

October 26, 2022

Via Public Comment Portal

Jillian Balow
Virginia Department of Education
Office of Policy: Department of Policy and Communications
Office of the Superintendent: Executive Director, Parental Engagement
P.O. Box 2120
Richmond, Virginia 23218-2120

Re: EPPC Scholars Comments Supporting Virginia Department of Education “2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools”

Dear Superintendent Balow:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong support of the Virginia Department of Education’s recent publication of the document titled “2022 Model Policies On The Privacy, Dignity, And Respect For All Students And Parents In Virginia’s Public Schools” (“2022 Model Policies”), and the Virginia Department of Education’s withdrawal of the current policy document titled “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools” (“2021 Model Policies”). Ryan T. Anderson is the President of EPPC and the author of *When Harry Became Sally: Responding to the Transgender Moment*. Mary Hasson is the Kate O’Beirne Senior Fellow at EPPC, an attorney, and co-founder of EPPC’s Person and Identity Project, an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person. Rachel N. Morrison is an EPPC Fellow, member of EPPC’s HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Roger Severino is Senior Fellow at EPPC, former Director of the Office for Civil Rights at the U.S. Department of Health and Human Services, and former trial attorney at the U.S. Department of Justice Civil Rights Division, and is a member of the Virginia Bar.

We offer the following comments in support of the 2022 Model Policies, along with some suggestions for improvements and sources for evidence-based best practices. Our comment headers correspond to the headers in the 2022 Model Policies.

Statutory Authority and Requirements

The 2022 Model Policies have been developed per § 22.1-23.3 of the Code of Virginia, which provides that local school boards *shall* adopt policies consistent with Virginia Department of Education’s 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” including “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.”

Athletics is explicitly excluded from the definition of “activities and events.” Even so, the 2022 Model Policies rightly acknowledge that “schools may separate their sports teams on the basis of sex. Neither the Fourteenth Amendment to the United States Constitution, Title IX, nor the Virginia Human Rights Act require school divisions to allow students of one biological sex to participate on sports teams reserved for members of the other biological sex.”¹ This clarification must be retained, as discussed in more detail later in this comment.

Purpose

The title and purpose of the Model Policies demonstrate a welcome respect for the rights of all and provide a framing for the specific policies that follow by acknowledging the government’s obligation to respect rights, particularly First Amendment rights of all and the fundamental rights of parents to direct the education and upbringing of their children.

The purpose statement of the 2022 Model Policies offers a needed corrective to the 2021 Model Policies by recognizing the rights of “all students ... to attend school in an environment free from discrimination, harassment, or bullying,” and then addressing particular concerns related to transgender-identified students within the larger context that recognizes the need for “compassion and respect for all students.”² See Virginia Code § 22.1-23.3, which emphasizes the need for a “safe and supportive learning environment... *for all students*” (emphasis added).

Importantly, the policy’s “Purpose” also expressly acknowledges the fundamental rights of parents, recognized by the U.S. Constitution and Virginia law, to direct the “care, upbringing, and education” of their children. This too is a needed corrective to the 2021 Model Policies which evinced a thoroughgoing disregard for parental rights (discussed below), undermining parental involvement in a student’s education and violating the U.S. Constitution and Virginia law (Va. Code § 1-240.1).

We applaud the Department’s proper recognition of the limits of government power, stating that the Constitution “prohibit[s] governmental entities from requiring individuals to adhere to or adopt a particular ideological belief” or “compelling speech that is contrary to an individual’s personal or religious beliefs.”³

The Department is right to withdraw the 2021 Model Policies, given the ideological bias that tainted the formulation and substance of those policies. Further, the 2021 Policies exceeded the statutory mandate by using the model policies as a vehicle to force ideologically driven social change on students, faculty, and other school community members, not only in the absence of evidence, but contrary to it. For example, the “Terminology” section of the 2021 Model Policies includes controversial terms premised

¹ 2022 Model Policies at 10.

² 2022 Model Policies at 1.

³ 2022 Model Policies at 1.

not on science but on ideological beliefs about the human person, identity, and sexual difference.⁴ The term “gender identity” is represented as “an innate part of a person’s identity,” but also defined as an “internal sense” of the person’s identity, variously described as “a boy/man, girl/woman, another gender, no gender,” or framed as an indescribable identity existing “outside the male/female binary.” The Terminology section inappropriately labels all persons who do not self-describe as “transgender” as “cisgender,” an ideological term with no basis in science and hostile to various familial and religious beliefs, including Catholicism.

The 2022 Model Policies rightly acknowledge that the “2021 Model Policies promoted a specific viewpoint aimed at achieving cultural and social transformation in schools” and which “disregarded the rights of parents and ignored other legal and constitutional principles.”⁵ Moreover, nowhere does the legislative mandate governing the 2022 Model Policies mention gender identity or the plethora of unscientific, ever-expanding, and ideologically loaded terms in the 2021 Model Policies such as “cisgender,” “gender-expansive/gender-diverse/gender-fluid/gender-nonbinary/agender/gender queer,” “gender nonconforming,” “LGBTQ+,” “nonbinary,” “genderqueer,” “agender,” “two-spirit,” or “sex assignment.” In fact, Virginia law requires model policies *only* with respect to “transgender students” and does not support any of the tendentious laundry list of categories in the 2021 Model Policies (Va. Code § 22.1-23.3). Further, the same law requires policies on “sex-based” dress codes and “sex-specific” school activities based on biological binary understanding of sex ubiquitous in Virginia law and consistent with the most elementary of biological principles taught in Virginia schools as well as basic commonsense.

