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To **Western Cape Education Department**

For attention: Adv Lynn Coleridge-Zils

Director: Policy Co-ordination

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Re: **Comments on the Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department**

From: **Advocate N L Badenhorst**

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CONTENTS:	PAGE NUMBER:
Introduction	2
About FOR SA, and our Interest in the Guidelines	2
Executive Summary of Submissions	3
Comments relating to the substance of the Guidelines:	
- The Guidelines' purpose	4
- The science behind transgender ideology	5
- The effect on fundamental rights	7
- The effect on parental rights	10
FOR SA's Recommendations	11

INTRODUCTION:

1. We refer to the invitation by the Western Cape Education Department (“the Department”) to make written submissions on the **Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department** (“the Guidelines”), and make the following submission in this regard.
2. We note that the Guidelines are not Departmental policy and therefore this is not a binding legal document on public schools in the Western Cape Province, but rather a policy recommendation to schools, which schools are free to use their discretion.

ABOUT FOR SA, AND OUR INTEREST IN THE GUIDELINES:

3. *Freedom of Religion SA NPC (2014/099286/08)* (“FOR SA”) is a non-profit organisation, working to protect and promote the constitutional right to religious freedom, and related rights, in South Africa.
4. FOR SA currently has an endorsement base of religious leaders representing approximately 6 million people in South Africa. Its constituency spans across various denominations, churches and faith groups in South Africa, many of whose members are parents and have children in the Province’s public school system.
5. At the outset, FOR SA wishes to unequivocally state that we deeply reprehend any acts or feelings of hatred, homophobia, transphobia or hostility by any person (of different moral conviction, whether Christian or otherwise) towards any person of the LGBT+ community.
6. As a faith-based organisation, FOR SA believes that every human being is created in the image of God and, as such, has intrinsic dignity and worth. Because God gives dignity and worth to all people, as human beings we ought to do the same. No person should suffer violence or hatred because of their race, nationality, sex, sexual orientation, gender, religion or any other characteristic.
7. FOR SA further esteems and affirms the constitutional promise that “*South Africa belongs to all who live in it, united in our diversity*”.¹

¹ Preamble to the Constitution of the Republic of South Africa, 1996.

8. *FOR SA* has a direct interest in these Guidelines, because of the **fundamental rights** – including the constitutional rights to equality (s 9), dignity (s 10), safety and security of the person (s 12), privacy (s 14), freedom of conscience, religion, thought, belief and opinion (s 15), and freedom of expression (s 16) - as well as **parental rights** directly affected by the Guidelines as set out below.

EXECUTIVE SUMMARY OF SUBMISSIONS:

9. We commend the Department for what we believe to be a *bona fide* effort to prevent and combat unfair discrimination, harassment and bullying, and to create an environment where every South African child can receive a basic education free from stigma and unfair discrimination.²
10. Our major concern, however, is that the Guidelines adopt a specific ideological position,³ and in doing so they depart from the framework, values and fundamental rights incorporated in the South African Constitution, and specifically infringe on the State's obligation to respect, protect, promote and fulfil (s 7(2)) the constitutional rights to:
- 10.1. Equality (s 9);
 - 10.2. Human dignity of all persons (s 10), including therefore persons who hold beliefs and opinions that gender is not a fluid, social construct;
 - 10.3. Freedom and security of the person (s 12);
 - 10.4. Privacy (s 14);
 - 10.5. Freedom of religion, belief and opinion (s 15); and
 - 10.6. Freedom of expression (s 16).

² Guidelines clause 3.1.(a) and (b).

³ Guidelines clause 3.1(c).

11. This same duty is incumbent on the State in terms of international covenants⁴ to which the Republic is a signatory, or to which the Republic is bound in terms of customary international law.⁵

COMMENTS RELATING TO THE SUBSTANCE OF THE GUIDELINES:

The Guidelines' purpose:

12. The Guidelines' stated purpose is to "*promote gender identity and gender expression*".⁶

13. The position that gender is a social construct and/or that it is "fluid" (meaning that a person can choose to identify as the gender (or no gender) of their choice) is a belief system – i.e. an ideology, known as "transgenderism". Its premise is that an individual's perception of their gender supersedes the biological and genetic binary certainty of their sex.

14. Transgenderism (as an ideology) is disputed amongst the top experts in psychiatry – which viewpoint will be set out in more detail below in the section entitled "the science behind transgender ideology".

