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504 PLANS, SCHOOL GENDER POLICY, AND GENDER
DYSPHORIA: HOW THE CASE OF KESHA T. WILLIAMS MAY
CHANGE EDUCATION POLICY

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ABSTRACT

Gender dysphoria affects transgender people at significantly higher rates than other populations. In the United States Court of Appeals for the Fourth Circuit case of Kesha T. Williams v. Stacey A. Kincaid, et al., 45 F.4th 759 (4th Cir. 2022), the Court found that the Fairfax County Sheriff's Office, in denying Ms. Williams' hormone replacement therapy for her gender dysphoria, had violated her right to equal treatment under the Americans with Disabilities Act (ADA). The Court generally found that, despite the ADA being written with animus toward transgender people, even under that language, gender dysphoria was not excluded from protection under the law.

With gender dysphoria protected by the ADA in the states over which the Fourth Circuit has authority, any laws or protections stemming from the Americans with Disabilities Act will need to be considered in relation to the new interpretation. This includes 504 plans in schools, which provide equal educational access to students with disabilities. In states where schools are prohibited by state or gubernatorial policy from affirming transgender students' identities, legal action due to conflicting state and federal guidelines is inevitable.

INTRODUCTION

A. What is Gender, and What Does it Mean to be Transgender or Nonbinary?

Sex, sometimes referred to as “biological sex,” is a designation that appears on a person’s birth certificate and other identifying documents.¹ Birth certificates are issued by the states and several federal agencies, but the federal government imposes very few minimum requirements.² Some states allow only for binary sex designations (e.g. male/female), while several other states, along with Washington, D.C. and New York City allow for non-binary designation, no designation, or intersex designation.³

Historically, sex designations on birth certificates took into account only

¹ See AM. MED. ASS'N, REPORT OF THE BOARD OF TRUSTEES 12 (2021); see also *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Feb. 6, 2024), https://www.lgbtmap.org/equality-maps/identity_documents.

² See Minimum Standards for Birth Certificates, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3825-26.

³ Corinne Segal, *D.C. Will Be First in Nation To Offer Non-Binary Driver's Licenses*, PBS NEWSWEEKEND (Jun. 25, 2017) <https://www.pbs.org/newshour/nation/d-c-will-first-nation-offer-non-binary-drivers-licenses>; see, e.g., Corrine Segal, *Nation's First Known 'Intersex' Birth Certificate Issued in New York City*, PBS NEWSHOUR (Jan. 5, 2017), <https://www.pbs.org/newshour/nation/new-york-city-issues-nations-first-birth-certificate-marked-intersex>.

the genitalia visible to whomever delivered the baby.⁴ This meant that, if a newborn was intersex, with the visible genitals fitting one category, and the internal reproductive organs fitting the other, the sex designation would generally be based on the visible anatomy.⁵ In cases where there was indicia of both categories of genitalia, doctors or families would force surgeries upon intersex newborns to make their visible genitalia conform with one of the binary sexes.⁶ Sex designation at birth also fails to take into account chromosomal and hormonal variations, that also may be considered intersex, and may not express until puberty or which are otherwise not entirely visible at birth.⁷

Gender, however, is a social construct.⁸ A social construct is a definition embraced by society as immutable, but which is actually an interpretation of human characteristics shaped by cultural and historical contexts.⁹ Social constructs include race, gender, ability, and sexuality.¹⁰ Social constructs are best exemplified by the United States in the 1700s and 1800s, when anyone with even a drop of African ancestry was considered Black, whereas in Brazil, many such people were considered White.¹¹ Gender, as a social construct in American society, has traditionally grouped people in one of two categories: male or female.¹² However, not all societies limit gender to the

⁴ See *Assigned Sex at Birth*, BOS. MED. CTR.: THE GLOSSARY FOR CULTURAL TRANSFORMATION (2021), <https://www.bmc.org/glossary-culture-transformation/assigned-sex-birth>.

⁵ See *Intersex*, CLEVELAND CLINIC (July 19, 2022), <https://my.clevelandclinic.org/health/articles/16324-intersex>.

⁶ See *Id.*

⁷ See *id.* (stating that someone can have a chromosomal pair that is XY but be born with a vagina and ovaries due to a lack of the SRY gene on the Y chromosome. Further, secondary sex characteristics inconsistent with a person's genitalia can be determined by the expression of certain genes being activated at puberty, such as someone assigned male at birth who develops breasts).

⁸ See *Gender and Health*, WHO, https://www.who.int/health-topics/gender#tab=tab_1 (last visited Feb. 24, 2024) (declaring “[g]ender refers to the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time . . . Gender interacts with but is different from sex, which refers to the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs. Gender and sex are related to but different from gender identity. Gender identity refers to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth.”).

⁹ See Timm Newman, *Sex and Gender: What is the Difference?*, MED. NEWS TODAY (Mar. 31, 2023), <https://www.medicalnewstoday.com/articles/232363>.

¹⁰ See MILIANN KANG, ET AL., *INTRODUCTION TO WOMEN, GENDER, SEXUALITY STUDIES* (2017) (ebook) (describing the concept of social constructionism and its relation to gender and race).

