VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

In Re: Model Policies for the Treatment of Transgender Students in Virginia's Public Schools"	)	
_____	)	
Christian Action Network,	)	
and	)	Case No. Judge
Benjamin and Shannon Green individually and as next friends of their children Jane Doe 1, Jane Doe 2 and John Doe 1.	)	
and	)	
Gregory and Amber Mosher individual and as next friends of their children, Jane Doe 3 and John Doe2.	)	
Appellants/ Plaintiffs,	)	
v.	)	
Atif Qarni, Secretary of Education and Virginia Department of Education Please serve: c/o Barbara Johnson Virginia Department of Education James Monroe Building, 25th Floor 101 N. 14th Street Richmond Va. 23219 (Process accepted on Thursdays 10 am to 2 pm during pandemic)	)	
Appellee/Defendant.	)	

Motion for Intermediate Relief pursuant to Va. Code § 2.2-4028

Appellants/Plaintiffs move the court for an order granting intermediate relief pursuant to Va. Code § 2.2-4028 postponing the effective date of the Virginia Department of Education (VDOE) "Model Policies for the Treatment of Transgender Students in Virginia's Public Schools" (hereafter, "Model Policies") adopted as a guidance document pursuant to Va. Code § 2.2-4002.1.

I. Introduction

Effective March 6, 2021, VDOE adopted a highly controversial, anti-science final regulation titled "Model Policies for the Treatment of Transgender Students in Virginia's Public Schools" (hereafter, "Model Policies") as a guidance document without complying with the Virginia Administrative Process Act (VAPA). The regulation masquerading as a guidance document violated its enabling law and several other Virginia laws and state and federal constitutional rights as explained below. This challenge is not about nondiscrimination as a goal but addresses what constitutes nondiscrimination in balance with the statutory requirement of a "safe and supportive education" for all students.

A. Summary of Issues

The Model Polices are defective and legally invalid for all of the following reasons:

1. The Model Polices are regulations, but VDOE did not follow the VAPA for adoption of regulations.

2. Even if the Model Policies are a mere "guidance document," VDOE failed to perform a critical step in the VAPA adoption process, specifically responding to public comments asserting that Model Policies violate

various laws, a mandatory procedural step that could have narrowed issues here in court or possibly could have persuaded these parties not to pursue direct legal review.

3. VDOE ignored its obligation to adopt only "best practices" for the "safe and supportive education environment…for all students" [emphasis added] that are "evidence-based," which Va. Code § 22.1-23-3 specifically requires.

4. VDOE exceeded its authority set forth in Va. Code § 22.1-23-3 by including additional categories of sexual condition and proclivity for mandatory minimum privileged status under the Model Policies.

5. VDOE adopted its regulation disguised as a guidance document to impose a controversial ideological and political social construct on school boards that conflicts with the basic science of biology and reality.

6. The Model Policies impose overbroad speech codes that violate the rights of students and others under the First Amendment to the United States Constitution and Article I, Section 12, of the Virginia Constitution by forbidding the use of "unwanted [yet biologically consistent] pronouns" (such as "him and "her") or unwanted use of legal names for transgender students, requiring the confusing use of sometimes unpronounceable invented pronouns based upon the allegedly transgender student's whim.

7. The Model Policies violate religious exercise and conscience rights by forcing school personnel and students to acknowledge the supposed existence of multiple sexes "assigned at birth" (rather than genetic from conception) and acknowledging limitless invented genders that do not exist in the religious teachings of any major religion on Earth, each of which teaches that humans are male or female.

8. The Model Policies permit a child to change his or her (or whatever the applicable pronoun may be) name on school records without the child's parents' consent and to change the name without compliance with Virginia law and procedure set forth in Va. Code § 8.01-217.

9. The Model Rules violate the Federal Family Education Rights and Privacy Act, which gives parents a right to all their child's school records, by authorizing schools to conceal from parents their child's gender identity issues.

B. Nature of the Action

The correct procedural mechanism for challenging the purported Guidance Document is unclear whether challenge is by way of appeal or by a complaint. These

parties notices of appeal pursuant to Rule 2A:2 and a petition for appeal pursuant to Rule 2A:4. In case this court would decide that the Article 2A appeal procedure is not appropriate for the statutory "direct review," these parties made their filing a Petition for Appeal, or in the alternative, a Complaint for Direct Review.

Whatever the proper procedure, the General Assembly created a statutory right to direct judicial review of guidance documents in Va. Code § 2.2-4002.1. Va. Code § 2.2-4028 authorizes the court to grant intermediate relief from an agency action under VAPA to postpone the effective date or otherwise preserve the status quo.

II. Intermediate Relief Requested

A. Authority to Grant Intermediate Relief

Va. Code § 2.2-4028 authorizes intermediate relief in any action for judicial review under the VAPA. The elements for intermediate relief set forth in § 2.2-4028 are as follows:

> 1. The relief is necessary to prevent immediate, unavoidable and irreparable injury;
>
> 2. Issues of law or fact presented are substantial; and
>
> 3. There is probable cause for the court to anticipate a likelihood of reversible error in accordance with § 2.2-4027.

Appellants/plaintiffs request the court to delay the effective date until this present action is resolved in this court or any further appellate court and lawful Model Policies are finally adopted.

