



October 26, 2022

Virginia Department of Education
Office of Policy: Department of Policy and Communications
Office of the Superintendent: Executive Director, Parental Engagement
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Dear Superintendent Balow,

Alliance Defending Freedom (“ADF”) supports the Virginia Department of Education’s proposed 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools (“2022 Model Policies”). This rule replaces the Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools (“2021 Model Policies”). Unlike the 2021 Model Policies, the 2022 Model Policies respect parents’ role in making important healthcare and education decisions; maintain safe intimate spaces for women and girls; preserve sex-separate sports to allow women and girls the opportunity to thrive among their peers; and respect students’ and teachers’ fundamental freedoms of religion and speech. Moreover, the 2022 Model Policies correctly afford compassion and respect to all students, regardless of their gender identity.

ADF is an alliance-building legal organization that advocates for the right of all people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters at both the state and federal levels involving parental rights, athletic fairness, student privacy, the First Amendment, and other legal principles, including several cases arising from constitutional violations by school districts following the 2021 Model Policies.

- I. The 2022 Model Policies recognize that parents are the primary caregivers for their children, they have the right to make important healthcare and education decisions for their children, and they should not be treated with suspicion by a school.**

School officials should openly communicate with parents about all aspects of their child’s school life.

The 2022 Model Policies rightfully foster this communication by seeking to engage parents first. They ensure parents can opt their child out of counseling services pertaining to gender and allow parents to decide whether to permit a school counselor to speak with their child about gender-related questions. *See* 2022 Model Policies §§ III.A.3-4. School officials must use a student’s legal name (or its derivative) along with pronouns consistent with the student’s sex unless the parents request otherwise. *See* §§ III.D.2-4. A student’s name or sex in the official school records can only be changed if requested by a parent and substantiated by a legal document indicating such change. *See* §§ III.C.1-2. Finally, the 2022 Model Policies prohibit school officials from requiring that teachers conceal material information about students from parents. *See* §§ III.D.7.

Parents’ rights to raise, care for, and educate their children are pre-political natural rights. “[T]hose who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

The United States Constitution and Virginia law recognize and protect parental rights. The law recognizes that parents, not school officials, are the primary decision-makers with respect to their minor children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected . . . broad parental authority over minor children.”).

Children lack the “maturity, experience, and capacity for judgment required for making life’s difficult decisions,” which is why parents have authority to make decisions in their child’s best interests. *Id.* And, parents, not government officials, “hav[e] the most effective motives and inclinations and [are] in the best position and under the strongest obligations” to decide what is best for their children. *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998).

Parents’ constitutional rights reach their peak on “matters of the greatest importance.” *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *see Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972). Medical and health-related decisions fall in this category: “Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions Parents can and must make those judgments.” *Parham*, 442 U.S. at 603.

Virginia law, like federal law, affirms these fundamental rights. Va. Code § 1-240.1 (“A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent’s child.”); § 22.1-207.2 (parental right

to review a school's family life curricula); § 22.1-207.2:1 (parental right to review audio-visual materials with graphic sexual or violent content in anti-bullying or suicide prevention program).

Affirming parental rights and empowering parents ensures each child's emotional, social, and physical needs are met. Parents know their own child's specific needs best, and parents are best equipped and positioned to meet those needs. Consequently, schools should never seek to hide information from parents or cut them out of important decisions impacting their child's health.

Unfortunately, school districts in Virginia used the 2021 Model Policies to introduce harmful policies that exclude parents from conversations about their children's health and force teachers to deceive parents about their children's struggles.

ADF is challenging several such policies. In the Harrisonburg City Public Schools, teachers are required to ask for and always use a student's preferred names and pronouns. Teachers also must hide that information from parents unless school officials authorize sharing it. *See* Complaint filed in *D.F. v. Sch. Bd. of Harrisonburg*, Case No. CL22-1304. Loudoun County public schools proposed a similar policy and placed a teacher on administrative leave because of his speech at a public board meeting questioning the policy. *See* Complaint filed in *Cross v. Loudoun Cty. Sch. Bd.*, Case No. CL21-3254.