¹¹ See *id.*

¹² See Timm Newman, *supra* note 9.

male/female binary.¹³ Some of those societies that acknowledge either a non-binary or third gender do so with the understanding that a person's gender is their own understanding of the lived, internal experience of their masculinity, femininity, neutrality or lack of any experience.¹⁴ The binary concept of gender, and its enforcement, has largely been a tool of European colonization based on Western socio-religious practices.¹⁵ As Western society begins to understand the nuances of gender, language has evolved to categorize different gender identities. Such categories include male and female (cisgender and transgender), non-binary, agender, genderqueer, gender fluid and other variations that are brought to light as people find new ways of expressing their experience of gender.¹⁶ When a person's gender identity is consistent with their sex assigned at birth, they are considered "cisgender."¹⁷ If a person's gender identity is inconsistent with their sex assigned at birth, this person is considered "transgender."¹⁸

B. What is Gender Dysphoria?

Dysphoria is a feeling of "marked incongruence between one's experienced/expressed gender and assigned gender" that causes "clinically

¹³ See, e.g., *6 Cultures That Recognize More than Two Genders*, BRITANNICA: HIST. & SOC'Y (Jan. 12, 2023), <https://www.britannica.com/list/6-cultures-that-recognize-more-than-two-genders> (noting that India recognized a third gender of "hijra" until the British criminalized hijras in 1871. The Bugis ethnic group of Indonesia recognizes three additional genders for a total of five genders. Muxes are recognized among the Indigenous Zapotec people of Oaxaca, Mexico. The Sakalava people, of Madagascar, recognize a third gender, sekrata, where feminine boys are raised as girls. Some Indigenous North American tribes recognized "two-spirit" people who embody both the male and female spirits until European-American colonization forced acculturation of Indigenous people, however the recognition is returning; the Philippines has a third gender that also suffered under Western colonization, but still exists in society today).

¹⁴ See, e.g., *id.*

¹⁵ See, e.g., Sandy O'Sullivan, *The Colonial Project of Gender (And Everything Else)*, GENEALOGY, July 2021, at 1.

¹⁶ See Google Search for "How Many Genders are There?", GOOGLE, https://www.google.com/search?q=How+Many+Genders+are+There%3F&rlz=1C5CHFA_enUS907US907&oq=How+Many+Genders+are+There%3F&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQABiABDIHCAIQABiABDIHCAMQABiABDIHCAQQABiABDIHCAUQABiABDIHCAYQABiABDIHCACQABiABDIHCAGQABiABDIHCAkQABiABNIBBzIIOWowajeoAgCwAgA&sourceid=chrome&ie=UTF-8 (last visited Feb. 24, 2024) (A Google search of "how many genders are there?" yields some search results with varying results on number of genders).

¹⁷ *Defining LGBTQ Terms and Concepts*, THE ANNIE E. CASEY FOUND. (Apr. 25, 2023), <https://www.aecf.org/blog/lgbtq-definitions>.

¹⁸ *Id.*; see also Understanding Transgender People, Gender Identity and Gender Expression, AM. PSYCH. ASS'N (June 6, 2023), <https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression> (treating the term "Transgender" as an "umbrella term for persons whose gender identity, gender expression or behavior does not conform . . . with the sex they were assigned at birth."). There is some social debate over whether "transgender" should be used as an umbrella term that encompasses non-binary, gender fluid, or agender people or if it should only include people who identify on the opposite end of the gender spectrum from the sex they were assigned at birth. For purposes of this article, "transgender" will be used as an umbrella term. However, when non-binary, gender fluid, or agender identities need to be distinguished, such will be done with specificity..

significant distress or impairment in social, occupational [or school], or other important areas of functioning.”¹⁹ This incongruence may start as early as two to four years old, and the related distress and impairment seems to consistently start by age seven.²⁰ Anyone may experience gender dysphoria, but it is most commonly experienced by people who are transgender, people who are intersex, cisgender children who will later identify as homosexual, as well as people with certain sex development disorders.²¹ Children and adolescents with gender dysphoria may experience significant distress related to their genitalia, their clothing, and their social circles and interactions, among other things.²² Adolescents with dysphoria are at a significantly higher risk of depression, anxiety, and suicidal ideation.²³

Clinically appropriate treatment for gender dysphoria varies from person to person, depending on their individual situation.²⁴ Treatment may include physical treatment such as hormone therapy, facial masculinizing or feminizing surgery, or breast reduction or augmentation.²⁵ It may also include behavioral health counseling that addresses the ingrained social stigma around gender variation.²⁶ Notably, because gender is a social construct, many transgender people experience non-acceptance and ostracism that can cause co-occurring behavioral disorders.²⁷ This rejection by some segments of society can make it difficult for transgender people to take the most basic steps to address their dysphoria, such as dressing consistent with their gender

¹⁹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452-453 (5th ed. 2022).

²⁰ *Id.* at 455; see Michael Zaliznyak et al. *Age at First Experience of Gender Dysphoria Among Transgender Adults Seeking Gender-Affirming Surgery*, NAT’L LIBR. OF MED. (2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7076333/>; see also *Gender Dysphoria*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/22634-gender-dysphoria> (last visited Feb. 10, 2023) (noting that while some factors for gender dysphoria may develop before birth, “[t]he anxiety, stress and general discomfort associated with gender dysphoria may be linked to social stigma. Gender nonconforming children, adolescents and adults often face discrimination and verbal harassment. One in 4 are physically attacked, and more than 1 in 10 are victims of sexual assault.”).

²¹ See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 19, at 455-57.

²² *Id.* at 457-458.

²³ *Id.*

²⁴ See *Gender Dysphoria*, *supra* note 20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 19, at 459.

identity.²⁸ Simple steps that others can take to avoid exacerbating a person's gender dysphoria include affirming the person's gender by using the person's identified gender pronouns, using the person's chosen name, and allowing them to use facilities consistent with their gender identity.²⁹

C. Effect of Gender-Affirming Policies in Schools

Knowledge of one's gender identity begins as early as three years old, and identity solidifies by age five.³⁰ By the time most students in the United States are starting first grade, they know whether they identify as boys, girls, some degree of both, or neither.³¹ This makes school an important place for gender affirmation, especially with students in the United States spending half of their waking hours at school on weekdays, not including extracurriculars.³² Steps that schools can take to affirm Lesbian, Gay, Bisexual, Transgender, Queer and Inclusive Communities (hereinafter "LGBTQ+") students include: having an available Gay-Straight Alliance or similar group ("GSAs"); including positive examples of LGBTQ+ history; teaching LGBTQ+ inclusive sexual and reproductive health; hiring supportive, diverse, and inclusive staff and teachers; and instituting LGBTQ+ inclusive policies, including those that allow transgender people to use bathrooms and locker rooms that correspond to their gender identity; and allowing transgender