Guiding Principles

The Guiding Principles of the 2022 Model Policies are sound, proportionate, and respectful of the rights of all.

Guiding Principle A

Section II.A appropriately recognizes the “rights of parents to make decisions with respect to their children” as the first among several key “guiding principles.”⁶ By grounding the Model Policies in a clear and explicit recognition of parents’ rights, the Department takes an important step towards building trust with parents and repairing the badly damaged relationship between schools and parents due to the previous administration’s unprecedented politicization of the education bureaucracy across the state.

Parents are the first and primary educators of their children—a principle recognized by diverse faith traditions, natural law, and civil law, including the U.S. Constitution and the Virginia law (Va. Code § 1-240.1). Schools and school officials exercise a limited, delegated, or derivative authority over students, with the permission of parents. This section of the 2022 Model policies is critically important because it mandates that schools adopt policies to “safeguard” parents’ rights and “facilitate the exercise of those rights.” This is a welcome reversal of the 2021 Model policies, which not only failed to respect parents’ rights but betrayed an intention to thwart the exercise of those rights if parents would not go along with the ideological prescriptions of the 2021 Model Policies.

For instance, the 2021 Section on “Student Privacy/Confidentiality” stated that “if a student is not ready or able to safely share with their family about their 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

⁴ 2021 Model Policies at 6-7.

⁵ 2022 Model Policies at 1.

⁶ 2022 Model Policies at 2.

gender identity.”⁷ Further, the 2021 Model Policies expressly condoned the duplicitous practice of “addressing the student at school with their 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.”⁸ Nowhere is this exclusion of parents from the moral, emotional, spiritual, and psychological upbringing of their children authorized by § 22.1-23.3 or any other Virginia law. Outside of the most extreme exceptions, such as when parents have lost legal custody of their children, excluding parents from discussions concerning their children’s well-being in school is *always* contrary to evidence-based best practices. On the question of student transgender ideation or self-identification in particular, excluding parents from such discussions *increases* the risk of suicide among children. Not eliminating the 2021 Model Policies on this question will endanger children’s lives.⁹

In addition, we applaud the Department for spelling out in Section II.A.1-3 a series of “commitments” that school policies are expected to make in order to “safeguard” parental rights and “facilitate” parents’ exercise of those rights. These commitments are important to rebuilding trust with parents as well as for modeling a positive tone towards parents’ diverse beliefs and welcoming their involvement as partners in the education of their children, which research conclusively demonstrates is essential to student educational success.

Guiding Principle A.1: Schools Shall Respect Parents’ Values and Beliefs.

This is an essential commitment, and we welcome the Department’s brief, but compelling, acknowledgement that parental values and family beliefs must be respected, not undermined or replaced, by school personnel. Further, the Department rightly notes that respecting parents’ values and beliefs requires more than lip service—it requires an appropriate deference to *parental decision-making*. Schools must not thwart parental efforts to raise their children in accord with their own “customs, faith, and family culture.”¹⁰ This commitment corrects the antagonistic stance of the 2021 Model Policies towards parental beliefs that did not align with the ideological bias of the 2021 guidance. According to the 2021 Model Policies, school staff were encouraged to pit students against parents who do not fully subscribe to the 2021 policies’ mandate of “gender affirmation.” See 2021 Model Policies at 14 (“[S]chool 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.”).

Section II.A.1’s succinct summary of the relevant law is accurate, helpful, and essential to ensure that local counsel for Virginia’s school districts are confident in the Constitution’s and the Code of Virginia’s clear recognition of and deference towards parental rights in education.

Guiding Principle A.2: Schools Shall Defer to Parents to Make the Best Decisions with Respect to their Children.

⁷ 2021 Model Policies at 12.

⁸ 2021 Model Policies at 14.

⁹ Jay Greene, Ph.D., “Puberty Blockers, Cross-Sex Hormones, and Youth Suicide,” The Heritage Foundation, June 13, 2022. <https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide>. See also the tragic story of Yaeli Martinez cataloged by Josh Boswell in The Daily Mail, March 18, 2022 <https://www.dailymail.co.uk/news/article-10612285/California-mom-claims-LA-school-encouraged-daughter-transition-blame-suicide.html>.

¹⁰ 2022 Model Policies at 2.

This is a significant change from the 2021 Model Policies, and we are grateful to the Youngkin administration for rectifying a serious wrong in the prior policies.

