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RE: Students' Rights Reminder for the 2019-2020 Academic Year

Dear Superintendent,

As our communities prepare for the new academic year and students head back to school, it is important to be aware of the key issues affecting Virginia's students and their rights. Being aware of students' rights under state and federal law can help school officials avoid any potential legal complications and contribute to a positive learning environment that will allow each student to thrive.

Federal and state laws afford children enrolled in school protection from discrimination and harassment based on race, color, religion, sex, national origin, or disability. Schools are responsible for ensuring these rights are protected and for promoting a safe school atmosphere. Additionally, schools are responsible for ensuring that students' right to free speech is respected and that the freedom to practice their religion—or no religion at all—is upheld.

Summarized below you will find information regarding: student speech rights; the Pledge of Allegiance; censorship; religious beliefs and accommodations; the rights of students who identify as LGBTQ; discipline and arrests; the rights of students with disabilities; the rights of students who are immigrants; and the rights of students who are pregnant.

We hope this information will help your school district understand the rights of students in schools and guide you in taking actions that ensure student rights are protected in a safe and supportive environment. Please do not hesitate to contact the ACLU of Virginia if you have any questions about these issues or if we can be of any assistance to you in evaluating and formulating school policy on any of these matters. We can be reached at (804) 644-8022 or [acluva@acluva.org](mailto:acluva@acluva.org).

Very truly yours,

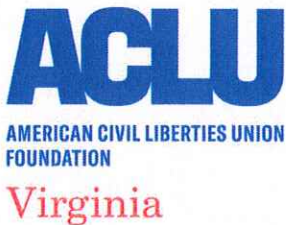


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## STUDENT SPEECH RIGHTS

The First Amendment ensures that students cannot be punished for exercising free speech rights, even if administrators do not approve of their message. In the landmark Supreme Court case *Tinker v. Des Moines Independent Community School District*, the ACLU successfully challenged a school district's decision to suspend three students for wearing armbands in protest of the Vietnam War. 393 U.S. 503 (1969). The court declared that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Over the years, the ACLU has also successfully defended the right of students to wear an anti-abortion armband, a pro-LGBTQ t-shirt, and shirts critical of political figures. Schools may not discipline students for expressing an idea or political viewpoint in class or during school activities, as long as it does not cause a substantial disruption to the school environment.

It is true that the constitutional rights of students in public school are not the same as those of adults exercising First Amendment rights on public streets. Students' speech rights may be limited by reasonable time, place, and manner restrictions because of the unique characteristics of the school environment. A school may limit student speech, for example, through reasonable school-wide policies against cyberbullying. Additionally, schools may prohibit vulgar or offensive speech that is inconsistent with the "fundamental values of public school education." *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675, 685-86 (1986).

School officials should take care, however, not to define peaceful assembly as behavior that causes a substantial disruption to school activities. If students engage in a walkout, school officials may choose to discipline students for missing class but may not engage in harsher punishment because of the message or political nature of the action. School officials must not draw distinctions based on the content of a student's speech or expressive activity in imposing discipline.

## PLEDGE OF ALLEGIANCE

Schools cannot punish students for refusing to salute the flag or say the Pledge of Allegiance. *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Sherman v. Comm. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992). School officials also cannot force students to stand during the Pledge of Allegiance or leave the room if a student refuses to recite the Pledge. *See* Va. Code § 22.1-202(C) ("[N]o student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating in this exercise.")

## CENSORSHIP

**Books:** Banning books, removing books and materials from a classroom or library, or otherwise making it difficult for students to read a broad array of literature limits intellectual freedom. Making books and ideas unavailable based on their content or viewpoint or taking books out of schools because they are controversial, unpopular, or offensive, may violate the First Amendment. *See, e.g., Bd. of Educ. v. Pico*, 457 U.S. 853 (1982). Courts view school libraries as the main place where students exercise their freedom "to inquire, to study and to evaluate, to gain new maturity and understanding." *Id.* at 868.