²⁸ See Anna Brown, et al., *The Experiences, Challenges, and Hopes of Transgender and Nonbinary U.S. Adults: Findings from Pew Center Focus Groups*, THE PEW RSCH. CTR. (June 7, 2022), <https://www.pewresearch.org/social-trends/2022/06/07/the-experiences-challenges-and-hopes-of-transgender-and-nonbinary-u-s-adults/> (noting that "[f]or some, deciding how open to be about their gender identity can be a constant calculation. Some participants reported that they choose whether to disclose that they are trans or nonbinary in each situation based on how safe or comfortable they feel and whether it's necessary for other people to know. This also varies depending on whether the participant can easily pass as a cisgender man or woman (that is, they can blend in so that others assume them to be cisgender and don't recognize that they are trans or nonbinary).").

²⁹ See *Gender Dysphoria*, *supra* note 20 (noting that people listening, acknowledging, and using preferred pronouns, among other behaviors, can help a person with dysphoria).

³⁰ See *What is Gender-responsive Parenting? How Parents Can Help Break the Cycle of Discrimination*, UNICEF, <https://www.unicef.org/parenting/child-development/what-gender-responsive-parenting> (last visited Feb. 24, 2024) (stating, "[a]round the age of three, children begin to develop a sense of gender identity, which continues to solidify as they get older. By the age of 5, children have a sense of gender stability and begin to express their gender identity through both words and actions.").

³¹ See *Gender Identity*, CARING FOR KIDS (June 2023), <https://caringforkids.cps.ca/handouts/behavior-and-development/gender-identity#:~:text=6%20to%207%20years%20old,no%20matter%20what%20she%20wears.>

³² See, e.g., *Average Number of Hours in the School Day and Average Number of Days in the School Year for Public Schools, by State: 2007–08*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/surveys/sass/tables/sass0708_035_s1s.asp (last visited Feb. 24, 2024) (noting that the average school day is approximately 6 2/3 hours); see also *Sleep in Middle and High School Students*, CDC (Sept. 10, 2020), <https://www.cdc.gov/healthyschools/features/students-sleep.htm#:~:text=The%20American%20Academy%20of%20Sleep,10%20hours%20per%2024%20hours> (noting that middle and high school students should sleep for 8 to 12 hours per night, depending on their age. Waking time is therefore 12 to 16 hours, with 6 2/3 hours of school being approximately half of a student's waking hours).

people to participate in sports consistent with their gender identity.³³

LGBTQ+ students, in schools with a GSA group report significantly higher acceptance among their peers than those in schools without GSA groups.³⁴ Schools with GSA groups also report higher instances of both teacher and peer intervention in the face of homophobic remarks and negative remarks about gender expression.³⁵ Further, students in schools with GSA groups are less likely to experience frequent negative remarks about gender expression to begin with, perhaps as a result of the increased incidences of teacher and peer intervention in the face of said remarks.³⁶

Generally, LGBTQ+ students in schools with inclusive curricula report facing less frequent and less intense victimization based on sexuality or gender expression.³⁷ Such curricula nearly double the number of students who feel comfortable approaching teachers and staff with issues related to their sexuality or gender.³⁸ Additionally, students perform better and have higher aspirations when their lived experiences are reflected in the curriculum.³⁹ “Access to an inclusive curriculum was related to greater feelings of school belonging, higher self-esteem, and lower depression among the LGBTQ students.”⁴⁰

LGBTQ+ students feel safer in schools with supportive teachers and staff and inclusive school administrative policies.⁴¹ This may be due to their knowing that these affirmational policies exist, or it may be because they experience less victimization in schools when these policies are in place.⁴² A study by the Gay, Lesbian & Straight Education Network (GLSEN) showed that in schools with comprehensive anti-bullying policies, negative remarks about gender expression were fourteen percent lower than in schools with no policy, and negative statements targeting transgender people were 12.1%

³³ Nancy Barile, *5 Things You Can Do to Support Your LGBTQ Students*, BEREACOLL. (Jan. 18, 2022), <https://www.beyondberea.org/blog/2022/01/18/5-things-you-can-do-to-support-your-lgbtq-students/>.

³⁴ See JOSEPH G. KOSCIW, ET AL., *THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 72* (2020) (noting approximately fifty-two percent acceptance with a GSA group compared to approximately thirty percent acceptance without a GSA group).

³⁵ *Id.*

³⁶ *Id.* at 73.

³⁷ *Id.*

³⁸ *Id.* at 74 (noting that 36.4% of student respondents in schools feel comfortable discussing LGBTQ+ issues with teachers in schools without inclusive curricula opposed to 64.6% of LGBTQ+ students in schools with inclusive curricula).

³⁹ *Id.* at 73 – 75.

⁴⁰ KOSCIW, ET AL., *supra* note 34, at 73-75.

⁴¹ *Id.* at 76 – 79.

⁴² *Id.* at 79.

lower.⁴³

Without these resources, students have worse educational outcomes, lower self-esteem, fewer plans to pursue higher education and more behavioral difficulties.⁴⁴ Further, “childhood abuse, neglect, maltreatment, and physical or sexual abuse . . . may be associated with [dysphoria].”⁴⁵ Schools without policies protecting LGBTQ+ students have higher incidences of harassment and abuse, both of which are associated with students experiencing dysphoria.⁴⁶

D. What is a 504 plan?

Section 504 of The Rehabilitation Act of 1973 states that:

[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.”⁴⁷ The Act goes on to define “program” to include “a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system.”⁴⁸

Section 8801 of Title 20 defines “local educational agency” to mean school boards for public schools or schools funded by the Bureau of Indian Affairs.⁴⁹ In sum, it prevents public schools—which receive federal funding—from discriminating based on disability status.

