VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANDREA LAFFERTY, JACK DOE, a minor, by and through JOHN and JANE DOE, his parents and next friends, JOHN DOE, individually and JANE DOE, individually, Plaintiffs v. SCHOOL BOARD OF FAIRFAX COUNTY, Defendant. Serve: John Foster Division Counsel 8115 Gatehouse Road, Suite 5400 Falls Church, VA 22042 John.Foster@fcps.edu	)	CASE NO.

VERIFIED COMPLAINT

1. Plaintiffs, Andrea Lafferty, Jack Doe, a minor, by and through John and Jane Doe, his parents and next friends, John Doe, individually and Jane Doe, individually (collectively "the Plaintiffs"), by counsel, pursuant to Va. Code §8.01-184, et seq., request this Court to issue declaratory judgments and award temporary and permanent injunctive relief against the Defendant, the School Board of Fairfax County, Virginia ("the Board") and in support thereof state as follows:

2. Plaintiffs ask this Court to award preliminary injunctive relief to prevent the Board from violating Plaintiffs' rights during the pendency of this case, and for declaratory and permanent injunctive relief to prevent the Board from implementing its unlawful expansion of its non-

discrimination policy and student code of conduct to include "sexual orientation" and "gender identity" in violation of Dillon's Rule.

Nature of this Action

3. Plaintiffs are asking this Court to halt Defendant's attempt to introduce a new, undefined, experimental classification into the non-discrimination policy and student handbook of Fairfax County Public Schools ("FCPS") in excess of Defendant's authority.

4. Despite overwhelming opposition from taxpayers, residents and parents of FCPS students, and without authority under the Virginia Constitution or from the General Assembly, on May 7, 2015 Defendant voted to add the undefined term "gender identity" to its non-discrimination policy and the terms "gender identity" and "gender expression" discrimination to the student handbook list of offenses for which students can be suspended from school.

5. On November 6, 2014, Defendant voted to add "sexual orientation" to the non-discrimination policy for FCPS.

6. Defendant's actions were void *ab initio* under Virginia Code §§1-248, 15.2-965 and under Dillon's Rule, which prohibits local governing bodies, including school boards, from expanding the universe of protected classes beyond what has been defined as a protected class by the General Assembly. The General Assembly has not included either sexual orientation or "gender identity" as protected classes under the laws of the Commonwealth. Therefore, Defendant wholly lacks authority to add those classes to its non-discrimination policy and concomitantly, to add those categories to its student handbook as potential grounds for suspension.

7. Plaintiffs are asking this Court, pursuant to Va. Code §8.01-184, to issue a declaratory judgment declaring that 1) Defendant's action in adding sexual orientation to the non-

discrimination policy is *ultra vires* and void *ab initio*; 2) Defendant's action in adding "gender identity" to the FCPS non-discrimination policy is *ultra vires* and void *ab initio*; 3) Defendant's action in adding "gender identity" and "gender expression" to the FCPS student handbook listing of prohibited discrimination is *ultra vires* and void *ab initio.*

8. Plaintiffs are also asking this Court for preliminary and permanent injunctions, enjoining Defendant from implementing the changes to its non-discrimination policy and student handbook inserting sexual orientation, "gender identity" and "gender expression" as protected categories and subjects of instruction, and from taking any other actions in furtherance of granting protected status to sexual orientation, "gender identity" or "gender expression" in the FCPS.

Parties

9. Plaintiff Andrea Lafferty is a citizen, taxpayer and resident of Fairfax County, Virginia.

10. Mrs. Lafferty is President of the Traditional Values Coalition, an organization that speaks on behalf of over 43,000 churches nationwide on pro-family issues. Mrs. Lafferty has served in presidential administrations and has extensive experience in researching and speaking on legislative issues.

11. Mrs. Lafferty has thoroughly researched non-discrimination laws at the state and federal levels and the detrimental consequences to local citizens when protected categories are inserted into such policies without the benefit of definition or of legislative authorization, thereby subjecting the locality, and its taxpayers, to potential liability.

12. Mrs. Lafferty, as a taxpayer and resident of Fairfax County, has researched and analyzed Defendant's policymaking, federal and state laws, and the societal costs of expanding non-discrimination laws without sufficiently defining terms and evaluating consequences.