15. The Guidelines, therefore, promote a clear ideological position, which permeates the entire content they contain, as evidenced by clause 13.1 which refers, as if it is a matter of fact, to "*the normal spectrum ... gender identities*", and clause 15.4 which talks about **fictional** "*gender identity rights*".

16. By adopting this ideological position, the Department is essentially recommending that public schools in the Western Cape should similarly adopt the same position.

⁴ The right to freedom of belief is protected under the following international covenants: Article 18 of the Universal Declaration of Human Rights (UDHR); Article 18(1) of the International Covenant of Civil and Political Rights (ICCPR); and Article 8 of the African Charter on Human and Peoples' Rights (the "Banjul Charter").

⁵ Section 232 of the Constitution of the Republic of South Africa, 1996.

⁶ Guidelines clause 3.1(c).

17. The case of *Organisasie vir Godsdienste-Onderrig en Demokrasie (OGOD) v Laerskool Randhart & Others*⁷ established that public schools should be **ideologically neutral places**.⁸

The science behind transgender ideology:

18. Until 2019, when the World Health Organization (WHO) removed gender identity disorder from its global manual of diagnoses, this was listed as a mental health condition.⁹

19. Studies of identical twins have found that when one of the twins identifies as transgender, the other twin only will only identify as transgender 20% of the time.¹⁰ This disproves the idea that transgenderism results primarily from pre-natal genetic or hormonal influences – i.e. physical, biological reasons. This makes sense because, as pointed about by Dr Michelle Cretella, “[a]n identity is not biological, it is psychological.”¹¹

20. The treatment of minors with puberty blockers and cross-hormone treatment has serious, lifelong repercussions, including complete and irreversible sterilisation¹². Furthermore, it puts the child at risk of heart disease, strokes, diabetes, cancers, and even the very emotional problems that the treatment is meant to be treating.¹³ The National Health Service (NHS) in the UK recognised these dangers when it recently updated its website (<https://www.nhs.uk/conditions/gender-dysphoria/treatment/>)

21. Critically, it is important to note that, without the above dangerous treatment, between 80% to 95% *minors* who identify as being a gender different to their biological sex, if allowed to

⁷ 2017 (6) SA 129 (GJ) para 102: “(a) It is declared that it offends s.7 of the Schools Act, 84 of 1996 for a public school –(i) to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly only one religion to the exclusion of others; and (ii) to hold out that it promotes the interests of any one religion in favour of others.”

⁸ Although the case specifically referred to “religion”, a religion is a belief system, thus an ideology. The same would thus apply to the school adopting any specific ideology to the exclusion of others. A public school which thus adopts the transgender ideology (i.e. belief system) to the exclusion of others would be acting illegally.

⁹ “World Health Organization removes “gender identity disorder” from list of mental illnesses” by Sophie Lewis, CBS News (2019). Available online at <https://www.cbsnews.com/news/world-health-organization-removes-gender-dysphoria-from-list-of-mental-illnesses/>

¹⁰ ‘Five Things to Know About “Gender Dysphoria” in Children’ by Peter Sprigg, Family Research Council (2016). Available online at <https://frcblog.com/2016/08/five-things-know-about-gender-dysphoria-children/>

¹¹ “I’m a Pediatrician. Here’s What I Did When a Little Boy Patient Said He Was a Girl” by Michelle Cretella, The Daily Signal (2017) Available online at <https://www.dailysignal.com/2017/12/11/cretella-transcript/>

¹² “Five Things to Know About “Gender Dysphoria” in Children’.

¹³ “I’m a Pediatrician. Here’s What I Did When a Little Boy Patient Said He Was a Girl”

go through the natural process of puberty, outgrow this condition.¹⁴ *“Science has shown that gender identity issues in children usually do not persist into adolescence or adulthood, and there is little scientific evidence for the therapeutic value of puberty-delaying treatments.”*¹⁵

22. Of further interest is the fact that in a longitudinal study that compared the well-being of *adults* who had undergone sex-change operations, with adults who had requested to undergo sex-change operations, but did not, it was found that there was no statistically significant difference between the two groups' scores of well-being.¹⁶

23. The very real problem is that “[t]ransgender ideology in schools is psychological abuse that often leads to chemical castration, sterilization, and surgical mutilation.”¹⁷

24. The conclusion from science such as the above is that identity (and thus one's perception of one's gender) is psychological, not physical. Further, the treatment of vulnerable children is not only unnecessary in up to 95% of cases, but leads to irreparable, permanent physical harm and side-effects.