Currently, all fifty states plus Washington, D.C., receive some form of federal funding.⁵⁰ For example, under Title I of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, the federal government provides funding for low-income school districts.⁵¹ Funding under Title III of this act supports English Speakers of Other Languages (ESOL) programs, and Title V, Part B, Subpart

⁴³ *Id.*

⁴⁴ *See generally, id.* at 76-79.

⁴⁵ Garima Garg et al., *Gender Dysphoria*, NAT’L LIBR. OF MED. (July 11, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK532313/>.

⁴⁶ *Id.*

⁴⁷ 29 U.S.C. § 794(a).

⁴⁸ 29 U.S.C. § 794(b)(2)(B).

⁴⁹ 20 U.S.C. § 8801(19).

⁵⁰ *See generally* U.S. DEP’T OF EDUC., FUNDS FOR STATE FORMULA-ALLOCATED AND SELECTED STUDENT AID PROGRAMS (2023), <https://www2.ed.gov/about/overview/budget/statetables/24stbystate.pdf> (showing all states and territories of the United States receiving aid from or through the U.S. Department of Education for various programs).

⁵¹ *See Fast Facts*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=158> (last visited Feb. 24, 2024); *see generally* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1815 (codified as amended in scattered sections of 20 U.S.C. beginning in § 6301).

2 supports rural education initiatives.⁵² The Department of Agriculture administers the National School Lunch Program and funds free meals for students from low-income households.⁵³ Additionally, pandemic relief programs have disbursed federal funds to help schools adapt to current challenges, and natural disaster recovery programs provide funding to rebuild schools.⁵⁴ Because of these various programs, all public schools in the United States are currently required to ensure they provide equal educational opportunity to students regardless of disability status.⁵⁵

The Individuals with Disabilities Education Act (IDEA)⁵⁶ takes the further step of defining a “child with a disability” as one with “serious emotional disturbance” that creates a need for specially designed education and services.⁵⁷ In fact, the “Child Find” part of the law mandates that schools find children in need of special education in order to provide them such services for free, whether the children are without a permanent address, non-English speakers, homeschooled, or in some other situation that may keep them out of the eye of the public school.⁵⁸ When a student has a disability necessitating special accommodations to fully participate in public education, they may qualify for a “504 plan.”⁵⁹

504 plans can be created for students originally enrolled in the issuing school, and for those that have been identified through the Child Find program.⁶⁰ These plans detail the “modifications, accommodations, and services that are needed for the student with a disability to participate in and enjoy the benefits of school programs at the same level as his peers without disabilities.”⁶¹ While Title 8, Agency 20, Chapter 671 generally abides by the definitions found in the Rehabilitation Act of 1973, the Virginia legislature took the additional step of including a definition for “Emotional disability” as,

[a] condition exhibiting one or more of the following characteristics over a long

⁵² 20 U.S.C. § 6812(1)-(2); 20 U.S.C. § 7351(a)(1); 20 U.S.C. § 7351(b)(2).

⁵³ 42 U.S.C. § 1751.

⁵⁴ *See, e.g.*, 20 U.S.C. § 3401; *see also* 42 U.S.C. § 5121(b)(6).

⁵⁵ 29 U.S.C. § 794(a). However, with transgender people close to receiving equal treatment under the law, some states have considered declining federal funding altogether and funding schools through state sources, which would allow them to ignore requests for equal opportunity in education for disabilities such as gender dysphoria. *See* Marta W. Aldrich, *Tennessee is Talking About Rejecting Federal Education Funding. What Would That Mean for Kids?*, CHALKBEAT TENN. (Feb. 16, 2023), <https://tn.chalkbeat.org/2023/2/16/23601641/tennessee-america-sexton-bill-lee-federal-education-funding-rejection-impact>.

⁵⁶ 20 U.S.C. §§ 1400-1409.

⁵⁷ 20 U.S.C. § 1401(3)(A).

⁵⁸ 20 U.S.C. § 1412(a)(3), *et seq.*

⁵⁹ 8 VA. ADMIN. CODE § 20-671-10 (2023).

⁶⁰ *See* 20 U.S.C. § 1412(a)(2)-(3).

⁶¹ 8 VA. ADMIN. CODE § 20-671-10 (2023).

period of time and to a marked degree that adversely affects a child's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;
2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
3. Inappropriate types of behavior or feelings under normal circumstances;
4. A general pervasive mood of unhappiness or depression; or
5. A tendency to develop physical symptoms or fears associated with personal or school problems.⁶²

Historically, gender dysphoria has not been included in 504 plans because, under the Americans with Disabilities Act (ADA), “transsexualism” and “gender identity disorders not resulting from physical impairments, or other sexual behavior disorders” were exceptions under the law and not entitled to disability status.⁶³ That language remains in the ADA today.⁶⁴

E. A tendency to develop physical symptoms or fears associated with personal or school problems

Several states have proposed bills, passed laws, and enacted policies that limit transgender youth from expressing their identities in schools or having their identities recognized by those around them.⁶⁵ Virginia Code § 22.1-23.3(A) requires that the Virginia Department of Education (VDOE) promulgate guidance to local school boards for the protection and fair treatment of transgender students to include:

1. Compliance with applicable nondiscrimination laws;
2. Maintenance of a safe and supportive learning environment free from discrimination and harassment for all students;
3. Prevention of and response to bullying and harassment;
4. Maintenance of student records;
5. Identification of students;
6. Protection of student privacy and the confidentiality of sensitive

⁶² *Id.*

⁶³ 42 U.S.C. § 12211(b)(1).