Many districts also maintain "shadow records" where official student records, accessible by parents, contain different information from the child's "Gender Support Plan" or other "shadow" files hidden from parents—even if they specifically request to access their child's records. A district court in Kansas recently found that such policies likely violate the Constitution. *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-cv-04015, 2022 WL 1471372 (D. Kan. May 9, 2022), ECF No. 21.

These policies intentionally exclude parents from important information and conversations about their minor child by falsely presuming school officials—who may only interact with a child for a few hours each week—are better equipped to guide a child through adolescence and beyond than the child's parents.

This is an unconstitutional imposition on parents' fundamental rights.

Deferring to parents' decision-making is especially critical with respect to gender identity struggles in children, where leading psychiatrists and psychotherapists widely vary on both causation and the best courses of

intervention. See Expert Aff. of Dr. Stephen B. Levine, *Doe v. Madison Metro. Sch. Dist.*, No. 20-CV-454, ¶¶ 22-44 (Wis. Cir. Ct. signed Feb. 10, 2020), <https://bit.ly/3TSoerz>. Governments should not mandate a one-size-fits-all approach in these cases. Even more concerning is evidence that a majority of children (in several studies, a very large majority) diagnosed with gender dysphoria “desist”—their gender dysphoria did not persist—beyond puberty. *Id.* ¶¶ 60-62.

Indeed, immediately putting a child with gender-related distress on puberty blockers pushes them down a dangerous and potentially irreversible path. The child risks a range of long-term harms, including sterilization (chemical or surgical); physical health risks associated with exposure to elevated levels of cross-sex hormones; surgical complications and lifelong after-care; family alienation; inability to form healthy romantic relationships; and elevated mental health risks. *Id.* ¶¶ 98-120. Some countries, like Sweden, France, and the United Kingdom, have stopped encouraging children to transition, employing instead a “watch and wait” approach. See, e.g., Royal College of Psychiatrists, *Supporting transgender and gender-diverse people*, March 2018 (United Kingdom).

Under Virginia law, the Department of Education must develop model policies “in accordance with evidence-based best practices.” Va. Code § 22.1-23.3. But the 2021 Model Policies unquestioningly adopted a reflexive “affirmative” response to students experiencing distress with their biological sex, ignoring evidence that a student’s “social transition” as part of an “affirmative” response (i.e., using different names, pronouns, or clothes) has real, significant implications for the child’s long-term health. Decl. & Expert Rep. of Dr. Stephen B. Levine, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv00316 (S.D. W. Va. Feb. 23, 2022), ECF 286-1, ¶¶ 127-137, <https://bit.ly/3L19WFw>.

The 2022 Model Policies correct the 2021 Model Policies’ unsupported, one-size-fits-all, immediate-affirmation approach. The 2022 Model Policies recognize medical and psychiatric treatment should be administered by doctors and psychiatrists with the appropriate informed consent. The school’s role is not to diagnose a child and have teachers administer such treatment without parents’ knowledge or consent.

School officials were never meant to be gatekeepers controlling when and whether parents have access to their children’s lives. The 2022 Model Policies correct this error and reflect parents’ primary role in directing their child’s upbringing.

II. The 2022 Model Policies preserve safe intimate spaces for women and girls.

Restrooms, locker rooms, and hotel rooms are intimate spaces where people sleep, change, shower, and perform other private functions. They are spaces where people are vulnerable, especially young women. No person should be forced to disrobe or do other private activities in the presence of members of the opposite sex. This basic and commonsense principle of human dignity is why we have separate changing facilities, shower areas, restrooms, overnight accommodations, and dorms for men and women, boys and girls.

Under the 2022 Model Policies, “[o]vernight travel accommodations, locker rooms, and other intimate spaces” (including restrooms), shall be used by students based on sex. *See* 2022 Model Policies §§ III.G.2-3. The 2022 Model Policies also provide, however, that “[s]ingle-user bathrooms and facilities” be made widely accessible for all students. *See* § III.G.4.

