Dear Virginia School Board Member,

We write to inform you of the outcome and the impact of the administrative appeal filed by The Family Foundation (TFF), Founding Freedoms Law Center (FFLC), and Hanover County parent Sarah Via against the Virginia Department of Education’s (VDOE) “Model Policies for the Treatment of Transgender Students in Public Schools” (“Model Policies”).

On Tuesday, July 27, Lynchburg Circuit Court Judge J. Frederick Watson dismissed our case, ruling that all our plaintiffs lacked standing to appeal the VDOE’s Model Policies through the Virginia Administrative Process Act. While we disagree with the judge’s interpretation and application of the law in this regard, we nevertheless see little practical value in appealing the ruling given that our primary objective was to obtain a temporary statewide injunction of the Model Policies before the deadline for schools to act on them (i.e. start of the 2021-22 school year) so that the VDOE could go back and correct its procedural and legal errors. These time constraints obviously won’t allow for that to happen now.

It is important to bear in mind, however, that since this case was dismissed on standing grounds, the merits of our legal claims have not yet been addressed and therefore remain to be resolved – including how the Model Policies violate various state and federal statutes, as well as infringe upon students’, parents’, and teachers’ constitutional rights of privacy, free speech, religious exercise, due process, equal protection, and parental rights. All of these considerations remain relevant as school boards consider what policies, if any, they can or should adopt. (Here is a brief list of specific examples of ways the Model Policies violate the law.)

Also importantly, during the court hearing on July 21 and in the judge’s written opinion, two critical points were established, of which school boards should take particular note:

1) The court’s opinion clarified that VDOE’s Model Policies are merely “guidance.” Hence, they should not be seen as a directive that is binding on school boards in what they choose to do. We urge school boards to take Judge Watson at his word by disregarding these heavy-handed and problematic suggestions from the VDOE.

2) The Attorney General acknowledged in court that schools would NOT lose funding if school boards decline to pass the Model Policies. During the oral arguments at the July 21 hearing, after being asked by Judge Watson directly, Assistant Attorney General Melissa Charnes stated that school boards would not lose education funding if they decided not to adopt VDOE’s model “transgender” policies. This admission was substantiated by Courthouse News Service in its July 21 article about the hearing.

Numerous school boards across Virginia have explicitly rejected the VDOE’s Model Policies outright, while maintaining that their current policies already sufficiently ensure that all students
are protected and treated with care and dignity. Others have chosen simply to take no action at all. Especially given the many legal problems inherent within the Model Policies that have yet to be adjudicated, we encourage every school board to follow these examples.

Several school boards have also wisely chosen to decline passing the Virginia School Board Association’s policy recommendation to add the operative Virginia Code section § 22.1-23.3 (Treatment of transgender students; policies) to the legal reference section of many of their school board policies. At best, it is very unclear what the legal and policy impact of these references would be. More likely, and realistically, it has the implied effect of incorporating by reference the entire 27-page Model Policies document into the school board’s policies – something which most school boards seem unwilling to adopt outright. We contend there is no need to add that reference to your policies and that it could only raise more questions and create more problems.

We recommend that school boards consider passing this Model Resolution, similar to what Russell County School Board unanimously adopted, or otherwise take no action at all.

Please know that TFF and FFLC, in conjunction with your legal counsel, would be honored to help your school board in any way that we can to ensure that every child is protected in every public school setting, that parents’ fundamental rights are respected, and that teachers can operate in accordance with their conscience. We stand ready to aid school boards in their endeavor to do this, and we also stand ready to challenge in court, if necessary, school board policies that fail to protect every student, parent, and teacher.

We thank you for your service to the families in your community, many of whom are supporters of ours. Please do not hesitate to let us know if there is any way we can assist you.

Sincerely,

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