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School Law

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18-1 INTRODUCTION

18-1.01 Right to Education

18-1.01(a) United States Constitution

The United States Constitution does not guarantee students a public education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973); *Sandlin v. Johnson*, 643 F.2d 1027, 1029 (4th Cir. 1981) (public education is not a fundamental right so as to trigger strict scrutiny of denial of equal protection claims). However, once state statutes extend the right to education (see section [18-1.01\(c\)](#)), it may be revoked or denied only in a manner consistent with the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). Any denial of the right to a discrete group must be justified by a showing that it furthers some substantial state interest. *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982) (Texas statute that authorized local school districts to deny enrollment to children who are not legally admitted to the United States violated the Equal Protection Clause).

18-1.01(b) Virginia Constitution

The Virginia Constitution provides that “[t]he General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.” Va. Const. art. VIII, § 1. In *Scott v. Commonwealth*, 247 Va. 379, 443 S.E.2d 138 (1994), the Court held that the Virginia Constitution guarantees a minimum standard of quality for educational funding to districts but does not guarantee uniformity of funding to all districts. Despite the seemingly broad language, the Court in *County Sch. Bd. v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963), held this provision to not be self-executing.

The Attorney General opined that Va. Const. art. VIII, § 10, read together with art. I, § 16 and art. IV, § 16, prohibits state aid to students in private sectarian schools through tuition grants or vouchers. 1994 Op. Va. Att’y Gen. 21.

18-1.01(c) Statutory Basis

The right to public education in Virginia also has a statutory basis. The public schools in each school division shall be free to each person of school age (defined in Va. Code § 22.1-1) who resides within the school division. Va. Code § 22.1-3. A local school board may admit others on a tuition basis. Va. Code § 22.1-5. A school board may also provide programs for certain students for whom English is a second language. If state funding is provided for such programs, no tuition shall be charged to such students. Va. Code § 22.1-5(D).

18-1.01(d) Children With Disabilities

Children with disabilities, ages two to twenty-one, are entitled to a “free, appropriate public education.” See section [18-7](#).

18-1.01(e) Standards of Quality

In order to implement the command of Article VIII, § 1 of the Virginia Constitution, the State Board of Education prescribes the Standards of Quality. The Standards of Quality as

formulated by the State Board are subject to revision by the General Assembly. Va. Const. art. VIII, § 2. The Standards of Quality are found in Va. Code §§ 22.1-253.13:1 to 22.1-253.13:10.

18-1.02 Organization

18-1.02(a) State Board of Education

The State Board of Education, a body of nine individuals appointed by the Governor, is charged with the general supervision of the public school system in Virginia. Va. Const. art. VIII, § 4; Va. Code § 22.1-9. This Board has the primary responsibility and authority for effectuating the educational policy of the State, subject to the ultimate authority of the General Assembly. Va. Const. art. VIII, § 5; Va. Code §§ 22.1-8 to 22.1-20. The State Board is required to divide the Commonwealth into such school divisions as will promote the realization of the Standards of Quality. Va. Code § 22.1-25; *Kilpatrick v. Smith*, 77 Va. 347 (1883) (“[T]he Board of Education should be made the efficient supervisory influence in the conduct and management of the public free school system.”); see also *James v. Duckworth*, 170 F. Supp. 342 (E.D. Va.), *aff’d*, 267 F.2d 224 (4th Cir. 1959). Of the nine Board members, at least five must reside in different superintendent’s regions. Va. Code § 22.1-9.

Virginia Code § 22.1-17.6 provides a legislative mandate that the Board minimize the information and forms that the Department of Education requires from schools to what is necessary to comply with state or federal law, unless such information is relevant to student outcomes or the efficient operation of the public schools, or the Department can otherwise demonstrate a compelling need.

18-1.02(b) Superintendent of Public Instruction

The Superintendent of Public Instruction serves as the secretary of the State Board. Va. Code § 22.1-23. The Superintendent is the chief administrative officer of the State school system.

18-1.02(c) Local School Boards

Local school boards are vested with the duty of supervision of the schools in their respective divisions. Va. Const. art. VIII, § 7; *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636 (1959) (a statute divesting local boards of all power and control over the schools in their respective districts is unconstitutional); accord *Howard v. Alleghany Cnty. Sch. Bd.*, 203 Va. 55, 122 S.E.2d 891 (1961). Management of a school board’s teaching staff is a matter for the local board, not the State Board or the General Assembly. *Richmond City Sch. Bd. v. Parham*, 218 Va. 950, 243 S.E.2d 468 (1978). However, the Attorney General has determined that the General Assembly’s limitations regarding the starting date for students in Va. Code § 22.1-79.1, which directs local school boards to set the starting date for students absent a waiver from the State Board for good cause, is not an “intolerable intrusion into the prerogatives reserved to local school boards” and is not, therefore, unconstitutional. 2010 Op. Va. Att’y Gen. 34.

18-2 SCHOOL BOARDS

18-2.01 In General

The local school board is charged with the duty of supervision of the schools in its division. Va. Code § 22.1-28; *Bradley v. Sch. Bd.*, 462 F.2d 1058 (4th Cir. 1972), *aff’d*, 412 U.S. 92, 93 S. Ct. 1952 (1973); *Fairfax Cnty. Sch. Bd. v. S.C.*, 297 Va. 363, 827 S.E.2d 592 (2019); *Bristol Va. City Sch. Bd. v. Quarles*, 235 Va. 108, 366 S.E.2d 82 (1988). While a school board has authority to consolidate certain functions with a city or county, e.g., health care plans or financial accounting services, sharing a locality’s chief financial officer may impermissibly restrict the independence of the school board in budgetary matters. 2011 Op. Va. Att’y Gen. 118.

18-2.02 Board Members**18-2.02(a) Qualifications—Va. Code § 22.1-29**

Virginia Code § 22.1-29 sets forth the following qualifications required of each person appointed or elected to a school board:

1. Qualified voter
2. Bona fide resident of the district or school division
3. Must take oath before entering office (Va. Code § 22.1-31)

A school board may provide for the appointment of a non-voting, advisory student representative to the board. Such student may be excluded from closed meetings. Va. Code § 22.1-86.1.

18-2.02(b) Who May Not Be a Member or Tie-Breaker—Va. Code § 22.1-30

Virginia Code § 22.1-30 states that the following may not act on a school board or serve as a tie breaker:

1. State, county, city or town officers, or their deputies.¹
2. A member of the governing body of a county, city or town.²
3. Any employee of a school board. See *also* Va. Code § 22.1-57.3(G); 2010 Op. Va. Att’y Gen. 3 (employees of a school division are employees of the school board).
4. A father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law, or brother-in-law of a member of the county governing body. This does not preclude a school board member who was appointed prior to the election of the relative to the county’s board of supervisors from continuing to serve on the school board after the relative’s election. 2014 Op. Va. Att’y Gen. 107.

The Attorney General has opined that persons in the above categories may be elected as members of a school board; the prohibition is only for appointments to the board. 2011 Op. Va. Att’y Gen. 124.

The following officials are excepted from the exclusions above:

1. Local directors of social services;
2. Commissioners in chancery;
3. Commissioners of accounts;
4. Registrars of vital records and health statistics;
5. Notaries public;
6. Clerks and employees of the federal government in the District of Columbia;
7. Medical examiners;
8. Officers and employees of the District of Columbia;
9. In Northumberland County, oyster inspectors;
10. In Lunenburg County, members of the county library board and members of the local board of social services;

¹ The deputies of constitutional officers may be elected, but not appointed, as members. Va. Code § 22.1-30(B).

² The Attorney General has opined that this prohibition does not prevent a member of a town council from serving on a county school board. 2011 Op. Va. Att’y Gen. 71.