**Student Publications:** Schools may review and control the content of school sponsored student publications including student newspapers, yearbooks, literary magazines, on-campus videos, and radio broadcasts. But schools cannot control student publications that are not sponsored or funded by the school, not done as part of a class or school project, or that are done on a student's own time with their own resources. *See, e.g., Burt v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Fujishima v. Bd. of Ed.*, 160 F.2d 1355 (7th Cir. 1972); *Eisner v. Stanford Bd. of Ed.*, 440 F.2d 803 (2d Cir. 1971).

## **RELIGIOUS BELIEFS AND ACCOMMODATIONS**

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**Free Exercise Clause:** Under the First Amendment's Free Exercise Clause, students have the right to worship as they see fit, with only limited restrictions. This means that while at school, students are free to practice their religion or nonreligion and to express themselves religiously without interference by school officials. Students may, for example, wear religious attire or clothing with religious messaging to school; post religious messages or images on their lockers; or bring religious materials, including religious texts or objects, to school. School officials may not, for instance, require students to remove their hijab, yarmulke, or other head covering, as it substantially burdens the practice of the student's religion. *See, e.g., Va. Code § 22.1-203.1 et seq.*; VIRGINIA STATE BOARD OF EDUCATION, GUIDELINES CONCERNING RELIGIOUS ACTIVITY IN THE PUBLIC SCHOOLS (1995).

**Establishment Clause:** Under the First Amendment's Establishment Clause, school officials cannot favor one religion over another or favor religion over nonbelief. In practice, this means that school officials and teachers cannot conduct prayer or bible-reading sessions, organize or participate in student-led prayer, or hold a prayer at graduation or sporting events, even when participation is voluntary. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 308 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992). Teachers cannot lead students in devotional activities or encourage student participation in religious activity before or after school, during class, or at school-sponsored activities. In fact, in the public-school context, the Supreme Court has invalidated almost every instance of school- or teacher-sponsored religious expression. Under Virginia law, school boards are permitted to establish a daily observance of one minute of silence, but the school board must be careful to ensure that its policy has secular justifications and is not merely a pretense to encourage prayer. *See, e.g., Va. Code § 22.1-203*; VIRGINIA STATE BOARD OF EDUCATION, GUIDELINES CONCERNING RELIGIOUS ACTIVITY IN THE PUBLIC SCHOOLS (1995).

## **RIGHTS OF LGBTQ STUDENTS**

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**Cultivating a Safe Environment:** Bullying of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") students has been documented as pervasive at many schools and is all too often ignored, or even encouraged, by school officials. LGBTQ students have a right to live their authentic lives and express themselves at school. Students have a right to be out of the closet at school, and conversely, public schools are not allowed to "out" students publicly. School officials and administrators must ensure they are creating a safe learning environment and protecting LGBTQ students from bullying and harassment. *See, e.g., Title IX*, 20 U.S.C. § 1681 (schools may be liable if they act with deliberate indifference in failing to protect students from severe harassment on the basis of sex).

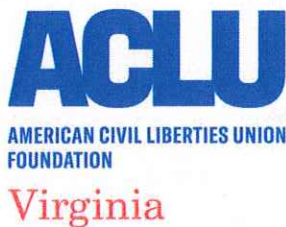
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**Restrooms & Locker Rooms:** Transgender students must be allowed to use the restroom facilities consistent with their gender identity. Schools cannot create policies that require transgender students to use restrooms or locker rooms that do not correspond with their gender identity, and schools may not create policies that require transgender students to use single-user facilities. *See Grimm v. Gloucester County Sch. Bd.*, Civil No. 4:15-cv-52, 2019 U.S. Dist. Lexis 138246 (E.D. Va. Aug. 9, 2019).