B. Necessity to Prevent Injury

If intermediate relief is not granted, the current effective date of March 6, 2021 will require all school boards to adopt policies that are consistent with the minimum

standards set forth in the Model Policies which, as detailed more fully in the probable cause for reversible error (See D. below), are likely to cause immediate, unavoidable and irreparable injury to the general population of students and teachers. One simple example detailed below is that the Model Policies forbid any school staff from questioning a biological male when entering the private female bathrooms, changing rooms, shower facilities, or sleeping facilities (on school trips), thus endangering the privacy, health, and safety of the general female student population and violating the religious practices of many.

Worse, by creating special protections for transgender students beyond general nondiscrimination principles, VDOE has created incentives for sexually normal students to claim or desire to be transgender to attain the privileged status, because kids being kids, it becomes "cool" to have the privileged status, or they realize they can “game the system” to gain access to undressed students of the opposite sex. By creating a privileged status for the students suffering from the mental condition known as "gender dysphoria" in the Fifth Edition of the *Diagnostic and Statistical Manual of Mental Disorders*[1] (DSM-5), VDOE encourages students with normal sexuality to experiment with, claim to have, or seek to attain the privileged status of this mental disorder. There is no base of evidence showing that VDOE's Model policies will protect the other students from harmful gender dissatisfaction with their biological reality.

C. Substantial Issues of Law and Fact

This case presents substantial issues that are both procedural and substantive. VDOE's Model Policies are procedurally defective under the VAPA. VDOE adopted the

[1] Since 2005, the standard diagnostic reference for mental health professionals. In the 1994 DSM-4, it was "gender identity disorder" defined somewhat more broadly.

Model Polices as a guidance document. There is a substantial question whether the Model Policies are regulations that should have been adopted by the VAPA regulation adoption procedure. In addition, even if the Model Policies were properly classified as a guidance document, VDOE ignored a mandatory duty under Va. Code § 2.2-4002.1 to respond to the various commenters who properly asserted that the Model Policies violate laws and constitutional rights.

Worse, the Model Policies both violate and exceed the authority of VDOE directed by Va. Code § 22.1-23-3, which is a substantial substantive issue. The Model Policies violate both constitutional and statutory rights of school personnel, parents and students as explained more fully below.

D. Probable Cause for a Likelihood of Reversible Error

Although each of the issues addressed below will be discussed more fully in the final briefing in this case, the argument below presents sufficient information to show that there is probable cause for the court to anticipate a likelihood of reversible error. If appellants/plaintiffs prevail on any of the many issues, the only statutory remedy for a guidance document "not in accordance with law" is set forth in Va. Code § 2.2-4029 (made applicable to guidance documents in Va. Code § 2.2-4002.1). "The court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law." Accordingly, it follows that an intermediate delay must apply to the entire guidance document, not simply to parts of it.

III. Procedural Errors

A. The Model Policies are Regulations Adopted Without Compliance with the Administrative Process Act

1. Procedure to Adopt a Regulation

Va. Code § 2.2-4007.01 of the VAPA establishes different procedures for an agency to adopt a regulation than for it to adopt a guidance document. To adopt a regulation, an agency must first provide the Register of Regulations with the Notice of Intended Regulatory Action (NOIRA), which describes the subject matter and intent of the planned regulation. The agency must state in the NOIRA whether it plans to hold a public hearing on the proposed regulation after the NOIRA is published. Even if the agency does not intend to hold a public hearing, the agency must hold a public hearing if the Governor so directs or if the agency receives requests for a public hearing from at least 25 persons.

To adopt regulations, Va. Code § 2.2-4007.02 requires agencies to first follow its established methods for the identification and notification of any interested persons and for any specific means of seeking input from interested persons or groups that the agency intends to use in addition to the NOIRA.

Before delivering any proposed regulation under consideration to the Registrar, Va. Code § 4007.04 requires the agency to "submit on the Virginia Regulatory Town Hall a copy of that regulation to the Department of Planning and Budget," which must within 45 days prepare an economic impact analysis of the proposed regulation.

Va. Code § 4007.05 provides that before promulgating any regulation under consideration, the agency must deliver certain information to the Registrar, including

specifying the advantages and disadvantages for the public and any agency response to the economic impact analysis.

Va. Code § 4007.06 provides that if there are one or more changes with substantial impact in the proposed regulation from the time it was initially published, any person may petition the agency within 30 days from the publication of the final regulation to request an opportunity for oral and written submittals on changes to the regulation. If the agency receives such requests from at least 25 persons, the agency must suspend the regulatory process for 30 days for additional public comment and file notice of the additional 30-day public comment period.

Obviously, the procedures required to adopt a regulation are substantial. VDOE followed none of these regulatory processes, purporting instead to adopt the Model Policies as a mere guidance document pursuant to Va. Code § 2.2-4002.1.

2. The Model Policies are Regulations.

Va. Code § 2.2-4001 defines regulation as follows:

> "Rule" or "regulation"' means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

The Model Policies, both as contemplated by the legislature and as adopted by VDOE, are statements of general application having the force of law and affecting the rights and conduct of many persons, including the appellants/plaintiffs.

A mere guidance document, defined by Va. Code § 2.2-4001, is one that provides "information or guidance of general applicability" in connection with the interpretation or implementation of a statute.