11. Auxiliary deputy sheriffs and auxiliary police officers receiving less than five dollars in annual compensation;
12. Members of the town councils serving towns within Craig, Giles, and Wise Counties; and
13. Public defenders.

Va. Code § 22.1-30(A).

18-2.02(c) Compensation—Va. Code § 22.1-32

Elected or appointed school board members may be paid the same amount as members of their respective board of supervisors or council and in accordance with those same procedures. Va. Code § 22.1-32; *see also*, e.g., 2002 Op. Va. Att’y Gen. 166. County school boards may establish a salary increase prior to July 1 of any year in which the members are to be elected or appointed, or if they have staggered terms, prior to July 1 of any year in which at least two members are to be elected or appointed, effective January 1 of the following year. Va. Code § 22.1-32. City or town school boards may establish a salary increase prior to December 31 in any year preceding a year in which members are to be elected or appointed, effective on July 1 of the year the election or appointment occurs if the election or appointment occurs prior to July 1, or on January 1 of the following year if the election or appointment occurs after June 30. *Id.* Except for boards with staggered terms, no salary increase can become effective during an incumbent member’s term of office. *Id.* The chairman may be paid an additional salary not exceeding \$2,000 per year. *Id.* Members may be paid a mileage allowance. *Id.*

18-2.02(d) Methods of Selection

18-2.02(d)(1) Popular Election of School Board

Most localities provide for the popular election of school board members as the result of voter approval in a local referendum. Va. Code §§ 22.1-57.1 to 22.1-57.5. Elections of school board members in a locality are held to coincide with the elections for members of the locality’s governing body at the regular general election in November or May, as the case may be. Va. Code § 22.1-57.3(A).

The initial elected board consists of the same number of members as the appointed school board it replaces, and members are elected from the established election districts on the same basis as the school board previously appointed. If the replaced appointed school board was not appointed either on an at-large basis or on the basis of the established election districts, the members are elected at large unless the locality provides for election on the basis of the established election districts. If the appointed school board was appointed at large, the locality may establish school election districts. The governing body may provide for a locality-wide district, one or more districts comprised of a part of the locality, or any combination thereof, and for the apportionment of one or more school board members to any district. Va. Code § 22.1-57.3(B); *see* 1999 Op. Va. Att’y Gen. 103.

Although Va. Code § 22.1-57.3(B) provides that the initial elected school board shall have the same number of members as the appointed board it replaces, a board of supervisors may provide by ordinance for school board representation with one representative per election district. A board of supervisors has the authority to abolish at-large seats. Town representation would violate the principle of one-person, one vote. 1995 Op. Va. Att’y Gen. 155.

Vacancies on elected school boards are filled by special elections ordered by the court to be held on the date of the next general election, unless the school board requests an earlier date. However, if the vacancy occurs within ninety days of the next general election, the special election is held on the following general election, unless otherwise requested by the school board. The remaining school board members make an interim

appointment within forty-five days of a vacancy until the special election is held. If a majority of the members cannot reach agreement, then the judges of the jurisdiction's circuit court fill the vacancy. If no person files and no qualified person is elected by write-in vote, a vacancy shall be deemed to exist as of January 1 or July 1, as the case may be, following the general election. Va. Code §§ 22.1-57.3(D), 24.2-226, and 24.2-228.

Virginia Code § 22.1-57.3(H) provides that if an elected school board chooses to have a tie-breaker, that person must be elected in the same manner and for the same term as other school board members. Any vacancy in the position is addressed as discussed in the preceding paragraph. Tie-break procedure is set forth in Va. Code § 22.1-75.

Voters may choose by referendum to revert to the appointment of school board members. Va. Code § 22.1-57.4.

18-2.02(d)(2) By Appointment

Virginia's statutory scheme for appointing local school board members, as opposed to electing them, is constitutional. *Irby v. Fitz-Hugh*, 692 F. Supp. 610 (E.D. Va. 1988), *aff'd sub nom. Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989).

At least seven days prior to the appointment of any school board member, the appointing authority must hold a public hearing. Publication of the hearing by newspaper must be given at least seven days prior to any such hearing. Only nominees or applicants considered at the public hearing may be appointed. Va. Code § 22.1-29.1.

18-2.02(d)(2)(i) Single County

Where a single county constitutes the division, the school board is selected by a school board selection commission. Va. Code §§ 22.1-35 to 22.1-36. Notice must be published in accordance with Va. Code § 22.1-37 prior to any appointments being made. § Vacancies are filled by the school board selection commission. Va. Code § 22.1-39. The commission may appoint a tie-breaker—a qualified voter who is a resident of the county—to a four-year term, after giving notice. Va. Code § 22.1-40.

Alternatively, where a single county constitutes the school division, voters may petition for a referendum asking whether selection of school board members be accomplished by the School Board Selection Commission or by the governing body of the county. Va. Code § 22.1-42. If the referendum results in selection "by the governing body," the School Board Selection Commission is abolished. Va. Code § 22.1-43. Appointments are made by majority vote of the body for terms of four years, except that vacancies are filled for the unexpired portion of the term. The tie-breaker term is four years and, if a vacancy occurs, the appointment is for a full four years. A referendum to revert to appointment by School Board Selection Commission, Va. Code § 22.1-45, cannot be held within four years of the previous referendum. Va. Code § 22.1-46.

18-2.02(d)(2)(ii) County Manager Plan or County Board Forms of Government

Under a county manager plan form of government, three to seven members are chosen by the county board of supervisors. A resident of the county may be appointed by county supervisors as a tie-breaker for a term of four years. Va. Code § 22.1-47. However, the only current county to utilize this method is Arlington, which has opted to elect school board members.

Under a county board form of government, three to six members are chosen by the county board of supervisors. Specifics are set forth in Va. Code § 15.2-410. Currently, however, all counties using this method have elected school boards.

18-2.02(d)(2)(iii) City or Town Constitutes School Division

The governing body of a city or town appoints three members for each district. Va. Code §§ 22.1-49 to 22.1-50. If the city or town school division consists of one district, five members will be appointed. Va. Code § 22.1-50. Terms are for three years, commencing on July 1. Initial appointments are staggered; a vacancy is filled for the unexpired term and successors are to be appointed within thirty days of July 1 for expiring members. Va. Code §§ 22.1-49 to 22.1-50. The governing body may, by duly adopted ordinance, limit the number of consecutive terms served by school board members. Va. Code § 22.1-50.

18-2.02(d)(2)(iv) Town Constitutes a Separate School Division

When a county contains a town that is a separate school division, the school board for such county shall have no member representing such town. Va. Code § 22.1-36.1. The county school board shall be comprised of one member from all of the election districts other than districts that are comprised of more than 5 percent of town residents, and an additional at-large member from the entire county, excluding the town. *Id.*

18-2.02(d)(2)(v) School Division Composed of Less Than One County or City or Part or All of More Than One County or City

The board is composed of six to nine members, with the exact number determined by the governing body of the county or city if the school division is composed of less than one county or city, or by agreement of the governing bodies of counties and cities where the school division is composed of part or all of more than one county or city. Va. Code § 22.1-52. For multi-county/city situations, see Va. Code § 22.1-53.

18-2.02(d)(2)(vi) Urban County Manager and Urban County Executive Forms of Government

For provisions relating to selection of school board members in urban county manager and urban county executive forms of government, see Va. Code § 15.2-837. Currently, all such school boards under these forms are elected.