The 2022 Model Policies state that “Parents are in the best position to work with their children” and to “determine” how best to respect and guide their child’s personal identity development, including the use of names and pronouns, and whether or not to consult their own health care provider regarding identity questions and related courses of action. This statement aligns with the truth—long acknowledged by Supreme Court jurisprudence, common sense, and the faith traditions of America’s major religions—that parents are best positioned to make decisions for the good of their minor children. As philosopher Melissa Moschella writes, “children belong primarily to their parents, *not* to the larger political community.... [P]arents are the ones with the primary responsibility to care for children and with the corresponding rights and authority to make child-rearing decisions in line with the dictates of their consciences.”¹¹

Further, government may not usurp parental authority in these critical areas, nor deprive them of the exercise of their fundamental rights regarding their children, absent an evidentiary finding of abuse, neglect, or abandonment. The 2021 Model Policies endorsed shocking efforts to cut parents out of some of the most significant aspects of a child’s life—the child’s mental health, social engagement, and emerging sense of identity. *See* 2021 Model Policies “Student Privacy/Confidentiality.”

Guiding Principle A.3: Schools Shall Keep Parents Informed About their Children’s Well-Being.

Building on the previous provisions of this foundational guiding principle—the recognition that parents have the fundamental right to direct their child’s upbringing and education—this section reflects another significant change. It reinforces the obligation of the schools to “keep parents fully informed about all matters that may be reasonably expected to be important to a parent, including, and without limitation, matters related to their child’s health, and social and psychological development.”

Under the prior administration, Virginia’s public schools too often took the position that when it comes to “sensitive issues,” children have the power to make their own decisions, or at least have gatekeeping power, *e.g.*, the right to decide whether to include parents in their deliberations and decision-making about significant issues related to identity and mental health. The 2021 Model Policies, for example, permitted a student to assert a “transgender” identity at school “without requiring any particular substantiating evidence, including diagnosis, treatment, or legal documents,” and without requiring (and even contrary to) parental permission.¹² In fact, those prior policies did not empower children, but rather left them bereft of the much-needed support and guidance of their parents, who love and know them best. Policies which claimed to respect minor children in the exercise of their supposed “autonomy” over life-changing decisions instead left children vulnerable to the influence of peers or other adults who—even if well-meaning—bore no long-term responsibility for the children and lacked long-standing knowledge of the children’s past experiences, present needs, and mental health vulnerabilities—knowledge that parents possess. School administrators who encourage young teenage girls to pursue permanently sterilizing interventions without parental involvement will not be there to pick up the pieces when many come to regret it years hence.¹³

¹¹ Moschella, M., *Parental Rights: A Foundational Account, Backgrounder*, B. Kenneth Simon Center for American Studies, The Heritage Foundation, No. 3568, December 9, 2020.

¹² 2021 Model Policies at 13.

¹³ See Alicia Ault, “Doctors Have Failed Them, Say Those Who Regret Transitioning,” WebMD March 22, 2022. <https://www.webmd.com/sex-relationships/news/20220322/doctors-have-failed-them-say-those-who-regret-transitioning>.

Past policies that did not respect parents’ rights to be fully informed about matters related to their child’s well-being were not mere omissions of little consequence—they caused significant harm. Policies which instructed or permitted schools to hide information from parents—based on the supposed consent of the child—sowed distrust between parents and schools, and between the parent and child. By keeping parents in the dark, schools disrupted the parent-child relationship and deprived parents of crucial information necessary to guide and protect their children. As parents have testified, too often they were the last to know when a child had started down the harmful path of psycho-social transition or body-modifying medical interventions.¹⁴ No parents should ever have to learn—after the fact—that *some other adult* has guided their child down a path contrary to the family’s beliefs and values or has facilitated their child’s entry into the world of “gender-affirming” medical interventions. And it is even more troubling when those *other adults* are public employees entrusted with the education of other people’s children.

Guiding Principle B: Schools Shall Serve the Needs of All Students.

We fully support the emphasis on serving the needs of all students. This is a necessary corrective to past policies that privileged the desires of a small group of students over the legitimate needs and concerns of other members of the school community. We appreciate the teamwork approach that anticipates collaboration among “appropriate school staff and other caregivers ... with the parents” as they work towards implementing “reasonable accommodations or modifications” which take into account both “the resources and staff available in the school and school divisions, as well as the rights and needs of other students and of school staff.” We applaud the 2022 Model Policies’ specific recognition that accommodations and modifications for individual students also must respect the rights and needs of other students and staff. In particular, the guidance recognizes that schools “should” provide access to “single-user bathrooms and facilities” for the sake of all students who need additional privacy. This is not a “transgender” issue, but rather encourages schools to recognize and accommodate various individual needs of students. Moreover, allowing students of the opposite sex into intimate facilities risks creating a hostile environment and violating Title IX of the Education Amendments of 1972.

Guiding Principle C: Schools Shall Partner with Parents.

Past policies have given lip service to this principle, while implementing practices that effectively locked parents out of decisions related to their child’s wellbeing once the school doors were shut behind the child. We support the policy’s clear statement—which aligns with the Virginia Code and U.S. Constitutional law—that “[p]arents are a child’s primary and most important educator,” and that while “public schools, teachers, counselors, and administrators” play an “essential” role in the child’s education, they do so only in partnership with parents.

