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LAW CENTER

## Youngkin VDOE “Transgender Model Policies” Guidance for Virginia School Boards

### **1) Where can the new Model Policies be found?**

The Youngkin Model Policies were finalized on 7/18/23, and can be accessed at the VDOE website [HERE](#).

### **2) Are school boards required to adopt policies consistent with the new Model Policies?**

Yes. [Va. Code § 22.1-23.3](#)(B) expressly states that “Each school board **shall adopt** policies that are consistent with but may be more comprehensive than the model policies [concerning the treatment of transgender students] developed by the Department of Education....”

Additionally, to the extent that the Virginia Department of Education’s (VDOE) new Model Policies embody standards that are constitutionally required of public governing bodies, such as respect for fundamental parental rights, privacy, free speech, and free exercise of religion, every school district’s policies must be consistent with those constitutional requirements.

### **3) What does it mean that a school board’s policies “may be more comprehensive than” the Department’s Model Policies?**

Whatever it means, one thing is clear: Any school policy that addresses issues concerning “transgender students” *beyond* what is specifically addressed in the VDOE’s Model Policies must, at a minimum, be “consistent with ...the model policies.” So, for example, any supplemental standards must be in keeping with parents’ right to know and consent to their child’s decisions related to the child’s self-identified “transgender” status, and be respectful of all students’ privacy and safety interests. Any additions bolstering or further clarifying such principles found in the new Model Policies would be appropriate.

### **4) If my school board previously adopted the “VSBA Policy” of merely adding Va. Code § 22.1-23.3 to the legal references section of various school policies, will it need to take further action?**

No. If a school board intended for the Department’s Model Policies to be incorporated into its policies by referencing Va. Code § 22.1-23.3, then it would not need to take any new action in order for the Youngkin Model Policies to be considered in full effect in its schools. Nearly 100 of Virginia’s 133 school divisions would likely fall into this category. However, school boards are free to pass specific policies adopting the express language of the new Model Policies, or standards consistent therewith, if they choose.

**5) If a school board previously adopted express policies aligned with the Northam Model Policies, is it required to amend those policies?**

Yes. According to law, “Each school board shall adopt policies that are consistent with . . . the model policies developed by the Department of Education[.]” Policies that are consistent with the Northam Model Policies would almost certainly be inconsistent with many of the standards in the new Youngkin Model Policies, including in areas of parental involvement and notification requirements, speech rights, facilities use, and student privacy concerns.

**6) What could happen to a school board if it does not adopt policies, or amend its existing policies, consistent with the new Model Policies?**

While no private right of action exists merely for a school board’s failure to pass certain policies it is statutorily required to adopt, a school board could nevertheless be sued over its policies, whether written or in practice, that violate certain constitutionally-protected or statutorily guaranteed rights, including parental rights, free speech, free exercise of religion, and others.

**7) Could school board members be held personally liable for passing or maintaining policies in clear contradiction to the new Youngkin Model Policies if a student is harmed as a result of those policies?**

Yes. Va. Code § 15.2-1405 specifies that members of local government boards generally have immunity for their discretionary or governmental actions that tortiously harm another, but not when it constitutes “gross negligence.” A school board’s deliberate refusal to adopt legally required policies regarding “transgender students” would certainly add more credence to a claim of gross negligence if a student were harmed because of the board’s policies (e.g. allowing boys to enter girls’ bathrooms at will and a girl is sexually assaulted by a boy in the girls’ bathroom).

Additionally, were the conflicting school board policies to violate a student’s, teacher’s, or parent’s constitutional or federal statutory rights, the typical legal protection of “qualified immunity”, which shields public officials from personal liability for such violations, would not apply where the right that was violated was “clearly established.” Although not fully settling the scope of what is considered clearly established, the U.S. Supreme Court has explained that qualified immunity is designed to protect “all but the plainly incompetent *or those who knowingly violate the law.*” (Emphasis added.)

**8) What are the main differences between the Northam Model Policies and the Youngkin Model Policies?**

See The Family Foundation’s [“The Top 7 Improvements to the Model Policies for Public Schools Relating to Transgender Students.”](#)

**\*\*\* NOTE: Nothing in this Guidance Document should be considered legal advice. For individualized analysis to fact-specific scenarios, feel free to reach out to FFCL for consultation.**

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