Training Corps (JROTC) or community youth athletic leagues who use school facilities. While the conversation is not easy, local school boards and school staff will need to provide clear guidance on the implementation of these policies and reduce their exposure to legal liability.

In order for the policies to be effective, local school boards should consider developing detailed guidelines and processes for the implementation of these policies. For example, to ensure consistency across the division, guidelines for the implementation of policies should include processes to update student classroom records and other school records with the student's asserted name and, if necessary, appropriate gender marker. Such a process will require clear procedures and coordination across the school division by all personnel with responsibilities related to student information and records, including but not limited to registrars, technology support personnel managing student information systems, administrative support personnel, and test administrators. Additionally, processes, including forms or templates, should be developed to support students or parents requesting a name and gender change and requesting an action plan to support the student's transition. School divisions are recommended to establish and designate a point-of-contact or team of knowledgeable and affirming staff members to support

Appendix A: Resources

Resources for School Divisions

American Psychological Association (APA) [LGBT Youth Resources](#)

APA [Promoting Resiliency for Gender Students Diverse and Sexual Minority in Schools](#)

APA [Supporting Transgender and Gender Diverse Students in Schools: Key Recommendations for School Administrators](#)

Gender Spectrum [Gender Inclusive Schools Toolkit](#)

GLSEN [Safe Space Kit](#)

Gender Spectrum [Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools](#)

Midwest Symposium for Leadership in Behavior Disorders [LGBTQ 101](#)

National School Board Association [Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff](#)

National Black Justice Coalition [Words Matter Gender Justice Toolkit](#)

SAMHSA [A Practitioner's Resource Guide: Helping Families to Support Their LGBT Children](#)

Teaching Tolerance [Classroom Resources](#)

US Department of HHS and National Center on Parent, Family and Community Engagement [Healthy Gender Development and Young Children: A Guide for Early Childhood Programs and Professionals](#)

Virginia School Boards Association (VSBA) [Council of School Attorneys \(COSA\) Welcoming Schools](#)

Model and Existing Policies and Guidelines

Arlington Public Schools [APS School Board Policy Information: Transgender & Gender Non-Conforming Students, Policy Implementation Procedures: Transgender Students in Schools, Transgender Students in Schools - Guidelines and Implementation Plan](#)

Boulder Valley School District [Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming](#)

California Safe Schools Coalition [Model School District Policy Regarding Transgender and Gender Nonconforming Students](#)

GLSEN [Model School District Policy on Transgender and Gender Nonconforming Students](#)

[Harvard Law School LGBTQ+ Advocacy Clinic and NCLR Trans Youth Handbook: Helping You Learn About Your Legal Rights in Different Areas of Your Life](#)

[Transgender Assistance Program of Virginia](#)

[The Trevor Project](#)

[UVA Teen & Young Adult Transgender Clinic](#)

[Virginia Department of Health \(VDH\) Virginia Transgender Resource and Referral List](#)

[VDH Resources for LGBTQ Youth](#)

Resources for Parents

[Child Welfare Information Gateway Resources for Families of LGBTQ Youth](#)

[Helping Families Support Their LGBT Children](#)

[Movement Advancement Project Family Support: Resources for Families of Transgender & Gender Diverse Children](#)

[PFLAG](#)

[San Francisco State University The Family Acceptance Project](#)

[San Francisco State University Supportive Families, Healthy Children: Helping Families with LGBT Children](#)

[Trans Youth Family Allies Resources for Parents](#)

[Welcoming Schools Transgender and Non-Binary Children: Books to Help Adults Understand](#)

Advocacy Organizations

[Equality Virginia](#)

[Gender Spectrum](#)

[GLSEN Richmond Chapter](#)

[GLSEN Northern Virginia Chapter](#)

[He She Ze and We](#)

[National Black Justice Coalition](#)

[National Center for Transgender Equality Youth & Student Issues](#)
[Shenandoah LGBTQ Center](#)

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EXHIBIT 4

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Todd Gathje, Ph.D., - The Family Foundation: Model "Transgender" Policies Threaten Student Safety, Parental Authority and Freedom of Speech

On behalf of The Family Foundation, I wish to express our strongest objections to these proposed policies which risk the health and safety of all students and undermine the ability of parents to care for and nurture their child.

There is broad agreement that every single child—including and especially those struggling with their sexual identity—should be protected from harm, bullying and harassment. Currently, Virginia has a strong anti-bullying law and well-established anti-bullying policies. Despite those strong protections, the proposed Model School Transgender Guidelines stretch well beyond prevention of harm and crosses the line into mandatory promotion of viewpoints that will be impossible to implement.

Given the growing body of scholarship that makes clear the majority of children outgrow gender dysphoria/confusion by the time they reach puberty, it's improper to impose policies that will contribute to more gender confusion and ultimately cause long-term damage to children who are still developing. (See statements about most kids outgrowing gender confusion in this Psychology Today article, as well as in this study and this one.)

Unfortunately, these draft policies were developed without input from professionals, clinicians and stakeholders who recognize the natural distinctions between biological males and females. Thus, these guidelines present a biased viewpoint that is void of any clinical and sociological data that demonstrates the harms of policies that promote transgenderism.

These proposed model policies also create a number of issues and contradictions that will make it difficult for administrators and local school divisions to administer and enforce them in any logical or coherent way. Below are several examples.

1. The guidelines propose a definition of “gender identity” that is purely subjective that does not require any formal evidence, making compliance with such policies impossible.

“Gender Identity: A person’s internal sense of their own identity as a boy/man, girl/woman, something in between, or outside the male/female binary. Gender identity is an innate part of a person’s identity and can be the same or different from the sex assigned at birth.” (Definitions, p.6)

“A student is considered transgender if, at school, the student consistently asserts a gender identity different from the sex assigned at birth... it does not necessarily require any



administrators will be unaware of a student's "preferred pronouns" on a weekly, daily, or even hourly basis. (e.g. Is this not inherent within the concept of "gender fluid" students, which the Guidelines reference?)

These policies are also void of any religious exceptions or accommodations for faculty and students who believe using pronouns and other speech would violate their religious identity, conscience, or their most basic understanding of biology and sociology. A policy that fosters pervasive promotion of a one-sided, politicized transgender agenda throughout the school actually creates a hostile environment for students, faculty, and families with deeply held, faith-based convictions. A likely consequence of these forced pronoun used and compelled speech will be that good, qualified teachers will leave the public schools to teach elsewhere.

3. These policies grossly undermine parental authority by permitting schools to help and encourage students to explore, facilitate and make decisions regarding their gender expression of sexual identity while at school, without a parent even knowing.

"School divisions will need to consider the health and safety of the student in situations where students may not want their parents to know about their transgender status ... There are no regulations requiring school staff to notify a parent or guardian of a student's request to affirm their gender identity..." (Recommended Standard, p.12)

The law in Virginia clearly affirms the primacy of parents' authority in Va. Code § 1-240.1, which states that "A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." Furthermore, in 2000, the U.S. Supreme Court also upheld the rights of parents in *Troxel v. Granville* when it noted that "the liberty interest...of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Court." It is abundantly clear that through these guidelines parental authority is being undermined by implementing rules that violate the legal rights and responsibilities of parents.

The model policies encourage schools to outright deceive parents. They provide that schools should "respect" students if they don't want their parents to know about their new transgender identity. The policy specifically allows that in cases where parents are not embracing or facilitating their child adopting a new gender identity (like using a new name, pronoun, etc.); teachers can use the child's new identity at school, but in the presence of the parent use the original legal name and pronouns.

It is extremely unwise for schools to actively encourage kids to lead a different life in secret that involves hiding vital information from parents. (There are already disturbing controversies like this happening in Wisconsin and Utah.)

locker room they choose, without being questioned by any school administrator or faculty, eliminating privacy and safety of students in states of undress.

“In addition to adhering to all legal standards of confidentiality, school personnel shall treat information relating to a student’s transgender status as being particularly sensitive, shall not disclose it to other students and parents, and shall only disclose to other school personnel with a legitimate educational interest.” (Draft Policy, p.12)

“Access to facilities such as restrooms and locker rooms that correspond to a student’s gender identity shall be available to all students.” (Draft Policy, p.18)

“School staff should not confront students about their gender identity upon entry into the restroom.” (Recommended Standard, p.18)

These policies ironically disregard minors’ bodily safety and privacy as part of the effort to create a “safe for all” learning environment. These policies will allow schools to permit boys identifying as girls, for instance, to use the girls’ bathrooms or change in female locker rooms, all done without any parents being notified. Sadly, no one ever talks about the harm done to very young girls, for example, who feel powerless to expect physical privacy in the presence of biological males. Conversely, there is no consideration of young men who don’t want to change in front of biological girls.

6. The requirements for schools to maintain gender-neutral dress code standards will cause disruptions and distractions, permitting boys to wear skirts and girls to go topless in activities where boys can – such as swimming activities or teams.

