

October 25, 2022

Superintendent Jillian Balow  
Virginia Department of Education  
James Monroe Bldg., 25th Floor  
101 N. 14th Street  
Richmond, VA 23219

**Re: Comments on the “Proposed 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools”**

Dear Superintendent Balow:

On behalf of the Virginia members and supporters of Americans United for Separation of Church and State, I write to express our opposition to the “Proposed 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools” (Model Policies). The Model Policies misuse the First Amendment’s guarantee of religious freedom as justification to erase trans and nonbinary youth from the classroom, creating a hostile and potentially dangerous school environment.

Religious freedom, as guaranteed by the First Amendment to the U.S. Constitution, protects everyone’s right to practice the religion of their choice or no religion at all—so long as they don’t discriminate against or harm others. The Virginia Department of Education should reject the Model Policies because they would result in harm to Virginia’s trans and nonbinary students.

**The Model Policies Would Harm Trans and Nonbinary Students**

Tragically, transgender and nonbinary youth report more than four times greater rates of suicide attempts compared with their cisgender peers. But a recent study shows that transgender and nonbinary youth who reported that adults and peers accepted their gender identity had *significantly* lower odds of attempting suicide, including importantly, approval from school professionals led to 33% lower odds.<sup>1</sup> Yet, the Model Policies would prohibit teachers and other school staff from providing the support trans and

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<sup>1</sup> Josh Weaver, [Acceptance of Transgender and Nonbinary Youth from Adults and Peers Associated with Significantly Lower Rates of Attempting Suicide](#), *The Trevor Project*, (Nov. 3, 2021) (overview of Myseshia Price & Amy E. Green, Transgender Health, [Association of Gender Identity Acceptance with Fewer Suicide Attempts among Transgender and Nonbinary Youth](#) (2021)).

nonbinary students need, actively creating a hostile and possibly dangerous school environment for these students. For example, they would prohibit school employees from using a student’s preferred name and pronouns without parental approval. And they would require school officials to “out” students to their parents in certain situations.

The Model Policies also require schools to deny students the right to participate in sports and to use bathrooms, locker rooms, and other facilities consistent with their gender identity. This is despite a recent study that found 60% of trans and nonbinary students who experienced bathroom discrimination seriously considered suicide: one in three attempted suicide in the past year, and one in five reported multiple suicide attempts.<sup>2</sup>

Moreover, a recent poll found that 85% of transgender and nonbinary youth—and two-thirds of all LGBTQ youth—say that debates about state laws restricting the rights of transgender people have negatively impacted their mental health.<sup>3</sup> This means that, just by proposing the Model Policies, Virginia has harmed its LGBTQ+ student community.

The evidence is clear—adopting the proposed Model Policies will harm students and could lead to increased incidents of suicide and suicide attempts by transgender and nonbinary youth.

### **The First Amendment Does Not Require Adoption of the Model Policies**

The Development Section of the Model Policies wrongly attempts to ground the rule in the First Amendment principle that “forbids government actors to require individuals to adhere to or adopt any particular ideological beliefs” by claiming that “compelling others to use preferred pronouns is premised on [an] ideological belief” about gender. But ensuring that school employees use the correct pronouns and allowing students to use the bathroom that matches their gender identity does not require anyone to “adopt”—or even agree with—any belief about gender or gender identity.<sup>4</sup> It merely requires school employees to treat trans and nonbinary students with respect. This is the right policy—no student should be discriminated against by their teacher.

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<sup>2</sup> Myseshia Price-Feeney, Amy E. Green, & Samuel H. Dorison, J. of Adolescent Health, [Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth](#) (2020).

<sup>3</sup> Josh Weaver, [New Poll Illustrates the Impacts of Social & Political Issues on LGBTQ Youth](#), *The Trevor Project*, (Jan. 10, 2022).

<sup>4</sup> Moreover, the Model Policies don’t just allow teachers who do not want to use the correct pronouns to refuse to do so. They prohibit *all* teachers, including those who do want to be gender affirming, from using a student’s preferred pronouns. This means that the Model Policies would actually require affirming teachers to “adhere to and adopt” the idea that using a student’s preferred pronouns is wrong.

To the contrary, the Model Policies actually violate the First Amendment because they use religion as a justification to prohibit all teachers and other school employees from being inclusive and affirming of transgender and nonbinary students in their teaching and in their interactions.

First, the Model Policies function as a blanket religious exemption. Under the Establishment Clause, the government's ability to issue religious exemptions is not unlimited: To avoid a constitutional violation, a religious exemption "must be measured so that it does not override other significant interests"<sup>5</sup> and may not "impose unjustified burdens on other[s]."<sup>6</sup> In other words, the government is forbidden from granting a religious exemption that will harm others.

The Model Policies, however, would impose real harm on trans and nonbinary students by not only prohibiting teachers and school employees from affirming transgender and nonbinary students but in fact also actively creating a hostile school environment. Indeed, the Model Policies' blanket exemption would likely increase the risk of suicide attempts by trans and nonbinary students.

The Model Policies would also impermissibly use religion to override the state's "significant interest" in protecting trans and nonbinary students. Virginia law requires the Department of Education to promulgate policies that maintain a "safe and supportive learning environment" for transgender students that is "free from discrimination and harassment."<sup>7</sup> Schools must also comply with Title IX of the Education Amendments of 1972, which prohibits sex-based discrimination in federally funded education programs and activities.<sup>8</sup> The Model Policies are contrary to the law that schools have an obligation to follow.

Second, the Model Policies would insert one religious viewpoint regarding trans and nonbinary people into school policies. The historic purpose of the federal Establishment Clause is to ensure "governmental neutrality between religion and religion, and between

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<sup>5</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) ("unyielding weighting" of religious interests of those taking exemption "over all other interests" violates Constitution).

<sup>6</sup> *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

<sup>7</sup> Va. Code Ann. § 22.1-23.3.

<sup>8</sup> 20 U.S.C. § 1681(a). In *Bostock v. Clayton County*, the Supreme Court explained that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. 1731, 1741 (2020). The Court of Appeals for the Fourth Circuit Court has held that the reasoning in *Bostock* applies to claims under Title IX. *Grimm v. Gloucester Cty. Schl. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

religion and nonreligion.”<sup>9</sup> Thus, “[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. . . . [I]t may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.”<sup>10</sup> The Establishment Clause “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred”<sup>11</sup> and bars government policies that are “tailored to the principles or prohibitions of any religious sect or dogma.”<sup>12</sup> Yet, the Model Policies do exactly that—they enshrine a particular religious viewpoint about gender identity into official policy, and thus, run afoul of the Establishment Clause.

### **Conclusion**

For all these reasons, Americans United urges you to oppose the Model Policies. Thank you for your consideration on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikolas Nartowicz". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Nikolas Nartowicz  
State Policy Counsel

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<sup>9</sup> *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968)

<sup>10</sup> *Id.*

<sup>11</sup> *Wallace v. Jaffree*, 472 U.S. 38, 70 (O'Connor, J., concurring).

<sup>12</sup> *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).