⁶⁴ *See id.*

⁶⁵ Vivian Jones, *Legislative Panel to Explore Rejecting Tennessee's Share of Federal Education Money*, THE TENNESSEAN (Sept. 25, 2023), <https://www.tennessean.com/story/news/politics/2023/09/25/tennessee-legislative-panel-study-rejecting-federal-education-funding/70963525007/>; *see also* VA. DEP'T OF EDUC., MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS 2-3 (2023); *see generally* FLA. STAT. ANN. § 1014.01–06 (2023).

information;

7. Enforcement of sex-based dress codes; and

8. Student participation in sex-specific school activities and events and use of school facilities. Activities and events do not include athletics.⁶⁶

§ 22.1-23.3(B) then allows school boards to accept the guidance or make more comprehensive policies.⁶⁷

In response to its duties under Virginia Code § 22.1-23.3(A), in July of 2023, the VDOE—pursuant to direction provided by Governor Glenn Youngkin—released its Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools (the “Model Policies”).⁶⁸ While the Model Policies claim that they are promulgated to comply with Virginia Code § 22.1-23.3, they noticeably fail to connect to the purpose of the law, which is to protect transgender students.⁶⁹ Notably, according to the policy, no student is to be considered transgender unless their parents (for students under the age of eighteen) have told the school in writing that their child identifies as transgender.⁷⁰ By limiting a student’s ability to self-identify as transgender, VDOE has narrowed its protections for transgender students to only those students who are out to their parents and whose parents are supportive of their identity.⁷¹ Transgender students may be cautious about disclosing their identities to their parents due to the higher rate of parental abuse against transgender youth, or

⁶⁶ VA. CODE § 22.1-23.3 (2023).

⁶⁷ VA. CODE § 22.1-23.3(B) (2023).

⁶⁸ See MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65.

⁶⁹ See *id.* (stating “[t]he Department issues the 2023 Model Policies to provide clear, accurate, and useful guidance to Virginia school boards that align with statutory provisions” (referencing VA. CODE § 22.1-23.3)); see also *Virginia’s Transgender Students Win Safeguards Against Harassment Under New Law*, WASH. POST (Mar. 5, 2020), https://www.washingtonpost.com/local/education/virginias-transgend...new-law/2020/03/05/0cadde8c-5e6d-11ea-b014-4fafa866bb81_story.html (quoting then Governor Ralph Northam as saying, as to the passage of VA. CODE § 22.1-23.3, “[i]n Virginia, we fully expect our schools to treat transgender students—like all students—with the dignity and respect they deserve” and, “[t]his bill represents an important step towards making Virginia more welcoming and inclusive of all,” and quoting Senator Jennifer B. Boysko as stating, “[t]ransgender students, their peers and their teachers will benefit from a consistent statewide policy.”).

⁷⁰ MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 5 (defining “transgender student” as “a public-school student whose parent has stated in writing that the student’s gender differs from the student’s sex, or an eligible student who states in writing that his or her gender differs from his or her sex.”).

⁷¹ *Id.*

the fear of housing insecurity.⁷² The most vulnerable students—those who are not out to their parents or whose parents are unsupportive—are thereby left out of the slim protections provided by the Model Policies.

Appendix I, Paragraph III, Subparagraph D of the Model Policies further limits protections available to students by prohibiting supportive teachers and staff from calling a student by their chosen name or using their identified pronouns if a parent has not signed a consent form.⁷³ It also protects teachers who, even in the face of a lawful name or gender marker change, refuse to identify students by the names and pronouns that most align with their gender identity.⁷⁴

The Model Policies claim that part of their purpose is to protect a parent’s “fundamental right to direct the upbringing and education of their children,” citing the United States Supreme Court’s decision in *Troxel v. Granville*.⁷⁵ The proposition in *Troxel*, however, was related to third-party (grandparent) visitation and whether the judge could take the decision-making authority away from the parent and force third-party visitation that would be beneficial to the child.⁷⁶ Under *Troxel*, the parent has the right to decide what ideas the child is exposed to by putting them in, or taking them out, of another’s care—not by determining what environment the third-party caregiver provides.⁷⁷ Such a case would have no bearing on what ideas are taught to the child once they are with the third-party public school. However, *Troxel* did recognize

⁷² See Brian Thoma et al., *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, PEDIATRICS, Aug. 2021, at 1 (noting that transgender youth report experiencing emotional abuse from parents and adults at an eighty-four percent higher rate than their heterosexual cisgender counterparts, physical abuse from parents and adults at a sixty-one percent higher rate, and sexual abuse from parents and adults more than double their heterosexual cisgender counterparts); see also Jonah DeChants et al., *Homelessness and Housing Instability Among LGBTQ Youth*, THE TREVOR PROJECT (Feb. 3, 2022), <https://www.thetrevorproject.org/research-briefs/homelessness-and-housing-instability-among-lgbtq-youth-feb-2022/> (finding that nearly forty percent of transgender youth report being housing insecure or homeless at some point in their lives, and that many LGBTQ+ youth who end up sleeping away from parents or caregivers did so because they were kicked out of the home or ran away “because of mistreatment or fear of mistreatment due to their LGBTQ[+] identity.”).

⁷³ See MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 14.

⁷⁴ See *id.* at 15, (stating “[n]otwithstanding the provisions of paragraph (4) of this section, [School Division] shall not compel [School Division] personnel or other students to address or refer to students in any manner that would violate their constitutionally protected rights.” The implication is that a teacher, administrator, or staff who doesn’t believe in transgender people can deadname a person and use the incorrect gender under their 1st Amendment right to Freedom of Speech).

⁷⁵ See *id.* at 2 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

⁷⁶ See Anna Brown, et al., *supra* note 28; see generally *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (note, the Court did not decide that third-party visitation statutes violated the Constitutional rights of parents; rather the Court found that they were not per se violations (*Troxel* at 73) and the issue of whether parents had an absolute right to decision-making turned on whether there was a finding of harm or potential harm to the child (*Troxel* at 74). There is harm or potential harm to a child who is not addressed properly, segregated from their peers, and othered, regardless of whether a parent agrees).