Guiding Principle D: Schools Shall Respect All Students.

We support the model policy’s specific recognition that schools have a duty towards *all students* (rather than the loudest or most politically organized subset of students) to ensure an educational environment free from discrimination and harassment—on the basis of *sex*. Prohibitions of discrimination on the basis of *sex* are long-standing protections in law and are grounded in the immutable nature of

¹⁴ See generally Donna St. George, *Gender Transitions at School Spur Debate Over When, or if, Parents Are Told*, Wash. Post (July 18, 2022, 6:00 a.m.), <https://www.washingtonpost.com/education/2022/07/18/gender-transition-school-parent-notification/>; Josh Christenson, *Some Schools Won’t Tell Parents When Their Kids Express Gender Confusion. Experts Say That’s Illegal*, Wash. Free Beacon (Aug. 11, 2022, 5:25 p.m.), <https://freebeacon.com/campus/some-schools-wont-tell-parents-when-their-kids-express-gender-confusion-experts-say-thats-illegal/> (discussing school policies that prohibit teachers from informing parents of a student’s gender identity without student permission).

sexual difference between males and females. We are grateful for the 2022 Model Policies' grounding in this scientific reality and oppose prior attempts to elevate the subjective sense of "gender identity" to the status of a civil right that supersedes sex-based protections. Respecting all students means respecting students as girls, students as boys, and students as people of faith, many of whom cannot in good conscience accept gender ideology.

Terminology

Parent or Parents

We appreciate and support the 2022 Model Policies' inclusion of the statutory definition of "parent" or "parents."¹⁵

"Sex" Means Biological Sex

The 2022 Model Policies are correct to define "sex" to mean "biological sex."¹⁶

The basics of sex determination are relatively clear. Sex, in terms of male or female, is identified by the organization of the organism for sexually reproductive acts. *Langman's Medical Embryology* concisely explains how the sex of a new organism is determined at fertilization: "An X-carrying sperm produces a female (XX) embryo, and a Y carrying sperm produces a male (XY) embryo. Hence, the chromosomal sex of the embryo is determined at fertilization." A new human organism of a particular sex is created at that moment. Scientists now know that "the *presence* of a Y chromosome determines maleness and its *absence* determines femaleness." This is because the Y chromosome ordinarily carries the SRY ("sex-determining region on Y") gene. The SRY gene contains a transcription factor known as the testis-determining factor, which directs the formation of the male gonads.

Sex as a status—male or female—is a recognition of the organization of a body designed for dimorphic sexual reproduction. More than simply being *identified* on the basis of such organization, sex is a *coherent concept* only on the basis of that organization. The fundamental conceptual distinction between a male and a female is the organism's organization for sexual reproduction. The conceptual distinction between male and female based on reproductive organization provides the only coherent way to classify the two sexes.

Lawrence Mayer and Paul McHugh highlighted the same truth in a recent review of the scientific literature on sexuality and gender identity:

The underlying basis of maleness and femaleness is the distinction between the reproductive roles of the sexes; in mammals such as humans, the female gestates offspring and the male impregnates the female.... This conceptual basis for sex roles is binary and stable, and allows us to distinguish males from females on the grounds of their reproductive systems, even when these individuals exhibit behaviors that are not typical of males or females.

Mayer is a past scholar-in-residence in the Department of Psychiatry at Johns Hopkins University and a retired professor of statistics and biostatistics at Arizona State University. McHugh is a professor of psychiatry and behavioral sciences at the Johns Hopkins University School of Medicine, and for twenty-

¹⁵ 2022 Model Policies at 4.

¹⁶ 2022 Model Policies at 4.

five years was the psychiatrist-in-chief at the Johns Hopkins Hospital. The editor of the *New Atlantis*, in the introductory note to their report, called McHugh “arguably the most important American psychiatrist of the last half-century.”

After explaining the “binary and stable” conceptual basis for maleness and femaleness, Mayer and McHugh note that a structural difference for the purposes of reproduction is the only “widely accepted” way of classifying the two sexes:

In biology, an organism is male or female if it is structured to perform one of the respective roles in reproduction. This definition does not require any arbitrary measurable or quantifiable physical characteristics or behaviors; it requires understanding the reproductive system and the reproduction process. Different animals have different reproductive systems, but sexual reproduction occurs when the sex cells from the male and female of the species come together to form newly fertilized embryos. It is these reproductive roles that provide the conceptual basis for the differentiation of animals into the biological categories of male and female. There is no other widely accepted biological classification for the sexes.

This fundamental difference in organization is what allows scientists to distinguish male from female. When Dr. Deanna Adkins called this “an extremely outdated view of biological sex” in her declaration to a federal court in North Carolina, Dr. Mayer responded in his rebuttal declaration: “This statement is stunning. I have searched dozens of references in biology, medicine and genetics—even Wiki!—and can find no alternative scientific definition. In fact, the only references to a more fluid definition of biological sex are in the social policy literature.” Just so, yet the 2021 Model Policies adopted a wholly subjective and amorphous understanding of the person, based on gender identity, divorced from scientific realities.

