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Schools that don't adopt Virginia's transgender model policies can be sued, according to state officials



FILE – Virginia Gov. Glenn Youngkin speaks to members of the press inside the Rotunda of the state Capitol building, Feb. 25, 2023, in Richmond, Va. (AP Photo/John C. Clark, File)

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writer

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Some Virginia school divisions appear to be entering a faceoff with the state and parents groups over Gov. Glenn Youngkin's model policies on the treatment of transgender students.

Attorney General Jason Miyares last week issued an advisory opinion stating that the policies complied with federal and state nondiscrimination laws. The opinion also states that local school divisions must adopt policies that are consistent with the state's model policies.

The opinion comes in the wake of several school divisions refusing to adopt the new policies, including [Fairfax County Public Schools](#) and [Prince William County Public Schools](#), which have indicated that they would not adopt the new policies. Last week, a resolution to adopt the new policies failed in Virginia Beach in a [split 5-5 board vote](#).

In Virginia Beach, some board members questioned whether the administration's model policies were in compliance with existing state and federal anti-discrimination laws. [Miyares' opinion](#) states he believes the 2023 model policies comply with Title IX, the Equal Protection Clause of the 14th Amendment and the Virginia Human Rights Act.

In stating that school boards are required to adopt policies consistent with the 2023 model policies, Miyares writes that although local school boards have general authority over the supervision of their divisions, "that power is not absolute."

“Rather, ‘primary responsibility and authority for effectuating the educational policy’ of the Commonwealth lies with state government, particularly the General Assembly,” he said.

Miyares adds that the Supreme Court of Virginia has consistently held that local school boards “only have those powers expressly granted or necessarily implied by statute.”

Questions remain about what might happen if schools fail to adopt the policies. The 2020 legislation that called for the drafting of guidelines on how transgender students should be treated did not address whether school boards that refuse to adopt state model policies will face any consequences. The [majority of school divisions in Virginia did not adopt](#) then-Gov. Ralph Northam’s model policies released in 2021. Northam’s model policies called for schools to use a student’s preferred pronoun and allow students to use restrooms that aligned with their gender identity.

Annie Kim, an assistant professor at the University of Virginia’s School of Law, said the 2020 legislation that called for the adoption of these model policies explicitly states that school boards “shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education.”

But legal theories could differ as to whether the state education department developed the model policies “pursuant to subsection A” of that legislation, Kim said.

[That subsection states](#) that the model policies should be developed “in accordance with evidence-based best practices,” and lists several points that the policies must address, including bullying prevention and response and the “maintenance of a safe and supportive learning environment” for all students.

Kim added that generally, model policies are considered guidance documents, and do not hold the same weight and force of law as state agency regulations.

“Guidance documents are basically lesser than regulations of an agency, more informative or advisory in nature,” she said.

In announcing their intent earlier this month not to change their existing policies on the treatment of transgender students, Fairfax County and Prince William County schools both said that their policies “are consistent with federal and state anti-discrimination laws.”

Youngkin’s policies, [released last month](#), require parents to provide written consent to allow students to go by preferred names and pronouns as well as require parental consent for students to receive counseling services “pertaining to gender.” The new policies also state that teachers cannot be instructed or encouraged to conceal information about a student from a parent, including information related to gender.

In addition to Miyares’ opinion, Youngkin has in recent days said schools “don’t have a choice” in whether to adopt the new policies.

In response to a question about what consequences school divisions face if they refuse to adopt the new policies, Miyares spokeswoman Victoria LaCivita said: “If a school board voted not to adopt policies consistent with the model policies, parents can sue under current state law. Our office will be monitoring all litigation and will be prepared to participate where doing so is appropriate and parents have valid claims.”

In response to the same question, a Youngkin spokesperson [referred to a memo](#) from Superintendent of Public Instruction Lisa Coons sent to division superintendents earlier this month, which stated: “Local school boards that elect not to adopt policies consistent with those released by the Department for the upcoming school year assume all legal responsibility for noncompliance.”

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