



October 26, 2022

The Virginia Equality Bar Association submits this letter to express our strong opposition to the Virginia Department of Education’s 2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools (the “2022 Model Policies”). As described in greater detail below, our opposition to the 2022 Model Policies is based on the following well-established facts:

- There is no legal document that durably reflects sex assigned at birth, or supposed “biological sex,” in Virginia.
- There is no reasonable legal basis for requiring a legal document to change a student’s sex in official school records.
- The 2022 Model Policies ignore legally established sex/gender designations.
- The 2022 Model Policies implicitly require intrusive physical examination of students’ bodies, which would not serve any rational interest and would make youth more vulnerable.
- The 2022 Model Policies ignore the fact that intersex people exist.
- Adopting the 2022 Model Policies will knowingly lead to protracted and expensive litigation despite already inadequate levels of funding for public education.

***About the Virginia Equality Bar Association.***

The Virginia Equality Bar Association (“VEBA”) was founded in 2013 to secure equality for the LGBTQ community and oppose discrimination based on sexual orientation, gender identity or gender expression. For nearly a decade, we have provided legal education, resources, and information to the legal community and the public.

***VEBA is an expert in legal name and gender marker changes in the Commonwealth of Virginia.***

Since 2014, a major component of VEBA’s work has been its award-winning Name and Gender Marker Change Clinics (the “Clinics”), which have provided pro bono legal services and free trainings for lawyers across the Commonwealth of Virginia. The Clinics offer pro bono legal services to both adults and youth, assisting clients with name change applications, petitions for changes of sex on birth certificates, DMV and social security record updates, DD214 (military discharge record) updates, and answering questions regarding these proceedings and processes. VEBA has sponsored approximately 30 Clinics, at which more than 500 clients have been served. Additionally, through the Clinics, VEBA has trained over 150 volunteer attorneys and law students to provide these pro bono legal services. VEBA is recognized as an expert in legal name and gender marker changes in the Commonwealth of Virginia.



Our work with these clients has shown us that legal affirmation of a person's identity on government-issued ID and other records can have positive, life-altering effects. The 2022 Model Policies are harmful and are seemingly based on a flawed understanding of the state and federal legal landscape concerning gender and sex designations, the process for changing these designations, and the science these legally established processes reflect.

***There is no legal document that durably reflects sex assigned at birth, or supposed “biological sex,” in Virginia.***

As a shaky foundation to their harmful substance, the 2022 Model Policies seek to draw a distinction between “legal sex” - referenced in sections (III)(C) and (D) pertaining to student records - and “biological sex” - referenced as sex<sup>1</sup> in section (III)(G) related to sex-specific activities.

Despite relying on this imagined distinction as a cornerstone for the 2022 Model Policies, no singular legal record exists to facilitate such a distinction or the required determination. [In 2020, Virginia amended its legal process](#) to update sex on birth certificates and eliminated any requirement to provide evidence of a medical procedure.<sup>2</sup> To amend a birth certificate, the Virginia Department of Health – Division of Vital Records requires [a certification from a healthcare provider](#) that the person has undergone “clinically appropriate treatment for gender transition.”<sup>3</sup> Gender affirming therapy and other non-medication and non-surgical treatments meet this standard. Once a birth certificate is reissued, an individual's sex, as assigned at birth, is indistinguishable from their “legal” sex.

Since the Division of Vital Records transitioned to printing abstracts of the birth certificate on the short-form version of the certificate many years ago, notations about changes and amendments to the record are not actually visible to those viewing the abstract printed on the paper birth certificate form. This was confirmed when the Virginia statute was updated in 2020 to explicitly remove the old requirement for such a notation on the paper birth certificate in the Division of Vital Records' files. Accordingly, reviewing a birth certificate – even an old one – does not necessarily provide definitive proof of a person's “biological sex” as assigned at birth. This aligns with Virginia's legal process, which necessarily seeks to establish an affirmative record of an individual's “legal sex” designation on a birth certificate. As discussed in greater detail below, this inconsistent and imprecise use of language in the 2022 Model Policies that creates such ambiguity between its chosen terms “legal sex” and “biological sex” will unfortunately lead to practical realities that violate a student's privacy when school officials attempt to enforce these problematic rules.