Private spaces are separated by sex to promote critical objectives such as privacy, dignity, and an environment free of sexual harassment. The 2022 Model Policies respect students’ right to have their personal privacy protected, especially survivors of traumatic sexual harassment or assault.

Justice Ginsburg agreed that sex-separate spaces are not only constitutionally permissible, but also “in some situations required, by regard for individual privacy.” Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, THE WASH. POST, April 7, 1975. Such individual privacy is “a right of constitutional dimension” and runs in harmony with, not contradictory to, equality. *Id.*

Female students deserve to know that their physical privacy will be protected. Being forced to expose one’s unclothed body to “people of the other sex may be especially demeaning and humiliating.” *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (citation omitted). Those concerns are heightened for self-conscious teenagers going through puberty and girls who are facing new and varying feminine hygiene needs. Schools should be places where girls can learn and grow, not be subjected to “embarrassing, frightening, and humiliating” experiences. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009). Female athletes forced to share locker rooms and private spaces with a male describe “extreme discomfort” because of his physical body, not his gender identity. Allie Griffin, *Lia Thomas competitor says she felt ‘extreme discomfort’ sharing locker*

room, N.Y. POST (July 27, 2022), <https://nypost.com/2022/07/27/lia-thomas-competitor-riley-gaines-felt-extreme-discomfort-in-locker-room/>.

Being forced to sleep or undress alongside males can be traumatic for female sexual assault survivors. Many of these women struggle to even enter public spaces where they will encounter men—the mere thought of encountering a male in private spaces where they undress, attend to private bodily needs, or sleep only adds to their fear and trauma.

The 2021 Model Policies required access to restrooms corresponding to gender identity be available to all students. That was far beyond what federal law requires and misconstrued *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596 (4th Cir. 2020) (“But today’s question is limited to how school bathroom policies implicate the rights of transgender students who ‘consistently, persistently, and insistentlly’ express a binary gender.”), as amended Aug. 28, 2020—itself a badly reasoned decision. The 2022 Model Policies restore schools and extracurricular activities as safe spaces for learning and adolescent growth.

III. The 2022 Model Policies support women and girls by enhancing their safety and opportunities to compete in sport.

Athletic competitions should give girls equal opportunities to showcase their hard work, discipline, and athletic abilities. This means females should compete against only females. Allowing males to compete on female teams harms female athletes, both with respect to their safety and their ability to demonstrate and receive recognition for their accomplishments.

The 2022 Model Policies provide that a student’s participation in “any athletic program or activity that is separated by sex . . . shall be determined by sex.” See 2022 Model Policies § III.H. This restores young womens’ right to have a fair shot at winning and receiving the benefits of competition, like scholarships and recognition for their hard work.

Sex-separated teams exist to provide fair competition. They control for physiological differences so competition can reward “talent, strategy, training, and dedication.” Exhibit 6, Expert Witness Declaration of Dr. Emma Hilton (Hilton Decl.) filed in *A.M. v. Indianapolis Public Schools*, 1:22-cv-1075 (ECF No. 36-6), ¶ 5.2. The Court agrees: Justice Ginsburg wrote in *United States v. Virginia* that the “[p]hysical differences between men and women . . . are enduring: ‘[T]he two sexes are not fungible.’” 518 U.S. 515, 533 (1996) (citation omitted).

The athletic advantage held by males over females is because of the male body, not masculine identity. Because athletic competitions test physical bodies and their capabilities, the only way to provide girls with fair competition is to base sports competition on physical bodies, or sex.

Finally, these physical differences also matter for female safety. National and international sports organizations recognize sports can be significantly more dangerous when females are forced to compete against males. *See, e.g., World Rugby, World Rugby approves updated transgender participation guidelines* (Oct. 9, 2020), <https://www.world.rugby/news/591776/world-rugby-approves-updated-transgender-participationguidelines>. Since girls are already at a higher risk than boys of career-ending Anterior Cruciate Ligament (ACL) injuries and both concussions and more severe concussion outcomes, it is safer for girls to play exclusively against females. Exhibit 15, Declaration of Chad Carlson in *B.P.J. v. W. Va. State Bd. of Educ.*, ¶¶ 70, 58.