**Dress Code:** School officials cannot force students to wear clothing inconsistent with their gender identity. Public schools may have dress codes, but dress codes cannot treat students differently based on their gender, force students to conform to sex stereotypes, or censor particular viewpoints. Schools cannot enact dress codes based on the stereotype that only girls can wear some types of clothes and only boys wear other types of clothes. *See, e.g., U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (government actors must not treat male and female students differently because of “overbroad generalizations about the different talents, capacities, or preferences of males and females.”). Schools may, for example, require that skirts be a certain length; however, they cannot require that some students wear skirts and prohibit others from doing so based on the student’s sex or gender expression. This also applies to pants, ties, or other clothing associated with traditional gender roles. And it applies to attire requirements for homecoming, prom, graduation, and other special school events.

**Discipline:** The intimate relationships of LGBTQ students must be treated with equal dignity as those of heterosexual students. Policies that prohibit same-sex couples or dates from attending prom, homecoming, or other dance functions violates students’ rights under Title IX of the Education Amendments of 1972, the Equal Protection Clause of the U.S. Constitution, and the Bill of Rights of the Virginia Constitution. LGBTQ students should not be punished more severely than heterosexual students for similar behavior, including for displays of affection.

**LGBTQ Student Organizations:** Students interested in forming a student organization, typically called a gay-straight alliance (“GSA”), are to be treated the same as students forming any other noncurricular organization or club. *See, e.g., 20 U.S.C. § 4071(a)* (if a school allows any noncurricular student group to meet, it cannot deny other groups the same access based on the content of their interest); *Gay All. of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976).

**Gender Markers, Pronouns, and Student Records:** Students should be addressed using their preferred names and pronouns. Refusing to do so, or refusing to update the gender markers on a student’s records when provided with appropriate documentation, may be considered a form of sex-based discrimination under federal law. *See Grimm v. Gloucester County Sch. Bd.*, Civil No. 4:15-cv-52, 2019 U.S. Dist. Lexis 138246 (E.D. Va. Aug. 9, 2019). Likewise, a student’s right to privacy includes a student’s sexual orientation or gender identity. It is against the law for school officials to disclose or compel students to disclose this information, even if the student appears open about their sexual orientation or gender identity. *See C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005).



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## **DISCIPLINE AND ARRESTS**

**Generally:** School discipline policies and practices should be fair and equitable and should prioritize prevention and intervention rather than harsh punishments like suspension, expulsion, and referral to law enforcement. The goal of discipline should be to teach appropriate behaviors and minimize the time students spend out of class. In Spring 2015, the Center for Public Integrity released a study finding that Virginia led the country in schools referring students to law enforcement, a phenomenon known as the “school-to-prison pipeline.” Additional studies conducted by the Virginia Department of Education found that African American students and students with disabilities were disproportionately represented in both suspensions and referrals to law enforcement throughout Virginia schools. These disparities open up school districts to potential legal challenges for race and disability discrimination under federal civil rights laws. *See, e.g.*, Complaint against Richmond Public Schools, available at <https://acluva.org/en/cases/equal-treatment-richmond-public-school-students>. In order to avoid potential legal problems, and to provide a more equitable school environment, school officials should reevaluate and revise their current discipline policies and practices to create a more positive and preventative approach to student conduct. The Virginia Board of Education has provided a blueprint for schools to use in revising their outdated practices – the Model Guidance for Positive, Preventative Code of Student Conduct Policy and Alternatives to Suspension, available at [http://www.doe.virginia.gov/support/student\\_conduct/index.shtml](http://www.doe.virginia.gov/support/student_conduct/index.shtml).

**Due Process:** The U.S. Constitution requires that students receive due process before disciplinary measures are imposed. This means that school officials must follow certain procedures before they can suspend or expel students from school. Students are generally entitled to receive notice prior to any suspension or expulsion. The notice must include the facts concerning the suspension or expulsion, and the basis for any accusations. The notice must also provide students an opportunity to explain their side. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). For Virginia’s specific procedural requirements, see Va. Code § 22.1-276.01 *et seq.*

**Corporal Punishment:** Corporal or physical punishment of students is strictly prohibited by Virginia law. *See* Va. Code § 22.1-279.1.