***There is no reasonable legal basis for requiring a legal document to change a student's sex in official school records.***

There is no one controlling legal designation of sex or gender. Instead, there are a myriad private, state, and federal identification systems with records reflecting sex and gender



designation, all of which are maintained and updated through separate processes. Many of these processes, like those of the Virginia Department of Health discussed above, have been simplified to reduce requirements around medical proof for gender transition. Still, distinct processes and standards remain. For example, [updating gender markers on U.S. passports](#)<sup>4</sup> and [Virginia DMV-issued identification](#) no longer requires documentation from a health care provider, but rather merely “checking the box” that is appropriate for the applicant’s gender. Amendments to a Virginia-issued birth certificate or Social Security marker, meanwhile, require a health care provider’s certification of clinically appropriate treatment for gender transition.

These various government-maintained records are not required to align with one another; in this way, a person can have multiple “legal sex” or gender designations at a single time. Despite this, the 2022 Model Policies require the submission of one of these - potentially conflicting - legal documents prior to updating a student’s legal name and sex.<sup>5</sup>

The 2022 Model Policies purport to further the Fourteenth Amendment interests of parents in directing the upbringing of their children. However, the documentation requirements of the 2022 Model Policies effectively prevent parents from exercising custody and control with respect to their child. If the parents and their child all request that the student’s intended name and gender/pronouns be respected, the 2022 Model Policies mandate that this cannot occur absent additional external approval (i.e. state issued legal documents or a court order). At best, this is a paradoxical outcome, but at worst, an indication of animus. What is the harm to the child that the state believes it has an interest in preventing by thwarting the express and aligned intent of both a child’s parents and that child?

School records are one of many government-maintained records including a sex or gender marker and form an essential element of social affirmation for those who experience gender dysphoria. The process of legal affirmation, such as obtaining identification documents that accord with an intended name and gender, can be time-consuming and costly despite recent administrative and legislative changes that have lowered barriers to accessing accurate identity documentation.

Requiring deference to one of a myriad of state-issued documents that include a sex or gender marker over the explicit intent and requests of a parent is a meaningless and harmful administrative burden. This requirement in the 2022 Model Policies is diametrically opposed to the 2022 Model Policies’ first and second guiding principals to “respect parents’ values and beliefs” and to “defer to parents to make the best decision with respect to their children.”

***The 2022 Model Policies ignore legally established sex/gender designations.***

The 2022 Model Policies fail to reflect the legal gender designation of nonbinary (or “other”) that is available on [Virginia DMV-issued identification](#)<sup>6</sup> and [U.S. passports](#)<sup>7</sup> and indicated with an “X” by mandating the school personnel only use male or female pronouns to refer to students.<sup>8</sup>



In addition, students born in other jurisdictions may not have a birth certificate that conforms to the male/female binary. For example, a birth certificate could identify the person to be male, female, intersex, or undesignated/non-binary, and as more jurisdictions expand these options, potentially otherwise such as with an X marker in lieu of an M or F.

Specifically, the 2022 Model Policies require schools to disregard an otherwise legal gender designation of nonbinary as indicated by an X on Virginia DMV-issued identification or U.S. passport. In fact, even when a parent's expressed intent for their child aligns with the legal designation of their child's gender, the 2022 Model Policies will require a school to defy the law and the parent's wishes to use "they/them" pronouns for that student with an "X" gender marker. This defiance of a student's "legal" gender marker and parent's wishes is directed by the very 2022 Model Policy that purports to require respect for, and indeed deference to, the student's "legal" sex. The 2022 Model Policies fail to meet their own explicit goals and standards by prohibiting the use of "they"/"them" or other pronouns applicable to these gender options, which are legally recognized genders by both the Commonwealth of Virginia and the federal government.