“Students have a right to dress in a manner consistent with their gender identity or gender expression. Schools shall administer and enforce dress and grooming codes consistently across the student body, regardless of actual or perceived gender identity or gender expression. Requirements for attire for school-related programs, activities, and events shall be gender-neutral.” (Draft Policy, p.16)

This policy provides that students may dress in a manner “free from gender expectations, as long as the student’s attire complies with the school’s dress code.” However, the goal of a dress code is not intended to promote modesty, rather it’s “to ensure the health and safety of students and not contribute to a hostile or intimidating atmosphere for any student.” Whether through distractions or questionable dress, there could be unintended consequences if VDOE requires schools to amend current dress codes to comply with these misguided policies.

7. These guidelines present a scientifically false assessment that people are arbitrarily “assigned” a gender when they’re born, which is contrary to knowledge of basic DNA science and biology and will only lead to more gender confusion.

EXHIBIT 5

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Founding Freedoms Law Center: Legal Flaws in the Model Policies

Re: Comments on Model Policies for the Treatment of Transgender

Students in Virginia's Public Schools (hereafter "Model Policies")

Founding Freedoms Law Center ("FFLC") is a public interest law firm headquartered in Richmond, Virginia. FFLC and its parent, The Family Foundation of Virginia ("TFF"), have supporters in most Virginia cities and counties. FFLC makes these comments on behalf of itself as well as its supporters.

I. Introduction

In *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), Justice O'Connor for a plurality of the United States Supreme Court reiterated the following principles that have guided the rights of parents over the education of their children for the past 100 years.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also includes a substantive component that provides heightened protection against government interferences with certain fundamental rights and liberty interests.

The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the 'liberty' protected by the Due Process Clause includes the right of parents "to establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment



student's participation in any school program on the basis of sex. The following statement in the Model Policies (that Title IX "may be understood to prohibit discrimination . . . based on . . . sexual orientation, and gender identity or transgender status") is wrong. On January 8, 2021, the U.S. Department of Education's ("USDOE") Office of General Counsel issued an opinion as to whether the Court's interpretation of "sex" in *Bostock v. Clayton County*, 104 S. Ct. 1731 (2020) affected the interpretation of "sex" for purposes of Title IX. USDOE's lawyers answered "no."

See <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf?bcs-agent-scanner=4c930bc7-a8a1-3442-907a-a81eb781dfea> at 2.

Regarding whether *Bostock* applied to school washrooms, locker rooms, and other sex-segregated programs addressed under Title IX, DOE's lawyers wrote that *Bostock* does not apply because (1) *Bostock* applies only to Title VII of the Civil Rights Act, not Title IX; (2) the ordinary public meaning of "sex" at the time of Title IX's enactment was biological sex, male or female, not transgender status or sexual orientation; and (3) the Department's regulations recognizing the male/female biological binary carry interpretative authority because they were the product of uniquely robust and direct Congressional review. *Id.* at 6.

- The Model Policies' description of the *Family Educational Rights and Privacy Act (FERPA)* on page 7 again is somewhat accurate, in that FERPA is a federal law that, with limited exceptions, protects the privacy of student educational records without the written consent of parents. The following two sentences in the Model Policies (that FERPA prohibits the improper disclosure of personally identifiable information, which includes gender identity or sexual orientation) is, however, very misleading if interpreted as applying to parents. In fact, according to USDOE's *Parents Guide to the Family Educational Rights and Privacy Act: Rights Regarding Children's Educational Records*, FERPA gives *parents* the right to review their child's educational records, and "generally requires schools to ask for written consent before disclosing your child's personally identifiable information to individuals *other than you*." See (<https://www2.ed.gov/policy/gen/guid/fpco/brochures/parents.html>) (emphasis added). In other words, FERPA gives parents the right to access their child's educational records, and it provides NO authority for the school to keep these records from parents. Hiding school records from parents who may not support their child's gender transition is directly against the spirit and intent of FERPA, which is designed to give parents unfettered access to their child's school records.

B. The Model Policies Violate Constitutionally Protected Parental Rights

The Model Policies are replete with statements with which few can argue, such as VDOE's commitment to "ensure a positive, safe, and nurturing learning environment for all students" (p.

Applying the compelling state interest test dooms the Model Policies' attempt to keep parents uninformed of their child's quest to transgender. Under this test, the Commonwealth must prove that its interest in helping a child transgender is "paramount," "of the highest order," and "vital" compared to the interest of the parents. See *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020). The Commonwealth must also prove that there is no other narrower means to achieve the student's transgender than by withholding information and deceiving the student's parents. The school, in such an instance, usurps the role of the parent, and becomes the student's protector and guide.

Such a role, of course, has additional due process dimensions. One of the major issues in a contested divorce is the fitness of a spouse to parent a child. If the parties cannot agree on the terms of parenting, an independent party (a judge typically) decides. Here, the school acts not only as a party, but also the judge, determining what information to give and what to withhold, as noted on page 13, which states that "school divisions will need to determine whether to respect the student's request [regarding preferred pronouns], abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents." See also page 15 pertaining to School Records, which allows schools "upon the request of a student *or* parent," to use the new name and gender of the student on school records. Allowing a minor, deemed by state laws incapable of making legally binding decisions because of a lack of capacity, to make a decision concerning gender reflected on school records is again a violation of constitutionally protected parental rights.

C. The Model Policies May Lead to FERPA and Virginia Code Violations

As noted above on pages 5-6, FERPA is a federal law that, with certain exceptions not applicable here, protects the privacy of student records from persons other than students and their parents. In fact, FERPA provides a statutory right for parents to access their child's educational records. See 20 U.S.C. § 1232g *et seq.*

On page 20 of the Model Policies, the authors state that when a student informs the school about his/her gender transition, the school should have a point-of-contact to "meet with the student (and parents/guardians if the parents/ guardians are affirming of the student's gender identity) to develop a plan to accommodate the student's needs and requests." The authors further state that a template may be helpful to address matters like names, use of pronouns, privacy concerns, communication plans, student records, and access to facilities and activities. The authors obviously recognize the need for documentation.

Stating that information will be shared with affirming parents implies that this information may not be shared with non-affirming parents. Assuming document(s) are created and then not provided to the parents upon their request, the school commits a FERPA violation. Withholding these documents is also a violation of Virginia Code § 20-124.6, which states that a parent shall not be denied access to his/her child's academic record.

those of parental rights and religious liberty advocates. A new, diverse committee likely would create model policies that better balance the needs of transgender students with parental rights, the constitutional rights of school faculty, staff, and students, and the community at large.

EXHIBIT 6

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Sarah Via - Strongly Oppose bc Policy is extremely flawed

As a parent & educator, I find these “Model Policies” developed & recommended by the VDOE to be extremely flawed on many levels. I have put a few points of major concern, but they are in no way an exhaustive list of concerns & grievances:

1. There is a lack of expertise from key figures. I see many school officials & pro-LGBTQ+ groups being asked for their expertise, but no outreach for expertise from non-academia related doctors & psychologists. Science experts that attest to gender/sex as binary are also missing from comments. This should have been a collaborative effort from all sides of the aisle to form model policies that seriously effect the safety, health, and overall well-being of our children & students.
2. I do not see any resources or proof that gender affirming & transitioning policies have any positive effect on the long-term psychological well-being of transgender individuals. In fact, studies actually show there may not be any positive effects, so why would a Dept of Education be promoting these policies without ample proof. Here are some sobering statistics:
 - a. 90% of transgender research subjects are lost to follow-up, so no one knows how many go back to identifying as their birth gender (Paper Genders by Walt Heyer)
 - b. Paul McHugh, MD cites a study that found that individuals who had had transgender surgery were about 5 times more likely than the control group to attempt suicide and almost 20 times more likely to succeed (What Percentage of Transgenders Regret Surgery by Susan Ciancio)
3. There are already numerous existing laws and policies that protect all individuals from abuse, harassment, bullying, discrimination, etc. More policies are not needed, unless they are trying to restrict the freedoms and liberties of others that are adversely affected by the application of such policies.
4. These policies usurp & undermine the parents’ authority of all the students. Here are a few examples of how the parent is purposely left out of important decisions for their child’s mental health & development on both sides of the issues:
 - a. For the mental health of the student wanting to change, why would the parent not be notified of a huge life altering decision. As we all know, children need the support of their parents to succeed at most anything in life. The parents are paying the taxes used to fund the schools & salaries of all involved. By this, are you asking a child to live a double life? Be different at home than at school. What are the long-term effects on the child for living like this?
 - i. *“School divisions will need to consider the health and safety of the student in situations where students may not want their parents to know about their transgender status ... There are no regulations requiring school staff to notify a parent or guardian of a student’s request to affirm their gender identity...”* (Recommended Standard, p.12)
 - b. Children exposed to the opposite biological gender in locker rooms have safety concerns & rights too. Not telling parents or even the students that the opposite biological gender will be in the bathroom/locker room that doesn’t align with their biological gender is harmful & damaging. At the least, it would be wise for parents to advise their children about something they are unfamiliar with and be able to have a



To me, it seems like these policies are only designed for some other reason as the costs, efforts, and overall burdens it imposes on the majority is a price that is way too high.