Va. Code § 22.1-23-3 expressly contemplates that VDOE's model policies will be something more than mere guidance. Va. Code § 22.1-23-3(A) requires VDOE to develop mandatory minimum model policies concerning the treatment of transgender students in accordance with "evidence-based best practices" and include (1) information, (2) guidance, (3) procedures, and (4) standards relating to a number of areas including nondiscrimination and providing a "safe and supportive learning environment…for **all** students." [Emphasis added.] The Model Policies are mandatory minimums establish standards that school boards must adopt. Va. Code § 22.1-23-3(B) School boards have no discretion to disregard these mandatory minimum Model Policies and accordingly the Model Policies have the force of law.

Requiring the adoption of standards is inherently regulatory as opposed to mere guidance. Mandatory minimum policies are inherently regulatory as opposed to mere guidance.

The Model Policies as adopted include provisions that affect the rights or conduct of persons. Although unlawful as detailed below, the Model Policies create a speech code that affects the rights or conduct of persons, purporting to redefine “harassment” as the intentional use of a transgender student's non-preferred (yet biologically consistent) pronoun or legal name. By redefining harassment, the Model Policies require investigation and "corrective action," i.e., school staff and students may be punished for harassment of transgender students (or others of abnormal sexuality) for such speech, including the failure to use invented pronouns (potentially unlimited in number and scope) some of which fall outside of current standard English usage and may be unpronounceable. [See Model Policies p. 11.]

The Model Policies also have the effect of amending Va. Code § 63.2-100, which defines "abused or neglected child," by imposing a mandatory obligation on school personnel to report parents to Child Protective Services if the school suspects that parents do not adequately affirm their child's gender dysphoria (or volitional decisions) in the manner desired by the school.

Specifically, page 14 of the Model Policies states,

> To comply with § 63.2-1509 of the Code of Virginia, whenever school personnel suspects or becomes aware that a student is being abused, neglected, or at risk of abuse or neglect (as defined by § 63.2-100 of the Code of Virginia) by their parent due to their transgender identity, they must report those concerns to Child Protective Services immediately. Before making a decision on policies relating to situations when parents or guardians are not accepting of the student's gender identity, school divisions should consult their school board attorney.

Clearly, the context demonstrates that the Model Policies define the mandatory duty to report suspected child abuse as including "when parents or guardians are not accepting of the child's gender identity...."

Nothing in existing Va. Code § 63.2-100 (as it exists today or as it will exist effective July 1, 2021) makes insufficient support of a student's gender identity abuse or neglect of a child.

The Model Policies' standards accordingly affect "the rights and conduct of" Virginians and must be subject to the regulatory process protections contained in the VAPA for regulations.

3. Probable Cause: Procedurally Defective

There is probable cause to believe that the court will conclude that the Model Policies are regulations, unlawfully adopted without following the requirements of the

VAPA for the adoption of regulations, and therefore, there is probable cause for the court to anticipate a likelihood of reversible error.

B. VDOE Violated the VAPA Procedure Requirements to Adopt a Guidance Document.

Even if the Model Policies were appropriately certified to be a Guidance Document, VDOE failed to comply with its mandatory duty set forth in Va. Code § 2.2-4002.1 for the adoption of a guidance document.

VDOE announced a 30-day comment period ending February 5, 2021, and published the proposed Model Policies on the Virginia Town Hall website for public comment. Appellants/plaintiffs provided timely comments asserting that the Model Policies violated state laws and both the state and federal constitutions.

When any public comment asserts that a guidance document is contrary to state law or regulation, Va. Code § 2.2-4002.1 states that (1) the effective date of the guidance document shall be delayed by 30 days, and (2) during this additional period, "the agency shall respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter."

Although VDOE delayed the effective date by 30 days, VDOE never responded in writing to any of appellants'/plaintiffs' comments either by certified mail or electronically in a manner consistent with the provisions for publication of comments on regulations.

VDOE's failure to comply with the mandatory duty set forth in Va. Code § 2.2-4002.1 is not mere harmless error. An agency's compliance with this duty serves at least two potentially salutary effects: (1) Responses to explain the reason that the agency

does not believe the guidance document violates the law or constitutional rights could lead to a dialogue either to clarify or resolve the perceived problems; and (2) the agency's response could persuade commenters that the guidance document does not in fact violate any law or constitutional rights, thus discouraging commenters from going to the significant effort and expense of obtaining direct judicial review authorized by Va. Code § 2.2-4002.1.

Because of VDOE's failure to comply with the mandatory requirement of Va. Code § 2.2-4002.1, the Model Policies are procedurally invalid as a guidance document under the VAPA, and there is probable cause for the court to anticipate a likelihood of reversible error.

IV. Violations of Law and Constitutional Rights

A. Overview

The Model Policies mandate that schools adopt a controversial political and ideological alternate reality in which biology does not matter and sex is not biological, but "assigned at birth." VDOE is using its power to impose this alternate reality not only upon schools but by extension upon students and their families.

Most children, especially prepubescent children, naturally grow out of gender dysphoria.[2] The alternate reality in which the Model Policies require not only schools, but parents and families to reaffirm the incongruent gender identity beliefs of children of tender years interferes with the rights of parents to raise their children as the parents deem appropriate. Parents may rationally believe that it is in the children's best

[2] See, e.g., Dreschler et al, "Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children," 44 The Hastings Center Report S4. "...only 6 to 23 percent of boys and 12 to 27 percent of girls treated in gender clinics showed persistence of their gender dysphoria into adulthood." From the abstract at https://onlinelibrary.wiley.com/doi/abs/10.1002/hast.365.

interests to be permitted to grow out of their gender confusion unencumbered by the school encouraging continuation of the gender confusion. Parents may also reasonably consider to be child abuse the encouragement of a child's belief incongruent with the child's biology.

