



Dear School Board:

You're being given this letter because your district is considering adopting the Virginia Department of Education's 2023 Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools ("2023 Model Policies"). School boards have an obligation to comply with various federal and state laws that prohibit discrimination on the basis of gender identity. The 2023 Model Policies fundamentally conflict with those laws, and their adoption could expose your district to legal liability. School boards should unequivocally express their commitment to prohibiting discrimination against trans and nonbinary students, and their policies should be consistent with their legal obligations to do so.

Federal Law Prohibits Discrimination Against Transgender Students

The Equal Protection Clause of the U.S. Constitution and Title IX of the Education Amendments of 1972 ("Title IX") both prohibit discrimination against transgender students, which is considered discrimination on the basis of sex.¹ In 2021, the Fourth Circuit Court of Appeals struck down a school board's discriminatory restroom policy and held that Gavin Grimm, a transgender student, must be permitted to use the restroom that aligned with his gender identity. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878, (2021). The court made clear that there is no evidence upon which school boards can justify discriminatory restroom policies, and that such policies are based on "sheer conjecture and abstraction." *Id.* at 614

Further, Title II of the Americans with Disabilities Act ("ADA") prohibits discrimination and ensures equal opportunities for persons with disabilities in state and local government operations, including public schools. In August 2022, the Fourth Circuit Court of Appeals ruled that "gender dysphoria" meets the definition of a disability under the ADA. *Williams v. Kincaid*, 50 F.4th 429, 430 (4th Cir. 2022), cert. denied, 143 S. Ct. 2414 (2023). Many – though not all – transgender people experience gender dysphoria. As a result, schools will often be required to provide accommodations to transgender students in order to provide access to educational and extracurricular programs for those students and avoid discrimination. These accommodations might include use of the student's affirming name

¹ In *Bostock v. Clayton County*, the U.S. Supreme Court affirmed that discrimination on the basis of gender identity or sexual orientation is sex discrimination. 140 S. Ct. 1731, 1734 (2020). Though *Bostock* concerned employment discrimination claims under Title VII of the Civil Rights Act of 1964, courts typically look to Title VII when construing Title IX. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399 (4th Cir. 2020) (citing *Bostock* in holding that discrimination against transgender individuals violated Title IX).

and pronouns, access to restrooms and other facilities that align with their gender identity, participation in programs and activities consistent with their gender identities, and confidential access to school counselors – all of which the 2023 Model Policies functionally dictate withholding from many transgender students.

The 2023 Model Policies contain only vague references to these obligations under federal law, and frame them as exceptions to the general policy mandates set out in the document. As a result, school districts are left to determine the reach of both the Model Policies and federal law for themselves, especially where the Model Policies appear to mandate outcomes that conflict with federal law.

For example, the 2023 Model Policies require schools to have policies that would delineate restroom and locker room usage based on “sex,” which is defined simply as “biological sex.”² However, in most cases involving transgender students, this default rule will conflict with the Fourth Circuit’s holding in *Grimm*, and therefore will conflict with the school district’s obligation not to discriminate on the basis of gender identity. Another section of the Model Policies similarly provides that when a “school program, event, or activity (including extracurricular activities)” is separated by sex, students must participate according to their “sex” rather than gender identity. The establishment of this default rule will necessitate a case-by-case analysis to determine the applicability of federal law to each scenario, making unlawful discrimination and litigation more likely than if the default rule were simply to allow students to participate in activities and use facilities in accordance with their gender identity.

Virginia Law Prohibits Discrimination Against Transgender Students

The Virginia Human Rights Act (VHRA) prohibits discrimination on the basis of gender identity in public accommodations, which are defined as “all places offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations.” Va. Code § 2.2-3904(A) and (B). The purpose of the VHRA is to “safeguard all individuals within the Commonwealth from unlawful discrimination... in places of public accommodation, including educational institutions[.]” Va. Code § 2.2-3900(B)(1). The 2023 Model Policies directly conflict with the VHRA by requiring districts to disregard students’ gender identity and force participation in activities and facilities access based on “biological sex” only. Because “biological sex” is not defined in the 2023 Model Policies and is not always determinable by clear and objective criteria, the application of this policy will inevitably be inconsistent, resulting in discrimination.

² The term “biological sex” itself is ambiguous in many respects, and may not be congruent with how federal law uses the term “sex”. See, e.g., *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, No. 22-1786, 2023 WL 4881915, at *6 (7th Cir. Aug. 1, 2023) (“There is insufficient evidence to support the assumption that sex can mean only biological sex.”).



Finally, the 2023 Model Policies, if adopted by your school district, will cause transgender students real harm. Schools that do not protect transgender and nonbinary students from discrimination see lower school attendance,³ lower self-esteem,⁴ higher rates of depression,⁵ and higher rates of physical and sexual assault⁶ than schools that affirm and include those students⁷. In Virginia, more than half of LGBTQ+ students experienced one form of discrimination in school.⁸ The statute that directs the Virginia Department of Education to create these model policies was enacted to help schools avoid these harms. The 2023 Model Policies subvert the intent of the authorizing statute by focusing overwhelmingly on parents rather than the statutorily required evidence-based best practices that will ensure the safety and success of transgender and nonbinary students in schools.

We urge all school districts to enact policies with regard to the treatment of transgender students that fulfill their obligations to comply with federal and state nondiscrimination laws and that will support transgender students through their education.

Sincerely,

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³ See Chad M. Burton et al., School Absenteeism and Mental Health among Sexual Minority Youth and Heterosexual Youth (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4058829/>.

⁴ See Human Rights Campaign 2023 LGBTQ+ Youth Report, https://reports.hrc.org/2023-lgbtq-youth-report?_ga=2.230448412.1654497609.1691921392-1942926487.1688907653&_gac=1.222171626.1688907653.Cj0KCQjwtaMlBhD3ARIsAARoaEwVDiv_PZe1LH9wHH-ZCQOl9esVRzj_cXgG3MP56hseCPohMR-WW8aAreZEALw_wcB.

⁵ See Centers for Disease Control and Prevention 2021 Youth Risk Behavior Survey at p.60, https://www.cdc.gov/healthyyouth/data/yrbs/pdf/YRBS_Data-Summary-Trends_Report2023_508.pdf (69 percent of LGBTQ+ youth reported feeling persistently sad and hopeless, compared to 35 percent of their heterosexual peers).

⁶ See Virginia Youth Survey 2019: <https://www.vdh.virginia.gov/content/uploads/sites/69/2021/03/VYS-2019-High-School-Bullying-and-Teasing.pdf> ; Human Rights Campaign 2023 LGBTQ+ Youth Report (Over half (53.9%) of transgender and gender-expansive youth, versus 46% LGBQ youth feel unsafe in at least one school setting.).

⁷ See Trevor Project 2022 National Survey on LGBTQ+ Youth Mental Health <https://www.thetrevorproject.org/survey-2022/> (“LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide.”).

⁸ See GLSEN 2021 Virginia State Snapshot: https://maps.glsen.org/wp-content/uploads/2023/02/GLSEN_2021_NSCS_State_Snapshots_VA.pdf.