EXHIBIT 7

TO

**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

Model Policies for the Treatment of Transgender Students in Virginia's Public Schools

March 2021



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Introduction

The **Model Policies for the Treatment of Transgender Students in Public Elementary and Secondary Schools** document was developed in response to House Bill 145 and Senate Bill 161, enacted by the 2020 Virginia General Assembly:

“1. That the *Code of Virginia* is amended by adding a section numbered 22.1-23.3 as follows § 22.1-23.3. Treatment of transgender students; policies.

- A. The Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to:
1. Compliance with applicable nondiscrimination laws;
 2. Maintenance of a safe and supportive learning environment free from discrimination and harassment for all students;
 3. Prevention of and response to bullying and harassment;
 4. Maintenance of student records;
 5. Identification of students;
 6. Protection of student privacy and the confidentiality of sensitive information;
 7. Enforcement of sex-based dress codes; and
 8. Student participation in sex-specific school activities, events, and use of school facilities.

Activities and events do not include athletics:

- B. Each school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Virginia Department of Education (VDOE) pursuant to subsection A:
1. That the Virginia Department of Education shall develop and make available to each school board model policies pursuant to subsection A of § 22.1-23.3 of the *Code of Virginia*, as created by this act, no later than December 31, 2020.
 2. That each school board shall adopt policies pursuant to subsection B of § 22.1-23.3 of the *Code of Virginia*, as created by this act, no later than the beginning of the 2021–2022 school year.”

In June 2020, an advisory committee was formed to review model policies, local policies throughout the nation, and resources pertaining to the treatment of transgender students in public schools. The committee included school-based personnel representing diverse Superintendent’s Regions and disciplines, representatives from state professional associations, parent representatives, student representatives, representatives from advocacy organizations, and specialists from the Virginia Department of Education (VDOE). The development of these model policies is a result of consultation and collaboration with multiple stakeholders throughout the Commonwealth with a variety of backgrounds and expertise.

identity. Other similar terms may include genderqueer, gender fluid, agender, or Two-Spirit (for Native American Indian, Alaska Native, First Nation, or Indigenous communities).

- **Sex Assignment:** A label, generally “male” or “female,” that is typically assigned at birth on the basis of a cluster of physical and anatomical features. Intersex refers to someone whose combination of chromosomes, gonads, hormones, internal sex organs, and genitals differs from the two expected patterns of male or female.
- **Transgender:** A self-identifying term that describes a person whose gender identity is different from their sex assigned at birth. A **transgender girl** is a girl who was presumed to be male when she was born, and a **transgender boy** is a boy who was presumed to be female when he was born. Note that there is a wide range of gender identities in addition to transgender male and transgender female, such as nonbinary.

Related Laws

A brief summary of federal and state laws is included for informational purposes and to aid in the development of model policies for the treatment of transgender students. The summary provided in this section does not constitute legal interpretation nor advice. Given the changing legal landscape, including on-going litigation and different interpretations, school divisions should consult with their school board attorney.

First Amendment: The First Amendment protects freedom of speech and expression. Schools may not prevent students from expressing their identity.

Equal Protection Clause of the 14th Amendment: This clause guarantees every citizen equal protection under the law. It protects LGBTQ+ youth in schools from unfair or discriminatory school actions.

Title VII of the Civil Rights Act of 1964: The US Supreme Court ruled in June 2020 that this federal law includes protection based on sexual orientation and gender identity in its prohibition of employment discrimination.

Title IX of the Education Amendments of 1972: Title IX is a federal law that prohibits schools that receive federal financial assistance from limiting or denying a student’s participation in any school program on the basis of sex. This may be understood to prohibit discrimination, including sexual harassment, based on sex stereotypes, sexual orientation, and gender identity or transgender status.

Equal Access Act: This is a federal law that requires public secondary schools to provide equal access to extracurricular clubs. Schools must treat all clubs the same and use school resources in the same way, including for Gay-Straight Alliance or Gender-Sexuality Alliance (GSA) clubs.

Family Educational Rights and Privacy Act (FERPA): This is a federal law that protects the privacy of student educational records. It prohibits the improper disclosure of personally identifiable information from student records. Information relating to gender identity or sexual orientation may constitute personally identifiable information.

Association of School Psychologists (NASP) declared in a resolution that “all persons, including children and adolescents who are diverse in their sexuality and gender identities, expression, and/or presentation, have the inherent human right to equal opportunity and a physically and psychologically safe environment within all institutions.” The American Academy of Pediatrics (2018) also acknowledged that, “variations in gender identity and expression are normal aspects of human diversity.”

School divisions are encouraged to develop comprehensive policies, regulations, guidance and implementation plans to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged, and achieve academic success. This process should be informed by the needs of students, and the strongest policies are developed when they include student participation. A recent study found that inclusive policies that focus on sexual orientation and gender identity were associated with more supportive school environments for LGBTQ+ youth and had a direct association with less truancy (Day, Ioverno, & Russell, 2019). While the terminology *transgender* is used throughout this document, it should be interpreted to include gender-expansive, nonbinary, and gender nonconforming individuals who do not identify on the cisgender binary.

To comply with HB 145 (2020) and SB 161 (2020), local school boards shall adopt policies consistent with model policies contained in this document no later than the 2021-2022 school year. They may adopt more comprehensive policies than these model policies relating to the treatment of transgender students. The goal is to develop policies that are informed by the law and ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. Local school boards should consult with their school board attorney in the development of policies and regulations relating to the treatment of transgender students.

The purpose of this document is to present model policies for use during the local school board’s policy development process. Given the broad range of topics to be addressed by local school boards relating to the treatment of transgender students, it is likely that multiple policies will be needed in different categories rather than a single policy. Existing policies and regulations may also need to be expanded or clarified to be more gender-inclusive or to emphasize specific protections for transgender, nonbinary, and gender-expansive students. This document provides information, best practices, guidance, procedures, and standards for each topic, and model policies are highlighted and distinctive from the discussions. Local school boards may adopt example language in the model policies or use it as a guide to draft policies that meet the unique needs of their school division.

Bullying, Harassment, and Discrimination

Because of societal prejudice and lack of awareness or understanding, transgender students may experience rejection, criticism, or bullying, that affect their emotional health and academic achievement. A 2019 national survey by GLSEN found that 84 percent of transgender youth feel unsafe at school, and those who experience victimization have significantly lower GPAs, are more likely to miss school out of concern for their safety, and are less likely to plan on continuing their education (Kosciw, Clark, Truong, & Zongrone, 2020). Compared to their

prohibited under federal and state laws. Nondiscrimination policy and related complaint procedures should be readily accessible to students and parents/guardians. While there are existing procedures for complaints related to discrimination, harassment, and bullying, school divisions may consider emphasizing steps that a student or parent may take for complaints specifically related to discrimination based on gender identity. For example, a division-level ombudsman or team may be established to hear concerns brought by students, families, and staff when their concerns are not resolved at the school level. This division-level ombudsman or team may also be available to provide consultations to school staff with questions regarding the implementation of the policies. To assist staff in understanding how to provide a safe educational environment for transgender students, refer to considerations for training under the Professional Development and Training section.

The [School Division] prohibits any and all discrimination, harassment, and bullying based on an individual's actual or perceived race, color, national origin, religion, sex, sexual orientation, gender identity, disability, or any other characteristic protected by law.

Any incident or complaint of discrimination, harassment, or bullying shall be given prompt attention, including investigating the incident and taking appropriate corrective action, by the school administrator. Complaints alleging discrimination, harassment, or bullying based on a student's actual or perceived gender identity shall be handled in the same manner as other discrimination or harassment complaints. The [School Division's Designated Contact] shall be available to hear concerns from students and parents when complaints are not resolved at the school level.

Student Privacy/Confidentiality

Many transgender students undergo the process of gender transition to confirm and live as the gender consistent with their gender identity. School divisions are encouraged to communicate openly, albeit confidentially, with students and families regarding the student's gender identity to ensure that appropriate steps are taken to determine a student's needs and address any privacy concerns and associated risks to the student's well-being. Protecting transgender students' privacy is critical to ensuring that they are treated consistent with their gender identity and minimizing the risk of harm to the students.