⁷⁷ See *Troxel v. Granville*, 530 U.S. at 63.

that a state may step in and disturb a parent’s right to make decisions “to prevent harm or potential harm to a child.”⁷⁸ This aligns with the requirements for VDOE under Virginia Code § 22.1-23.3(A), that it maintain a “safe and supportive learning environment free from discrimination and harassment for all students” and prevent bullying and harassment.⁷⁹

What *Troxel* did *not* mandate, and what the Model Policies purport to rely on, is the concept that a parent should be informed about every aspect of their child’s life while the parents are not present.⁸⁰ Instead, the Court in *Troxel* notes that the lower court’s decision to expose the children to worlds outside their parents may have been the better decision; however, the Court would not impose such a decision on the parents without a showing of harm to the child.⁸¹ While the *Troxel* decision might allow the parent to take a child out of school if they disagreed with the care being provided by the school, in no way does it allow a parent to dictate what care should look like while the child is in school.⁸² In fact, contrary to the Youngkin administration’s analysis, *Troxel* should *increase* protections for transgender students; the “harm to the child” that the *Troxel* court was concerned with will naturally occur if students with dysphoria do not have their identities affirmed or are outed to unsupportive or abusive parents.⁸³

The current Model Policies are a drastic departure from the 2021 version that was released by the VDOE under then-Governor Ralph Northam (the “Northam Policies”).⁸⁴ The departure is first noticeable from the title page of the two documents.⁸⁵ Where the Northam Policies, from their title, make it immediately clear that they were promulgated as “Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools,” the Youngkin administration, seemingly incapable of using the word

⁷⁸ *Id.*

⁷⁹ VA. CODE § 22.1-23.3(A)(2)-(3) (2020).

⁸⁰ See MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 2-3; see also *Troxel v. Granville*, 530 U.S. at 65.

⁸¹ *Troxel v. Granville*, 530 U.S. at 72-73.

⁸² See generally *id.*

⁸³ Compare *Troxel v. Granville*, 530 U.S. at 62 with Evan Urquhart, *My Parents Still Struggle to Know Me After I Transitioned Late*, THE ATLANTIC (July 4, 2018), www.theatlantic.com/family/archive/2018/07/transition-parents/564008/ild (detailing how the author’s transition may have been smoother “[i]f only [his] parents could have known and embraced [him] for who [he is] 20-something years ago” and how the author believes his “parents would have embraced having a trans child if they’d had some way of knowing that was what they had.”).

⁸⁴ Compare *Troxel v. Granville*, 530 U.S. at 62 with Evan Urquhart, *supra* note 83.

⁸⁵ Compare VA. DEPT OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS (2021), with MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65.

“transgender,” instead called their version the, “Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools.”⁸⁶ Youngkin’s VDOE, even from the title page of its policies, fails to acknowledge transgender students’ existence and instead shifts the focus to privacy in public schools and parental rights.⁸⁷

The Northam Policies set a further difference in tone by providing definitions for the following: cisgender, gender, gender-expansive/gender-diverse/gender-fluid/gender-nonbinary/agender/gender queer, gender expression, gender identity, gender nonconforming, gender transition (differentiating between, and including, social and medical transition), LGBTQ+, sex assignment (at birth), and transgender.⁸⁸ The current Model Policies only contain definitions for the following: parent or parents, sex, transgender student, and eligible student.⁸⁹ The new policies define “sex” as “biological sex,” rather than “sex assigned at birth,” in direct contradiction to the science of sex and biology.⁹⁰ More importantly, the new policies define “transgender” as someone whose parents have designated them as such in writing, as compared to the Northam Policies which defined transgender as: “[a] self-identifying term that describes a person whose gender identity is different from their sex assigned at birth.”⁹¹ A transgender girl is a girl who was presumed to be male when she was born, and a transgender boy is a boy who was presumed to be female when he was born.⁹² Note that there is a wide range of gender identities in addition to transgender male and transgender female, such as nonbinary.⁹³

By allowing self-identification, the Northam Policies are better suited to

⁸⁶ Compare MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 85, with MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65.

⁸⁷ See generally MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65.

⁸⁸ See generally MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 85, at 6-7.

⁸⁹ MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 4-5.

⁹⁰ See *id.* at 5. But see *Intersex*, *supra* note 5 (summarizing how differences in chromosomal expression, hormones, reproductive organs, and secondary sex characteristics are variable within a population, and that “biological sex” is an imprecise term that focuses on visible genitalia rather than other biological factors).

⁹¹ Compare MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 85, at 7 with MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 5.

⁹² *Frequently Asked Questions about Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), *Frequently Asked Questions about Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

⁹³ *Id.*

identify students who may experience dysphoria. As an example, if a child has been removed from school by an unsupportive parent and is experiencing gender dysphoria due to the parent’s treatment, the school could, under its obligations under Child Find, bring that child back to a safer environment.⁹⁴ Conversely, under the current Model Policies, if transgender students may only be identified as such by their parents, a school that cannot acknowledge a student’s identified gender may not be able to identify or help students with gender dysphoria.

The Northam Policies differed from the current Model Policies in their basic treatment and affirmation of the lived experiences of transgender people. They acknowledged that “transgender students may experience rejection, criticism, or bullying, that affect their emotional health and academic achievement.”⁹⁵ In light of the achievement gap that correlates with the victimization of transgender people—and the effects of victimization on mental health—the Northam Policies better protected vulnerable students from sex-based discrimination by requiring, among other things, that teachers and staff name and gender students consistent with the students’ identities and allowing students to use facilities consistent with those identities.⁹⁶ The policies further acknowledged that outing a student to unsupportive parents can lead to imminent safety risks or homelessness for the student.⁹⁷

Virginia Code § 22.1-23.3 mandates that the Department of Education promulgate its model policies “in accordance with *evidence-based best practices* . . .”⁹⁸ The Northam Policies cite the American Academy of Pediatrics, American Counseling Association, American Medical Association, and numerous other scholarly publications, professional organizations, and advocacy groups.⁹⁹ Comparatively, the current Model Policies have no such academic or professional citations included in the document, nor any “evidence-based best practices”; rather, the current Model Policies include links to parent intervention and the recognition and prevention of bullying, putting the onus on the transgender students to avoid their own victimization.¹⁰⁰

⁹⁴ See 20 U.S.C. § 1412(a)(3), discussed *supra*, text accompanying notes 58-60.