There is a significant body of medical and psychiatric opinion disputing VDOE's political and ideological alternate reality embodied in the Model Policies. [See e.g., the authorities cited in "Brief of Amici Curiae Dr. Paul R McCue, MD, Dr, Paul Hruz, MD, PhD, and Dr. Lawrence S Mayer, PhD" (copy attached) filed in *Gloucester County School Board v. G.G.*, United States Supreme Court case no. 16-273 (remanded for further proceedings, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (*reh. den.* 9/22/20,) p*et. for cert. pending,* no. 12-1163).

There is a logical analogy between gender dysphoria and other dysphoric conditions, as explained by Michelle Cretella, president of the American College of Pediatricians. She gives examples of dysphorias that show parallels to gender dysphoria,

> [A] girl with anorexia nervosa has the persistent mistaken belief that she is obese; a person with body dysmorphic disorder (BDD) harbors the erroneous conviction that she is ugly; a person with body integrity identity disorder (BIID) identifies as a disabled person and feels trapped in a fully functional body. Individuals with BIID are often so distressed by their fully capable bodies that they seek surgical amputation of healthy limbs or the surgical severing of their spinal cord. Doctor Anne Lawrence, who is transgender, has argued that BIID has many parallels with GD [gender dysphoria]. [Cretella, M, "Gender Dysphoria in Children and Suppression of Debate," 21 Journal of American Physicians and Surgeons p.51 (Summer 2016).]

Dr. Paul McHugh, Psychiatrist-in-Chief at Johns Hopkins Hospital, shut down the gender identity clinic at Johns Hopkins in 1979 on the grounds that trans affirmative care meant "cooperating with a mental illness."

Because parents may rationally believe that it is in the best interests of gender dysphoric children to be treated for the underlying psychological condition to achieve a psychological state consistent with biologic reality, VDOE's Model Policies and the objectively false "assigned at birth" alternate reality imposed by Model Policies on schools and thereby on students, parents and families interfere with parental rights.

In VDOE's alternate reality, schools and students must affirm students' gender confusion that contradicts their biological reality. The Model Policies require staff to report to Child Protective Services parents of gender-confused children who are not (in their view) sufficiently supportive of the alleged incongruent gender identity. [Model Policies p. 14.] Thus, the Model Policies have an *in terrorem* effect on parents and families to enforce VDOE's alternate reality.

B. Violation of Va. Code § 22.1-23-3: VDOE Mandates Unsafe Conditions for Students

Va. Code § 22.1-23-3 requires VDOE to adopt model policies that include, "Maintenance of a safe and supportive learning environment free from discrimination and harassment for **all** students." [Emphasis added.] Instead, the Model Policies mandate dangerous conditions for the general population of students, even if the school has no known transgender students.

All school boards must adopt policies with the following minimum standard, [Model Polices p. 18.],

> It can be emotionally harmful for a transgender student to be questioned regarding the use of restrooms and facilities. School staff should not confront students about their gender identity upon entry into the restroom.

The context is clear. This minimum standard applies not only to restrooms but also to shower facilities and changing facilities and to sleeping facilities on school-

sponsored trips. What happens when a male predator (non-transgender) seeks to enter female shower, changing, or sleeping facilities? The predator cannot be questioned. The Model Policies prohibit staff members from ascertaining from the person whether they suffer from the gender identity disorder.

Do the Model Policies offer *any* standards or even any guidance for the moment a potential predator seeks to enter female-private facilities? No.

Here is how the Model Policies fail to protect vulnerable females: "Schools should work with a student to address any concern that an asserted gender identity[3] may be for an improper purpose, such as permitting the student to respond with information that supports the request to be treated consistent with their gender identity" [Model Policies p. 13] obviously not until after-the-fact. The Model Policies say nothing about the effect on vulnerable students or about working with actual victims of sexual assault/harassment resulting from the Model Policies' prohibition of questioning potential predators.

What about the victim? VDOE says that the Model Policies can be used for improper purposes. How will VDOE respond to the victims of sexual assaults? By asserting sovereign immunity, no doubt.

The same sorts of policies have caused problems for students in schools elsewhere. Here are two such public reports and the problems caused for general population students: https://wlos.com/news/local/bathroom-confusion-leads-to-protest-at-north-buncombe-high-school; https://www.dailymail.co.uk/news/article-7542005/Girls-skipping-school-avoid-sharing-gender-neutral-toilets-boys.

[3] About which, of course school staff is not supposed to ask per the previous quote.

With its Model Policies, VDOE abandoned its statutory duty to maintain a safe learning environment for **all** students in favor of not offending the sensibilities of the very small minority of students who struggle with gender dysphoria. We all want the students with medically recognized conditions such as gender dysphoria to be treated with courtesy, kindness, and understanding, but not at the expense of endangering the physical safety of the general population of students.

Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (*reh. den.* 9/22/20,) p*et. for cert. pending,* no. 12-1163), which we believe will be reversed, did not address whether schools could question biological males entering areas historically private for biological females. In *Grimm*, a transgender male (i.e., biological female) sued for the right to use the school's male bathrooms. The Fourth Circuit Court of Appeals held that equal protection and title IX prevent schools from separating bathrooms for use based upon biological sex at birth.