18-2.02(d)(2)(vii) Consolidation

For provisions relating to selection of school board members in situations where there is a consolidation of school divisions comprised of single cities and single counties, see Va. Code § 22.1-38.1. For provisions relating to the effect of consolidation on the receipt of state funding, see Va. Code §§ 15.2-1302 and 22.1-25(D). See *also* section [15-13.03\(d\)](#) of Chapter 15, Governmental Boundary and Status Changes; 2011 Op. Va. Att’y Gen. 76 (discussing state funding of consolidated divisions); 2001 Op. Va. Att’y Gen. 63 (discussing the effect on a joint school system when the city transitions to town status); Va. Code § 22.1-25(D) (providing for the promulgation of regulations regarding consolidation proposals).

18-2.03 Character—Va. Code § 22.1-71

Duly appointed or elected members constitute the school board. A school board is declared a body corporate. *Lee v. King William Cnty. Sch. Bd.*, 146 Va. 804, 132 S.E. 863 (1926) (as it respects third persons, a school board is a corporation). School boards are “public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication.” *Kellam v. Norfolk City Sch. Bd.*, 202 Va. 252, 117 S.E.2d 96 (1960).

School boards may sue or be sued. A suit by the school board must be brought in its corporate name. *Stewart & Palmer v. Thornton*, 75 Va. 215 (1881); *see also D.N. v. Louisa Cnty. Pub. Sch.*, 156 F. Supp. 3d 767 (W.D. Va. 2016) (public school divisions are not entities that may be sued); *Augustine ex rel. M.A. v. Winchester Pub. Sch. Dist.*, No. 5:13cv25 (W.D. Va. Sept. 17, 2013) (“Winchester Public School District” is not a legal entity capable of being sued); *M.S. v. Fairfax Cnty. Sch. Bd.*, No. 1:05-cv-01476 (E.D. Va. Mar. 20, 2006) (“Fairfax County Public Schools” is not an entity that can be sued), *aff’d in part and vacated in part on different grounds*, 553 F.3d 315 (4th Cir. 2009). The power to sue includes the power to settle litigation. 1979-80 Op. Va. Att’y Gen. 297. School

boards may contract and be contracted with and may purchase, take, hold, lease, and convey real and personal property.

18-2.04 Powers and Duties—Va. Code § 22.1-79

School boards shall:

1. See that school laws are enforced and explained. Va. Code § 22.1-79(1).
2. See that schools are operated efficiently and according to law. Va. Code § 22.1-79(2).
3. Care for and manage property (including the erection, furnishing, and non-instructional operation of school buildings, which may be provided by private entities through purchase, lease, or other contract). Va. Code § 22.1-79(3).
4. Provide for consolidation of schools, redistricting of school boundaries, or adoption of pupil assignment plans when such will contribute to the efficiency of the school division. Va. Code § 22.1-79(4). The Virginia Attorney General has opined that a board of supervisors may not control through its appropriation of funds a school board's decision whether and how to consolidate schools. 2010 Op. Va. Att'y Gen. 126.
5. Operate and maintain the schools, including the determination of the length of the school term, the studies to be pursued, the methods of teaching, and the government to be employed. Va. Code § 22.1-79(5). In connection with determining the length of the school term, see Va. Code § 22.1-79.1, mandating the adoption of local school calendars that require that the first day of student attendance occur no sooner than fourteen days before Labor Day, unless the Board of Education grants a waiver for good cause as statutorily specified; see *also* 2010 Op. Va. Att'y Gen. 111, finding this statute constitutional.
6. Establish and administer a grievance procedure for all school board employees, except the division superintendent and those employees covered under Va. Code §§ 22.1-293 (principals and assistant principals) and 22.1-306 (teachers), who have completed such probationary period as required by the school board, not to exceed eighteen months. Va. Code § 22.1-79(6). See *Sullivan v. Warren Cnty Sch. Bd.*, 49 Va. Cir. 226 (Warren Cnty. 1999); *Pettis v. Nottoway Cnty. Sch. Bd.*, No. 3:12cv864 (E.D. Va. May 31, 2013). A principal is covered by the state grievance procedure established pursuant to Va. Code § 22.1-308 for purposes of dismissal or probation. *Tazewell Cnty. Sch. Bd. v. Brown*, 267 Va. 150, 591 S.E.2d 671 (2004). See section [18-8.03](#).
7. Perform such other duties as shall be prescribed by the Board or as are imposed by law. Va. Code § 22.1-79(7).
8. Obtain public comment through a public hearing not less than seven days after public notice prior to providing for (1) the consolidation of schools; (2) the transfer of the administration of all instructional services for any public school classroom or all noninstructional services in the school division pursuant to a contract with any private entity; or (3) in school divisions having at least 15,000 pupils, for redistricting of school boundaries or adopting any pupil

assignment plan affecting the assignment of at least 15 percent of the pupils in the affected school. Va. Code § 22.1-79(8).

9. At least annually, survey the school division to identify critical shortages of (1) teachers and administrative personnel by subject matter, (2) specialized student support positions as that term is described in subsection O of Va. Code § 22.1-253.13:2, and (3) school bus drivers and report such critical shortages to the Superintendent and to the Virginia Retirement System; however, the school board may request the division superintendent to conduct such survey and submit such report to the school board, the Superintendent, and the Virginia Retirement System. Va. Code § 22.1-79(9).
10. Ensure that the schools in the division are registered with the Department of State Police to receive electronic notice of registration information of any person required to register with the Sex Offender and Crimes Against Minors Registry pursuant to Va. Code § 9.1-900 et seq. Va. Code § 22.1-79(10).
11. Ensure that information about application and eligibility for free or reduced price student meals is made available to parents at back to school night events. Va. Code § 22.1-79(11).
12. Ensure that the information sheet on the SNAP benefits program provided pursuant to Va. Code § 63.2-801(D) is sent home with each student. Va. Code § 22.1-79(12).
13. Ensure that a fillable free or reduced price meals application is sent home with each student. Va. Code § 22.1-79(13).

This list is not exhaustive since other powers and duties appear throughout Title 22.1. See, e.g., Va. Code § 22.1-26.1 (establish satellite classrooms for kindergarten through third grade at private businesses); Va. Code § 22.1-60.1 (annually evaluate superintendents); Va. Code § 22.1-79.4 (establish threat assessment teams); Va. Code § 22.1-89.4 (develop policies relating to commercial, promotional, and corporate partnerships and sponsorships); Va. Code § 22.1-127 (condemnation power); Va. Code § 22.2-132.1 (operate child day care); and Va. Code § 22.1-212.2:2 (establish public school foundations).

18-2.05 Construction of School Board's Power

The powers of school boards are limited to those expressly granted, necessarily implied, or essential and indispensable to the functions of such board. *Commonwealth v. Cnty. Bd. of Arlington Cnty.*, 217 Va. 558, 232 S.E.2d 30 (1977). For a power to be necessarily implied, it must be consistent with, and directly related to, a stated power or function of the board. See *W.M. Schlosser Co. v. Fairfax Cnty. Sch. Bd.*, 980 F.2d 253 (4th Cir. 1992); *Eberhardt v. Fairfax Cnty. Employees Ret. Sys. Bd. of Trs.*, No. 1:10cv771 (E.D. Va. Mar. 30, 2012) (no explicit or implied authority for school board to establish or monitor a retirement system); 2015 Op. Va. Att'y Gen. 52 (a local school board has authority to include sexual orientation and gender identity in its nondiscrimination policies; overruling 2002 Op. Va. Att'y Gen. 105); ³ 2004 Op. Va. Att'y Gen. 117 (a local school board has no authority to lend money to a board of supervisors); 2007 Op. Va. Att'y Gen. 82 (a local school board may not charge for the transportation of students to and from school); 2007 Op. Va. Att'y Gen.