13. Mrs. Lafferty has provided to Defendant board members the results of her research, including the deleterious consequences of acting without legislative authorization to insert a new, experimental and undefined protected class into Defendant's non-discrimination policy and regulations.

14. Mrs. Lafferty has worked on issues related to school board policy for many years and is familiar with the scope of authority of the school board and of its policies and procedures for making revisions to district regulations.

15. Plaintiff, Jack Doe, is a minor and is a high school student in the Fairfax County Public Schools and resides in Fairfax County. Jack Doe is appearing through his parents and next friends, John and Jane Doe, and is utilizing a pseudonym to protect his identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect his and his family's identity because of the sensitive subject matter of the proceeding and the likelihood of adverse repercussions to him as a continuing student resulting from his family's challenge to the Board's actions.

16. John Doe is Jack Doe's father and is a citizen, taxpayer and resident of Fairfax County. John Doe is utilizing a pseudonym to protect his son's identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect his son's and his family's identity because of the sensitive subject matter of the proceeding and the likelihood of repercussions to his son as a continuing student resulting from his family's challenge to the Board's actions.

17. Jane Doe is Jack Doe's mother and is a citizen, taxpayer and resident of Fairfax County. Jane Doe is utilizing a pseudonym to protect her son's identity as a minor, and pursuant to Va. Code §8.01-15.1 is seeking to protect her son's and her family's identity because of the sensitive subject matter of the proceeding and the likelihood of repercussions to her son as a continuing student resulting from his family's challenge to the Board's actions.

18. Defendant Fairfax County School Board is the public body that governs the Fairfax County Public Schools, Va. Code §22.1-1 & Va. Const. Art. VIII §7, and can sue or be sued. Va. Code §22.1-71.

Jurisdiction and Venue

19. This Court has subject matter jurisdiction pursuant to Va. Code §§8.01-184, 8.01-620 and 17.1-513.

20. Venue is proper in this judicial district pursuant to Va. Code §8.01-261 because the petition is brought in the Circuit Court of the county in which the School Board sits and in which it enacted the policies and regulations at issue in this matter.

Background Facts

Virginia Constitutional and Statutory Provisions

21. Defendant is a school board formed under the authority of Article VIII, §7 of the Virginia Constitution, which provides: "The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

22. Pursuant to Virginia Code §22.1-28, Defendant is vested with the supervision of the public schools in Fairfax County.

23. Pursuant to Virginia Code §§22.1-78 and 22.1-79, Defendant has the authority to supervise, operate and maintain public schools in Fairfax County, including through the adoption of policies and regulations, but those policies and regulations must be consistent with state statutes and regulations of the Board of Education.

24. The Virginia Human Rights Act, Virginia Code §§2.2-3900 *et. seq.*, prohibits unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or

related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions and employment. The General Assembly has defined "unlawful discrimination" as: "Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

25. The General Assembly has specifically limited the power of local governing boards, including Defendant, regarding anti-discrimination regulations in Virginia Code §15.2-965, which provides:

> Any locality may enact an ordinance, not inconsistent with nor more stringent than any applicable state law, prohibiting discrimination in housing, employment, public accommodations, credit, and education on the basis of race, color, religion, sex, pregnancy, childbirth or related medical conditions, national origin, age, marital status, or disability.

26. Neither "sexual orientation" nor "gender identity" have been granted protected status by the General Assembly.

Attorney General's Interpretation of School Board Authority

27. On March 4, 2015, Attorney General Mark Herring issued an opinion addressed to State Senator Adam P. Ebbin regarding whether school boards have the authority to add sexual orientation and gender identity to non-discrimination policies in light of the Virginia Supreme Court's determination that school boards do not have such authority. A true and correct copy of General Herring's opinion letter is attached to this Complaint, marked as Exhibit A and incorporated herein by reference.

28. General Herring opined that school boards have the authority to add sexual orientation and gender identity to non-discrimination policies because of a purported broad grant of authority from the Constitution of Virginia and the General Assembly. (Exhibit A).

29. General Herring based his opinion that school boards are given a broad grant of authority by the General Assembly, in part, by saying that in Virginia Code §22.1-78, "[t]he General Assembly has further authorized school boards to 'adopt bylaws and regulations ... for the management of its official business and for the supervision of schools.'" (Exhibit A).