Grimm different from the issues raised in the present challenge. Nothing in the *Grimm* opinion would prevent school staff from protecting vulnerable children from a potential predator. Nothing in the *Grimm* opinion prohibits staff from questioning a particular student attempting to use opposite-sex bathrooms. To the contrary, citing DSM-5, the majority opinion recognized that incongruence between gender identity and biological sex must be manifested and listed six "markers" to recognize it. Indeed, how are school staff supposed to recognize the markers if staff are not permitted to ask and seek substantiation?

The Majority Opinion in *Grimm* inappropriately dismissed the predator problem, calling it a "transgender predator myth." ([972 F.3d 626.]) A student who truly suffers from gender confusion is not the likely predator. The potential predator under the

Model Policies is the person who exploits the "don't ask" prohibition in the Model Policies to violate opposite-sex privacy and safety. Once it happens, try telling the parents of the girl who is assaulted or the girl whose boyfriend showers with her in school that it is merely a myth. It is a false assumption that any alleged absence of reported occurrences to date means that it will not happen.

Because the issue of whether bathrooms may be separated by birth-sex is in the United States Supreme Court in a subsequent appeal of *Grimm* in which certiorari was previously granted, appellants/plaintiffs reserve their rights on the *Grimm* issues notwithstanding the *Grimm* decision. But, even if transgender students cannot be prohibited from using particular bathrooms, a school (on behalf of students and parents) has a legitimate interest in protecting the safety and privacy rights of general population students in intimate facilities.

Grimm did not specifically address the potentially knottier problems of other intimate facilities: showers, changing facilities and sleeping arrangements during school trips. Even without a predator, does anyone really believe that adolescent kids will not act like kids resulting in hanky-panky from exploitation of the "don't ask" rule?

There is probable cause that the Model Policies violate the enabling statute, Va. Code § 22.1-23-3, by failing to require a safe and supportive environment for <u>all</u> students. There is probable cause for the court to anticipate a likelihood of reversible error.

C. Violation of Va. Code § 22.1-23.3: Absence of Evidence Supporting the Model Policies as "Best Practices" for <u>All</u> Students

The Model Policies exceed VDOE's authority under Va. Code § 22.1-23-3 by going beyond the statutory mandate of merely protecting transgender students, that is those

students suffering from gender dysphoria, to mandating that school boards adopt a controversial ideological, anti-science approach to all manner of abnormal sexual conditions and proclivities. Va. Code § 22.1-23-3 requires the Model Policies to "address common issues regarding transgender students in accordance with evidence-based best practices...."

As argued above, Va. Code § 22.1-23-3 mandates VDOE to provide Model Policies for a "safe and supportive learning environment" for **all** students, not just for transgender students. It necessarily follows that a "best practice" would balance the well-being and interests of all students, including both transgender students and the majority of students who do not have a gender disorder.

Nothing in the Model Policies suggest that the administrative record will contain any documentation of evidence that the Model Policies are best practices for both the general student population as well as the students suffering from gender dysphoria as required by Va. Code § 22.1-23-3.

A review of the VDOE's Model Policies attached to the petition for appeal/complaint reveals no effort whatsoever to create programs, policies, systems or standards to protect the rights or welfare of the majority as opposed to the perceived welfare of rare gender dysphoric students. The Model Policies fail to comply with the mandate of Va. Code § 22.1-23-3 to mandate minimum "best practices" that are "evidence-based."

Accordingly, there is probable cause for the court to anticipate a likelihood of reversible error.

D. Violation of Va. Code § 22.1-23.3: Inclusion of Unauthorized Categories of Sexual Condition and Proclivity into Mandatory Minimums.

Va. Code § 22.1-23-3 authorizes VDOE to adopt mandatory minimum policies regarding transgender students. Va. Code § 22.1-23-3 neither grants nor mentions any authority for VDOE to take any action with respect to students with other categories of sexual conditions.

The Model Policies in the Guidance Document exceed the statutory authority by creating an ideological, radical leftist, anti-science, social agenda for not only transgender students but also for so-called "LGBTQ+" students as well as students with so-called "nonbinary" and “gender fluid” sexuality. The Model Policies define "LGBTQ+" as "lesbian, Gay, bisexual, transgender, queer/questioning, and others." [Model Policies p. 6.] Of those, Va. Code § 22.1-23-3 authorizes **mandatory minimum** policies only for transgender students. Va. Code § 22.1-23-3 contains no authority for mandatory minimum polices to be imposed upon school boards, school staff, and students for other categories of sexual condition.

By clearly exceeding its authority under Va. Code § 22.1-23-3, there is probable cause for the court to anticipate a likelihood of reversible error.

E. Violation of Va. Code § 22.1-23.3: VDOE Exceeded the Scope of the Statutory Eight Categories for Regulation.

VDOE's "mandatory minimum" standard policies go well beyond (1) compliance with nondiscrimination laws; (2) maintenance of a learning environment free from discrimination; (3) prevention of bullying and harassment; (4) maintenance of student records; (5) identification of students, (6) protection of student privacy; (7) enforcement

of sex-based dress codes; and (8) student participation in sex-specific school activities, which are the authorized categories stated in Va. Code § 22.1-23-3.

