



October 26, 2022

# Comments on: “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools”

## Introduction

The Women’s Liberation Front (WoLF) is a radical feminist nonprofit organization that works to restore, protect, and advance the rights of women and girls through legal argument, policy advocacy, and public education. WoLF thanks the Department for the opportunity to provide input on this important issue. WoLF brings a unique perspective to this request for public comments as a nonpartisan, secular, radical feminist organization. The concept of “gender identity” is extremely contentious in the U.S. and it is commonly portrayed as a highly partisan issue, with opposition to “gender identity” based on religious beliefs or other moral disapproval. The assumption that disagreement and opposition to massive changes to American civil rights law stems solely or primarily from a traditional religious perspective is unfounded. Even putting aside the implied suggestion that religious perspectives are unimportant, it is simply not true that a religious perspective *is driving opposition* to the redefinition of ‘sex’ in law and policy. WoLF’s members and supporters include many individuals who are concerned that government-mandated support for gender identity ideology carries adverse effects for secular interests in free speech, free association, and freedom of conscience, in addition to its adverse effect on the rights, privacy, and safety of women and girls.

The Department has already received high-quality comments in favor of female-only sports and sex-separated spaces such as locker rooms and bathrooms. This includes noting and opposing the fact that the 2022 Model Policies does not appear to facially protect sex-separated bathrooms and locker rooms. WoLF agrees with and urges consideration of many arguments submitted urging protection of single-sex spaces for female students, but will not repeat them here. Instead, this comment covers other important ground, including secular First Amendment considerations and exceptions in anti-discrimination laws for bona fide occupational qualifications.

## **Free Speech and Belief**

WoLF agrees with the Department that the 2021 Model Policies “promoted a specific viewpoint aimed at achieving cultural and social transformation in schools.” It undermined the legal permissibility of factually, objectively identifying people as males (boys and men) or females (girls and women). It made it actionable to distinguish between individuals on the basis of sex, even when such distinctions are important for securing equal opportunities for women and girls to flourish in educational programs and activities. The proposed 2022 model policy (“2022 Model Policies”) is a welcome shift back toward an embrace of the constitutional rights that are critical for the empowerment of women and girls.

The 2022 Model Policies ostensibly seek to protect constitutional rights of Virginia students, noting that: “The First Amendment forbids government actors to require individuals to adhere to or adopt any particular ideological beliefs. 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. Additionally, the First Amendment guarantees religious freedom and prohibits compelling others to affirm ideas that may be contrary to their personal religious beliefs.” The document further stated the Department’s intent to be “mindful of constitutional protections that prohibit governmental entities from requiring individuals to adhere to or adopt a particular ideological belief,” again citing the First Amendment.”

In addition to the formal consequences currently in place, the culture in some communities or political groups (and in some schools) has shifted in a way that not only devalues the First Amendment, but views parts of the U.S. Constitution as an active threat to their narrow vision of

“social justice.” In this political environment in particular, WoLF welcomes the 2022 Model Policy's seeming pivot toward a holistic vision of social justice that leaves no student behind.

However, the 2022 Model Policies is woefully unclear about whether so-called “preferred pronouns” will still be required in circumstances where a student’s parent has given permission. If the Department intends the 2022 Model Policies to protect free speech for all on the subject of gender - if this ambiguity is unintentional - The Department needs to rectify that. On the other hand, if the Department does not intend a robust embrace of free speech protections, that is a grave error and must be reconsidered.

People should be as free to believe in ideas such as human sex change, just as they are about any other ideological concept. But WoLF rejects the imposition of this belief as a required set of beliefs, as a sort of state establishment of religion, or as a precondition of access to education. It is bad enough to reject the constitutional right to freedom of belief, and it is absurd enough to even frame a commitment to objective facts as “beliefs” It is outright dangerous to completely reject the constitutional right to even speak about verifiable facts such as that human beings, like all mammals, cannot change sex. Yet the 2021 Model Policies sought to discipline Virginia students in schools for doing just that, and the 2022 Model Policies do not adequately protect them. Students receive the message that they must cater to subjective beliefs they do not share and even consider irrational, while suppressing their own views and preferences. These students fear they will be disciplined if they express personal beliefs about “gender identity” that do not align with their classmate’s ideological belief system.