Here is how one scholar put it in *Best Practice and Research: Clinical Endocrinology and Metabolism*:

Females enter puberty earlier and undergo a more rapid pubertal transition, whereas boys have a substantially longer growth period. After adjusting for dimorphism in size (height), adult males have greater total lean mass and mineral mass, and a lower fat mass than females. These whole-body differences are complemented by major differences in tissue distribution. Adult males have greater arm muscle mass, larger and stronger bones, and reduced limb fat, but a similar degree of central abdominal fat. Females have a more peripheral distribution of fat in early adulthood; however, greater parity and the menopause both induce a more android fat distribution with increasing age. Sex differences in body composition are primarily attributable to the action of sex steroid hormones, which drive the dimorphisms during pubertal development. Oestrogen is important not only in body fat distribution but also in the female pattern of bone development that predisposes to a greater female risk of osteoporosis in old age.

The result is that male and female bodies differ not only in their sex chromosomes (XX and XY) and in their organization for reproduction, but also, on average, in size, shape, bone length and density, fat distribution, musculature, and various organs including the brain. These secondary sex differences are not what define us as male or female; organization for reproduction does that. But this organization leads to other bodily differences. There are organizational differences and organism-wide differences in organs and tissues, as well as differences at the cellular and molecular levels.

The 2022 Model Policies should clarify that biological sex is based ultimately on genetics.

Transgender Student

The 2022 Model Policies state “[t]he phrase ‘**transgender student**’ shall mean a public school student whose parent has requested in writing, due to their child’s persistent and sincere belief that his or her gender differs with his or her sex, that their child be so identified while at school.”¹⁷ Given the mandate from the Virginia legislature to create policies regarding the treatment of “transgender” students, it is essential for the 2022 Model Policies to incorporate and define the term “transgender.”

However, we note that the Virginia Code section’s use of the term “transgender student” is itself problematic, as there is no medical or mental health diagnosis of “transgender,” only a diagnosis of “gender dysphoria” under the DSM-5-TR. Revised terminology in the DSM-5-TR relevant to the diagnosis of gender dysphoria includes the following: “‘desired gender’ is replaced with ‘experienced gender’; ‘natal male/natal female’ with ‘individual assigned male at birth’ or ‘individual assigned female at birth’; and ‘cross-sex treatment regimen’ with ‘gender-affirming treatment regimen.’”¹⁸ The 2022 Model Policies’ definition of “transgender student” provides clear notice to school districts, parents, and students as to who is covered by aspects of the policy that pertain specifically to “transgender students.” By its terms, this definition reinforces the importance of parental involvement in a matter as significant as the child’s public expression of an identity that differs from his or her sex and respects parental judgment on the timing and manner of such a disclosure.

The 2021 Model Policies, in contrast, define transgender as “[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.”¹⁹ The 2021 Model Policies exceeded the statutory mandate by crafting policies that addressed a wide variety of self-defined “gender identities,” including those that were expressly defined as falling outside the definition of “transgender.” For example, they note that “[n]onbinary may be considered a subset of transgender or a distinct identity. Other similar terms may include genderqueer, gender fluid, agender, or Two-Spirit.” These policies were stretched to apply to these identities, even though they were expressly acknowledged to be “distinct” from a “transgender” identity.

In addition, the cultural definitions of “transgender” vary widely and could lead to significant inconsistencies across school districts, absent the 2022 Model Policies’ definition.

For example:

- The Human Rights Campaign defines “transgender” as “people whose gender identity is different from the sex assigned to us at birth.”²⁰

¹⁷ 2022 Model Policies at 4.

¹⁸ First MB, Yousif LH, Clarke DE, Wang PS, Gogtay N, Appelbaum PS. *DSM-5-TR: Overview of What’s New and What’s Changed*. World Psychiatry. 2022 June 21(2):218-219. doi: 10.1002/wps.20989. PMID: 35524596; PMCID: PMC9077590. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9077590/>.

¹⁹ 2021 Model Policies at 7.

²⁰ *Understanding the Transgender Community*, Human Rights Foundation, <https://www.hrc.org/resources/understanding-the-transgender-community>.

- GLSEN, an LGBTQ advocacy group which creates model policies for schools, defines “transgender” as “people whose gender identity does not match their sex assigned at birth.”²¹
- WPATH, a transgender health advocacy group, links the term “transgender” with “gender diverse,” resulting in broad recommendations for psycho-social, medical, and surgical interventions for school-age children who are simply “gender non-conforming,” meaning they feel like they don’t fit in with stereotypical notions of masculinity or femininity.
- Recent proposed regulations by the U.S. Department of Health and Human Services said the term “transgender” is being used as an umbrella term to encompass individuals with transgender, nonbinary, gender diverse identities.²²

The 2022 Model Policies’ definition of “transgender student” clearly indicates that no student can self-define as “transgender” nor can a student insist on being identified as transgender at school without parental permission. These are important changes that for the benefit of students and parents alike.