30. General Herring failed to quote the entirety of Virginia Code §22.1-78, and in particular omitted the General Assembly's express limitation upon school board authority provided in the italicized statement below:

> A school board may adopt bylaws and regulations, *not inconsistent with state statutes and regulations of the Board of Education,* for its own government, for the management of its official business and for the supervision of schools, including but not limited to the proper discipline of students, including their conduct going to and returning from school. (Emphasis added).

31. General Herring further opined that because a three-judge panel of the United States Court of Appeals for the Fourth Circuit opined that Virginia's Constitutional provision and statutes defining marriage as the union of one man and one woman discriminated on the basis of "sexual orientation" in violation of the United States Constitution,[1] school boards could not discriminate against same-sex "spouses." (Exhibit A).

32. General Herring said that the Fourth Circuit panel opinion not only prohibited discrimination against same-sex "spouses," but also granted school boards the power to add "sexual orientation" to non-discrimination policies without General Assembly authorization.

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[1] *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014*), cert. denied sub nom., Rainey v. Bostic*, 135 S. Ct. 286 (2014), *Schaefer v. Bostic*, 135 S. Ct. 308 (2014), *McQuigg v. Bostic*, 135 S. Ct. 314 (2014).

33. General Herring went further to assert that the Fourth Circuit panel opinion, which did not address "gender identity" nevertheless conferred upon school boards the authority to add "gender identity" to their non-discrimination policies. (Exhibit A).

34. General Herring opined that school boards could create new categories of protected classes for non-discrimination notwithstanding the fact that the General Assembly has not enacted legislation creating such categories and notwithstanding the Commonwealth's continuing adherence to Dillon's Rule of state law pre-emption.[2] (Exhibit A).

35. General Herring's opinion contradicts a 2002 opinion from the same office, which concluded that school boards do not have the authority to prohibit discrimination based upon sexual orientation or gender identity because the General Assembly has not enacted legislation that would make explicit school boards' authority to do so. (Exhibit A, n. 13).

Revision of Defendant's Non-discrimination Policy

36. On the day after General Herring's opinion was released, Board Member Ryan McElveen made a written request that the Board consider adding "gender identity" to its non-discrimination policy. Mr. McElveen said that he wanted the Board's consensus to add "gender identity" as a protected class because:

> When the board adopted a new non-discrimination policy on November 6, 2014 to protect against discrimination based on sexual orientation, it failed to offer protection based on "gender identity." Further, on March 4, 2015, Virginia Attorney General Mark Herring released an opinion stating that school boards in Virginia have the authority to expand their anti-discrimination policies to encompass both sexual orientation and gender identity.

[2] *Commonwealth v. County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977).

37. Mr. McElveen did not define the term "gender identity." A true and correct copy of Mr. McElveen's written request is attached to this Complaint, marked as Exhibit B and incorporated herein by reference.

38. The non-discrimination policy to which Mr. McElveen referred was first adopted by Defendant on July 1, 1986 as Policy 1450 (the "Policy"). A true and correct copy of the Policy is attached hereto, marked as Exhibit C and incorporated herein by reference.

39. Defendant revised the Policy over the course of time, renumbering the Policy with each revision. (Exhibit C).

40. On November 6, 2014, Defendant revised the Policy to add "sexual orientation" as a protected class and renumbered the Policy as Policy 1450.5. (Exhibit C).

41. On May 7, 2015, Defendant further revised the Policy, relabeling it Policy 1450.6, to add "gender identity" as a protected class. "Gender identity" is not defined in the Policy. (Exhibit C).

42. As revised on May 7, 2015, the Policy states:

> No student, employee, or applicant for employment in the Fairfax County Public Schools shall, on the basis of age, race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity, as required by law. It is the express intent of the School Board that every policy, practice, and procedure shall conform to all applicable requirements of federal and state law. (Exhibit C).

43. Prior to the May 7, 2015 vote, Board members considered the proposed revision and presented questions to staff members regarding the necessity and consequences of revising the policy. A true and correct copy of Deputy Superintendent Steven Lockard's memorandum to the Board regarding the questions is attached to this Complaint, marked as Exhibit D and incorporated herein by reference.

