

Virginia Education Department Releases New Model Policies on Treatment of Student Gender Identity

By Susan D. Friedfel, Michelle E. Phillips & Carol R. Ashley

September 21, 2022

Meet the Authors



Susan D. Friedfel

Principal
914-872-8027
Susan.Friedfel@jacksonlewis.com



Michelle E. Phillips

(She/Her)
Principal
914-872-6899
Michelle.Phillips@jacksonlewis.com



The Virginia Department of Education issued new [2022 Model Policies](#) pursuant to Virginia School Code § 22.1-23.3 that reverse the 2021 Model Policies. The new policies provide that parents, not students, must communicate with the school regarding matters pertaining to a student's gender identity.

The 2022 Model Policies are slated to take effect after a brief public comment period and approval by the state superintendent.

2022 Model Policies

The new model policies define a transgender student as “a public school student whose parent has requested, in writing, due to their child’s persistent and sincere belief that his or her gender differs with his or her sex, that their child be so identified while at school.” The model policies also expressly define sex to mean “biological sex.” In addition, the policies mandate that a school board may not distribute policies, guidance, training, or other written materials that “encourage or instruct teachers to conceal material information about a student from the student’s parent, including information related to gender.”

Under the 2022 Model Policies, schools will be required to maintain official records for each student that include their legal name and sex. These records can be changed *only* if a student’s parent, or an emancipated student, submits a legal document “substantiating the student or former student’s change of legal name or sex.” The model policies also require that a student can only be referred to a name and pronouns other than the ones consistent with their official record if a parent requests such accommodations in writing. Transgender students will be required to join sports teams, use bathrooms, locker rooms, and other facilities that correspond with their biological sex. Teachers are not required to abide by modifications to students’ official records “in any manner that would violate their constitutional rights,” such as their personal religious beliefs.

2021 Model Policies

In 2021, the Virginia state legislature passed Virginia Code § 22.1-23.3, which required the Virginia Department of Education to develop and distribute model policies concerning the treatment of transgender students to each public school board.

Under the 2021 Model Policies, schools were required to:

- Comply with applicable nondiscrimination laws;
- Maintain a safe and supportive learning environment free from discrimination and harassment for all students;
- Take steps to prevent bullying and harassment of transgender students;

Carol R. Ashley

Of Counsel

Carol.Ashley@jacksonlewis.com

Related Services

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- Maintain student records consistent with the student's preferred gender identity;
- Identify students consistent with their gender identity;
- Protect student privacy and the confidentiality of sensitive information;
- Enforce dress codes in manner that did not discriminate against students based on their gender identity; and
- Allow students to participate in in sex-specific school activities (not including athletics) based on their gender identity.

The 2021 Model Policies also provided that transgender students could use the use bathrooms and other facilities, along with personal pronouns and names, consistent with their gender identity.

Federal Law Conflict?

Some question whether the 2022 Model Policies violate federal law. The U.S. Supreme Court declined to review an appeal in *Grimm v. Gloucester*, leaving in place the Fourth Circuit's ruling that Gloucester County School Board violated the rights of a transgender student when it restricted his access to the boy's bathroom. The 2022 Model Policies appear to conflict with 2021 guidance issued by the U.S. Department of Education (DOE) prohibiting discrimination based on gender identity and sexual orientation. A federal district court in Tennessee temporarily blocked DOE's guidance protecting transgender students in 20 states that have laws or are attempting to pass laws that restrict transgender students' access to facilities and sports (which does not include Virginia). Therefore, the 2022 Model Policies provide that any modifications to the Policies are permitted only to the extent required by federal law.

The Jackson Lewis attorneys focusing on education matters continue to monitor legal issues affecting elementary, secondary, and postsecondary school policies pertaining to transgender or gender non-binary students. Please contact a Jackson Lewis attorney with any questions in this area.

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