Nevertheless, the 2022 Model Policies’ definition of “transgender student” should be modified to read as follows: “a public school student whose parent has requested in writing that the child has a persistent desire to identify as a person of the other sex, without improper motive, and that it is the parent’s wishes that the child be so identified while at school.” This is consistent with Va. Code § 22.1-23.3 and the Supreme Court’s *Bostock* decision which presume a *binary* and biological understanding of “sex” and “transgender.”

Development

We support the immediate withdrawal of the 2021 Model Policies. As explained above, these policies are harmful and unlawful.

We also support the 2022 Model Policies’ “confidence in parents to prudently exercise their fundamental right under the Fourteenth Amendment and the Virginia Constitution to direct the upbringing, education, and control of their children,”²³ as well as its recognition that the “primary role of parents is well established and beyond debate. Empowering parents is essential to improving outcomes for children.”²⁴

We support the statement in Section V.C. about compliance with the First Amendment, which “forbids government actors to require individuals to adhere to or adopt any particular ideological beliefs” and “guarantees religious freedom and prohibits compelling others to affirm ideas that may be contrary to their personal religious beliefs.”²⁵

We applaud the specific reference resisting the compelled use of preferred pronouns. With increasing numbers of children identifying as transgender, this issue is becoming prevalent in the school context across the country. Multiple teachers have been fired over their refusal, based on their religious beliefs, to use preferred names or pronouns in violation of school policy (even in cases where they opt to

²¹ *Gender Terminology: Discussion Guide*, GLSEN, <https://www.glsen.org/sites/default/files/Gender%20Terminology%20Guide.pdf>.

²² 87 Fed. Reg. 47870.

²³ 2022 Model Policies at 5.

²⁴ 2022 Model Policies at 5.

²⁵ 2022 Model Policies at 5.

not use pronouns altogether to avoid unintentionally giving offense).²⁶ Such adverse employment actions have been found to be unlawful. For example, the Sixth Circuit in *Meriwether v. Hartop* (discussed more below) recently held that a state university policy requiring a teacher to use a student’s preferred pronouns in opposition to the teacher’s sincerely held religious beliefs violated the First Amendment Free Speech and Free Exercise Clauses.²⁷

We ask that the 2022 Model Policies clearly recognize the First Amendment free speech and free exercise rights of *teachers and other school employees* to not be compelled to use preferred pronouns contrary to biology or religious belief. **Specifically, we ask that the 2022 Model Policies clarify that “individuals” refer to teachers, school staff, volunteers, students, and parents, among others.** This clarification is necessary in light of the 2021 Model Policies, which unconstitutionally required school staff to “abide by the student’s wishes as to how to address the student” and warned that a “school employee’s intentional and persistent refusal to respect a student’s name and pronoun is considered discriminatory.”²⁸

Additional Related Laws

We applaud the inclusion of relevant federal and state laws, as well as case law. We suggest the following evidence-based changes and additions to the descriptions of law.

Title VII

The explanation of Title VII states “The U.S. Supreme Court has determined, for purposes of terminating employees, ‘sex’ under Title VII includes gender and sexual orientation.”²⁹ This is incorrect. The Court used the language “homosexuality or transgender status” not “gender and sexual orientation” more broadly. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). Indeed, the term “gender” does not appear by itself once in the majority opinion. Its only references are to “gender dysphoria” once, “gender identity” once, and “gender roles” three times. *Id.* at 22, 23. As a recent federal district court explained, “Though human sexuality correlates to myriad attractions, identifications, actions, and relationships, the Court cabined its definitions and descriptions of ‘being homosexual’ and ‘being transgender’ to *status*.” *Texas v. Equal Emp’t Opportunity Comm’n*, 2:21-CV-194-Z, 4 (N.D. Tex. Oct. 1, 2022) (quoting *Bostock*, 140 S. Ct. at 1737-38, 1741-49, 1753-54).

²⁶ See, e.g., *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021) (affirming rejection of federal court removal of claims under the Virginia constitution and state statutes by high school French teacher who was fired for not abiding by school nondiscrimination policy that required him to use student’s preferred pronouns in violation of his religious beliefs); *Ricard v. USD 475 Geary Cnty.*, 5:22-cv-04015-HLT-GEB (D. Kan. May. 9, 2022) (preliminarily enjoining school from disciplining teacher for referring to a student by the student’s preferred name and pronouns in her communications with the student’s parents within the regular course of her duties); see also *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21-3254 (Va. Dec. 1, 2021) (affirming parties’ agreement to permanently enjoin school in case raising free speech and free exercise claims by elementary school teacher who was placed on administrative leave after speaking out against proposed preferred pronoun policy at public school board meeting).

²⁷ *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (reversing dismissal of First Amendment free speech and free exercise claims by professor disciplined by university for not following university’s gender identity nondiscrimination policy when he refused to address transgender identifying student by student’s preferred title and pronouns and instead used only student’s last name), *settled & voluntarily dismissed sub nom. Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), press release available at <https://adfmmedia.org/case/meriwether-v-trustees-shawnee-state-university> (university agreed to pay teacher \$400,000 plus attorneys’ fees, and agreed teacher has a right to choose when to use, or avoid using, titles or pronouns when referring to or addressing students, including when student requests preferred pronouns).