Regarding student privacy within the school community, a student's gender identity may be public or private, and the degree to which others are aware of the student's gender identity will influence plans to support the student. Given the potential for discrimination, sharing this information could expose a student to harassment and abuse from peers or adults within the school community. School staff should discuss with the student about how they prefer information about their gender identity to be shared. Some students may wish the information to remain private while others may prefer that the gender identity is shared or even discussed in class. If the student is in a setting where they have been known by their assigned sex at birth, options for privacy may be limited. In some situations, the student's move to a new school setting (e.g., starting middle school, transferring to a different school) affords the opportunity to confirm their gender identity with more privacy. Regardless of the circumstances, the school should support the student's need for privacy and safety and not disclose a student's gender identity to other students or other parents. Additionally, school staff should treat a student's

For many transgender students, their daily emotional and psychosocial wellness are dependent on receiving support and recognition for their gender identity. A transgender student may adopt a name that is different from their legal name on their birth certificate and use pronouns reflective of their gender identity. Many transgender students will adopt the gender pronouns typically associated with their gender identity. For example, most transgender girls will use she/her/hers pronouns, while most transgender boys will use he/him/his pronouns. There may be a less common pattern of pronoun usage among nonbinary students. Nonbinary students, as well as transgender students, may use gendered pronouns like she/her/hers or he/him/his, use gender-neutral pronouns such as they/them/their or ze/hir/hirs, use multiple sets of pronouns interchangeably, or use their name in place of any pronoun. School divisions should accept a student's assertion of their gender identity without requiring any particular substantiating evidence, including diagnosis, treatment, or legal documents. A student is considered transgender if, at school, the student consistently asserts a gender identity different from the sex assigned at birth. This should involve more than a casual declaration of gender identity, but it does not necessarily require any substantiating evidence nor any required minimum duration of expressed gender identity. Establishing gender identity can present differently from student to student, including, but not limited to: uniform assertion of such an identity, indication that the identity is sincerely held as part of the student's core identity, or that the student is not asserting such an identity for an improper purpose. Schools should work with a student to address any concern that an asserted gender identity may be for an improper purpose, such as permitting the student to respond with information that supports the request to be treated consistent with their gender identity.

When a student asserts that they have a name and/or pronoun affirming their gender identity, school staff should abide by the student's wishes as to how to address the student. All school employees shall treat all students with respect and dignity. In accepting employment with a school district, a school staff member agrees to abide by and uphold their school board's policies and procedures, as well as federal and state laws. A school administrator may need to direct school staff to abide by the wishes of a student on their name and pronoun. A school employee's intentional and persistent refusal to respect a student's name and pronoun is considered discriminatory. Schools also should be prepared for genuinely innocent confusion or uncertainty that may come up from school staff and students. Existing school board policies, including anti-discrimination, harassment, and bullying policies, may need to be adjusted or clarified relating to processes that address when a school staff member fails to comply with the student's request or an administrator's directive to use the name and pronoun consistent with their gender identity.

Schools shall allow students to use a name and gender pronouns that reflect their gender identity without any substantiating evidence. School staff shall, at the request of a student or parent, when using a name or pronoun to address the student, use the name and pronoun that correspond to their gender identity.

In the situation when parents or guardians of a minor student (under 18 years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request, abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents. This process will require consideration of short-term solutions to address the student's emotional needs to be affirmed at school as well as the long-term goal of

where school divisions are required to use or to report a transgender student's legal name or sex assigned at birth, such as for purposes of standardized testing or student data reporting to the VDOE, school staff should adopt practices to avoid the inadvertent disclosure of such information. Additionally, schools should eliminate gender markers from their forms, documents, and records when feasible. While the topic of transgender students usually focuses on transgender males or transgender females, there are students who identify as nonbinary or gender-expansive. Since the concept of gender is increasingly being viewed as a gender spectrum, it may be beneficial to remove gender from forms and documents or provide a broader, more inclusive range of options. For purposes of data collection, the VDOE has expanded gender choices to include nonbinary as a third option if the student or parent wishes to use this option.

When a student or parent requests to change the student's name or gender on school records, the extent to which records are modified will depend on the type of record and the substantiation of the change. Local school boards may need to revise or clarify current policies relating to the process to change any element of a student's record, including the appeals process for decisions made regarding a change to the student's record.

School divisions will also need to consider policies relating to records for former students. When a student transitions after they are no longer enrolled in the school division, they may request amendments to school records reflecting a new name and gender that are different from those during their attendance. Former students may want to ensure that information on their records such as transcripts and standardized test scores are consistent with information they are submitting such as those on college or job applications. School divisions could consider respecting a former student's request to amend records retroactively and may consider processing those requests in the same way other student record amendment requests are processed. If a former student obtains a court order changing their name or amend other legal documents such as their birth certificate, state-or federal-issued identifications, or passports, school divisions, when requested, should amend the student's record, including reissuing a high school diploma or transcript, to reflect the student's current name and gender. Before making a decision on policies relating to changes to school records, transcripts, and diplomas, school divisions should consult their school board attorney.

Dress and grooming codes shall be written relating to the attire or articles of attire without limits on gender expectations. Students have a right to dress in a manner consistent with their gender identity or gender expression. Schools shall administer and enforce dress and grooming codes consistently across the student body, regardless of actual or perceived gender identity or gender expression.

Requirements for attire for school-related programs, activities, and events shall be gender-neutral.

Access to Activities and Facilities

Student Participation in School Activities and Events

In general, school divisions should make efforts to eliminate gender-based practices to the extent possible. Gender-based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, regardless of their gender identity or gender expression. Examples of practices that may be based on gender include grouping students for class activities, gender-based homecoming or prom courts, limitations on who can attend as “couples” at school dances, and gender-based events such as father-daughter dances. School divisions should review any gender-based policies, rules, and practices to determine whether they serve a legitimate educational goal or otherwise non-discriminatory purpose. School activities and practices should be gender-neutral and avoid dividing students by gender in the absence of an educational purpose. Any single-gender activity or program should not be premised on generalizations or stereotypes about the different talents, capacities, or preferences of any gender. For example, the composition of choruses should be gender-inclusive and based only on vocal range or quality requirements.

Whenever schools provide gender-specific activities such as physical education classes, students should be allowed to participate in a manner consistent with their gender identity. Students have the right to equitable access to programs, activities, and events that include but are not limited to acknowledgements, dances, assemblies, after-school programs, extracurricular activities, intramurals, non-competitive sports leagues, and field trips. For overnight field trips, the school should not force the student into single-occupancy accommodations that are not required for other students; however, such alternative accommodations should be made available to any student requesting them. It is important that school divisions adopt policies and procedures that are focused on the safety of all students and seek to address privacy interests in situations involving individuals undressing or showering. School divisions should ensure that all students who participate in extracurricular activities that involve overnight trips are aware of the school’s policies and options available to them in advance.

HB 145 and SB 161 exclude athletics for purposes of developing local school board policies. School divisions should follow rules and policies for interscholastic athletic participation as outlined by those athletic organizations. The Virginia High School League (VHSL) has provided policies regarding the participation in gender-specific sports team by transgender students (VHSL, 2020).

Access to facilities such as restrooms and locker rooms that correspond to a student's gender identity shall be available to all students.

Upon request, single-user or gender-inclusive facilities or other reasonable alternatives shall be made available to any student who seeks privacy. Any options offered shall be non-stigmatizing and minimize lost instructional time.

Professional Development and Training

In order to promote a positive school climate where all students feel safe and supported, school divisions should incorporate regular education about transgender students into staff professional development and training. Periodic professional development should be provided to school mental health professionals (SMHPs), such as school-based counselors, psychologists, and social workers. SMHPs play a critical role in addressing the mental well-being of students that may have an impact on their academic performance. Thus, they are key personnel in addressing challenges that transgender students may face in their schools. Yet, in a recent national survey (GLSEN, 2019), 80 percent of SMHPs received little to no competency training in their graduate programs related to working with transgender populations, and 37 percent had not received any formal education or training on LGBTQ+-specific student issues during their professional careers. When they receive competency training and continuing education and training activities related to LGBTQ+ students, SMHPs feel more confident and engage in more efforts to support LGBTQ+ students directly and to address overall school climate. In addition to SMHPs, school divisions should provide training to all school staff, including but not limited to custodial staff, administrative support staff, substitute teachers, school nurses, and bus drivers. Any staff with opportunities to interact with students should have some familiarity with how to support LGBTQ+ students and would benefit from training that fosters a safe and supportive school climate.

The goal of professional development for all staff is to ensure that they understand the rights of all students to a safe learning environment and the local school board's expectations regarding the treatment of transgender students. Additionally, professional development should include culturally affirming, accessible LGBTQ+ competency training. It is recommended that training provided to school staff cover the following components:

- Key LGBTQ+ terminology and the use of unbiased language to promote equality and justice for LGBTQ+ students.
- Challenges and barriers frequently faced by LGBTQ+ students. This should heighten awareness of the implicit bias and discrimination that transgender students may encounter and identify the need for a gender-inclusive school.
- Federal and state laws and local school board policies and regulations relating to the rights of all students to a safe learning environment. This should include expectations relating to preventing, identifying, and responding to bullying and harassment of transgender students. Another area to address is the student's rights to privacy and how unauthorized disclosures to peers, parents, school staff, and other third parties may negatively impact the student's safety and well-being.

should be developed to support students or parents requesting a name and gender change and requesting an action plan to support the student's transition. School divisions are recommended to establish and designate a point-of-contact or team of knowledgeable and affirming staff members to support transgender students. When a student informs the school about their transition or requests a change to their name and gender, it is recommended that a point-of-contact, or a multi-disciplinary school team if needed, meet with the student (and parents/guardians if the parents/guardians are affirming of the student's gender identity) to develop a plan to accommodate the student's needs and requests. A template may be helpful to develop a plan that includes areas to be addressed such as names and pronouns, privacy concerns, communication plans, student information and records, access to facilities and activities, and other considerations.