⁹⁵ MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 85, at 9.

⁹⁶ *Id.* at 13, 18.

⁹⁷ *Id.* at 12.

⁹⁸ VA. CODE § 22.1-23.3(A) (2020).

⁹⁹ MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 85, at 26.

¹⁰⁰ MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 10-11.

II. DISCUSSION

*A. The Application of 504 plans to Dysphoria in the Fourth Circuit.¹⁰¹
Williams v. Kincaid and Federal Preemption.*

In *Kesha T. Williams v. Stacey A. Kincaid*, in her official capacity, et al., Ms. Williams, a transgender woman, was jailed for six months at the Fairfax County Adult Detention Center, run by Sheriff Stacey A. Kincaid.¹⁰² At the time of her arrest, Ms. Williams was a Maryland resident who had legally changed her name and gender marker on her identification.¹⁰³ Ms. Williams was also on hormone replacement therapy (HRT) as part of a treatment regimen for gender dysphoria.¹⁰⁴ She had been on HRT as part of her treatment for a decade and a half prior to her incarceration.¹⁰⁵

Upon incarceration, Ms. Williams notified the nurse at the detention center of her dysphoria and the HRT treatment, and provided the nurse with her hormone medication.¹⁰⁶ She disclosed that while she had been on hormones, she had not surgically transitioned and retained the genitalia with which she had been born.¹⁰⁷ Upon learning this, the nurse, citing the jail's policy of categorizing inmates by their genitalia, changed Ms. Williams' records to reflect "male" and had Ms. Williams assigned to the male side of the jail.¹⁰⁸ While she was initially given female clothes, including female undergarments, Ms. Williams was forced to exchange them for male clothes.¹⁰⁹

During her stay in the jail, the nurse failed to give Ms. Williams her HRT medication for at least two weeks; she was denied other accommodations such as searches by female deputies or showering without male inmates present; she was harassed and manhandled by deputies and inmates for her gender identity; she was threatened with solitary confinement; and her gender identity was routinely and forcibly negated, all of which exacerbated her

¹⁰¹ U.S. CT. OF APPEALS FOR THE FOURTH CIR., *About the Court*, <https://www.ca4.uscourts.gov/about-the-court#:~:text=The%20United%20States%20Court%20of,and%20from%20federal%20administrative%20agencies> (last visited Feb. 24, 2024) (stating "[t]he United States Court of Appeals for the Fourth Circuit is one of twelve regional appellate courts within the federal judicial system. The court hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina and from federal administrative agencies.").

¹⁰² See *Williams v. Kincaid*, 45 F.4th 759, 763 (4th Cir. 2022).

¹⁰³ *Id.* at 764.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Williams v. Kincaid*, 45 F.4th at 764.

¹⁰⁹ *Id.*

dysphoria.¹¹⁰ Upon her release, Ms. Williams brought a civil action against Sheriff Kincaid and several others associated with her treatment, claiming “violations of the ADA, 42 U.S.C. §§ 12101 *et seq.*, the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*, the U.S. Constitution, and state law”—all of which were denied by the defendants who claimed that the ADA exceptions regarding gender identity disorders barred Ms. Williams from the ADA’s protections.¹¹¹ The U.S. District Court dismissed Ms. Williams’ complaint for failure to state grounds for relief, at which point the case was appealed to the Court of Appeals for the Fourth Circuit.¹¹²

Williams argued that gender dysphoria is not categorically a “gender identity disorder” and therefore gender dysphoria is not excluded from ADA protections.¹¹³ As noted *supra*, gender dysphoria may be experienced by intersex people, children who will later identify as cisgender homosexuals, as well as people with certain sex development disorders, not just people who are transgender.¹¹⁴ Looking at the definition of “gender identity disorder” at the time the ADA exceptions were enacted, the Fourth Circuit found that this term was intended to reflect a diagnosis of what was then considered the mental illness of being transgender: “the incongruence of sex . . . and gender identity.”¹¹⁵ The Court then noted that “gender identity disorder” has since been removed from the Diagnostic and Statistical Manual (DSM) as our understanding of gender and identity has advanced.¹¹⁶ In its decision, the Court explained that gender dysphoria is not the incongruence itself, rather it is the “clinically significant stress” due to such incongruence.¹¹⁷

The Court then examined Williams’ contention that even if the ADA exception for gender identity disorders without a physical basis was still valid, her gender dysphoria had a physical basis, both because of emerging research about in utero development and because the dysphoria was alleviated by hormone replacement therapy.¹¹⁸ The Court found that to be a reasonable inference and, with evidence taken in the light most favorable to

¹¹⁰ *Id.* at 764-765.

¹¹¹ *Id.* at 765-766.

¹¹² *Id.* at 765.

¹¹³ *Id.* at 766.

¹¹⁴ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 19, at 455-57.

¹¹⁵ See *Williams v. Kincaid*, 45 F.4th at 767 (citing AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 71 (3d ed., rev. 1987) (DSM-III-R)); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020).

¹¹⁶ See *Williams v. Kincaid*, 45 F.4th at 780.

¹¹⁷ See *Id.* at 768.