³ Note that the Virginia Values Act of 2020 prohibits discrimination because of a person's "sexual orientation" or "gender identity." Va. Code § 2.2-3900(B). The law applies to school boards. *Id.* § 15.2-1500.1(B).

80 (a local school board has no authority to prohibit the possession of firearms at school board meetings that are not held on school property); 2012 Op. Va. Att’y Gen. 72 (local school boards may act together with localities to create a single voluntary, self-funded trust to insure employee and dependent health benefits pursuant to the Dillon Rule, Va. Code § 22.1-85, and the Joint Powers Act).

In *Lafferty v. Fairfax County School Board*, 293 Va. 354, 798 S.E.2d 164 (2017), the Virginia Supreme Court held that a student and his parents lacked standing to challenge the authority of a school to include sexual orientation and gender identity in its nondiscrimination policy, finding that their claimed injuries were speculative. The Court held that “general distress over a general policy does not alone allege injury sufficient for standing.” The Court also found that the plaintiffs lacked taxpayer standing.

18-2.06 Meetings

18-2.06(a) Types of Meetings

A school board holds its annual organizational meeting for the purposes of establishing its regular meeting schedule for the ensuing year. Organizational meetings are held in January or July except for county school boards that are solely appointed, in which case the organizational meeting is in July. A board may hold special meetings and can fix its own procedures for calling a special meeting. Va. Code § 22.1-72.

A district court held that if a school board opens its meeting for public comment, a restriction on public speakers prohibiting attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group is unconstitutional. *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001). While this decision is not binding across Virginia, the broader issue in the case was determining permissible limits on speech in a limited public forum. A school board may not limit speech based on viewpoint discrimination, but may be able to limit the subject matter of speech to school board business.

18-2.06(b) Quorum

A majority of the board constitutes a quorum. Va. Code § 22.1-73. A vacancy reduces the number of persons who are duly appointed or elected and, therefore, reduces the number of persons necessary to establish a quorum. 2010 Op. Va. Att’y Gen. 114.

18-2.06(c) Minutes

The minutes shall be signed by the chairman and the clerk of the school board. Va. Code § 22.1-74.

18-2.07 Officers

At its annual meeting, the board elects a chairman and approves a designee of the division superintendent to attend meetings when the superintendent is unable to do so. On recommendation of the superintendent, the board appoints a clerk at its annual meeting. Optional officers include a vice chairman and a deputy clerk. An officer’s term of office is one year. Va. Code § 22.1-76.

The clerk and deputy clerk each furnish a corporate surety bond that the board fixes for not less than \$10,000. The premium is paid by the board. The clerk or deputy clerk may not be (a) the mayor; (b) a member of the governing body; (c) an officer of a city, town, or county; or (d) a deputy officer of a city, town, or county. A division superintendent is not ineligible. Va. Code § 22.1-76.

18-2.08 Bylaws & Regulations

A local school board may adopt bylaws and regulations for its own government, for the management of its official business, and for the supervision of schools (e.g., proper discipline of students) which are not inconsistent with State statutes or State Board of

Education regulations. Va. Code § 22.1-78; *Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926) (local board is authorized to promulgate regulations for the conduct of the schools). The courts should not supplant school officials' interpretation of school regulations with their own, so long as the interpretation of school officials is reasonable. *Bd. of Educ. v. McCluskey*, 458 U.S. 966, 93 S. Ct. 1952 (1982).

18-2.09 Annual Report

An annual report must be filed by each school board with the Superintendent of Public Instruction on or before September 15 of each year. For good cause shown, a maximum extension of fifteen days may be obtained. Va. Code § 22.1-81.

18-2.10 Insurance

School boards are authorized to maintain insurance with companies authorized to do business in Virginia for property damage, and liability insurance for certain or all officers and employees, student teachers, and others. Va. Code § 22.1-84.

18-2.11 Benefits

School boards are authorized to establish a) a fund for payment of medical benefits to school board members, employees, and their dependents; and b) a fund for payment of expenses incurred by employees for dependent care. Va. Code § 22.1-85; see 1995 Op. Va. Att'y Gen. 162. This authority may be exercised jointly with other school boards and localities. 2012 Op. Va. Att'y Gen. 72.

18-2.12 Park Areas

Where park areas are adjacent to a public school, the school board is "authorized and encouraged" to develop or improve such area as an extension of the school's facilities. Va. Code § 22.1-80.

18-2.13 School Committees

When it deems it necessary, each school board is required to call meetings of the people of the school division for consultation in regard to matters of school interest. Committees of three to seven members for each school may be appointed to advise the board about the situation at that school. Va. Code § 22.1-86. These members may be parents, citizens, or representatives of public agencies, business, and industry. The committee may further community participation in the development of a biennial plan for each public school as required by the educational Standards of Quality. See 1993 Op. Va. Att'y Gen. 141. The statute, however, does not provide authority for a school board to appoint an ex officio, nonvoting teacher representative to the school board. 1995 Op. Va. Att'y Gen. 160.

School boards also may appoint a local advisory committee on gifted education to review the annual local plan and evaluate implementation of the previous year's plan. Va. Code § 22.1-18.1.

18-2.14 Legal Actions

Legal actions instituted by a school board against "any other governmental agency in Virginia" (including expending funds therefor) must first be approved by the governing body of the county, city or town constituting the school division, unless the legal action is between the school board and the governing body. Va. Code § 22.1-82(C).

18-2.14(a) Employment of Legal Counsel

A school board may employ legal counsel. Counsel is authorized to (a) advise the school board about "any legal matter," or (b) to represent the board, any board member, or any school official in any legal proceeding which relates to official school business. Va. Code § 22.1-82(A). The Attorney General has opined that this statutory provision prevails over a city charter provision that required a school board to obtain legal advice only from the city attorney. 2010 Op. Va. Att'y Gen. 1. "Any legal proceeding" includes criminal as well as civil

proceedings. *Wood v. Halifax Cnty. Bd. of Sup'rs*, 236 Va. 104, 372 S.E.2d 611 (1988). In such cases, all costs and expenses (including liabilities) shall be paid out of school board funds. Va. Code § 22.1-82(B).

18-2.14(b) Legal Fees

A school board may pay the legal fees and expenses of an employee who is (a) arrested, indicted, or prosecuted on any charge arising out of any act committed in the discharge of school duties where such charge is subsequently dismissed or a not guilty verdict is rendered; or (b) made a defendant in a civil action arising out of his official duties as a school employee. Va. Code § 22.1-83.

18-2.14(c) Judicial Review of School Board Decisions

A school board's decision will be set aside if the board exceeded its authority; acted arbitrarily or capriciously; or abused its discretion. "A well-deserved measure of deference . . . must be factored into any application of Va. Code § 22.1-87." *Fairfax Cnty. Sch. Bd. v. S.C.*, 297 Va. 363, 827 S.E.2d 592 (2019). A parent, custodian, or legal guardian of a pupil in the school division has standing to challenge a school board decision. The lawsuit must be filed in the circuit court having jurisdiction in the school division within thirty days of the board's action. Va. Code § 22.1-87; *see Hatrick v. Tagg-Murdock*, Rec. No. 101401 (Va. Oct. 21, 2011) (unpubl.) (failed motion to suspend rules to discuss student suspension did not constitute board action within thirty days and circuit court therefore had no jurisdiction to address legality of suspension).