***The 2022 Model Policies implicitly require intrusive physical examination of students' bodies, which would not serve any rational interest and would make youth more vulnerable.***

As there is no single legal document that would conclusively prove "biological sex" for any given student, it is unclear exactly how the Virginia Department of Education proposes a school determine a student's "biological sex." The 2022 Model Policies imply that additional evaluations of the child's body will be necessary to determine biological sex. But the 2022 Model Policies do not even suggest any specific method of determining "biological sex" or identify who is qualified to render that decision, if not the child's own parents and/or medical provider. Indeed, a medical provider participated in the issuance of the student's birth certificate; and if the child was born in Virginia, in any amendment of the sex indicated on the certificate. If a provider's certification is insufficient in this respect, the 2022 Model Policies are unclear as to what additional documentation would suffice to "prove" biological sex or who would be qualified to make that determination and how, if at all, that decision could be reviewed.

Documenting a student's "sex" under the amorphous "biological sex" standard would therefore require examination and documentation of the child's body. Legislative proposals such as Ohio's H.B. 134 show the end result of such approaches: requiring invasive medical examinations of student's "internal and external reproductive anatomy" if their gender is disputed. The 2022 Model Policies do not suggest that local schools implement any constraints on the authority that would be required to implement and enforce the distinction of "biological sex" or who (or what document) would be the final arbiter of biological sex. Rather, the 2022 Model Policies intentionally embolden those who reject the scientific and legally recognized fact (referred to as a "particular ideological belief" by the 2022 Model Policies) that an individual's gender identity and the sex they were assigned at birth may not be aligned.<sup>9</sup>



When the student has already been evaluated by a healthcare provider, this sort of additional screening can only serve prurient interests and/or serve to embarrass, humiliate, harass, and otherwise ostracize the student. Additionally, it is unclear whether all students would be subjected to screening for an “accurate” categorization, or only those transgender or nonbinary students that personnel believes may be transgender. If the policy is to be selectively implemented, those who are motivated by ill-will could use the policy to target students they dislike or want to embarrass with intrusive physical examination where the process and/or results are evident to the student’s peers.

The Commonwealth has neither an interest in, nor should it have any role in, sanctioning this conduct by any actor under color of law. Transgender and gender nonconforming bodies are constantly under threat, and this particularly vulnerable population should be protected from intrusive and unnecessary evaluations, not subjected to the constant threat of state-sanctioned invasions of their bodily privacy.

***The 2022 Model Policies ignore the fact that intersex people exist.***

The 2022 Model Policies either acknowledge that there is no singular determinant for a binary understanding of “biological sex” or they callously disregard the existence of intersex students whose sex is incongruous with a singular notion of binary (male/female) “biological sex.” Indeed, biological sex is a combination of primary and secondary sex characteristics. If sex were a simple concept, the 2022 Model Policies would not need to vaguely reference “biological sex.” Likewise, intersex students’ anatomy may never have conformed to a singular binary sex option or their anatomy may have been made to conform to a single binary option externally, but that anatomy does not or may not conform to a singular binary sex option internally. Intersex individuals, whose “biological sex” is not clearly male or female may come to identify as nonbinary in the Commonwealth of Virginia, which is a legally recognized gender designation. The 2022 Model Policies ignore that intersex individuals exist, perhaps because the existence of intersex individuals proves that “biological sex” does not exist in a simple binary as the 2022 Model Policies suggest.