¹¹⁸ *Id.* at 771 (noting that because the dysphoria could be relieved by the physical treatment of hormones, not just therapy, the dysphoria had a physical basis).

her, it was a sufficient reason to remand for further proceedings.¹¹⁹

Importantly, the Court made specific note of the discussion by certain senators that led to the exclusion of transgender people from ADA protections. For example, Senator William Armstrong characterized the “moral content” of the “disorders” in the ADA exclusions, while others described the law as “talking about behavior that is immoral, improper, or illegal.”¹²⁰ In response to the history behind the exclusion of transgender people, the Fourth Circuit stated, “[i]n light of the ‘basic promise of equality . . . that animates the ADA,’ we see no legitimate reason why Congress would intend to exclude from the ADA’s protections transgender people who suffer from gender dysphoria.”¹²¹ The Court went on to say “[t]he only reason we can glean from the text and legislative record is ‘a bare . . . desire to harm a politically unpopular group, [which] cannot constitute a legitimate governmental interest.’”¹²² Sheriff Kincaid appealed this decision to the United States Supreme Court where certiorari was denied, leaving the Fourth Circuit decision intact.¹²³

In light of the *Williams* ruling, if a youth with gender dysphoria is living within the bounds of the Fourth Circuit, a parent or a state agency with the parent’s permission can request an evaluation to determine if the youth has a disability.¹²⁴ While there are procedures for a youth to be evaluated, under the current Model Policies, if their parent is unresponsive, or if their parent or surrogate does not approve of services being provided, a student with gender dysphoria may never be gendered according to their identity or called by their chosen name at school.¹²⁵ However, if a youth *is* evaluated and found to be experiencing gender dysphoria, they could be placed on a 504 plan requiring the school to make reasonable accommodations regarding their dysphoria.¹²⁶ This could include proper naming and gendering consistent with their identity, allowing the youth to make use of school facilities consistent with their identity, and/or providing the youth access to sports and

¹¹⁹ *Id.*

¹²⁰ *Id.* at 772 (citing Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, Yale Human Rts. & Dev. J., 2014, at 1).

¹²¹ *Williams v. Kincaid*, 45 F.4th at 773.

¹²² *Id.*

¹²³ *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) (Alito, J., & Thomas, J., dissenting to the denial of certiorari).

¹²⁴ See 20 U.S.C. § 1414 (1)(A); see also 20 U.S.C. § 1415 (in the case of an emancipated minor, the minor could request the evaluation on their own. If a minor’s parents are unknown, the school may ask someone to be appointed to stand in *locus parentis*).

¹²⁵ See 20 U.S.C. § 1414(a)(1)(D)(ii)(II).

¹²⁶ MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA’S PUBLIC SCHOOLS, *supra* note 65, at 3.

other extracurriculars consistent with their identity.¹²⁷ In other words, providing the youth full and equal participation.

However, due to the limitations placed on schools by certain state legislation (like Virginia's Model Policies), in some areas—and particularly in areas where administrators may be *against* providing equal education to students with dysphoria—proper evaluation may only be possible if the child has a supportive parent who knows how to advocate for their child.¹²⁸ While the *Williams* ruling does not apply to every transgender student in the boundaries of the Fourth Circuit (i.e. only those experiencing dysphoria), the potential uptick in dysphoria caused by an increase in discrimination created by these policies may cause an uptick in the use of 504 plans.

B. The Possibility of Malingering in Order to have Gender Affirmed

Opponents to the equal treatment of transgender students may worry that transgender students will malingering—claiming gender dysphoria when they have no distress—in order to obtain equal treatment to their cisgender peers, including using the bathroom consistent with their gender or participating on sports teams consistent with their gender. Some fear mongers may even claim that cisgender students will malingering to obtain 504 plans to use the facilities of the opposite gender to commit crimes or perform sex acts with each other.¹²⁹ However, 504 plans have a number of safeguards including evaluation by a professional, administrators, and parents.¹³⁰ The idea that a high school student will manage to outsmart someone with a doctorate in psychology, another person with a doctorate in education, another masters level graduate, and their parents is good fodder for a television series, but otherwise laughable.¹³¹

¹²⁷ *Id.*

¹²⁸ See 8 VA. ADMIN. CODE § 20-81-70(B)(1) (2024) (stating that an evaluation team determining if a child has a disability is comprised of the same individuals who would comprise an IEP team); see also 8 VA. ADMIN. CODE § 20-81-110 (2024) (requiring that an IEP team include a regular education teacher, a special education teacher, a representative of the local educational agency [usually a school board] and others. These teachers and administrators could deny a determination of disability for a student experiencing gender dysphoria if they refuse to acknowledge the student's gender identity. See also, Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 U.S. Dist. LEXIS 75665, at *6 (E.D. Pa. 2017) (noting, without deciding, that it was plausible for gender dysphoria to be protected under the ADA).

¹²⁹ See, e.g., Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS (Mar. 19, 2014), <https://www.mediamatters.org/sexual-harassment-sexual-assault/15-experts-debunk-right-wing-transgender-bathroom-myth> (describing and disproving scare tactics used to prevent transgender people from using the bathroom of their identified gender).

¹³⁰ See, e.g., 8 VA. ADMIN. CODE § 20-81-170 (2024) (describing safeguards in Virginia).

¹³¹ See 8 VA. ADMIN. CODE § 20-81-110 (2024) (describing the required personnel on an educational disability panel).

CONCLUSION

State departments of education with policies that are inconsistent with federal law, such as Virginia, are putting transgender and non-binary youth at risk of violence—both at home and in school—and putting those same youth at risk of future anxiety, depression, Post Traumatic Stress Disorder (PTSD), and other mental health problems. While the career politicians promulgating these rules do so with disregard for evidence-based best practices, they are also doing so in a manner that violates the ADA protections afforded by *Williams*. The best way around policies like the Model Policies is with 504 plans. A 504 plan, properly enacted, can save a student from abuse and show them what it means to be treated with respect and dignity for who they are; they allow students to take full and equal part in the education system that so many others enjoy without a second thought. That is the foundation of the Rehabilitation Act of 1973 and exactly the spirit in which it was enacted.