Instead, VDOE's mandatory minimum Model Policies are a controversial, nonscientific, ideological document to establish a radical social goal of social normalizing a variety of sexual conditions outside of natural male-female biology.

The Model Policies contain a set of strange definitions, including a definition for a word for persons of normal sexuality, which is a word widely considered to be an epithet when used by those in the transgender community. In short, it is insulting to most Virginians.

VDOE exceeds its statutory authority by imposing definitions and standards on school districts that clearly violate established biological principles. The Model Policies require school boards to pretend that biological sex is not biological at all, but that sex is merely a label "assigned at birth." [Model Policies p. 7.] School boards are mandated to pretend that XX chromosomes and XY chromosomes are completely meaningless in the determination of sex and, presumably, that sex has nothing to do with reproduction, because a person's sex is just whatever they might happen to want it to be at the time.

VDOE defines transgender using that same anti-reality fiction that sex is "assigned at birth:"

> • Transgender: 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[4] 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. [Model Policies p. 7, footnote added.]

[4] If gender is really infinitely fluid, by what logic should it be presumed that a "transgender girl's" preferred pronoun should be "she"?

VDOE's Model Policies refuse to recognize transgendered individuals as having a disorder, but expressly insists that schools pretend that transgender dysphoria, a recognized psychological disorder in DSM-5, is normal.[5] [Model Policies p. 9.] Of course, it is neither necessary nor rational to demand that a disorder is just another kind of normal to prohibit discrimination.

Using the Model Policies, VDOE demands the school boards approach biological sex in a manner completely contrary to reality for which there is no rational basis in biology. In short, the comprehensive false reality extreme ideology adopted by VDOE as mandatory minimums far exceeds any authority granted to VDOE, which was merely to protect transgender students, not convert the world from being reality-based to fantasy based in which psychological disorders are the norm.

By clearly exceeding its authority under Va. Code § 22.1-23-3, there is probable cause for the court to anticipate a likelihood of reversible error.

F. Violations of the Right of Free Speech Under the United States and Virginia Constitutions.

The mandatory minimum Model Policies establish a speech code that is unconstitutionally vague and overbroad in violation of the First Amendment to the United States Constitution and violates the Article 1, Section 12 of the Virginia Constitution. It inhibits the rights of free expression of both students and school staff.

The mandatory minimum Model Policies require punishment of school employees and students for harassment who fail to use compelled speech including a variety of strange pronouns not yet part of the English language. These include without

[5] It is truly baffling how persons who are profoundly uncomfortable with their own biological bodies unlike 99.94% of the population should be considered normal when speaking about sex/gender.

limitation pronouns ranging from "ze", which has no standard pronunciation, to "hir/hirs" [Model Policies p 13.] which apparently has pronunciations identical to the standard English third party feminine and feminine possessive, together with unidentified additional pronouns[6] which may be preferred by the gender dysphoric student, any of which may or may not be normally pronounceable in English. In using non-preferred pronouns, the only punishment exception is "genuinely innocent confusion or uncertainty that may come up from staff or students." [Model Policies p. 13].

The Model Policies state, "For transgender students, acts of verbal harassment may include the intentional and persistent **use of names and pronouns** not consistent with their identity. Sex-based harassment may also include the disclosure of the student's gender identity without their consent as this presents safety concerns for the student." [Model Policies p. 13.] The Model Policies create a standard of *per* se harassment (unless genuinely innocent, confused or uncertain), defining harassment as the "intentional and persistent use of names and pronouns not consistent with their identity" [Model Policies p. 13.] or the "disclosure of a person's gender identity without their consent." [Model Policies p. 10.]

In *Meriwether v. Hartop*, ___ F.3d. ___, case no. 20-3289 (6th Cir. 3/26/21)(https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0071p-06.pdf,) the Sixth Circuit Court of Appeals reversed the district court's dismissal of free-speech and religious-exercise First Amendment claims that challenged Shawnee State University's policy of requiring the use of "preferred pronouns" for allegedly transgender students. Applying

[6] See *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1782 (footnote 58), 207 L.Ed.2d 218 (2020)(Alito, J. dissent) noting that the University of Wisconsin lists 6 new categories of pronouns, including (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers; ve, ver, vis, xe, xem, xyr, xyrs, ze,/zie etc)

"the most rigorous of scrutiny" [Slip Op. at 30], court held that the university's pronoun use mandate, for which a teacher could be punished, was an unconstitutional violation of First Amendment speech and religious rights.

Contrary to the Model Policies, more than mere words are necessary to differentiate free speech from harassment or bullying that may be punished. Since the United States Supreme Court's decision in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (holding armband protests are protected speech), schools have apparently kept the courts quite busy striking down speech codes and other restrictions on speech. See, e.g., *Newsom ex rel. Newsom v. Albemarle County*, 354 F.3d 249 (4th Cir. 2003) (allowing nonthreatening images of weapons on t-shirts); Bair v. Shippensburg University, 280 F.Supp.2d 357 (M.D. Pa. 2003) (enjoining speech code which forbids "acts of intolerance" which could be interpreted to prohibit First Amendment protected speech which includes speech that "demonstrate[s] malicious intent towards others."); *Roberts v. Haragan*, 346 F.Supp.2d 853 (N.D. Tex. 2004) (speech code cannot prohibit leafleting that homosexuality is a sin); *Dejohn v. Temple University*, 537 F.3d 301 (3rd Cir. 2008) (declaring unconstitutional a definition of sexual harassment as gender motivated conduct which creates an "intimidating, hostile or offensive environment"). *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 at 241 (3rd Cir. 2010), in holding certain university speech codes unconstitutionally overbroad), reciting the overbreadth doctrine, states:

> The First Amendment overbreadth doctrine states that:
>
> A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad-that is, if it reaches too much expression that is protected by the Constitution. [A] policy can be found

> unconstitutionally overbroad if “there is a ‘likelihood that the statute's very existence will inhibit free expression’ ” to a substantial extent.