**School Resource Officers:** School Resource Officers (“SROs”) can protect students from outside danger, but often punish minor behaviors through ticketing and arrests. Law enforcement intervention should typically be a last resort for minor violations best handled by schools as discipline issues. For additional resources on how to limit disproportionate school-based arrests or referrals to law enforcement, visit the Model Guidance for Positive, Preventative Code of Student Conduct Policy and Alternatives to Suspension, available at [http://www.doe.virginia.gov/support/student\\_conduct/index.shtml](http://www.doe.virginia.gov/support/student_conduct/index.shtml).





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## **RIGHTS OF STUDENTS WITH DISABILITIES**

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Students with disabilities are provided legal protections under several federal laws. The Individuals with Disabilities Education Act (“IDEA”) requires that public schools provide eligible students with disabilities a “free, appropriate public education” in the least restrictive environment. *See* 20 U.S.C. § 1400 *et seq.* As part of the IDEA, schools must affirmatively locate, identify, and evaluate children in their district for special education and related services, a process known as “child find.” Parents may also request an evaluation at any time in writing or by speaking to a teacher or administrator, and the school district must respond to the parent’s request. Schools must educate students with disabilities in the least restrictive setting possible, with an emphasis on inclusion and integration in the regular education classroom where feasible. Additionally, students receiving special education services under the IDEA, as well as students suspected of being eligible to receive services, are entitled to certain protections and safeguards in the school discipline process. *See* 34 C.F.R. § 300.530 *et seq.*

Students with disabilities are also provided with protections under Section 504 of the Rehabilitation Act of 1974 (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”). Section 504 and the ADA prohibit discrimination against students with disabilities. This means that schools are prohibited by federal law from denying students with disabilities equal access to academic courses, field trips, extracurricular activities, school technology, and health services. School officials also have a duty to ensure that students with disabilities are not being discriminated against by being denied necessary accommodations. Restricting access to educational activities and opportunities, ignoring harassment and bullying, and failing to train staff on compliance with these laws is also prohibited under Section 504 and the ADA. *See also* Va. Code § 22.1-213 *et seq.*

## **RIGHTS OF IMMIGRANT STUDENTS**

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Schools cannot discriminate against students on the basis of race, color, or national origin. This includes discriminating against students on the basis of their immigration status. Undocumented students have a right to a free public education in your school district regardless of their immigration status, and schools cannot deny students of this right. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982). Likewise, schools are not permitted to deny enrollment to a student based on their undocumented status; treat a student differently to determine residency; make inquiries of students or parents that may expose their undocumented status; require social security numbers from parents or students for purposes of enrollment; or engage in any other practices which may chill the right of access to school. Schools cannot turn away students with limited English proficiency; they must be provided with language instruction. *See, e.g., Lau v. Nichols*, 414 U.S. 563 (1974).

School officials should not allow immigration enforcement actions on school grounds without a judicial warrant based on probable cause that a criminal violation of the immigration laws has occurred. Schools should not call immigration authorities on students or consent to any immigration enforcement on school grounds without a criminal warrant. There is no state law requiring any state or local official to contact immigration officials nor any state or federal law prohibiting adoption of a policy that protects students and teachers from immigration action in the absence of a judicial criminal warrant.

## **RIGHTS OF PREGNANT STUDENTS**

Schools are prohibited from excluding pregnant students and students with children under Title IX of the Education Amendments of 1972. This means that schools must also ensure that pregnant students or students with children have access to educational instruction, school activities, and reasonable accommodations, to the same extent that students with temporary medical conditions are given access, including the ability to make up missed classwork and learn in a safe, nonjudgmental environment. Schools are also not allowed to punish students who choose to terminate a pregnancy or to reveal a student's private medical information.

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