25. While we recognise that the Department does not have the power to either force, or permit, parents to subject their child(ren) to treatment as they see fit, the fact that the Department is promoting a proven harmful ideology in its Guidelines (and effectively recommending that schools follow the same) is wholly inappropriate because the Department is constitutionally obligated to promote and protect the best interests of children,¹⁸. Furthermore, by doing so, it inadvertently affects the fundamental rights of others as set out below.

¹⁴ “Five Things to Know About ‘Gender Dysphoria’ in Children” and “Gender Identity” by Drs Lawrence S. Mayer and Paul R. McHugh, *The New Atlantis* (2016) at page 107. Available online at <https://www.thenewatlantis.com/publications/part-three-gender-identity-sexuality-and-gender> which refers to the following study: “A follow-up study of girls with gender identity disorder” by Kelley D. Drummond *et al.*, *Developmental Psychology* 44, no. 1 (2008): 34 – 45.

¹⁵ “Gender Identity” at page 86.

¹⁶ “Gender Identity” at pages 109 and 110.

¹⁷ “I’m a Pediatrician. Here’s What I Did When a Little Boy Patient Said He Was a Girl”.

¹⁸ Section 28(2) read with section 7(2) of the Constitution of the Republic of South Africa, 1996.

The effects on fundamental rights:

26. Dignity,¹⁹ equality,²⁰ freedom of belief and opinion,²¹ freedom of expression,²² privacy²³, and freedom and security of one's person²⁴ are all fundamental rights guaranteed by the Bill of Rights. Although the Guidelines attempt to cater for the “*sensitivity of other learners*” in two (2) places,²⁵ this is insufficient protection of the fundamental rights of all (other) learners and teachers – which the Department is constitutionally obligated to respect, protect and promote.²⁶

27. Dignity, Freedom of Belief and Opinion, Freedom of Expression:

27.1. The above-mentioned three (3) rights are closely intertwined, with the freedom to believe as one chooses having been held by our Courts to be inseparable from human dignity²⁷. The Court has further held that the freedom to express one's belief and opinion (whatever that may be), lies at the heart of our democracy.²⁸

27.2. The Guidelines (because they promote a specific ideology) may well have the inadvertent effect of restricting free speech at schools and/or creating an environment of “forced speech” wherein fellow learners and teachers may feel and/or be compelled and/or pressurised to - potentially against their own conscience, belief and opinion - refer to the individual by their chosen name²⁹, and as a result (although the Guidelines make no specific mention of this) their chosen pronoun.

27.3. It is important to be cognizant of the fact that a right – such as the right conferred in clause 6.1 - imposes a reciprocal obligation on everyone else to recognise that right. Should learners and/or teachers find themselves in the position set out in the paragraph above, this would affect the learners' and teachers' fundamental rights to freedom of

¹⁹ Section 10 of the Constitution of the Republic of South Africa, 1996.

²⁰ Section 9 of the Constitution of the Republic of South Africa, 1996.

²¹ Section 15 of the Constitution of the Republic of South Africa, 1996.

²² Section 16 of the Constitution of the Republic of South Africa, 1996.

²³ Section 14 of the Constitution of the Republic of South Africa, 1996.

²⁴ Section 12 of the Constitution of the Republic of South Africa, 1996.

²⁵ Guidelines clauses 9.1 and 10.3.

²⁶ Section 7(2) of the Constitution of the Republic of South Africa, 1996.

²⁷ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 paras 33 to 36 and legal philosopher Ronald Dworkin's statement in *Freedom's Law: The Moral Reading of the American Constitution* (1996), at 200: “Governments insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.”

²⁸ *Masuku v South African Human Rights Commission* 2018 JDR 2170 (SCA) para 17.

²⁹ Guidelines clause 6.1.

belief and opinion and expression, and, as a consequence, their right to human dignity. This position (i.e. the granting of a right in clause 6.1 of the Guidelines) conflicts with the fundamental rights guaranteed by the South African Constitution.

28. Equality:

28.1. “*Equality means equal concern and respect across difference*”³⁰ and “*equal concern and respect for all*”.³¹

28.2. The above is the standard that the Department is obliged to meet in the promulgation of the Guidelines. However, we see that it has failed to meet this standard, by inadequately catering to protect fellow learners’ fundamental rights (not just their “*sensitivity*”) and by failing to cater for, let alone protect, the teachers’ fundamental rights.