44. Mr. Lockard told the Board that the Fairfax County Public Schools ("FCPS") division was already making accommodations for "transgender" students. (Exhibit D).

45. Despite the fact that FCPS was already making accommodations for "transgender" students, Mr. Lockard said that the Policy must be revised to comply with a directive from the United States Department of Education ("DOE"), Office of Civil Rights. (Exhibit D).

46. According to Mr. Lockard, the DOE has interpreted Title IX, which prohibits discrimination on the basis of sex, to also prohibit discrimination on the basis of "gender identity." (Exhibit D).

47. Neither Mr. Lockard nor Defendant's counsel referenced any federal laws or judicial decisions determining that Title IX's protections include sexual orientation, perceived sexual orientation, "gender identity" or "gender expression."

48. In fact, Defendant was informed that federal courts have specifically held that Title IX's protections do not include "gender identity" or "gender expression."[3]

49. Mr. Lockard said that he understood that the DOE requires that all school boards revise their non-discrimination policies to include "gender identity." (Exhibit D).

50. Mr. Lockard opined that if the Board failed to revise the Policy, then DOE would have the right to recommend the termination of federal funding to FCPS. (Exhibit D).

51. Mr. Lockard did not cite any statutes or court decisions to support his statement about the withdrawal of federal funding. (Exhibit D).

52. Instead Mr. Lockard cited recent administrative resolutions of DOE investigations of school districts following complaints of unequal treatment of students identifying as "transgender." (Exhibit D).

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[3] *See e.g., Johnston v. University of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Penn. 2015); *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 2015 WL 5560190 (E.D. Va. 2015).

53. Neither Mr. Lockard nor any other member of the FCPS staff or school board reported that any complaints had been filed against FCPS related to a failure to accommodate "transgender" students. To the contrary, Mr. Lockard stated that FCPS was already accommodating requests from "transgender" students. (Exhibit D).

54. Nevertheless, Mr. Lockard opined that FCPS was required to revise its non-discrimination policy because "we could see no reason to conclude" that DOE would treat FCPS any differently than it did when it resolved complaints against other school districts by, *inter alia,* requiring that the districts revise their non-discrimination policies to include "gender identity." (Exhibit D).

55. Mr. Lockard acknowledged that in the administrative decisions cited by the DOE the agency did not rule that the school districts had violated federal law and did not require that the districts adopt a policy requiring that all transgender students be required to use the bathroom of their choice, but permitted school districts to handle issues on a case by case basis. (Exhibit D).

56. Nevertheless, Mr. Lockard stated that the administrative resolutions of DOE complaints compelled the Board to revise the FCPS non-discrimination policy to include "gender identity" or face the loss of federal funding. (Exhibit D).

57. Citizens, including parents of FCPS students, presented oral and written testimony to the Board at the May 7, 2015 meeting. A true and correct copy of the written citizen testimony is attached to this Complaint, marked as Exhibit E and incorporated herein by reference.

58. The written citizen testimony included a petition signed by more than 200 FCPS parents opposing the revision to the Policy, informing the Board that the change would create confusion in the minds of young children, disrespect the privacy rights of most of the student population,

and would prematurely add a category to the non-discrimination policy without clearly defining the category or examining the consequences of the revision. (Exhibit E).

59. Parents who signed the petition informed the Board that the policy change would have severe negative impacts on children and would jeopardize their safety and privacy. (Exhibit E).

60. Parents also informed the Board that the policy change would negatively affect the respect between students and fellow students and students and teachers. (Exhibit E).

61. Dr. Melinda Kelly, an obstetrician-gynecologist and parent of two children attending FCPS informed the Board that there is no medical consensus on "gender identity," and cautioned against prematurely instituting a policy without fully understanding what is being implemented. Dr. Kelly quoted from the American College of Obstetricians and Gynecologists' ("ACOG") recent committee report regarding "transgender" health care, which stated that "there is no universally accepted definition of the word 'transgender' because of the lack of agreement regarding what groups of people are considered 'transgender.' In addition, definitions often vary by geographic region and by individual." (Exhibit E).

62. Other parents testified that the proposed revision would be a distraction to children's learning processes and would create conflicts for many students who belong to minority groups. (Exhibit E).