Review shall be based on the plaintiff's petition, the minutes of the board meeting at which the challenged action was taken, orders of the board, an attested copy of the transcript (if any) of the hearing before the board, and any other relevant evidence. Va. Code § 22.1-87. *Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926), may be cited for the proposition that courts should apply only the legal standard set out above to any challenged decision, and that they should not attempt to question the board's wisdom in making a particular decision. Courts should consider only if there is a rational and factual basis for the decision, not whether they agree with it. *See also Dekenipp v. Loudoun Cnty. Sch. Bd.*, No. 71451 (Loudoun Cnty. Cir. Ct. Aug. 20, 2012) (rezoning of attendance districts not arbitrary); *Hunn v. Loudoun Cnty. Sch. Bd.*, No. 71499 (Loudoun Cnty. Cir. Ct. Aug. 20, 2012) (same); *Johnson v. Chesapeake City Sch. Bd.*, 52 Va. Cir. 252 (City of Chesapeake, 2000) (decision to use textbook not arbitrary); *M.M. v. Chesapeake City Sch. Bd.*, 52 Va. Cir. 356 (City of Chesapeake, 2000) (expulsion of student and school's "zero-tolerance" policy not arbitrary).

18-2.14(d) Sovereign Immunity

See Chapter 20, State Law Immunity of Local Government Entities and Their Employees, section [20-5](#).

18-2.14(e) Statutes of Limitations

Statutes of limitation are applicable to suits brought by school boards. *Fairfax Cnty. Sch. Bd. v. M.L. Whitlow, Inc.*, 223 Va. 157, 286 S.E.2d 230 (1982).

18-2.14(f) Section 1983 Actions

A local school board is a "person" within the meaning of 42 U.S.C. § 1983 and is amenable to suit thereunder. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

Section 1983 actions against public entities such as school boards cannot successfully be premised on theories of respondeat superior, but rather depend upon the existence of an established rule, regulation, policy, or custom, or an action of the public body itself that violates an individual's rights. *Monell, supra*; *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988) (plurality opinion); *Pachaly v. City of Lynchburg*, 897

F.2d 723 (4th Cir. 1990); see *Riddick v. Sch. Bd. of Portsmouth*, 238 F.3d 518 (4th Cir. 2000) (school board not subject to municipal liability based on decisions of superintendent and principal because the board did not delegate final policy making authority to them). But see *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529 (4th Cir. 2022), *aff'g in part and rev'g in part*, No. 4:18cv63 (E.D. Va. Nov. 20, 2020), holding that, because under Virginia law school boards have final policymaking authority over short-term suspensions, school board actions regarding suspensions can serve as “policies” for purposes of § 1983 liability. Although individual school officials or school board members are entitled to assert a qualified immunity defense, qualified immunity from liability for compensatory damages is not available to the school board. See *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).

Non-attorney parents generally may not litigate the claims of their minor children in federal court. *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Augustine v. Winchester Pub. Sch. Dist.*, No. 5:13cv25 (W.D. Va. Sept. 17, 2013) (holding that *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994 (2007), under which parents are entitled to prosecute IDEA claims on their own behalf and are not required to have counsel, does not extend to non-IDEA claims).

A municipality cannot be held liable for punitive damages in a § 1983 action. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981). School boards are similarly exempt. See *Liggins v. Clarke Cnty. Sch. Bd.*, No. 5:09CV00077 (W.D. Va. Sept. 17, 2010), *aff'd*, No. 10-2239 (4th Cir. May 20, 2011); *Myers v. Loudoun Cnty. Sch. Bd.*, 500 F. Supp. 2d 539 (E.D. Va. 2007).

School board members and school officials exercising discretion in the operation of schools have “qualified immunity” from civil damages in § 1983 actions if their conduct does not violate an individual’s clearly established statutory or constitutional rights of which a reasonable person would have known. See *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). Implicit in an official’s qualified immunity is the “entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.” *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985). In a proper case, school board members are entitled to legislative immunity under 42 U.S.C. § 1983 when they adopt prospective, legislative-type rules or act within a traditional legislative province. *Chadwell v. Lee Cnty. Sch. Bd.*, 457 F. Supp. 2d 690 (W.D. Va. 2006) (contrasting legislative and administrative actions in an employment context).

In *Ominski v. Tran*, No. 2:96cv724 (E.D. Va. July 19, 1997), a district court held that school officials and other teachers were not liable under § 1983 for sexual abuse of a student by a teacher. The court held that as there was no affirmative duty of the officials and teacher to protect the student, there was no liability even if officials were deliberately indifferent. (The court also found no deliberate indifference.) In *Baynard v. Lawson*, 76 F. Supp. 2d 688 (E.D. Va. 1999), the court held there was no claim under § 1983 for a constitutional deprivation of parental rights based on the school’s knowledge and failure to warn parents of the child’s molestation by teacher. In the same case, the Fourth Circuit on appeal upheld a finding that the principal was deliberately indifferent to the risk presented by the teacher, who was allowed to continue teaching despite the prior known instances of sexual abuse of a student. *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001). In *Rasnack v. Dickinson County School Board*, No. 2:03cv00038 (W.D. Va. June 12, 2003), the court assumed that a principal could be held liable for the abuse of a student by a teacher if the principal learned of the allegations of abuse but was deliberately indifferent by failing to take actions to prevent or stop the abuse. The principal was not liable in *Rasnack* because she had taken certain steps to prevent or stop the abuse. The court subsequently determined, however, that the superintendent was subject to liability as he

was aware of prior instances of abuse and failed to take any measures. *Rasnick v. Dickenson Cnty. Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004); see also *Meeker v. Edmundson*, 415 F.3d 317 (4th Cir. 2005) (no qualified immunity when allegation is that coach encouraged the teammates' hazing of wrestler); cf. *Cole v. Buchanan Cnty. Sch. Bd.*, 328 F. App'x. 204 (4th Cir. 2009) (given the breadth of the school board's authority to control access to school grounds, a reasonable board member may have believed it was constitutional to ban a reporter from school grounds in order to protect both the safety of the students and the integrity of the educational process).

Citing an unpublished Fourth Circuit opinion, federal district courts have held that the relationship between a school and a pupil does not create a special relationship sufficient to trigger the substantive protections of the due process clause. *Wilson v. Isle of Wight Cnty.*, 939 F. Supp. 2d 568 (E.D. Va. 2013) and *J.S. v. Thorsen*, 766 F. Supp. 2d 695 (E.D. Va. 2011) (both citing *Stevenson v. Martin Cnty. Bd. of Educ.*, 3 F. App'x 25 (4th Cir. 2001)).

Although stated in the context of a criminal conviction for lewd conduct with a minor over which an adult has a custodial or supervisory relationship, the Virginia Supreme Court broadly defined when a school employee maintained such a relationship with a student. Lunchroom and sidewalk duty established such a relationship with a student and that relationship was maintained even when the proscribed acts occurred outside the context establishing the relationship; e.g., the acts were unrelated to any school activity, taking place in a private home during winter break. *Linnon v. Commonwealth*, 287 Va. 92, 752 S.E.2d 822 (2014).

For a fuller discussion of § 1983 actions, see [Chapter 19, 42 U.S.C. § 1983](#).

18-2.14(g) Title IX

This law provides that no "person" shall be discriminated against on the basis of sex by any educational program or activity receiving federal financial assistance. 20 U.S.C. § 1681. The U.S. Supreme Court has held that Title IX proscribes discrimination against employees, as well as students and beneficiaries. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 102 S. Ct. 1912 (1982). The Federal Department of Education has promulgated regulations to implement Title IX. See 34 C.F.R. Part 106. A Title IX lawsuit cannot be brought against an individual. *Bracey v. Buchanan*, 55 F. Supp. 2d 416 (E.D. Va. 1999).