²⁸ 2021 Model Policies at 13.

²⁹ 2022 Model Policies at 6.

Further, while it is correct that the *Bostock* opinion did not address other federal antidiscrimination laws, it also did not address issues under Title VII outside the hiring and firing context. As the *Bostock* Court explained:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.” ... Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

140 S. Ct. at 1753. We ask that *Bostock*’s exclusion of sex-specific bathrooms, locker rooms, and dress codes, even under Title VII, be recognized as limiting the scope of the decision.

We ask that the summary of Title VII also recognize the nondiscrimination protections for employees on the basis of religion. 42 U.S.C. § 2000e-2. Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief” and requires employers to “reasonably accommodate” employees’ religious observances and practices when such accommodations do not impose “undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). These protections may be relevant when it comes to expectations for interactions with “transgender students” by teachers and other school employees. Many employees are likely religious, and many religions hold sincere beliefs about marriage, gender, and sexuality which may differ from a student’s or parent’s beliefs or purported identity.

Title IX

In the discussion of Title IX regulations, we ask that Virginia also recognize regulations that permit sex-specific athletics (34 CFR § 106.41). Title IX is widely lauded for championing women’s sports, and since its implementation, participation by girls and women in athletics have increased more than tenfold.³⁰

Grimm v. Gloucester County School Board

In the summary of the *Grimm v. Gloucester County School Board* case the 2022 Model Policies state: “the U.S. Court of Appeals for the Fourth Circuit held that transgender students must be allowed to use restroom facilities that correspond to their gender.”³¹ We ask that “gender” be changed to “transgender identity” to reflect the mandates of Virginia Code, to acknowledge the internal subjective nature of the designation, and to avoid confusion over the historic use of the term “gender” as a synonym for “sex” (both biological in nature). This is consistent with the Fourth Circuit’s decision. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (“Grimm’s four years of high school were shaped by his fight to use the restroom that matched his consistent and persistent *gender identity*.”)

³⁰ See Charles L. Kennedy, *A New Frontier for Women’s Sports (Beyond Title IX)*, Gender Issues (1-2) 78 (2010), <https://link.springer.com/article/10.1007/s12147-010-9091-y>.

³¹ 2022 Model Policies at 9.

(emphasis added)). Note however, that, as stated earlier, Title IX still prohibits schools from allowing a hostile environment where biological boys are allowed to either undress in front of biological girls, or to see biological girls undress. Justice Ruth Bader Ginsburg reminded us that “Physical differences between men and women, however, are enduring” and that women’s admission to an all-male school “would require accommodations, primarily in arranging housing assignments and physical training programs for female[s].”³²

Meriwether v. Hartop

In the description of the *Meriwether v. Hartop* case, the 2022 Model Policies mention that the Sixth Circuit held that the state university “violated a professor’s free speech rights when it punished him because he declined to refer to a male student as a woman, with feminine titles and pronouns, after the student requested that he do so.”³³ The court also found that the university violated the teacher’s free exercise rights. *Meriwether v. Hartop*, 992 F.3d 492, 512 (6th Cir. 2021) (“Meriwether next argues that as a public university, Shawnee State violated the Free Exercise Clause when it disciplined him for not following the university’s pronoun policy. We agree.”). We ask that the 2022 Model Policies reflect this important holding as well.

Sample Policy

Discrimination, Bullying, and Harassment

We applaud Virginia’s sample policies recognizing the importance of prohibiting discrimination, harassment, and bullying for *all students*.³⁴

Identification of Students

Section III.D.6 of the sample policy states: “Notwithstanding the provisions of paragraph (4) of this section, [School Division] shall not compel [School Division] personnel or other students to address or refer to students in any manner that would violate their constitutionally protected rights.”³⁵ We ask that this paragraph also recognize statutorily protected rights. For example, as discussed above, Title VII provides religious accommodation protections for employees which may provide additional protections against compelled speech. We also ask that this provision clarify that students and staff have a constitutional right to decline to address a person using a pronoun that does not match that person’s biological sex both on Free Speech grounds and, where relevant, Free Exercise grounds. *See Cross v. Loudon County* case discussed above. Leaving this scenario unspecified would allow recalcitrant school boards to easily trample on the rights of students, faculty, and staff.

Enforcement of Sex-Based Dress Codes

The 2022 Model Policies would allow students to “dress in any manner consistent with maintaining a respectful, distraction-free environment which supports a focus on learning for all students.” It helpfully clarifies “that students are not required to dress in a gender-neutral manner.” It also contemplates school dress or grooming codes that are sex-specific so long as they “provide the same set of rules and standards regardless of gender, as required by the Code of Virginia, § 22.1-279.6.” This

³² *United States v. Virginia*, 518 U.S. 515, 540 (1996).

³³ 2022 Model Policies at 9.

³⁴ 2022 Model Policies app. 1 at 14-15.