In *Saxe v. State College Area School District*, 240 F.3d 200 (3rd Cir. 2000), the Third Circuit Court of Appeals reversed the District Court's finding that a school district's harassment policy was constitutional. The school district's definition of harassment included examples such as, "Harassment on the basis of sexual orientation extends to 'negative name-calling and degrading behavior.'" *Saxe 240 F.3d at 203.*

In *Saxe* a Christian member of the Pennsylvania State Board of Education filed suit alleging that the harassment policy was facially unconstitutional under the First Amendment's free speech clause. The District Court dismissed the complaint on the ground that harassment is not constitutionally protected speech. Rejecting the District Court's stated legal ground, the Court of Appeals reversed, stating that there is “no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)."

The *Saxe* court explained,

> The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See Tinker, 393 U.S. at 509 (school may not prohibit speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint") Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Street v. New York, 394 U.S. 576, 592 (1969) ("It is firmly settled that... the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); see also Doe v. University of Michigan, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (striking down university speech code: "Nor

> could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people."). [240 F.3d at 215]

VDOE's Model Policies mandate that general population students, including appellants/plaintiffs, and school staff use names other than the students' legal names in violation of free speech rights of the First Amendment to the United States Constitution and the Free Speech Rights of the Virginia Constitution. It is one thing to ask individuals to call a person by their preferred name, as is common in polite society, but it is something completely different to punish someone for choosing to call a person by their official legal name, for which the Model Policies apparently provide. That seems especially outrageous.

Merely offensive speech is protected free speech. The Model Policies accordingly create a speech code that violates the First Amendment of the United States Constitution and the free speech requirements of the Virginia Constitution.[7]

The Model Policies speech codes are overbroad and violate the rights of plaintiffs, parents, students, and school employees to freedom of speech under the First Amendment to the United States Constitution and under the Section 12, Article I Bill of Rights in the Virginia Constitution and violates plaintiffs' rights as taxpayers. There is probable cause for the court to anticipate a likelihood of reversible error.

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[7] VDOE's 2013 model policies on bullying which the new Model Policies incorporate by reference contain some of the same deficiencies. "Harassing behavior may include, but is not limited to, epithets; derogatory comments or slurs ..." and "[H]arassment, intimidation, and bullying may take many forms: slurs, rumors, jokes, innuendoes, demeaning comments, drawings, cartoons, ...whether electronic, written, oral, or physically transmitted messages or images." ["Model Policy to Address Bullying in Virginia's Schools at 4 and 5 respectively.]

G. Violations of Freedom of Religion Under the United States and Virginia Constitutions

The Model Policies establish mandatory minimum standards that require school boards to adopt unscientific ideological beliefs that (1) there exists a variety of sexes as well as gender identifications; and that (2) that the sex of a child is somehow assigned at birth rather than recorded to reflect reproductive anatomical realities and the result of genetic biology, i.e., the genetic melding of the mother and father that occurs when the mother's egg is fertilized by the father's sperm at conception.

The Model Policies deliberately omit freedom of religion in the recitation of the First Amendment as a "related law." [Model Policies p. 7.] It is difficult to escape the inference that the anti-religious nature of the Model Policies' mandated false ideology is quite intentional.

The Model Policies violate the rights of both school employees and students who believe in any of the major religions, all of which teach that there is man and there is woman, and that God created them that way purposefully and immutably.

Article I, Section 16 of the Virginia Constitution reads in part:

> **That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction**, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, **according to the dictates of conscience**; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor **shall otherwise suffer on account of his religious opinions or belief**; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And **the General Assembly shall not prescribe any religious test whatever**, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any

> district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please. [Emphasis added.]

Although it does not establish Christianity as an official religion, the Virginia Constitution (unlike VDOE) recognizes the Christian religion which teaches "...in the image of God He created them; male and female He created them," [Genesis 1:27 NKJV] and "But from the beginning of the creation, God 'made them male and female.'" [Mark 10:7 NKJV, quoting Jesus.] This view is not exclusive to Christianity, but is consistent among every major religion on earth.

The mandatory minimum Model Policies require school boards to treat a person's sex as solely a label "assigned at birth" [Model Policies p. 7.] as opposed to being biologically established or endowed by God at conception, which in many ways necessarily violates the religious rights of many school employees, students and their families. The Model Policies mandate the use of preferred pronouns forcing staff an students to acknowledge a "gender identity" reversal that cannot exist under most religions, including the Christian religion. See the March 26, 2021, United States Sixth Circuit Court of Appeals decision *Meriwether v. Hartop*, *supra*.

The Model Policies violate the rights of appellants/plaintiffs and others to the free exercise of religion, as well as conscience rights, under the First Amendment to the United States Constitution and under Article I, Section 16 of the Virginia Constitution and violates appellants'/plaintiffs' rights as taxpayers.