## **Safeguarding: Bona Fide Occupational Qualifications**

Under current civil rights law employers may hire and assign work on the basis of sex only when it is a bona fide occupational qualification (“BFOQ”), meaning that it is “reasonably necessary to the normal operation of that particular business or enterprise.” This is typically in situations where privacy, safety, modesty, or religious observance require a member of the public to be served by a person of the same sex. There are many exceptions to prohibitions on sex discrimination under BFOQ, but in the educational context it includes:

- Perform security pat downs or strip searches
- Supervise locker rooms or shared showers
- Supervise children in restrooms and/or on overnight trips.

A man who identifies as transgender or nonbinary is still male and thus is still as capable as any man of imposing physical and psychological damage on girls through sexual misconduct. This is not a controversial fact with regard to the male population in general; and WoLF appreciates that the Department has proposed Model Policies that do not pretend otherwise.

## **Incorrect Use of *Bostock* Used to Support Unlawful Guidance**

In defending its redefinition of sex to include “gender identity,” the 2021 Model Policies partly relies on President Biden’s Executive Order No. 13988, which justified its unlawful guidance by expanding the narrow scope of the *Bostock* holding beyond recognition. In *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act’s prohibition on sex-based discrimination in the workplace extends to individuals who are homosexual or who identify as transgender. That holding was specific to Title VII of the Civil Rights Act, which covers discrimination in employment, yet the Department extended it to Title IX, which covers discrimination in education. This misconstruction of *Bostock* thereby extended the workplace-specific *Bostock* holding (which forbid discrimination on those grounds in circumstances in which it is already illegal to discriminate based on sex) to educational settings. But entities covered under Title IX allow some disparate treatment based on sex, and in some cases actually *require* disparate treatment, in order to comply with the mandate of Title IX to ensure equal access to education for women and girls.

This exact misconstruction of *Bostock* was also used by President Biden’s Equal Employment Opportunity Commission (“EEOC”) to disregard and eliminate sex-separated spaces, dress codes, and sex as a bona fide occupational qualification under Title VII. Yet, *Bostock* expressly stated that these items were not covered by its decision, which again was limited to *arbitrary* discrimination - where disparate treatment based on sex is already illegal.

The 2022 Model Policies, as compared to the 2021 Model Policies, is more cautious; it defines the protected characteristic of ‘sex’ to better protect female people as a class, and it restores the lawfulness of certain actions to protect the female sex class from discrimination - actions that until recent years were *required* in order to comply with anti-discrimination rules for female students. There is no logical reading of *Bostock* that allows, let alone requires, this result. The Eastern District of Tennessee recently enjoined similar interpretations being enforced under Title VII and Title IX in 20 states, correctly identifying this interpretation as “advanc[ing] *new*

interpretations... and impos[ing] *new* legal obligations on regulated entities” (emphasis in original). The 2022 Model Policies rightly discards that unlawful framework.<sup>1</sup>

Just this month, a federal judge joined the Eastern District of Tennessee's return to sanity, vacating the EEOC's guidelines in this area and declaring them unlawful. The Texas and Tennessee decisions together demonstrate that the federal judiciary's “consistency” in ignoring the stated terms of the *Bostock* decision is nowhere near consensus.

## Recommendations

Though largely supportive of the 2022 Model Policies, in addition to the statements above about free speech, WoLF has other constructive feedback that would enhance and strengthen it.

### Use of Coherently-Defined Terms

The Department continues to use terms such as “gender identity” and “transgender” that do not have clear meanings. Enshrining these terms into law and policy only serve to further this confusion. WoLF suggests that the Department should, if it chooses to use and codify the concept of “gender identity,” include a coherent definition such as “a person’s belief that he or she has an internal sense of self-identification as male, female, both, or neither, that is incongruent with his or her sex.” The Department must also ensure - as it has taken some steps to do in the 2022 Model Policies - that it uses appropriate and objective definitions of terms such as harassment and discrimination.

WoLF does approve of certain changes in terminology from the 2021 Model Policies, including the omission of absurdities such as “cisgender” and “sex assignment.” However, while the definition of “transgender” is an improvement from the 2022 Model Policies, it still does not acknowledge anywhere that a person’s sex is not determined or changed by that person’s thoughts or beliefs, nor is a person’s sex changed by steps taken to emulate the appearance or physiology of the opposite sex.