³⁵ 2022 Model Policies app. 1 at 16 (alterations in original).

section must clarify that sex-specific dress codes are not only allowed but in some cases are required by law. For example, concerning school activities involving water sports or water play, not only may a school impose a dress code requiring the covering of breasts, it *must* do so to avoid creating a hostile sexual environment.

Student Participation in Sex-Specific School Activities and Events and Use of School Facilities

As recognized in Section III.G.4, single-user bathrooms and facilities are a great option for all students who are not comfortable using a bathroom with others, regardless of the reason—whether they identify as transgender, do not want to share a facility with someone of the other sex, or for medical, personal, or practical reasons. This alternative should be encouraged and promoted in all schools. This is especially important in light of the sexual assault of a Loudoun County female student in the women’s bathroom by a male student wearing a skirt.³⁶ The 2022 Model Policies should clarify that sex education classes may have sections taught to biological boys and girls separately to preserve student privacy. For example, no biological boy, regardless of self-identification has a right to intrude on a class of biological girls discussing their menstruation as part of their education. Overnight travel accommodations, locker rooms, and other intimate spaces, as discussed above, *must* be based on biological sex, not subjective gender identity or transgender status to avoid creating a hostile sexual environment contrary to law. The 2022 Model Policies should make this explicit.

Athletics

We especially applaud the inclusion of Section III.H, which recognizes the important of ensuring sex-specific athletic programs and activities are based on sex.

The reason why there are separate *female* sports is because of the recognition of the significant physiological and anatomical differences between males and females, and the resulting performance advantage for males—an advantage that has not diminished even though female athletes now receive the same top-level training as male athletes. Biology and sex must continue to be the basis for participation standards in interscholastic athletics. A research review published in 2021 in the journal *Sports Medicine* states that “the performance gap between males and females becomes significant at puberty and often amounts to 10-50%, depending on the sport.”³⁷ This performance gap is greatest in sports like track and field that require explosive power—track and field, incidentally, is the among the most popular sports for high school female athletes.³⁸

The basis of this performance gap is physiological: males and females are physiologically different. On average, males have a built-in biological advantage. They are bigger, stronger, faster, have more muscle mass, stronger bones, greater lung and cardio capacity, and more fast-twitch muscle fibers (which gives an advantage in explosive power); males, on average, also have more upper-body muscle

³⁶ See Justin Jouvenal & Hannah Natanson, *Va. Supreme Court Affirms Probe of Loudoun Sexual Assaults Can Continue*, Wash. Post (Sept. 2, 2022, 3:13 p.m.), <https://www.washingtonpost.com/dc-md-va/2022/09/02/loudoun-bathroom-assault-grand-jury/>. Loudoun County schools’ policy allowed students to access single-sex bathrooms corresponding to gender identity.

³⁷ Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.

³⁸ Jill Kochanek, & Daniel Gould, *The Status of High School Girls’ Sport Participation: A Report Compiled for the State of Michigan Women in Sports Task Force*, Institute for the Study of Youth Sports, Michigan State University, East Lansing, Mich. (2020).

and lower-body muscle than females.³⁹ The male body is simply built differently—an advantage conferred by nature. As exercise physiologists have long acknowledged, in direct competitions between male and female athletes, males will win. For females to have the chance to win, especially at higher levels of competition, males and females must compete in separate categories.⁴⁰

This performance advantage cannot be erased even when males suppress their testosterone production: longitudinal studies show that “the loss of lean body mass, muscle area and strength typically amounts to 5% after 12 months of treatment” to suppress testosterone.⁴¹ Moreover, suppressing testosterone does not eliminate enduring male-bodied anatomical advantages. A 15-year-old male who uses medication to suppress his natural testosterone does not lose the performance advantages conferred by nature, rooted in numerous physiological differences.

All males and females deserve a team on which to play. But the costs to females, who are muscled out of positions on “girls” or “women’s” school athletic teams by males who identify as “girls” or “women,” are likely to be substantial.

Conclusion

We applaud Virginia’s concrete action to respect parental rights guaranteed by the U.S. Constitution and laws of Virginia and to ensure privacy, dignity, and respect for all students in Virginia schools. We urge adoption of the 2022 Model Policies and the recommended changes identified above.

Sincerely,

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³⁹ Eduardo Saez-Saez de Villarreal et. al. *Does Plyometric Training Improve Strength Performance? A Meta-Analysis*, 13 J. Sci. Med. Sport 513 (2010), <https://pubmed.ncbi.nlm.nih.gov/19897415/>; A. E. Miller, *Sale DG. Gender Differences in Strength and Muscle Fiber Characteristics*. 66 Eur J Appl Physiol Occup Physiol 254 (1993), <https://pubmed.ncbi.nlm.nih.gov/8477683/>.

⁴⁰ “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger muscles and bones as well as a higher circulating hemoglobin level. Hence, elite female competition forms a protected category with entry that must be restricted by an objective eligibility criterion related, by necessity, to the relevant sex-specific physical advantages.” David J. Handelsman, et. al. *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 Endocrine Reviews 803 (2018), <https://doi.org/10.1210/er.2018-00020>.

⁴¹ Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 Sports Medicine 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.