The Model Policies state, "In accepting employment with a school district, a school staff member agrees to abide by and uphold their school board's policies and procedures, as well as federal and state laws." [Model Policies p. 13.] By demanding

that school boards and their employees agree to and operate under the unscientific, un-biological fiction that a person's sex is something "assigned at birth" and that normal sexes are essentially infinitely variable, the Model Policies unconstitutionally impose a secular religion that rejects biology and thereby establishes a religious test for employment in violation of the Virginia and United States Constitutions.

There is probable cause for the court to anticipate a likelihood of reversible error.

H. Violation of Va Code §8.01-217

Va. Code § 8.01-217 establishes certain rights and requirements with respect to the use and the changing of names of minors. Va. Code § 8.01-217 provides in pertinent part,

> A. Any person desiring to change his own name, or that of his child or ward, may apply therefor to the circuit court of the county or city in which the person whose name is to be changed resides.... In case of a minor who has no living parent or guardian, the application may be made by his next friend. In case of a minor who has both parents living, the parent who does not join in the application shall be served with reasonable notice of the application pursuant to § 8.01-296 and, should such parent object to the change of name, a hearing shall be held to determine whether the change of name is in the best interest of the minor.

Under Va. Code § 8.01-217, a minor's name may not be changed without parental consent and only after filing an application in the appropriate circuit court.

The Model Policies, however, state as a mandatory minimum, "A transgender student may adopt a name that is different from their legal name on their birth certificate and use pronouns reflective of their gender," and, "When a student asserts that they have a name and/or pronoun affirming their gender identity, school staff should abide by the student's wishes as to how to address the student. [Model Policies p. 13.] Note how the Model Polices abandon any requirement for parental consent.

Furthermore, the Model Policies specifically authorize an unlawful name change in its records, "When a student or parent request to change the students name or gender on school records, the extent to which records are modified will depend on the type of record and the substantiation of the change." There is no mention of compliance with Va. Code § 8.01-217. There is no mention of parental consent being required.

Worse, if the parents disagree to an unlawful name change, the school may overrule the parents: "In the situation when parents or guardians of a minor student (under 18 years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request…."[8]..[Model Policies p. 13.] The Model Policies even instruct schools to conceal from the parents the child's gender identity issue, "If a student is not ready or able to safely share with their family about their gender identity, this should be respected." [Model Policies p. 12.]

The Model Policies would require school divisions to violate Va. Code § 8.01-217 by changing the name of a child in the student's records and the use of a name other than the legal name in the classroom in violation of Va. Code § 8.01-217.

Accordingly, The Model Policies violate the rights of appellants/plaintiffs to require the use of the legal names of their children or to join in any name change and violates the rights of appellants/plaintiffs as taxpayers. There is probable cause for the court to anticipate a likelihood of reversible error.

[8] The sentence continues to permit, the but not require, the school to "abide by the parent's wishes to continue using the student's legal name and sex assigned at birth, or develop an alternative that respects both the student and the parents." [Model Policies p. 13.]

I. Violation of Federal Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act (FERPA) generally protects the privacy of student records and protects the rights of parents to see student records. FERPA (20 U.S.C. Sec. 1232g) provides,

> (1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

But the Model Policies state, "If a student is not ready or able to safely share with their family about their gender identity, this should be respected." [Model Policies p. 12.] The Model Policies thereby authorize schools to conceal gender identity issues from a student's parents. After adoption, the schools would have a policy of effectively prevent parents' access to a portion of their child's education record.

By requiring schools to violate FERPA, the Model Policies violate parents' rights under federal law and violate appellants'/plaintiffs' rights as taxpayers by threatening federal school funding by inhibiting parent access to their child's education record. There is probable cause for the court to anticipate a likelihood of reversible error.

V. Conclusions

Youth who feel their gender is inconsistent with their biological body should be treated compassionately and with great care by the schools without discrimination based upon those feelings. However, VDOE's Model Policies go too far. "Evidence-based- best-practices" require evidence that the Model Policies provide a "safe and supportive learning environment" for "all students." as Va. Code § 22.1-23-3 requires. VDOE's Model Policies venture into an unscientific and ideological anti-biology bias

that present a false reality land by embracing and imposing upon everyone an unworkable framework and by accepting transgender activists' fictional unsustainable social construct that denies the biological character of sex and instead treats sex as somehow a mere "label" "assigned at birth." [Model Policies p. 7.]

Because VDOE's Model Policies, which became effective March 6, 2021, are defective both substantively and procedurally, there is probable cause for the court to anticipate a likelihood of reversible error for any or all the procedural and substantive issues argued above. Procedurally, the Model Policies constitute regulations adopted without following the required VAPA procedures, but even if it was properly certified as a guidance document, VDOE omitted a vital step required by Va. Code § 2.2-4002.1 in the adoption procedure as described above.

Substantively, the Model Policies fail to conform to the requirements of Va. Code § 22.1-23-3 which authorized them and violate statues and constitutional rights in many ways described above.

If the court agrees that there is probable cause to believe that there is reversible error on *any* of the issues, procedural or substantive, Appellants/plaintiffs ask the court to grant intermediate relief by delaying the effective date of the VDOE Model Policies without bond as authorized by Va. Code § 2.2-4028 and ordering VDOE to so inform the School Boards that the Model Policies are not in effect during the pendency of this case and any appeals.

Respectfully submitted,

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