28.3. Practically, this results in unfair discrimination by the Department on the basis of conscience and belief³² (when it comes to being allowed to speak freely), as well as gender³³ (when it comes to allowing a transgender learner to compete in the sport of his/her choice).³⁴ As has been shown internationally, allowing boys (who identify as girls) to compete on girls’ teams, deprives girls of the opportunity to participate fully and fairly in sports and is fundamentally unfair to girl athletes.³⁵ It is a physiological fact that men and women are built differently. Men have more muscle mass, larger hearts, and higher bone density, making them stronger than women. As such, men (or boy) athletes have a physiological advantage over females (or girl) athletes in nearly all sports – and no amount of training will ever change that. (Even worse, there have been reported incidents of male athletes who identify, and compete, as females against other females in contact sports, and who – because of their physiological advantage - beat their female opponents so severely that the female opponents suffered severe injury).³⁶

³⁰ *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at para 60.

³¹ *Minister of Home Affairs v Fourie* at para 95.

³² Section 9(3) of the Constitution of the Republic of South Africa, 1996.

³³ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

³⁴ Guidelines clause 8.1.

³⁵ “*Trans Athletes Are Posting Victories and Shaking Up Sports*” by Christie Aschwanden, Wired (2019). Available online at <https://www.wired.com/story/the-glorious-victories-of-trans-athletes-are-shaking-up-sports/> and “*Teen runners sue to block trans athletes from girls’ sports*”, The Guardian (2020). Available online at <https://www.theguardian.com/us-news/2020/feb/13/transgender-athletes-girls-sports-high-school>.

³⁶ See for e.g. <https://www.attacktheback.com/transgender-mma-fighter-fallon-fox-breaks-opponents-skull/>

28.4. Of further importance, when considering fellow learners' as well as teachers' right to equality, is that "[o]ur Constitution does not tolerate **diversity** as a necessary evil, but affirms it as one of the **primary treasures of our nation**"³⁷, "[t]he objective of the Constitution is to **allow different concepts** about the nature of human **existence to inhabit the same public realm**"³⁸, and "**in this country diversity is celebrated, not tolerated.**"³⁹

28.5. In light of the above, it is evident that the Guidelines fail to make room for the plurality and diversity of views about transgenderism, as well as put girls at an unfair disadvantage, and destroy their athletic opportunities, by forcing them to compete against boys.

29. Privacy and Freedom and Security of the Person:

29.1. Perhaps the most pertinent practical consideration, is fellow learners' constitutional rights to privacy and freedom and security of their person, which are affected and infringed by clauses 9.1 and 10 of the Guidelines, which conflate sex and gender by recommending that bathrooms and sleeping arrangements (in school hostels and on school excursions, or trips) be made open to learners of the opposite sex who identify as the other gender.

29.2. The Department is essentially recommending that schools infringe the fellow learners' privacy and safety without providing any proper protection for these rights apart from saying that their "*sensitivities*" must be taken into account.

29.3. This recommendation directly affects learners who, in the course of changing (potentially on multiple occasions) for their sporting activities or on school trips, may be seen naked by other learners in the shared bathrooms. In this regard, we point out that internationally, there already are various reported incidents of male pedophiles who – under the guise of being "trans-women" – have made their way into girls' locker rooms and hostels.⁴⁰

³⁷ *MEC for Education, KwaZulul-Natal & others v N Pillay & Others* 2008 (1) SA 474 (CC) at para 92.

³⁸ *Minister of Home Affairs v Fourie* at para 95.

³⁹ *OGOD v Laerskool Randhart & Others* at para 95.

⁴⁰ See for e.g. <https://www.fpiw.org/blog/2016/02/25/convicted-sex-offender-seeks-access-to-womens-locker-rooms-through-bathroom-law/> and <https://www.thecourier.co.uk/fp/news/local/fife/832849/warning-as-transgender-sex-offender-placed-in-womens-hostel/>

29.4. In a society that is crippled by violence against women, this conflation of sex and gender, which exposes female learners (in particular) not only to unwanted privacy violations, but to potential safety risks, is a wholly inappropriate policy recommendation or “guideline” to schools.