In addition to policies that address the areas discussed above, local school boards should consider developing additional policies, regulations, or guidelines that foster an inclusive school climate. For example, school divisions may consider ensuring LGBTQ+-inclusive curricula. According to GLSEN, schools with LGBTQ+-inclusive and affirming curricula have students who have less-hostile school experiences, increased feelings of connectedness to the school community, better academic and mental health outcomes, and are less likely to miss school (GLSEN, 2019). School divisions may take an inclusive approach by incorporating educational content that is transgender affirming into the general education curriculum, such as history, literature, and science. For example, material may feature or include transgender people or highlight the contributions of LGBTQ+ people in state and US history curricula. School divisions should also initiate efforts to curate an inclusive library collection. As with many curricular choices, school divisions should involve key stakeholders in making those decisions. School divisions will need to consider additional actions if they wish to include material related to gender identities in Family Life Education (FLE). Per the *Code of Virginia* § 22.1-207.2, parents and guardians have the right to review the Family Life Education (FLE) curriculum. Additionally, in the *Code of Virginia* § 22.1-207.1, parents and legal guardians have the right to excuse their child from all or part of FLE instruction.

To further foster positive, inclusive school climates, school divisions should promote activities and LGBTQ+-affirming resources for students and families. For example, schools should support the formation of student clubs or programs regarding issues related to LGBTQ+ youth such as Gay-Straight Alliances or Gender & Sexuality Alliances (GSAs), ensuring that these are equally easy to establish in relation to other student clubs or programs. Besides professional development for school staff, students may also benefit from training on an inclusive school environment. This may be in the form of peer-led education groups, educational material on student rights and training on self-advocacy skills, learning assemblies, or training of student leaders. Other affirming activities include the promotion of visible supports for LGBTQ+ youth such as the use of flags and stickers and the sharing of affirming community resources. Examples of resources for students are provided in Appendix A.

Connecticut State Department of Education [Guidance on Civil Rights Protections and Supports for Transgender Students Frequently Asked Questions](#)

GLSEN [Model Local Education Agency Policy on Transgender and Nonbinary Students](#)

Madison Metropolitan School District [Guidance & Policies to Support Transgender, Non-Binary, and Gender-Expansive Students](#)

Massachusetts Department of Elementary and Secondary Education [Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity](#)

Montgomery County Public Schools [Guidelines for Students: Gender Identity](#)

Oregon NOW [Model Student Dress Code](#)

State of New Jersey Department of Education [Transgender Guidance for School Districts](#)

US Department of Education [Examples of Policies and Emerging Practices for Supporting Transgender Students](#)

Virginia High School League (VHSL) [Virginia High School League Handbook and Policy Manual 2020-2021](#)

Professional Development Resources

[American Counseling Association LGBTQ-Affirmative Counseling Competencies](#) (in partnership with Human Rights Campaign)

[Garden State Equality Professional Development Workshops](#)

[GLSEN Professional Development](#)

[Rainstorms to Rainbows](#) (LGBTQ+ Consulting and Counseling)

[Side-by-Side Trainings](#)

[Teaching Tolerance](#) (Gender & Sexual Identity Webinars)

[The Safe Zone Project](#) (Awareness and Ally Training Workshops)

[Welcoming Schools Professional Development](#)

Resources for Students

[Campus Pride](#)

Centers for Disease Control and Prevention [LGBTQ Youth Resources](#)

National Center for Transgender Equality [Youth & Student Issues](#)
[Shenandoah LGBTQ Center](#)

[Side by Side](#)

[Trans-Latinx DMV](#)

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Publication Information

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EXHIBIT 8

TO

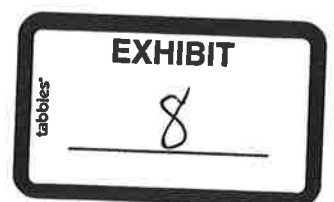
**PETITION FOR APPEAL FROM VIRGINIA
DEPARTMENT OF EDUCATION**

OF

**FOUNDING FREEDOMS LAW CENTER, THE
FAMILY FOUNDATION OF VIRGINIA,
and SARAH VIA**

March 30, 2021

**Model Policies for the
Treatment of Transgender
Students
in Virginia's Public Schools**



March 2021



**VIRGINIA
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Introduction

The **Model Policies for the Treatment of Transgender Students in Public Elementary and Secondary Schools** document was developed in response to House Bill 145 and Senate Bill 161, enacted by the 2020 Virginia General Assembly:

“1. That the *Code of Virginia* is amended by adding a section numbered ~~22.1-23.3~~ as follows-

~~§-~~

§ 22.1-23.3. Treatment of transgender students; policies.

~~A-~~

A. The Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices and include information, guidance, procedures, and standards relating to:

1. Compliance with applicable nondiscrimination laws;
2. Maintenance of a safe and supportive learning environment free from discrimination and harassment for all students;
3. Prevention of and response to bullying and harassment;
4. Maintenance of student records;
5. Identification of students;
6. Protection of student privacy and the confidentiality of sensitive information;
7. Enforcement of sex-based dress codes; and
8. Student participation in sex-specific school activities, events, and use of school facilities.

Activities and events do not include athletics:

~~B-~~

Each school board shall adopt policies that are consistent with but may be more
B. ~~comprehensive~~ than the model policies developed by the Virginia Department of Education (VDOE) pursuant to subsection A:

1. That the Virginia Department of Education shall develop and make available to each school board model policies pursuant to subsection A of ~~§- 22.1-23.3-~~ of the *Code of Virginia*, as created by this act, no later than December 31, 2020.
2. That each school board shall adopt policies pursuant to subsection B of ~~§- 22.1-23.3-23.3-~~ of the *Code of Virginia*, as created by this act, no later than the beginning of the 2021–2022 school year.”

In June 2020, an advisory committee was formed to review model policies, local policies throughout the nation, and resources pertaining to the treatment of transgender students in public schools. The committee included school-based personnel representing diverse Superintendent’s Regions and disciplines, representatives from state professional associations, parent representatives, student representatives, representatives from advocacy organizations, and specialists from the Virginia Department of Education (VDOE). The development of these

Background

Terminology

This document uses the following terms:

Transgender and nonbinary students may use different terms to describe their lives and gender experiences. While terminology and language differ and evolve based on region, language, race or ethnicity, age, culture, and other factors, for purposes of discussion in this document, the following terms are used:

- **Cisgender:** AAn adjective describing a person whose gender identity aligns corresponds with the gender society typically associates with the sex they were assigned at birth.
- **Gender:** A set of social, psychological, and emotional traits that classify an individual as typically masculine or feminine, although the social construct of gender may be more diverse across a continuum rather than as a binary system.
- **Gender-expansive/gender-diverse/gender-fluid/gender-nonbinary/agender/gender queer:** Terms that convey a wider, more inclusive range of gender identity and/or expression than typically associated with the social construct of a binary (two discrete and opposite categories of male and female) gender system.
- **Gender Expression:** The manner in which a person represents or expresses their gender identity or role to others, often through appearance, clothing, hairstyles, behavior, activities, voice, or mannerisms. Gender expression may change over time and from day-to-day and is not necessarily related to the person's gender identity.
- **Gender Identity:** A person's internal sense of their own identity as a boy/man, girl/woman, something in between another gender, no gender, or outside the male/female binary. Gender identity is an innate part of a person's identity and can be the same or different from society's expectations with the sex they were assigned at birth.
- **Gender Nonconforming:** A person who does not conform to gender stereotypes. Their gender expression differs from society's expectations associated with the sex assigned at birth. Being gender nonconforming is distinct from being transgender, though some transgender people may consider themselves to be gender nonconforming.
- **Gender Transition:** The process of shifting toward living according to their gender identity, rather than the sex assigned at birth. Transitions can be at different levels, including social transition, such as new names, pronouns, appearance, and clothing. Some people may undergo medical transitions, such as hormone therapy or surgery.
- **LGBTQ+:** An acronym for "lesbian, gay, bisexual, transgender, queer/questioning, and others."
- **Nonbinary:** a term used to refer to people whose gender identity is not exclusively male or female, including those who identify with a different gender, a combination of genders, or no gender. Nonbinary may be considered a subset of transgender or a distinct identity. Other similar terms may include genderqueer, gender fluid, agender, or Two-

- female when he was born. Note that there is a wide range of gender identities in addition to transgender male and transgender female, such as nonbinary.