Where safeguards like those in the 2022 Model Policies are not in place, girls are being dramatically and negatively impacted. Girls are being told that they have the right to participate in athletic competitions, but no right to win. *See* Declaration of Chelsea Mitchell filed in *B.P.J. v. W. Va. State Bd. of Educ.*, 2:21-cv-00316 (ECF No. 286-1), ¶ 14. Female volleyball players felt demoralized after they were too intimidated by a male on the other team and afraid of getting hurt to actually play. *See* Exhibit 5, Declaration of Darcy Aschoff (Aschoff Decl.) filed in *B.P.J. v. W. Va. State Bd. of Educ.*, 2:21-cv-00316 (ECF No. 286-1), ¶ 24.

Women and girls across the country are afraid to speak up about this issue, fearing retaliation, censorship, and lost scholarships. But they deserve real opportunities to compete, earn scholarships, and win on a fair playing field. The 2022 Model Policies allow girls a fair shot at these opportunities while also protecting their safety.

IV. The 2022 Model Policies restore the freedoms of speech and religion for both students and teachers.

Instead of unlawfully censoring certain viewpoints on gender identity or unconstitutionally compelling students and teachers to use pronouns and names inconsistent with a student's sex, the 2022 Model Policies respect constitutional protections for speech and religion.

The 2022 Model Policies prohibit school officials from compelling staff or students “to address or refer to students in any manner that would violate their constitutionally protected rights.” *See* 2022 Model Policies § III.D.6.

Schools have long been recognized as important societal institutions for learning and the exploration of ideas. Schools cannot fulfill their function of training citizens fit for participation in American democracy if they become instruments of ideological conformity. This is dangerous for the next generation and often unconstitutional. The myriad opinions on human identity raised by the issue of sexual orientation, gender expression, and gender identity are the sort of “things that touch the heart of the existing order” over which the Constitution guarantees “the right to differ,” especially in American schools. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Following the 2021 Model Policies, many Virginia schools imposed restrictions on teacher speech, generating litigation. ADF cases in Harrisonburg and Loudoun County illustrate the harm done by the 2021 Model Policies: school staff members may hold beliefs that prevent them from personally affirming or communicating views about human nature contrary to those beliefs, particularly for those who believe “preferred pronouns” communicate an untrue message to a child. *See* Complaint filed in *D.F. v. Sch. Bd. of Harrisonburg*, Case No. CL22-1304, ¶¶ 72–78; Complaint filed in *Cross v. Loudon Cty. Sch. Bd.*, Case No. CL21-3254. Schools have no interest adequate to outweigh the teachers’ interests in such cases.

School policies governing sex and gender identity affect speech and religion. Students who identify as transgender commonly request to be addressed by different names and pronouns. Like any speech, using pronouns inconsistent with a person’s sex communicates the message that what makes a person a man or a woman is solely that person’s sense of being a man or a woman. However, students and teachers who take a contrary view of the relationship between biological sex and personal identity (for religious, philosophical, scientific, or other reasons) may be reluctant to use another’s “preferred” pronouns or name because using them contradicts their own deeply held views. *See Meriwether v. Hartop*, 992 F.3d 492, 507-08 (6th Cir. 2021) (a professor’s right to refuse to use opposite sex pronouns “reflect[s] [the] conviction that one’s sex cannot be changed”).

The 2022 Model Policies recognize that students who identify as transgender deserve compassion and respect. And so too do teachers and students with different views and beliefs about gender ideology. We can show kindness to the former without violating the rights and convictions of the latter by compelling them to

speak things they disagree with. This ensures that teachers are not forced to choose between their faith and their job and that Virginia continues to uphold the fundamental freedoms of all of its citizens.

Respectfully submitted,

A handwritten signature in black ink that reads "Ryan Bangert". The signature is written in a cursive style with a large initial "R".

Ryan L. Bangert*
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*not licensed in DC, practices in federal courts