The effect on parental rights:

30. According to binding international law, parents have the right to bring up their children in conformity with their religious, moral or philosophical convictions and beliefs.⁴¹ These rights are confirmed and reinforced in the Department’s *White Paper on Education and Training* (Chapter 4, item 3). The fact that parents are primarily responsible for their children’s well-being (which includes physical, mental, spiritual and emotional well-being) is reiterated and reinforced in national legislation,⁴² which also states that it is parents who have the right to guide and direct their child’s education and upbringing, including their religious and cultural education.⁴³

31. FOR SA wishes to point out that the Department, however well-meaning its interventions, is obliged to respect these parental rights due to the international instruments ratified,⁴⁴ and in terms of the Children’s Act, which grants parents the right of care.⁴⁵ As the Department is tasked with protecting the above parental rights under these laws, it must not infringe on these rights through the Guidelines.

32. The Guidelines, however, directly affect the afore-mentioned parental rights by recommending (clauses 14 and 15 of the Guidelines) that schools utilize the “school

⁴¹ Article 9 of the African Charter on Human and Peoples’ Rights (“**Banjul Charter**”), 1990 provides for the right of children to Freedom of Thought, Conscience and Religion and explicitly mandates that “**State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.**” [Own emphasis added.]

⁴² Section 18(2)(a) of the **Children’s Act** (Act 38 of 2005) reads as follows:

“The **parental responsibilities and rights** that a person may have in respect of a child, **include** the responsibility and the **right to care** for the child” with the Act defining “**care**” as including *inter alia* “safeguarding and promoting the **wellbeing of the child; protecting the child from... exploitation and any other physical, emotional or moral harm**”. [Own emphasis added]

See also article 18.4 of the United Nations International Covenant on Civil and Political Rights which recognises parents’ primary responsibility.

⁴³ Definition of “**care**” contained in section 1 of the Children’s Act.

See also article 9 of the Banjul Charter referred to above.

See also article 26.3 of the Universal Declaration of Human Rights, 1948.

⁴⁴ Articles 5 and 14 of the United Nations Convention on the Rights of the Child, 1990.

⁴⁵ Section 18(2)(a) of the Children’s Act reads as follows:

“The **parental responsibilities and rights** that a person may have in respect of a child, **include** the responsibility and the **right to care** for the child” with the Act defining “**care**” as including *inter alia* “safeguarding and promoting the **wellbeing of the child; protecting the child from... exploitation and any other physical, emotional or moral harm**”. [Own emphasis added]

*environment, curriculum and assemblies*⁴⁶ to promote the ideological position adopted by the Guidelines and “*educate the school community about ... gender identity rights*”.⁴⁷

33. It is important to note that there is no such thing in South African law as “*gender identity rights*” – only the right not to be unfairly discriminated against based on one’s gender,⁴⁸ which is completely different to a right to “*gender identity*”. The inclusion of “gender” in the South African Constitution was historically intended to protect females from being subjected to systemic harmful patriarchal practices.

FOR SA’s Recommendations:

34. Given the aforesaid, FOR SA recommends that the Department revise the Guidelines as follows to ensure that they are ideologically neutral and that the rights of all learners and teachers are fully respect, protected and promoted:

34.1. Amend clause 6.1 so that it does not confer a right.

34.2. Insert specific provisions to ensure the protection of the dignity, freedom of belief and opinion, and freedom of expression of both fellow learners and teachers - as opposed to merely catering for their “*sensitivities*”.

34.3. Amend clause 8.1 to protect the equality of biological girls in their sports teams.

34.4. Remove clauses 9.1 and 10, which conflate sex and gender and thereby exposes fellow learners to privacy and safety risks.

34.5. Insert specific provisions protecting the rights of parents to be consulted in advance in the event that any training and/or content is planned to be taught during any school time (including assemblies). This is in accordance with the national Education Department’s *White Paper on Education and Training* which states that:

*“Parents or guardians have the primary responsibility for the education of their children, and have the **right to be consulted** by state authorities with respect to the form that education should take and to take part in its governance.”*

⁴⁶ Guidelines clause 14.1

⁴⁷ Guidelines clause 15.4

⁴⁸ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

34.6. Insert specific provisions to protect parents' rights to educate their children according to their own values and belief as per the aforementioned *White Paper on Education and Training* which states that:

“Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents’ right to choose includes choice of the language, cultural or religious foundation of the child’s education, with due respect to the rights of others and the rights of choice of the growing child.”;

34.7. Insert specific provisions to protect a parent’s right to withdraw their children from training and/or classes where the content is in conflict with their beliefs and/or values.

35. We trust that you find these submissions of assistance to you, and request that you please keep us informed of any developments and include us in any consultations with stakeholders, in relation to this matter.

Kind regards,

Adv Nadene Badenhorst

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THE END.