

September 10, 2021

Dear School Board and Superintendent,

As we begin the new academic year and students head back to school, I write on behalf of the American Civil Liberties Union Foundation of Virginia (ACLU-VA) and its more than 200,000 members and supporters to remind you of your legal obligation to protect students from discrimination and harassment based on race, color, religion, sex, national origin, or disability. Discrimination on the basis of sex includes: “(1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.”¹ Being aware of students’ rights under state and federal law can help school officials avoid any potential legal complications. The purpose of this advisory letter is to assist school districts in creating an educational environment for all students that is safe, inclusive, and free from discrimination, and to encourage compliance with state and federal laws, specifically laws concerning discrimination and privacy related to sexual orientation and gender identity.



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State and Federal Law Protects Transgender and Nonbinary Students

Passed by the General Assembly in 2020, Section 22.1-23.3 of the Code of Virginia requires the Virginia Department of Education (VDOE) to develop model policies concerning the treatment of transgender students in public schools in Virginia. VDOE has informed your district of its obligations under the statute to “adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education.”² These policies must be adopted no later than the 2021-2022 school year.³ While a number of school districts have recently adopted policies in compliance with state law, others have refused to do so. This blatant disregard for state law and VDOE’s guidance is ill-informed and may subject school districts to unwanted litigation.

In lieu of adopting the model policies, a number of school districts have opted instead to adopt blanket nondiscrimination rules. Yet, VDOE’s model

¹ Press Release, U.S. Department of Education, U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity>. See also *Bostick v. Clayton County*, 140 S.Ct. 1731 (2020). In *Bostick*, the Supreme Court noted that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual on the basis of sex.” *Id.* at 1741.

² §22.1-23.3 (B); Virginia Department of Education, [Superintendents Memo #202-21 \(July 30, 2021\)](#); Virginia Department of Education, [Superintendents Memo #085-21 \(April 2, 2021\)](#); [House Bill 145](#) and [Senate Bill 161](#).

³ H.145

policies extend beyond just nondiscrimination and address matters such as privacy, student records, bullying and harassment, dress codes, and participation in school activities. Nondiscrimination policies alone do not meet the full scope of the legal directive.

The ACLU-VA applauds those districts that have adopted policies to protect transgender and nonbinary students. For those who have failed to adopt policies that are consistent with VDOE’s model policies, your school district is potentially violating state law. We urge you to reverse course and comply with §22.1-23.3 of the Code of Virginia.

A school district’s failure to protect transgender and nonbinary students from discrimination may also subject it to repercussions under federal law. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex, including discrimination based on sexual orientation or gender identity. School district policies which discriminate against transgender students may be found to violate both Title IX and the 14th Amendment’s Equal Protection Clause.⁴

Disclosing Students’ Sexual Orientation or Gender Identity is Prohibited

It is against the law to disclose a student’s sexual orientation or gender identity, even to a student’s parents or other school administrators, without full and voluntary consent by the student. The Supreme Court has long recognized that individuals have a right to control the nature and extent of highly personal information released about that individual.⁵ This right extends to students. Students have a right to express themselves and to be open about their sexual orientation or gender identity at school if they so choose. Conversely, students have a right to withhold information about their gender identity or sexual orientation from their classmates, teachers, parents, and other parties. Public schools are not allowed to “out” students publicly or compel students to disclose information about their gender identity or orientation – doing so violates the guaranteed right to privacy.⁶

The Family Educational Rights and Privacy Act (“FERPA”) also protects students against the disclosure of personally identifiable information.⁷ The National Association of Secondary School Principals (“NASSP”) has

⁴ See, e.g., *Grimm v. Gloucester County School Bd.*, 972 F.3d 586 (4th Cir. 2020).

⁵ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

⁶ This is true even in cases where students appear to be open about their identity at school. School officials may not disclose this information. See *C.N. v. Wolf*, 410 F.Supp. 2d 894, 903 (C.D. Cal. 2005) (explaining “the fact that an event is not wholly private does not mean that individual has no interest in limiting disclosure or dissemination of that information to others”).

⁷ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §123g; 34 C.F.R. §§99.00, *et seq.*



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recognized that students’ “transgender status, legal name or sex assigned at birth is confidential medical information and considered ‘personally identifiable information’ under” FERPA and cautions that “[d]isclosure of that information to other school staff or parents could violate the school’s obligations under FERPA or constitutional privacy protections.”⁸

School officials may think they are doing the right thing by revealing students’ sexual orientation or gender identity to their parents. But doing so can have dramatic and unforeseen consequences, in addition to legal consequences. In one particularly tragic case, a teenager died by suicide after a police officer threatened to disclose his sexual orientation to his family.⁹ Depending on the circumstances, disclosing a student’s sexual orientation or gender identity to their parents could also lead the student to be physically abused or thrown out of their home.

Consequences of Non-Compliance are Severe

Failure to comply with state and federal law can be expensive. In 2015, the ACLU and the ACLU-VA sued the Gloucester County School Board after the Board passed a policy barring transgender students from using the bathroom that aligned with their gender identity. After six years of litigation, the Gloucester County School Board recently agreed to pay the ACLU and ACLU-VA over \$1.3 million dollars in legal fees and costs. The district’s decision turned out to be costly and completely avoidable.

School boards and their insurance providers are not the only ones who pay a hefty price for their decisions. Taxpayers across the Commonwealth are ultimately forced to bear the financial burden of school boards’ failure to respect students’ rights.

The fiscal cost of non-compliance pales in comparison to the emotional and physical costs that transgender and nonbinary students experience. The United States Department of Education’s Office for Civil Rights recently reported that “LGBTQ+ students often face additional challenges in schools, including disproportionately experiencing persistent bullying, harassment, and victimization.”¹⁰ Transgender students are more likely than their peers to report feeling unsafe at school.¹¹ Additionally, when transgender students are

⁸ NASSP, Position Statement on Transgender Students (2016), <https://www.nassp.org/top-issues-in-education/position-statements/transgender-students/>.

⁹ *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).

¹⁰ Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students, available at <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

¹¹ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence: Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students* — 19 States and Large Urban School Districts, 2017, Morbidity and Mortality

prevented from using bathrooms aligned with their gender identity, they often avoid using restrooms at school, which can cause serious medical problems.¹²

As school administrators, you have an obligation to provide a safe learning environment and protect **all** students in your care. We urge school boards across the Commonwealth to adopt policies that protect transgender and nonbinary students in accordance with state and federal law. Should your school district refuse to adopt such policies, the ACLU-VA will not hesitate to take action on behalf of students or parents who are harmed.

We hope this information will help your school district act in accordance with state and federal law and ensure that students' rights are protected in a safe and supportive environment. Please do not hesitate to contact the ACLU-VA if you have any questions about these issues or if we can be of any assistance to you in evaluating and formulating school policy on any of these matters. We can be reached at (804) 644-8022 or acluva@acluva.org.



Virginia

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Sincerely,

A handwritten signature in black ink, appearing to read "Eden B. Heilman". The signature is fluid and cursive.

Eden Heilman
Legal Director

Weekly Report, CDC (Jan. 25, 2019),
<https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

¹² See, e.g., *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 600 (4th Cir. 2020).