Related Laws

A brief summary of federal and state laws is included for informational purposes and to aid in the development of model policies for the treatment of transgender students. The summary provided in this section does not constitute legal interpretation nor advice. Given the changing legal landscape, including on-going litigation and different interpretations, school divisions should consult with their school board attorney.

First Amendment: The First Amendment protects freedom of speech and expression. Schools may not prevent students from expressing their identity.

Equal Protection Clause of the 14th Amendment: This clause guarantees every citizen equal protection under the law. It protects LGBTQ+ youth in schools from unfair or discriminatory school actions.

Title VII of the Civil Rights Act of 1964: The US Supreme Court ruled in June 2020 that this federal law includes protection based on sexual orientation and gender identity in its prohibition of employment discrimination.

Title IX of the Education Amendments of 1972: Title IX is a federal law that prohibits schools that receive federal financial assistance from limiting or denying a student's participation in any school program on the basis of sex. This may be understood to prohibit discrimination, including sexual harassment, based on sex stereotypes, sexual orientation, and gender identity or transgender status.

Equal Access Act: This is a federal law that requires public secondary schools to provide equal access to extracurricular clubs. Schools must treat all clubs the same and use school resources in the same way, including for Gay-Straight Alliance or Gender-Sexuality Alliance (GSA) clubs.

Family Educational Rights and Privacy Act (FERPA): This is a federal law that protects the privacy of student educational records. It prohibits the improper disclosure of personally identifiable information from student records. Information relating to gender identity or sexual orientation may constitute personally identifiable information.

Health Insurance Portability and Accountability Act of 1996 (HIPAA): This is a federal law that mandates the privacy protections for individually identifiable health information. Demographic information such as gender may be considered protected health information under HIPAA.

Conversion Therapy Prohibited: ~~§ 54.1-2409.5. This~~ § 54.1-2409.5 ~~The Code of Virginia state law~~ § 54.1-2409.5 prohibits licensed professionals from engaging in conversion therapy with youth under 18 years of age. Note that conversion therapy is opposed by most major professional organizations such as the American Psychiatric Association (APA, 2018), the American Counseling Association (ACA, n.d.), and the American Medical Association (AMA, 2019).

Virginia Anti-Bullying legislation: Virginia school boards are required to include bullying prevention as a part of character education (§ 22.1-208.01 of the *Code of Virginia*). In addition, school boards are expected to include bullying as a prohibited behavior in their student codes of conduct (§ 22.1-279.6.D of the *Code of Virginia*) and to implement policies and procedures to educate school board employees about bullying and the need to create a bully-free environment (§ 22.1-291.4 of the *Code of Virginia*). Finally, §§ 22.1-276.01 and 22.1-279.6 of the *Code of Virginia* requires including standards for reducing bias and harassment in the enforcement of any code of student conduct.

Virginia Identification Documents legislation: §§ 46.2-323, 46.2-341.12, 46.2-345, and 46.2-345.2 of the *Code of Virginia* require the Department of Motor Vehicles to offer any applicant the option to mark “male,” “female,” or “non-binary” when designating the applicant’s sex on an application for a driver’s license or special identification card. Additionally,

§§ 32.1-261 and 32.1-269 of the *Code of Virginia* require the State Registrar to issue a new certificate of birth to show a change of sex upon request and, if a certified copy of a court order changing the person’s name is submitted, to include the person’s new name.

Guiding Principle to Support Transgender Students

The Virginia Department of Education continues to be committed to working with school divisions to ensure a positive, safe, and nurturing learning environment for all students. It is important that as education leaders we affirm our commitment to advancing equity in Virginia’s public schools. Efforts to advance equity priorities include developing a culturally competent workforce of educators, closing opportunity and achievement gaps among marginalized student groups, increasing access to high quality early learning opportunities, and maximizing the potential of every Virginia student. The key guiding principle of the model policies is that all children have a right to learn, free from discrimination and harassment.

For many people, their gender identity matches their sex assigned at birth. For others, their **internalized** gender identity does not necessarily correspond to the sex assigned at birth, where the gender identity may be one in a range such as transgender, nonbinary, or gender-expansive. Gender identity is considered an innate characteristic that most children declare by age five to six (Lamb & Lerner, 2015). In 2020, the American Psychological Association (APA) and National Association of School Psychologists (NASP) declared in a resolution that “all persons, including children and adolescents who are diverse in their sexuality and gender identities, expression, and/or presentation, have the inherent human right to equal opportunity and a physically and psychologically safe environment within all institutions.” The American Academy of Pediatrics (2018) also acknowledged that, “variations in gender identity and expression are normal aspects of human diversity.”

School divisions are encouraged to develop comprehensive policies, regulations, guidance and implementation plans to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged, and achieve academic success. This process should be informed by the needs of students, and the strongest policies are developed when they include student participation. [A recent study found that inclusive policies that focus on sexual orientation and gender identity were associated with more supportive school environments for LGBTQ+ youth and had a direct](#)

To comply with HB 145 (2020) and SB 161 (2020), local school boards shall adopt policies consistent with model policies contained in this document no later than the 2021-2022 school year. They may adopt more comprehensive policies than these model policies relating to the treatment of transgender students. The goal is to develop policies that are informed by the law and ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. Local school boards should consult with their school board attorney in the development of policies and regulations relating to the treatment of transgender students.

The purpose of this document is to present model policies for use during the local school board's policy development process. Given the broad range of topics to be addressed by local school boards relating to the treatment of transgender students, it is likely that multiple policies will be needed in different categories rather than a single policy. Existing policies and regulations may also need to be expanded or clarified to be more gender-inclusive or to emphasize specific protections for transgender, nonbinary, and gender-expansive students. This document provides information, best practices, guidance, procedures, and standards for each topic, and model policies are highlighted and distinctive from the discussions. Local school boards may adopt example language in the model policies or use it as a guide to draft policies that meet the unique needs of their school division.

Bullying, Harassment, and Discrimination

Because of societal prejudice and lack of awareness or understanding, transgender students may experience rejection, criticism, or bullying, that affect their emotional health and academic achievement. A 2019 national survey by GLSEN found that 84 percent of transgender youth feel unsafe at school, and those who experience victimization have significantly lower GPAs, are more likely to miss school out of concern for their safety, and are less likely to plan on continuing their education (Kosciw, Clark, Truong, & Zongrone, 2020). Compared to their cisgender and heterosexual peers, LGBTQ+ youth report much higher rates of depression, anxiety, alcohol and drug use, and lower self-esteem. LGBTQ+ youth of color may experience additional stress and adverse effects as a result of their intersecting identities, facing both bias against their gender identity or expression as well as racism. Research has shown that LGBTQ+ students experience higher levels of victimization because of their gender identity and/or gender expression and have more adverse outcomes compared to their cisgender and heterosexual peers (Human Rights Campaign Foundation, 2018):

- 73 percent of surveyed LGBTQ+ youth have experienced verbal threats because of their actual or perceived LGBTQ+ identity.
- 77 percent of surveyed LGBTQ+ youth report feeling depressed or down over the past week, and more than 70 percent report feelings of worthlessness and hopelessness in the past week.
- 95 percent of surveyed LGBTQ+ youth report trouble sleeping at night.

Furthermore, a recent study found that socially transitioned transgender children who are supported in their gender identity have no elevations in depression and only minimal elevations in anxiety relative to population averages (Olson, Durwood, DeMeules, & McLaughlin, 2016).

According to the Office of Civil Rights (OCR), ~~gender-based harassment may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, when these acts create~~ “in cases where a hostile environment and deny or limit complaint alleges that a student’s ability to participate in or benefit school’s action or policy excludes a person from participation in, denies a person the educational benefits of, or subjects a person to discrimination under an education program (or activity, on the basis of sex, the *Bostock* opinion guides OCRs understanding that discrimination against a person based on their status as homosexual or transgender generally involves discrimination on the basis of their biological sex. “(OCR, 2001-2020). For transgender students, acts of verbal harassment may include the intentional and persistent use of names and pronouns not consistent with their identity. ~~GenderSex-~~ based harassment may also include the disclosure of the student’s ~~transgender-~~ statusgender identity without their consent as this presents safety concerns for the student.

Each local school division should ensure its compliance with all state and federal laws regarding harassment, intimidation, or bullying. Schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving complaints consistent with *Model Policy to Address Bullying in Virginia’s Public Schools* (VDOE, 2013) and compliant with the *Code of Virginia* § 22.1-276.01, § 22.1-208.01, § 22.1-279.6.D, § 22.1-291.4.

