



Dear School Board and/or Superintendent:

You're being given this letter to draw your attention to new final Title IX regulations issued by the U.S. Department of Education that clarify your obligations to protect students from discrimination on the basis of gender identity. In addition, the U.S. Court of Appeals for the Fourth Circuit just issued a major decision regarding the rights of transgender and nonbinary students in your district. The regulations make clear that federal law requires schools to ensure that transgender and nonbinary students have access to the school facilities aligned with their gender identity and the Court of Appeals' decision prohibits schools from enacting or applying blanket bans on the ability of transgender and nonbinary students to participate in sports. Under these new binding authorities, the Virginia Department of Education's 2023 Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools ("2023 Model Policies") could expose districts to legal liability.

School districts in Virginia must comply with federal law, which takes precedence over state and local laws and regulations. This letter will explain these recent legal developments in federal law. We encourage each school district in Virginia to examine their policies and practices to ensure they are meeting their legal obligations to prohibit discrimination against transgender and nonbinary students.

**New Title IX regulations protect access to restrooms and locker rooms**

The U.S. Department of Education issued a final rule on April 19, 2024 governing schools' obligation to guarantee that all students, including transgender and nonbinary students, have full and equal access to educational opportunities regardless of sex. The new regulations make explicit that Title IX covers harassment and discrimination based on sexual orientation, gender identity, and sex stereotypes.<sup>1</sup> The regulations also clarify that in the limited circumstances where Title IX's regulations permit differential treatment or separation on the

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<sup>1</sup> "Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, *sexual orientation, and gender identity*." 34 CFR § 106.10 (effective August 1, 2024) (emphasis added).



basis of sex, that differential treatment cannot prevent a person who is transgender from participating in an educational program or activity consistent with the person's gender identity.<sup>2</sup> These provisions unambiguously apply to both restroom and locker room access.<sup>3</sup>

This is in line with precedent in the Fourth Circuit Court of Appeals, which covers Virginia. In 2021, the Fourth Circuit struck down a school board's discriminatory restroom policy and held that Gavin Grimm, a transgender student, must be permitted to use the restroom that aligned with his gender identity.<sup>4</sup>

Finally, the rule clarifies that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient's education program or activity consistent with their gender identity imposes more than de minimis harm."<sup>5</sup>

These regulations take effect on August 1, 2024. Thus, your district should act swiftly to ensure that its policies and practices comply with these requirements before the 2024-2025 school year begins. This is especially critical if your district has adopted all or some of the Virginia Department of Education's 2023 Model Policies. The 2023 Model Policies require "locker rooms[...] and other intimate spaces used for school-related activities and events shall be based on sex." 2023 Model Policies at 16. The 2023 Model Policies also create a default rule on restroom access that clearly conflicts with the new Title IX regulations: "Students shall use bathrooms that correspond to his or her sex, except to the extent that federal law otherwise requires. See *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)." 2023 Model Policies at 16. These Model Policies provisions, if adopted verbatim, would likely lead districts to violate the requirements of Title IX.

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<sup>2</sup> 34 CFR § 106.31(a)(2) (effective August 1, 2024) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm... Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.") (emphasis added). This provision does not apply to policies around living arrangements or athletics. A separate rule addressing participation in athletics is expected to be finalized in the coming year.

<sup>3</sup> See Final Rule at 1260 ("§ 106.31(a)(2) applies [] to any circumstances in which a recipient engages in permissible sex separation or differentiation, such as in its provision of restrooms and locker rooms (34 CFR 106.33), access to classes and activities (34 CFR 106.34(a)-(b)), and policies such as appearance codes (including dress and grooming codes)." (emphasis added)).

<sup>4</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878, (2021)

<sup>5</sup> Final Rule at 1272.

## Transgender athletics and BPJ

The Fourth Circuit Court of Appeals recently held that a West Virginia law banning transgender girls from playing on girls' sports teams violated the Title IX rights of a 13-year-old trans girl. *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, No. 23-1078, 2024 WL 1627008 (4th Cir. Apr. 16, 2024). The middle school track athlete had been taking medication that allowed her to go through puberty typical of other girls her age. Because in these circumstances there was no possible unfairness in allowing her to compete against other girls, the court ordered West Virginia to let her participate on the girls' track and cross-country teams. The court declared: "a 'choice' between not participating in sports and participating only on boys teams is no real choice at all." *Id.* at \*13. Thus, policies that only provide these options functionally exclude trans girls from participating in school athletics altogether.



The Fourth Circuit's ruling makes clear that blanket bans on the participation of transgender student athletes consistent with their gender identity violate Title IX. Although West Virginia has indicated it will ask the U.S. Supreme Court to review this decision, this ruling remains the law of the land unless and until the U.S. Supreme Court rules differently. The 2023 Model Policies dictate that athletic participation "shall be determined by sex rather than gender or gender identity." 2023 Model Policies at 16. School districts that have adopted a blanket ban, such as the athletics policy suggested in the 2023 Model Policies, should review and amend these policies to bring them into compliance with the Fourth Circuit's decision.

All students in Virginia, including transgender and nonbinary students, have the right to a public education. All school districts must therefore ensure that they adopt and implement policies that will protect, support, and include transgender students throughout their education.

Sincerely,

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