63. Former Board Member Stephen Hunt told the Board that there are already students attending FCPS who identify as "transgender," and who are being accommodated in "common sense ways that respect the dignity of all students" so that revision of the Policy to add "gender identity" is not necessary. (Exhibit E).

64. Nevertheless, the Board voted overwhelmingly to amend the Policy without adding any definitions, and after denying a motion to postpone consideration until additional study could be done.

Defendant's Revision of Student Handbook

65. On May 7, 2015, Defendant also approved Regulation 2601.29P, which established a revised Student Rights and Responsibilities Booklet ("Booklet" herein). A true and correct copy of Regulation 2601.29P is attached hereto, marked as Exhibit F and incorporated by reference as if set forth in full.

66. In Chapter II, Rules of Conduct, Interventions, and Disciplinary Procedures, Paragraph 2b(3) provides that "disruptive behavior" for which a student can be suspended includes: "discriminatory harassment (which is harassment based on a person's race, color, religion, national origin, disability, personal or physical attributes or matters pertaining to sexuality, including sexual orientation, gender identity or gender expression). "Discriminatory harassment" is further defined in the glossary section as encompassing:

> Verbal, electronic, or physical action that denigrate or show hostility toward an individual because of his or her race, color, religion, national origin, gender, disability, sexual orientation, gender identification, genetic information, or any other characteristic protected by federal and/or state law. Harassment may create an intimidating, hostile, or offensive learning environment, and/or interfere with an individual's academic performance. (Exhibit F).

67. In Chapter II, Rules of Conduct, Interventions, and Disciplinary Procedures, Paragraph 2b(4) provides that "disruptive behavior" for which a student can be suspended includes: "sexual harassment (which includes unwelcome sexual advances regardless of sexual orientation; requests for sexual favors; and other inappropriate verbal, electronic, or physical conduct of a sexual nature that creates an intimidating, hostile or offensive environment)." (Exhibit F).

68. On May 7, 2015 "gender identity" and "gender expression" were added to the Booklet as grounds for student discipline, but Defendant did not define "gender identity" or "gender expression" anywhere in the Booklet. (Exhibit F).

69. Neither "gender identity" nor "gender expression" are defined in the Virginia Constitution or Code of Virginia, including Section 22.1-279.3 which Defendant cites as the authority for drafting and revising the Booklet.

70. Jack Doe is particularly distressed about the Board's decision to add "gender identity" to the non-discrimination policy and to the student code of conduct because "gender identity" is not defined in either the policy or the code, so Jack Doe has no idea what words or conduct might be interpreted as discriminating on the basis of "gender identity," and therefore does not know what speech or conduct might subject him to discipline, including suspension.

71. Jack Doe is distressed about the Board's decision to add "gender identity" to the non-discrimination policy and student code of conduct because he understands that the decision will mean that the restrooms, locker rooms and other intimate spaces set apart, respectively, for boys and girls, will now be open to students who might have the physical features of one sex but are permitted to use the bathroom of the opposite sex which the student "identifies" as, whatever that means.

72. Because the new policy and code of conduct are not sufficiently defined, Jack Doe has no way of knowing whether he can, for example, question someone who appears to be a girl using the boys' restroom or locker room, refer to someone by a certain pronoun or even compliment someone on his/her attire without being subject to discipline for "discrimination."

73. Jack Doe is nervous about having to think about every statement or action and its potential sexual connotations to third parties before interacting with students and teachers, and

the prospect of having to interact in such an uncertain environment creates significant distress to the point that it adversely affects his ability to participate in and benefit from the educational program.

74. Jack Doe is terrified of the thought of having to share intimate spaces with students who have the physical features of a girl, seeing such conduct as an invasion of his privacy, invasion of fellow students' privacy and a violation of the though patterns and understanding about male and female relationships which are part of his cultural values.

75. Because of Defendant's actions, Jack Doe cannot regard school as a safe place where he can learn what he needs to be a productive and well-educated adult without fear of harassment, being charged with harassment, and having his speech and conduct chilled by the fear of reprisals or of discipline for unknowingly violating the ambiguous code of conduct.

76. Jack Doe's ability to fully and freely participate in and benefit from the school's educational program has been significantly diminished by the Defendant's actions in adding the undefined terms "gender identity" and "gender expression" to the non-discrimination policy and student code of conduct.