18-2.14(g)(1) Sexual Harassment or Assault

In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S. Ct. 1989 (1998) (5-4), the United States Supreme Court held that a school district may be held liable under Title IX for sexual harassment of a student by a teacher only if an official with authority to institute corrective measures on the district's behalf had actual knowledge of, and was deliberately indifferent to, the teacher's misconduct. The failure to have a sexual harassment grievance procedure was immaterial to liability. The Court explicitly rejected Title VII law on vicarious liability as a model for Title IX. In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), the court held that although the school principal knew of prior instances of sexual abuse of a student by a teacher, because the principal did not have authority to institute corrective measures, i.e., suspension or termination, liability could not be imputed to the school district.

However, in *Doe v. Fairfax County School Board*, the Fourth Circuit clarified that *Baynard* did not stand for the principle that "a *specific act or instance* of sexual harassment would be insufficient to establish actual notice." 1 F.4th 257 (4th Cir. 2021) (emphasis in original). Rather, *Baynard* held that allegations of past sexual abuse of students, or even a "substantial risk" of or "potential" for future abuse, did not constitute actual notice of *current* abuse for purposes of Title IX. In *Doe*, the court held that a school's receipt of a report alleging sexual harassment is sufficient to establish actual notice. So long as the

report could be reasonably understood to allege sexual harassment, it does not matter, for purposes of liability, whether the school official subjectively understood that the report alleged sexual harassment or whether the official actually believed that harassment occurred. After Fairfax County filed a petition for certiorari with the U.S. Supreme Court, the Court invited the U.S. Solicitor General to file an amicus brief. In its brief, the Solicitor General agreed with the Fourth Circuit's holding that for purposes of Title IX liability, a school's receipt of a report alleging sexual assault is sufficient to establish actual notice, but argued the case did not implicate any circuit conflict warranting the Supreme Court's review.

In interpreting *Baynard*, a district court held that in Virginia only the school board can be considered the appropriate authoritative body pursuant to *Gebser's* interpretation of Title IX. *Rasnick v. Dickenson Cnty. Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004); see also *Litman v. George Mason University*, 131 F. Supp. 2d 795 (E.D. Va. 2001) (no deliberate indifference to the harassment once school obtained actual knowledge because effective action taken), *aff'd*, 92 Fed. Appx. 41 (4th Cir. 2004).

The Fourth Circuit used an analogous test from Title VII jurisprudence in order to determine whether the defendant's actions were sufficiently severe or pervasive so as to create a sexually hostile educational environment in violation of Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007) (en banc); *Sanders v. Brown*, 257 Fed. App'x. 666 (4th Cir. 2007) (finding no supervisory liability on the part of a school principal who was found not deliberately indifferent to the risk of sexual abuse of a student by a teacher, even though there may have been additional precautions the principal could have imposed).

In *Doe v. Russell County School Board*, No. 1:16cv45 (W.D. Va. April 13, 2017), a district court found that *Jennings* overruled *Baynard* to the extent the latter held that the official with knowledge of the sexual misconduct must have authority to suspend or terminate the employee. It is sufficient if the official has authority to take some corrective measures such as preventing access to the student, conducting an investigation, or reporting the misconduct. Thus, as the principal had actual notice and failed to take any measures, the school district could be held liable.

A Title IX damages action may also lie against a school board in cases of student-on-student harassment but only where the school is deliberately indifferent to the sexual harassment, of which it has actual notice, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999); *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257 (4th Cir. 2021) (school may be liable under Title IX for response to single incident of severe, student-on-student sexual harassment if school's response was clearly unreasonable and thereby made victim more vulnerable to future harassment).

In *Feminist Majority Foundation v. Hurley*, 911 F.3d 674 (4th Cir. 2018), the Fourth Circuit held that a basis for imputing liability to a college could exist when students made sexually harassing comments through anonymous postings on a social media site, finding that the school could have sought to disable access to the site on its network, held mandatory assemblies to discuss cyberbullying, and sought to identify the posters through technological means. The court also found that though some steps had been taken to stop the harassment, the school's failure to take any "meaningful" action could constitute deliberate indifference. The court further held that an equal protection claim can be predicated on a university administrator's deliberate indifference to student-on-student sexual harassment, but granted qualified immunity on the grounds that the right was not clearly established. Later decisions have called into question that element of the holding.

See *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257 (4th Cir. 2021); *Butters v. James Madison Univ.*, 145 F. Supp. 3d 610 (W.D. Va. 2015).

Failure to comply with the school's own policy does not necessarily prove deliberate indifference. *Facchetti v. Bridgewater College*, 175 F. Supp. 3d 627 (W.D. Va. 2016).

18-2.14(g)(2) Discrimination on the Basis of Sex

Title IX does not preclude a § 1983 action alleging unconstitutional gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S. Ct. 788 (2009).

In *Alston v. Virginia High School League*, 176 F.R.D. 220 (W.D. Va. 1997), the district court held that a difference in treatment of schedules for boys' and girls' sports stated a Title IX claim. The court in *Alston* assumed for purposes of a Rule 12(b)(6) motion that the allegation that the Virginia High School League received federal funding was sufficient. The United States Supreme Court subsequently held, however, that the mere receipt of dues from federally funded member institutions is not sufficient to bring an entity within the scope of Title IX. *NCAA v. Smith*, 525 U.S. 459, 119 S. Ct. 924 (1999). The Court left undecided whether the relinquishment of controlling authority of a federally-funded program by a federal financial recipient to another entity is sufficient to bring the controlling entity within Title IX's scope. See also *Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999) (schools are not required to mix sexes in contact sports, but if they allow it, they may not discriminate against individuals on the basis of sex). Significant disparities in the quality of the athletic facilities and bathrooms provided to male versus female students may give rise to Title IX liability. 2019 Op. Va. Att'y Gen. 6. For an extensive discussion of Title IX and school athletics, see *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91 (4th Cir. 2011).

In *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2657 (2023), plaintiffs challenged a public charter school's dress code requiring boys to wear pants but girls to wear skirts, jumpers, or skorts to promote "traditional values" and "to preserve chivalry and respect." The court affirmed the district court's grant of summary judgment to the plaintiffs on their Equal Protection claim, vacated the district court's judgment award of summary judgment to the defendants on the plaintiffs' Title IX claim, and remanded the case for further proceedings. Considering the "totality of the circumstances," the court determined that the charter school was a state actor and not "merely . . . a private actor providing a service under its charter contract with the state." *Id.* Accordingly, the court held that "in operating a school that is part of the North Carolina public school system, [the charter school] performs a function traditionally and exclusively reserved to the state." *Id.* The court also determined, however, that the charter school's for-profit management company was not a state actor for purposes of an Equal Protection claim. As such, "in the absence of any important governmental objective supporting" the charter school's requirement that girls wear skirts, the court held "that the skirts requirement fails intermediate scrutiny and facially violates the Equal Protection Clause." *Id.* The court further determined that because the management company received 90 percent of its funding from the four schools operated by the charter school, it was subject to Title IX and that Title IX "unambiguously applies to sex-based dress codes." *Id.*

The private right of action implied by Title IX encompasses claims of retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 125 S. Ct. 1497 (2005) (5-4). The Court held that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX. Significantly, the discrimination does not have to be based on the complainant's sex.

See also *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), in which the Supreme Court held that private rights of action under Title VI (which it recognized was the pattern for Title IX) must be limited to those derived from the statute itself, not implementing regulations. Thus, the Court found that there was no implied right of action based on a theory of disparate impact under Title VI. Construing *Sandoval*, the court in *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), concluded that there is a private cause of action for retaliation under Title VI.

18-2.14(g)(3) Discrimination on the Basis of Transgender Status

In *Grimm v. Gloucester County School Board*, following five years of delays caused by changing policies of successive Presidential administrations, the Fourth Circuit held that the Equal Protection Clause and Title IX “protect transgender students from school bathroom policies that prohibit them from affirming their gender.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). Indeed, joining “a growing consensus of courts,” the court stated that the answer to the question of whether equal protection and Title IX protect transgender students in this way is “resoundingly yes.”