***Adopting the 2022 Model Policies will knowingly lead to protracted and expensive litigation despite already inadequate levels of funding for public education.***

Ill-defined metrics in the 2022 Model Policies, such as the undefined “biological sex,” invite violations of students’ bodily autonomy and privacy, not to mention parents’ rights to consent (or to refuse to consent) to intrusive intimate examinations of their children’s anatomies. The 2022 Model Policies’ unworkable standard is likely to be applied in a selective fashion, and therefore is a clear route for local school boards to end up in protracted and expensive litigation at a time when the Commonwealth continues to chronically under-fund its schools. According to the statewide [Fund Our Schools Coalition](#),<sup>10</sup> state funding for Fiscal Year 2024 currently falls \$365.7 million short of what would be necessary to fully fund the Virginia Board of Education’s prescribed “Standards of Quality” and an additional \$279 million short of what would be



necessary to fund support staff positions (such as instructional specialists, technology professionals, administrative assistants, and custodians) as prescribed by the Virginia Board of Education. Our local school systems' money is best spent educating our Commonwealth's children, not defending policies that likely violate the law and opportunistically target some of our most vulnerable students for political gains.<sup>11</sup>

***The 2022 Model Policies are harmful, not based on a complete understanding of existing Virginia or U.S. law, and thwart parents' ability to determine what is in the best interests of their children.***

VEBA calls on the Virginia Board of Education to reject the 2022 Model Policies and for school boards across the Commonwealth to decline to adopt the 2022 Model Policies. They are legally unsound and cruel and will undoubtedly cost the Commonwealth precious money and energy defending these overtly illegal policies in court.

This letter highlights certain core legal issues with the 2022 Model Policies, but is not a comprehensive analysis of all the reasons for which the 2022 Model Policies should be rejected outright. Please feel free to reach out to VEBA if you would like to discuss further based on our years of experience working in this area.

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<sup>1</sup> "The word "sex" means biological sex." 2022 Model Policies, Appendix 1, (II)(B). "For any school program, event, or activity, including extracurricular activities that are separated by sex, the appropriate participation of students shall be determined by sex." 2022 Model Policies, Appendix 1, (III)(G)(1)

<sup>2</sup> See Va. Code § 32.1-261. (<https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP0466>)

<sup>3</sup> [https://www.vdh.virginia.gov/content/uploads/sites/93/2020/07/VS42\\_Gender-Designation-Form.pdf](https://www.vdh.virginia.gov/content/uploads/sites/93/2020/07/VS42_Gender-Designation-Form.pdf)

<sup>4</sup> <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html>

<sup>5</sup> "[School Division] is required to maintain an official record for each student that includes the student's legal name and sex." 2022 Model Policies, Appendix 1, (III)(C)(1). "[School Division] shall change the legal name or sex in a student or former student's official record only if a parent or eligible student submits a legal document, such as a birth certificate, state- or federal-issued identification, passport, or court order substantiating the student or former student's change of legal name or sex." 2022 Model Policies, Appendix 1, (III)(C)(2).

<sup>6</sup> Virginia has issued more than 5,600 nonbinary driver's licenses and IDs since 2020.

(<https://www.virginiamercury.com/blog-va/virginia-has-issued-5600-nonbinary-drivers-licenses-and-ids-since-2020/>). Additionally, 22 states and Washington, D.C. now allow residents to list themselves as "X," or nonbinary, on state-issued identification ([https://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](https://www.lgbtmap.org/equality-maps/identity_document_laws)).

<sup>7</sup> <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/>

<sup>8</sup> "[School Division] personnel shall refer to each student using only the pronouns appropriate to the sex appearing in the student's official record - that is, **male pronouns for a student whose legal sex is male, and female pronouns for a student whose legal sex is female.**" Model Policy (III)(D)(3) (emphasis added).

<sup>9</sup> "Practices such as compelling others to use preferred pronouns is premised on the ideological belief that gender is a matter of personal choice or subjective experience, not sex. Many Virginians reject this belief." 2022 Model Policies, Section V.C.

<sup>10</sup> <https://www.fundourschoolsva.org/>

<sup>11</sup> For example, *Grimm V. Gloucester County School Board* (addressing bathroom access by transgender students in Virginia public schools) was filed in June 2015 and was litigated through July 2021. In finding



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that the school's policies discriminated against the plaintiff in violation of the Equal Protection Clause and Title IX of the U.S. Education Amendments of 1972, Gloucester County was ordered to pay \$1.3 million to plaintiff in attorneys' fees and costs, which was in addition to their own legal fees and expenses.