~~Additionally, the OCR indicated gender-based harassment, including harassment predicated on sex-stereotyping, is covered by Title IX when the harassment is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program (OCR, 2001).~~

The OCR indicated that discrimination against a person based on their status as transgender generally involves discrimination on the basis of their biological sex (OCR, 2020). Thus, schools have a responsibility to respond to discrimination on the basis of sex, including on the basis of the student’s nonconformance to stereotyped notions of gender. Additionally, President Biden issued an Executive Order that states “Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports...All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation” (Exec. Order No. 13988, 2021).

Schools should provide a safe educational environment for all students and treat all students with dignity and respect, regardless of a student’s sex, sexual orientation, gender identity/expression, or transgender status. Local school boards should expand their policies prohibiting discrimination, harassment, and bullying to emphasize that discrimination or harassment against a student, by either school staff or by other students, on the basis of their gender identity is prohibited under federal and state laws. Nondiscrimination policy and related complaint procedures should be readily accessible to students and parents/guardians. While there are, existing procedures for complaints related to discrimination, harassment, and bullying, school divisions may consider emphasizing steps that a student or parent may take for complaints specifically related to ~~transgender issues-discrimination based on gender identity.~~ For example, a division-level ombudsman or team may be established to hear concerns brought by students, families, and staff when their concerns are not resolved at the school level. This division-level ombudsman or team may also be available to provide consultations to school staff with questions regarding the implementation of the policies. To assist staff in understanding how to provide a safe educational environment for transgender students, refer to considerations for training under the Professional Development and Training section.

~~Designated Contact shall be available to hear concerns from students or parents when complaints are not resolved at the school level.~~

Student Privacy/Confidentiality

Many transgender students undergo the process of gender transition to confirm and live as the gender consistent with their gender identity. School divisions are encouraged to communicate openly, albeit confidentially, with students and families regarding the student's ~~transgender status~~ gender identity to ensure that appropriate steps are taken to determine a student's needs and address any privacy concerns and associated risks to the student's well-being. Protecting transgender students' privacy is critical to ensuring that they are treated consistent with their gender identity and minimizing the risk of harm to the students.

Regarding student privacy within the school community, ~~gender transitions, or a student's~~ gender identity confirmation, may be public or private, and the degree to which others are aware of the student's gender identity will influence plans to support the student. Given the potential for discrimination, sharing this information could expose a student to harassment and abuse from peers or adults within the school community. School staff should discuss with the student about how they prefer information about their ~~transgender status~~ gender identity to be shared. Some students may wish the information to remain private while others may prefer that the ~~status~~ gender identity is shared or even discussed in class. If the student is in a setting where they have been known by their assigned sex at birth, options for privacy may be limited. In some situations, the student's move to a new school setting (e.g., starting middle school, transferring to a different school) affords the opportunity to confirm their gender identity with more privacy. Regardless of the circumstances, the school should support the student's need for privacy and safety and not disclose a student's gender identity to other students or other parents. Additionally, school staff should treat a student's ~~transgender status~~ gender identity as being particularly sensitive information that should not be shared even internally among school personnel except to those with a legitimate educational interest or need to know. When a student ~~undergoes a public~~ publicly shares their gender transition identity, schools should work proactively to set clear boundaries about being gender inclusive and respond to negative reactions from the school community should they arise. Refer to additional discussions in the Other Considerations section regarding the process for school personnel when a student or parent informs the school about the student's ~~transition~~ gender identity.

Regarding student privacy outside of the school community, a student's ~~transgender status~~ gender identity, legal name, or sex assigned at birth may be considered confidential medical information and protected Personally Identifiable Information (PII). Disclosure of that information may violate the school's obligations under the *Family Educational Rights and Privacy Act (FERPA)* and the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*. Although school divisions may disclose a student's name and gender as directory information, parents and eligible students have the right to refuse the designation of that information as directory information, pursuant to ~~§§ 22.1-287.1~~ §§ 22.1-287.1 of the *Code of Virginia*. Absent an explicit legal obligation, permission, or authorization from the appropriate party, such information should not be shared with anyone, and the local policy should explicitly prevent such disclosures. In order to maintain confidentiality, school divisions may need to consider additional policies related to record keeping. Refer to additional discussions on the separation of confidential information under the Student Records section. Any unauthorized disclosure of protected student information should be addressed according to existing policies and regulations in accordance with FERPA and HIPAA.

Additionally, privacy and confidentiality are critical for transgender students who do not have supportive families. Disclosing a student's ~~transgender status~~ gender identity can pose imminent safety risks, such as losing family support or housing. According to a recent study, LGBT youth have a 120 percent increased risk of experiencing homelessness compared to youth who identified as heterosexual and cisgender (Morton, Dworsky, & Samuels, 2017). School divisions will need to consider the health and safety of the student in situations where students may not want their parents to know about their ~~transgender status~~ gender identity, and schools should address this on a case-by-case basis. If a student is not ready or able to safely share with their family about their ~~transgender status~~ gender identity, this should be respected. There are no regulations requiring school staff to notify a parent or guardian of a student's request to affirm their gender identity, and school staff should work with students to help them share the information with their family when they are ready to do so. Refer to additional discussions regarding when parents are aware of but are not affirming of the student's ~~transgender status~~ gender identity in the next section.

All school personnel shall adhere to legal standards of confidentiality relating to information about a student's ~~transgender status~~ gender identity, legal name, or gendersex assigned at birth.

In addition to adhering to all legal standards of confidentiality, school personnel shall treat information relating to a student's ~~transgender status~~ gender identity as being particularly sensitive, shall not disclose it to other students and other parents, and shall only disclose to other school personnel with a legitimate educational interest.

Student Identification

For many transgender students, their daily emotional and psychosocial wellness are dependent on receiving support and recognition for their gender identity. A transgender student may adopt a name that is different from their legal name on their birth certificate and use pronouns reflective of their gender identity. Many transgender students will adopt the gender pronouns typically associated with their gender identity, ~~but a growing number are using gender neutral pronouns.~~ Some examples of commonly used pronouns include. For example, most transgender girls will use she/her/hers, pronouns, while most transgender boys will use he/him/his pronouns. There may be a less common pattern of pronoun usage among nonbinary students. Nonbinary students, as well as transgender students, may use gendered pronouns like she/her/hers or he/him/his, use gender-neutral pronouns such as they/them/their ~~and/or~~ ze/hir/hirs, use multiple sets of pronouns interchangeably, or use their name in place of any pronoun. School divisions should accept a student's assertion of their gender identity without requiring any particular substantiating evidence, including diagnosis, treatment, or legal documents. A student is considered transgender if, at school, the student consistently asserts a gender identity different from the sex assigned at birth. This should involve more than a casual declaration of gender identity, but it does not necessarily require any substantiating evidence nor any required minimum duration of expressed gender identity, ~~and expression of gender identity can present differently from student to student.~~ Establishing gender identity can present differently from student to student, including, but not limited to: uniform assertion of such an identity, indication that the identity is sincerely held as part of the student's core identity, or that the student is not asserting such an identity for an improper purpose. Schools should work with a student to address any concern that an asserted gender identity may be for an improper purpose, such as permitting the student to respond with information that supports the request to be treated consistent with their gender identity.

including anti-discrimination, harassment, and bullying policies, may need to be adjusted or clarified relating to processes that address when a school staff member fails to comply with the student's request or an administrator's directive to use the ~~asserted~~-name and pronoun consistent with their gender identity.

Schools shall allow students to assert a name and gender pronouns that reflect their gender identity without any substantiating evidence. School staff shall, at the request of a student or parent, when using a name or pronoun to address the student-using, use the-asserted name and pronoun that correspond to their gender identity.

In the situation when parents or guardians of a minor student (under 18 years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request, abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents. This process will require consideration of short-term solutions to address the student's emotional needs to be affirmed at school as well as the long-term goal of assisting the family in developing solutions in their child's best interest. For example, a plan may include addressing the student at school with their ~~asserted~~-name and pronoun consistent with their gender identity while using the legal name and pronoun associated with the sex assigned at birth when communicating with parents or guardians. Research has shown that transgender youth with supportive families experience a 52 percent decrease in recent suicidal thoughts and 46 percent decrease in suicide attempts (Ryan, Russell, Huebner, Diaz, & Sanchez, 2010) and that "chosen name used in more contexts was associated with lower depression, suicidal ideation, and suicidal behavior" (Russell, Pollitt, Li, & Grossman, 2018). Thus, school staff should be prepared to support the safety and welfare of transgender students when their families are not affirming. School staff should provide information and referral to resources to support the student in coping with the lack of support at home, provide information and resources to families about transgender issues, seek opportunities to foster a better relationship between the student and their family, and provide close follow-ups with the family and student. Refer to Appendix A for resources to support families of transgender students. ~~Whenever~~To comply with § 63.2-1509 of the Code of Virginia, whenever school personnel suspects or becomes aware that a student is being abused, neglected, or at risk of abuse or neglect (as defined by § 63.2-100 of the Code of Virginia) by their parent due to their transgender identity, they ~~should~~must report those concerns to Child Protective Services immediately. Before making a decision on policies relating to situations when parents or guardians are not accepting of the student's gender identity, school divisions should consult their school board attorney.