The plaintiff, Gavin Grimm, was born a biological female but transitioned to presenting as a boy, consistent with his male gender identity. At first, he was allowed to use the boys’ restrooms at Gloucester County High School. Following outcry from some parents, however, the School Board adopted a policy under which students could only use restrooms matching their “biological gender.” The school then created single-stall bathrooms as an “alternative” for students with “gender identity issues.” In addition, even though he was issued a new birth certificate reflecting his male gender identity, school administration refused to change the gender on Grimm’s school records.

The Fourth Circuit affirmed the district court’s decision granting the student’s motion for summary judgment. The summary judgment opinion, 400 F. Supp. 3d 444 (E.D. Va. 2019), largely reiterated the reasoning of its previous decision denying the School Board’s motion to dismiss, 302 F. Supp. 3d 730 (E.D. Va. 2018). In both decisions the district court held that “claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory under Title IX”; that transgender individuals constitute “at least” a quasi-suspect class warranting intermediate scrutiny; and that a policy that relies on sex-based stereotypes is a sex-based classification. After a comprehensive review of the medical literature and standards of care recognized by leading public health organizations regarding transgender youth, the Fourth Circuit affirmed. Like the lower court, the Fourth Circuit applied intermediate scrutiny, finding that the Board’s policy was not substantially related to the important objective of protecting student privacy and violated Gavin’s equal protection rights. The Board’s refusal to update the student’s school records similarly violated those rights: the Board’s decision was not substantially related to its important interest in maintaining accurate records “because Grimm’s legal gender in the state of Virginia is male, not female.”

In 2020, the General Assembly directed the Virginia Department of Education to develop model policies concerning the treatment of transgender students in public schools in accordance with evidence-based best practices and addressing issues such as the maintenance of a safe and supportive learning environment, and the prevention of and response to bullying. Va. Code § 22.1-23.3. These [model policies](#) were adopted in March 2021; school boards were directed to adopt policies consistent with the model policies before the beginning of the 2021-2022 school year. *Id.* However, following a change in the governorship, the Department of Education released new [model policies](#) rescinding the previous guidelines. These policies require parental consent for students to (1) use bathroom facilities not matching their gender assigned at birth (except to the extent required by federal law), (2) use a name associated with the student’s gender preference or gender-nonconforming pronoun at school, or (3) receive counseling about gender-related issues at school.

18-2.14(h) Virginia Freedom of Information Act and Government Data Collection and Dissemination Practices Act

Local school boards are subject to the Virginia Freedom of Information Act (VFOIA) and the Government Data Collection and Dissemination Practices Act. Va. Code §§ 2.2-3700 et seq. and 2.2-3800 et seq. The Acts are covered fully in [Chapter 23, FOIA and GDCDPA](#). See 1999 Op. Va. Att’y Gen. 15 (school board may not meet in closed session to discuss selection of its chairman and vice chairman); 2000 Op. Va. Att’y Gen. 24 (elected school board may not meet in closed meeting to discuss the performance of individual members of the board and other related matters).

18-2.14(i) State and Local Government Conflict of Interests Act

Local school boards are subject to this Act. Va. Code § 2.2-3100 et seq. For those employees who may be related to school board members, see Va. Code § 2.2-3119. See *generally* [Chapter 27, The State and Local Government Conflict of Interests Act](#).

In *Ambrogio v. Koontz*, 224 Va. 381, 297 S.E.2d 660 (1982), because they were school system employees whose employment contracts were negotiated individually, two members of the county board of supervisors were not entitled to vote on the appointment of school board members, a matter in which they would have a “material financial interest” under the former Virginia Conflict of Interests Act. A school principal who also was an elected member of the city council was prohibited from voting on appointments to the school board in *West v. Jones*, 228 Va. 409, 323 S.E.2d 96 (1984).

Members of the school board must file a disclosure statement of their personal interests with the clerk of the school board. Employees of the school board so designated by ordinance of the county board of supervisors must file disclosure statements with the clerk of the school board, not the board of supervisors. Va. Code § 2.2-3115; 1999 Op. Va. Att’y Gen. 8.

18-2.14(j) Contractor Certifications

As a condition of awarding a contract for services that require the contractor or his employees to have direct contact with students on school property during regular school hours or during school-sponsored activities, the contractor must provide a certification that all persons who will provide such services have not been convicted of a felony, an offense involving sexual molestation, or physical or sexual abuse or rape of a child. Va. Code § 22.1-296.1(E). Virginia Code § 22.1-296.1 also states that this requirement does not apply to a contractor or his employees providing services to a school division in an emergency or exceptional situation, such as when student health or safety is endangered or when repairs are needed on an urgent basis to ensure that school facilities are safe and habitable, when it is reasonably anticipated that the contractor or his employees will have no direct contact with students. See *also* 2007 Op. Va. Att’y Gen. 89; 2006 Op. Va. Att’y Gen. 108. Virginia Code § 2.2-4311.1 requires that all public bodies include in their written contracts for goods and services subject to the Virginia Public Procurement Act a provision that the contractor does not, and shall not, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986.

18-3 DIVISION SUPERINTENDENTS

18-3.01 In General

There must be a division superintendent for each school division, Va. Code § 22.1-58, although two school divisions may appoint the same person. Va. Code § 22.1-62. No person may be employed as a part-time division superintendent without the approval of the State Board of Education. *Id.*

No school board shall renegotiate a superintendent’s contract during the period following the election or appointment of new board members and the date such new members are qualified and assume office. Va. Code § 22.1-60(C). Whenever a

superintendent's contract is being renegotiated, all members of the school board shall be notified at least thirty days in advance of any meeting at which a vote is planned on the renegotiated contract unless the members agree unanimously to take the vote without the thirty days' notice. Each member's vote on the renegotiated contract shall be recorded in the minutes of the meeting. Va. Code § 22.1-60(D).

Virginia Code § 15.2-1510.1 requires that severance benefits provided to any departing official appointed by a school board be publicly announced by the school board prior to such departure.

18-3.02 Qualifications

Qualifications for division superintendents are prescribed by State Board of Education. Va. Code § 22.1-59; *State Bd. of Educ. v. Carwile*, 169 Va. 663, 194 S.E. 855 (1938). Certain individuals are ineligible to be division superintendent. See Va. Code § 22.1-63.

18-3.03 Term

Division superintendents must serve initial terms of not less than two years nor more than four years. Va. Code § 22.1-60. After the initial term, the school board may specify any length of term, provided that the term does not exceed four years. *Id.*

18-3.04 Appointment

Appointment must occur within 180 days after a vacancy occurs. Va. Code § 22.1-60. If no appointment is made within 120 days of a vacancy, the school board will submit a written report to the Superintendent of Public Instruction demonstrating its timely efforts to make an appointment, and a 180-day extension will be granted upon the board's request. *Id.* Other than instances where a superintendent who has been appointed seeks and is granted a release, or in the event of the death of a superintendent, appointments must be made within the statutory period. 1983-84 Op. Va. Att'y Gen. 263. A school board may not contract with an independent consultant to serve temporarily as superintendent. 1991 Op. Va. Att'y Gen. 140.

If a local school board fails to appoint a superintendent in the time prescribed by Va. Code § 22.1-60, the State Board will appoint one. Va. Code § 22.1-61.

18-3.05 Oath

The division superintendent is required to take and subscribe the oath provided in Va. Code § 49-1. A certificate of the clerk of the court in which the oath is administered shall be furnished to the Superintendent of Public Instruction. Va. Code § 22.1-64; *Wood v. Halifax Cnty. Bd. of Sup'rs*, 236 Va. 104, 372 S.E.2d 611 (1988).