COUNT I

Defendant's Inclusion of Sexual Orientation and Gender Identity in its Non-Discrimination Policy and Student Handbook Are *Ultra Vires* Acts In Violation of Virginia Law and Dillon's Rule

77. Plaintiffs re-allege the facts in Paragraphs 1-76 and incorporate the same herein by reference as if set forth in full.

78. Pursuant to Virginia Code §15.2-965, no local governing board, including Defendant, can enact a non-discrimination policy that is more stringent than the laws enacted by the General Assembly.

79. Pursuant to the Dillon Rule of strict construction, which Virginia adheres to, school boards such as Defendant exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.

80. Under the Dillon Rule, any doubts as to the existence of a power must be resolved against the locality.

81. The General Assembly has not included "sexual orientation" and "gender identity" or "transgender" as protected classes for purposes of anti-discrimination laws in the Commonwealth of Virginia.

82. Neither does the Constitution of the Commonwealth of Virginia provide protection against discrimination for "sexual orientation," "gender identity" or "transgender."

83. Absent enabling legislation from the General Assembly or the Constitution, local governing bodies, including Defendant, cannot enact ordinances or policies that are more stringent, *i.e.*, protect more classes of people, than do state statutes.

84. Neither state law nor the Virginia Constitution permit school boards to prohibit discrimination based on sexual orientation.

85. Neither state law nor the Virginia Constitution permit school boards to prohibit discrimination based on the undefined concept of "gender identity."

86. Prohibiting discrimination based on sexual orientation is not necessarily implied from state laws prohibiting unlawful discrimination because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

87. Prohibiting discrimination based on an undefined concept of "gender identity" or "transgender" is not necessarily implied from state laws prohibiting unlawful discrimination

because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

88. Prohibiting discrimination based on sexual orientation is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include sexual orientation.

89. Prohibiting discrimination based on an undefined concept of "gender identity" is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include "gender identity."

90. Defendant's action in revising its non-discrimination policy to include sexual orientation as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

91. Defendant's action in revising its non-discrimination policy to include "gender identity" as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

92. Defendant's action in revising its non-discrimination policy to include sexual orientation as a protected class is an *ultra vires* act that is void *ab initio*.

93. Defendant's action in revising its non-discrimination policy to include "gender identity" as a protected class is an *ultra vires* act that is void *ab initio*.

94. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that Defendant's actions expanding non-discrimination protection to sexual orientation, "gender identity" and "gender expression" is *ultra vires* and void *ab initio* while Defendant asserts that it has the authority to expand its non-discrimination policy to include sexual orientation and "gender identity." Plaintiffs' rights can be adjudicated through a declaration by this Court.

WHEREFORE, Plaintiffs respectfully request that the Court grant the declaratory and injunctive relief set forth herein and award such damages to Plaintiffs as are reasonable and just.

COUNT II

Defendant's Revision of Regulation 2601.29P Is Void As An Ultra Vires Act In Violation of Virginia Law and Dillon's Rule

95. Plaintiffs re-allege the facts in Paragraphs 1-94 and incorporate the same herein by reference as if set forth in full.

96. Pursuant to Virginia Code §15.2-965, no local governing board, including Defendant, can enact regulations such as Regulation 2601.29P that are more stringent than the laws enacted by the General Assembly.

97. Pursuant to the Dillon Rule of strict construction, to which Virginia adheres, school boards such as Defendant exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.

98. Under the Dillon Rule, any doubts as to the existence of a power must be resolved against the locality.

99. The General Assembly has not included "sexual orientation" and "gender identity" or "transgender" as protected classes in the Commonwealth of Virginia.

100. Neither does the Constitution of the Commonwealth of Virginia provide protection against discrimination for "sexual orientation," "gender identity" or "transgender."

101. Absent enabling legislation from the General Assembly or the Constitution, local governing bodies, including Defendant, cannot enact ordinances or policies that are more stringent, *i.e.*, protect more classes of people, than do state statutes.

102. Neither state law nor the Virginia Constitution permit school boards to enact regulations that discipline students for conduct defined as unlawful discrimination based on sexual orientation.

103. Neither state law nor the Virginia Constitution permit school boards to enact regulations that discipline students for conduct defined as unlawful discrimination based on the undefined concept of "gender identity."