The Department should note that most civil rights laws already include “perception” as to protected characteristics (i.e. people are protected from sex discrimination whether they are a particular sex or whether they are perceived to be a particular sex.) This includes trans-identified persons. Furthermore, discrimination on the basis of sex stereotypes is also

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<sup>1</sup> Memorandum Opinion and Order at 31. *Tennessee v. U.S. Department of Education*. Case No. 3:21-cv-308. U.S. District Court - Eastern District of Tennessee at Knoxville. July 15, 2022.

included in sex discrimination, which means that trans-identified persons are protected for their non-conformity to sex-based stereotypes even when not perceived by others as the opposite sex.

In practical terms, the inclusion of 'perception' *should* provide students who identify as transgender functional protection against invidious discrimination within existing statutes and legal precedent on the basis of their appearance or non-conformity to sex stereotypes.

## **Protection of LGB Students**

Although WoLF encourages the legal recognition of "LGB" as separate from "T," and therefore does not object facially to the Department's omission of sexual orientation from *both* model policies, it is an unfortunate fact that people who experience same-sex attraction, are subject to disproportionate rates of sexual harassment and sexual violence in schools and elsewhere. Lesbians in particular often experience immense pressure from across the political spectrum to accept male sexual and romantic partners.<sup>2</sup> Many people assume that the "religious right" has a monopoly on homophobia, but a vocal faction of the secular left now insists that it is immoral - and even unlawful harassment - for a lesbian to categorically refuse sexual or romantic relationships with men if those men self-identify as women. Lesbians who refuse sexual or romantic interactions with men experience dire consequences, including social ostracism and violence from men within their own supposedly safe "LGBT" communities.

The Department must protect the right of lesbian and gay students to define their sexuality as same-sex attraction, not as "same-gender" attraction. In order to ensure robust protection against discrimination, harassment, and bullying on this basis, the Department should (perhaps even via a separate Model Policy):

1. Clarify that a lesbian who only dates female people, or a gay man who only dates male people, and who states as such, is not committing actionable discrimination based on "gender identity;"
2. Clarify that pressuring same-sex attracted people to accept opposite-sex partners (based on "gender identity") *is* actionable sexual harassment and that coercing lesbians into sex with males is a form of sexual violence; and

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<sup>2</sup> Some gender activists have coined the term "cotton ceiling," an insulting play on the term "glass ceiling," which refers to barriers experienced by women in employment (and education). In the "cotton ceiling," cotton refers to a woman's underwear, and the "cotton ceiling" refers to lesbians who "unjustly" withhold sex from men who identify as women.

3. Affirm that this behavior, when tacitly or explicitly encouraged or promoted by school officials, constitutes actionable sexual harassment and can be considered a form of conversion therapy or conversion effort.

## **Conclusion**

WoLF abhors harassment and violence against any individual – including individuals who identify as transgender — and recognizes that the 2021 Model Policies ostensibly aimed to improve the safety and the educational experience of trans-identified students. However, the 2021 Model Policies sought to achieve this objective by unethically and unlawfully eliminating single-sex provisions, infringing on free speech protections, and steamrolling freedom of belief for religious people and non-religious people alike (which are both guaranteed by the U.S. and Virginia constitutions). The Department also failed to consider that the resulting negative impacts would be (and have been) particularly profound for female students (including those who identify as transgender or nonbinary), members of racial, ethnic, or religious minorities, those with disadvantaged socioeconomic status, and students who experience barriers to education due to language, health, limited mobility, and other experiences of disability.

WoLF applauds the Department for acknowledging the errors of the 2021 Model Policies and taking steps to correct them. WoLF also urges the Department to continue to analyze and improve these policies, and hopes that these comments provided a few helpful suggestions to that end.

WoLF's positions on the issues raised by these model policies have their roots in a feminist analysis as well as a straightforward commitment to the truth, and the belief that truth can only be revealed by factual evidence and careful examination of material conditions of our lives and our world. The 2022 Model Policies is a breath of fresh air in its openness to these principles.