School Records

Schools' student information systems typically use the student's legal name and sex assigned at birth as reflected on their birth certificate, required at the time of school registration (§ 22.1-3.1 of the Code of Virginia), and some documents attached to student records may require the use of the legal name and sex assigned at birth. Information in the student information systems is then used for a variety of documents and processes such as a unique student identification number needed for proper student accounting (i.e., for purposes of funding and accountability indicators), communication with parents, class rosters, attendance records, student identification cards, library cards, standardized tests, year books, and school photos. Not

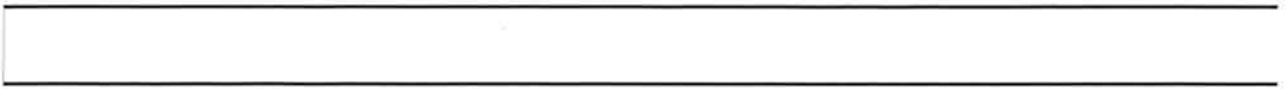
school documents and processes. Record keeping that does not include the legal name and sex assigned at birth as well as the ~~asserted~~-name and gender consistent with the gender identity may pose risks of inadvertently disclosing the student's ~~transgender~~gender identity as well as cause potential emotional trauma for a transgender student.

School divisions should develop solutions to support a transgender student's wishes for privacy. For example, schools could consider maintaining the student's legal name and sex assigned at birth as sensitive information in their student information system that requires additional privilege to access. The student information system can then separately include the ~~asserted~~-name and gender consistent with the gender identity as additional information that is used to the greatest extent possible to populate school-related documents and are available to other users. The protection of the student's legal name and gender as sensitive information would prevent a student's ~~transgender status~~gender identity from being disclosed, such as by a substitute teacher. In situations where school divisions are required to use or to report a transgender student's legal name or sex assigned at birth, such as for purposes of standardized testing or student data reporting to the VDOE, school staff should adopt practices to avoid the inadvertent disclosure of such information. Additionally, schools should eliminate gender markers from their forms, documents, and records when feasible. While the topic of transgender students usually focuses on transgender males or transgender females, there are students who identify as ~~gender-nonbinary, gender-expansive,~~ or ~~gender-nonconforming~~expansive. Since the concept of gender is increasingly being viewed as a gender spectrum, it may be beneficial to remove gender from forms and documents or provide a broader, more inclusive range of options. For purposes of data collection, the VDOE has expanded gender choices to include nonbinary as a third option if the student or parent wishes to use this option.

When a student or parent requests to change the student's name or gender on school records, the extent to which records are modified will depend on the type of record and the substantiation of the change. Local school boards may need to revise or clarify current policies relating to the process to change any element of a student's record, including the appeals process for decisions made regarding a change to the student's record.

School divisions will also need to consider policies relating to records for former students. When a student transitions after they are no longer enrolled in the school division, they may request amendments to school records reflecting a new name and gender that are different from those during their attendance. Former students may want to ensure that information on their records such as transcripts and standardized test scores are consistent with information they are submitting such as those on college or job applications. School divisions could consider respecting a former student's request to amend records retroactively and may consider processing those requests in the same way other student record amendment requests are processed. If a former student obtains a court order changing their name or amend other legal documents such as their birth certificate, state-or federal-issued identifications, or passports, school divisions, when requested, should amend the student's record, including reissuing a high school diploma or transcript, to reflect the student's current name and gender. Before making a decision on policies relating to changes to school records, transcripts, and diplomas, school divisions should consult their school board attorney.





- Practices to create a safe, inclusive environment for all students. This should include strategies to promote understanding and foster positive relationships between LGBTQ+ students and their peers and the school community and steps to affirm LGBTQ+ students.

transition. School divisions are recommended to establish and designate a point-of-contact or team of knowledgeable and affirming staff members to support

Appendix A: Resources

Resources for School Divisions

American Psychological Association (APA) [LGBT Youth Resources-](#)

APA [Promoting Resiliency for Gender Students Diverse and Sexual Minority in Schools-](#)

APA [Supporting Transgender and Gender Diverse Students in Schools: Key Recommendations for School Administrators-](#)

Gender Spectrum [Gender Inclusive Schools Toolkit-](#)

GLSEN [Safe Space Kit-](#)

Gender Spectrum [Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools-](#)

Midwest Symposium for Leadership in Behavior Disorders [LGBTQ 101-](#)

~~National School Board Association [Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff](#)~~

~~National School Board Association [Transgender Students in Schools: Frequently Asked Questions and Answers for Public School Boards and Staff](#)~~

National Black Justice Coalition ~~[Words Matter Gender Justice Toolkit -Words Matter Gender Justice Toolkit](#)~~

SAMHSA [A Practitioner's Resource Guide: Helping Families to Support Their LGBT Children-](#)

Teaching Tolerance [Classroom Resources-](#)

US Department of HHS and National Center on Parent, Family and Community Engagement [Healthy Gender Development and Young Children: A Guide for Early Childhood Programs and Professionals-](#)

Virginia School Boards Association (VSBA) [Council of School Attorneys \(COSA\)- Welcoming Schools-](#)

Model and Existing Policies and Guidelines

Arlington Public Schools [APS School Board Policy Information: Transgender & Gender Non-Conforming Students-~~Conforming Students~~, Policy Implementation Procedures: Transgender Students in Schools, -Transgender Students in Schools - Guidelines and Implementation Plan-](#)

Boulder Valley School District [Guidelines Regarding the Support of Students and Staff Who Are Transgender and/or Gender Nonconforming-](#)

California Safe Schools Coalition [Model School District Policy Regarding Transgender and Gender Nonconforming Students-](#)

[Connecticut State Department of Education Guidance on Civil Rights Protections and Supports for Transgender Students Frequently Asked Questions](#)

[GLSEN Model Local Education Agency Policy on Transgender and Nonbinary Students](#)

Madison Metropolitan School District ~~[Guidance & Policies to Support Transgender, Non-Binary](#)~~
~~[Guidance & Policies to Support Transgender, Non-Binary, and Gender-Expansive Students, and Gender-Expansive Students](#)~~

Massachusetts Department of Elementary and Secondary Education ~~[Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity](#)~~
~~[Basis of Gender Identity](#)~~

Montgomery County Public Schools [Guidelines for Students: Gender Identity](#)

Oregon NOW ~~[Model Student Dress Code](#)~~ -
~~[Model Student Dress Code](#)~~

State of New Jersey Department of Education [Transgender Guidance for School Districts](#)

US Department of Education [Examples of Policies and Emerging Practices for Supporting Transgender Students](#)

Virginia High School League (VHSL) [Virginia High School League Handbook and Policy Manual 2020-2021](#)

Professional Development Resources

[American Counseling Association LGBTQ-Affirmative Counseling Competencies \(in ~~partnership~~ with Human Rights Campaign\)](#)
~~[partnership with Human Rights Campaign](#)~~

[Garden State Equality Professional Development Workshops](#)

[GLSEN Professional Development](#)

[Rainstorms to Rainbows](#) (LGBTQ+ Consulting and Counseling)

[Side-by-Side Trainings](#)

[Teaching Tolerance](#) (Gender & Sexual Identity Webinars)

[The Safe Zone Project](#) (Awareness and Ally Training Workshops)

[Welcoming Schools Professional Development](#)

Harvard Law School LGBTQ+ Advocacy Clinic and NCLR [Trans Youth Handbook: Helping You Learn About Your Legal Rights in Different Areas of Your Life-](#)

[Transgender Assistance Program of Virginia-](#)

[The Trevor Project-](#)

UVA [Teen & Young Adult Transgender Clinic-](#)

Virginia Department of Health (VDH) [Virginia Transgender Resource and Referral List-](#)

VDH [Resources for LGBTQ Youth-](#)

Resources for Parents

Child Welfare Information Gateway [Resources for Families of LGBTQ Youth-](#)

[Helping Families Support Their LGBT Children-](#)

Movement Advancement Project [Family Support: Resources for Families of Transgender && Gender Diverse Children-Gender Diverse Children-](#)

[PFLAG-](#)

San Francisco State University [The Family Acceptance Project-](#)

San Francisco State University [Supportive Families, Healthy Children: Helping Families with LGBT Children-](#)

[Trans Youth Family Allies Resources for Parents-](#)

Welcoming Schools [Transgender and Non-Binary Children: Books to Help Adults Understand-](#)

Advocacy Organizations-

[Equality Virginia-](#)

[Equality Virginia](#)

[Gender Spectrum-](#)

GLSEN [Richmond Chapter-](#)

GLSEN [Northern Virginia Chapter-](#)

[He She Ze and We-](#)

[National Black Justice Coalition-](#)

National Center for Transgender Equality [Youth & Student Issues-](#)

Side by Side-

Trans-Latinx DMV-

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