104. Disciplining students for behavior deemed to be discrimination based on sexual orientation is not necessarily implied from state laws prohibiting unlawful discrimination because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

105. Disciplining students for behavior deemed to be discrimination based on an undefined concept of "gender identity" or "transgender" is not necessarily implied from state laws prohibiting unlawful discrimination because of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."

106. Disciplining students for behavior deemed to be discrimination based on sexual orientation is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include sexual orientation.

107. Disciplining students for behavior deemed to be discrimination based on an undefined concept of "gender identity" is not expressly permitted nor necessarily implied from Title IX's prohibition against sex-based unlawful discrimination in educational programs and services, which prohibition has not been expanded by statute or judicial decision to include "gender identity."

108. Defendant's action in revising Regulation 2601.29P to include sexual orientation violates Virginia Code §15.2-965 and Dillon's Rule.

109. Defendant's action in revising Regulation 2601.29P to include "gender identity" as a protected class violates Virginia Code §15.2-965 and Dillon's Rule.

110. Defendant's action in revising Regulation 2601.29P to include sexual orientation as a protected class is an *ultra vires* act.

111. Defendant's action in revising Regulation 2601.29P to include "gender identity" as a protected class is an *ultra vires* act.

112. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that inserting undefined terms into the student handbook and thereby subjecting students to discipline without proper notice of the conduct for which they can be suspended exceeds Defendant's authority under Virginia law, while Defendant asserts that it can consistent with Virginia law insert the terms "gender identity" and "gender expression" into its student handbook and subject students to discipline. Plaintiffs' rights can be adjudicated through a declaration by this Court.

WHEREFORE, Plaintiffs respectfully request that the Court grant the declaratory and injunctive relief set forth herein and award such damages to Plaintiffs as are reasonable and just.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

A. That this Court issue a Preliminary Injunction enjoining the implementation of Policy 1450.5 insofar as it prohibits discrimination based on sexual orientation or "gender identity," and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by enlarging the categories of protected classes under Defendant's non-discrimination policy to include sexual

orientation or "gender identity" pending the outcome of this action;

B. That this Court issue a Preliminary Injunction enjoining the implementation of Regulation 2601.29P insofar as it includes discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined, and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by including discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined pending the outcome of this action;

C. That this Court issue a Permanent Injunction to permanently enjoin the implementation of Policy 1450.5 insofar as it prohibits discrimination based on sexual orientation or "gender identity," and permanently enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by enlarging the categories of protected classes under Defendant's non-discrimination policy to include sexual orientation or "gender identity;"

D. That this Court issue a Permanent Injunction enjoining the implementation of Regulation 2601.29P insofar as it includes discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined, and enjoining Defendant, Defendant's agents, employees, and all persons in active concert or participation with them, from violating Plaintiffs' constitutional and statutory rights by including discrimination based on sexual orientation or "gender identity" in the definition of "disruptive behavior" for which students can be disciplined;

E. That this Court render a Declaratory Judgment:

(1) declaring Policy 1450.5 void as an *ultra vires* act under Dillon's Rule insofar as it adds sexual orientation to Defendant's non-discrimination policy absent enabling legislation from the General Assembly;

(2) declaring Policy 1450.6 void as an *ultra vires* act under Dillon's Rule insofar as it adds "gender identity" to Defendant's non-discrimination policy absent enabling legislation from the General Assembly;

(3) declaring Regulation 2601.29P void as an *ultra vires* act under Dillon's Rule insofar as it subjects students to discipline for disruptive behavior defined as discrimination based on sexual orientation;

(4) declaring Regulation 2601.29P void as an *ultra vires* act under Dillon's Rule insofar as it subjects students to discipline for disruptive behavior defined as discrimination based on "gender identity" and "gender expression;"

F. That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy, in order that such declaration shall have the force and effect of final judgment;

G. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's orders;

H. That this Court award Plaintiffs the reasonable costs and expenses of this action.

I. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

DATED this day of December, 2015.

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*Application for admission *pro hac vice* *pending*

VERIFICATION

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

_____

ANDREA LAFFERTY

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

_____

JOHN DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

_____

JANE DOE

All the above statements are true to the best of my knowledge. I understand that a false statement in this Verified Complaint may subject me to penalties of perjury.

_____

JACK DOE