18-3.06 Other Employment

A school board must approve a division superintendent's engaging in other business or employment. Va. Code § 22.1-66; 1971-72 Op. Va. Att'y Gen. 353. A school board must determine whether a superintendent's outside business is a "substantial" business activity, prohibited by Va. Code § 22.1-66. 1991 Op. Va. Att'y Gen. 144.

18-3.07 Salary

The State Board prescribes the minimum salaries of division superintendents. The State pays 60 percent of the minimum salary. Local boards may supplement minimum salaries. Necessary travel and office expenses are paid by the local board. Va. Code § 22.1-67.

18-3.08 Records

Each division superintendent is required to ensure that an accurate record is kept of all receipts and disbursements of school funds. Va. Code § 22.1-68.

18-3.09 Board Meetings

The division superintendent or his designee is required to attend school board meetings unless the board votes to excuse him when matters that pertain to the division superintendent personally are being discussed. Va. Code § 22.1-69.

18-3.10 Powers/Duties

The powers and duties of the division superintendent are those prescribed by law, by the local school board, and by the State Board. Va. Code § 22.1-70. Specific statutory charges include making certain reports, Va. Code § 22.1-70.1, and establishing an internet use policy that must include the use of technology to filter pornography and obscenity, Va. Code § 22.1-70.2.

18-3.11 Evaluations

Division superintendents must receive training on the implementation of the Standards of Learning (see section 18-6.01(g)) and the evaluation and documentation of administrative and instructional personnel. Va. Code § 22.1-253.13:5. The school board must evaluate the division superintendent annually based on criteria that include assessing teacher and administrative skills and knowledge, improving student academic progress, providing for school safety, and enforcing student discipline. Va. Code § 22.1-60.1. No later than the 2022-23 school year, all school board employees must complete a cultural competency training program every two years, pursuant to standards to be issued by the Board of Education, Va. Code § 22.1-298.7, and employee evaluations must include an evaluation of cultural competency. Va. Code § 22.1-253.13:5.

18-3.12 Sanctions

A division superintendent may be fined or removed for cause by the State Board of Education, upon the recommendation of the Superintendent of Public Instruction, or by the local school board. He may appeal the decision to the appropriate circuit court, where he will receive a trial de novo as to whether there was sufficient cause. Va. Code § 22.1-65. This section, however, limits the trial de novo to the issue of whether a school board had sufficient cause to remove a superintendent. *Bristol Va. Sch. Bd. v. Quarles*, 235 Va. 108, 366 S.E.2d 82 (1988).

18-3.13 Freedom of Information Act Exemption

Virginia Code § 2.2-3705.7(2) exempts “[w]orking papers and correspondence of the . . . chief executive officer of any political subdivision of the Commonwealth” from the public access requirements of the Act. A division superintendent is a “chief executive officer” of a political subdivision. 1978-79 Op. Va. Att’y Gen. 378; 1976-77 Op. Va. Att’y Gen. 315; see also Chapter 23, Freedom of Information Act, section 23-4.04(g)(1).

18-3.14 Official Capacity

A lawsuit against the division superintendent in his official capacity generally represents only another way of pleading an action against the same entity, the school board. Since the division superintendent is an agent of the school board and where such claims are duplicative, the officer is entitled to dismissal. *H.H. v. Chesterfield Cnty. Sch. Bd.*, No. 3:07cv223 (E.D. Va. Nov. 29, 2007), *aff’d*, *H.H. v. Moffett*, 335 Fed. Appx. 306 (4th Cir. 2009).

18-4 SCHOOL PROPERTY

18-4.01 Title

Title to real and personal school property is vested in a local school board, although a city school board and a city governing body may agree that title shall vest in the city. Va. Code § 22.1-125. For financing reasons, however, whenever a locality has incurred a multi-year financial obligation to fund the acquisition, construction, or improvement of public school property, the local governing body of the locality shall be deemed to have acquired title to

such school property as a tenant in common with the local school board for the term of the financial obligation. Va. Code § 15.2-1800.1. The tenancy in common is created by operation of law and no recordation is required. *Id.* The tenancy in common does not otherwise grant the locality any powers over school property and the locality may by resolution decline the tenancy in common. *Id.* When property is bequeathed or devised to a school board, title vests in the school board. Va. Code § 22.1-126.

Whenever a school board acquires title to real property, the title must be certified by an attorney-at-law or title insurance must be obtained. Va. Code § 22.1-128. The report of such certification shall be filed with the clerk of the school board along with the recorded deed. *Id.*

Whenever a school board determines it has no use for some of its real property, it may sell such property and may retain all or a portion of the proceeds upon approval of the local governing body and after the school board has held a public hearing on such sale and retention of proceeds. Va. Code § 22.1-129(A). A school board may also convey title to such property to the appropriate county, city or town. *Id.* To convey title to such property, the school board shall adopt a resolution declaring the property surplus and shall record the resolution along with the deed to the property with the clerk of the court where the deed to the property is recorded. *Id.* Upon the recording of the resolution and the deed, title passes. *Id.*

18-4.02 Property Powers

With regard to real and personal property, a local school board has the power to: exchange; lease as lessor or lessee; grant easements; convey real property in trust to secure loans; convey real property to adjust its boundaries; sell personal property; as lessee to make capital improvements; sell vocational education projects and the associated land, pursuant to Va. Code § 22.1-234; and donate obsolete technology hardware and software to other schools, preschools, or students. Va. Code § 22.1-129. A school board does not, however, have authority to offer public funds as a reward for information leading to the arrest and conviction of persons who have vandalized school property. 1975-76 Op. Va. Att’y Gen. 240; see 1996 Op. Va. Att’y Gen. 121 regarding authority to make capital improvements as lessee. A school board may lease property for a nominal amount if the lease is consistent with good business judgment and the leased property is used for the benefit of the school district. 2004 Op. Va. Att’y Gen. 123 (lease of school owned building to museum). A school board does not have the legal authority to fund capital renovation costs for school property that it does not lease and which is fully owned and operated by another school division, although two school boards may contract to fix tuition payments which include such costs as set forth in Va. Code § 22.1-5(C). 2013 Op. Va. Att’y Gen. 162.

18-4.03 Eminent Domain

School boards have the power of eminent domain necessary for public school purposes pursuant to Va. Code § 25.1-200 et seq. including the power to “quick take” under Va. Code § 25.1-300 et seq. Va. Code § 22.1-127. A local school board has “right of entry” under the same conditions as a county, city, or town pursuant to Va. Code § 25.1-203. *Harrisonburg City Sch. Bd. v. Alexander*, 126 Va. 407, 101 S.E. 349 (1919) (use of property for public school is a public use).

18-4.04 Real and Personal Property Purchase

School boards are authorized to purchase real and personal property from the United States and its agencies. Va. Code § 22.1-130.

18-4.05 Local Zoning Ordinances

The law is unclear as to whether a school board must comply with local zoning ordinances. Although it has not directly addressed this issue, the Virginia Supreme Court has found that the power to select school sites and to determine the manner in which school properties

shall be used is vested exclusively in the local school board. *Howard v. Alleghany Cnty. Sch. Bd.*, 203 Va. 55, 122 S.E.2d 891 (1961) (upheld the school board's powers to select a school site over the citizenry's referendum power to force the school board to abandon a site); *Carroll Cnty. Sch. Bd. v. Shockley*, 160 Va. 405, 168 S.E. 419 (1933) (upheld the school board's authority to select a school site over the General Assembly's power to pass a law directing the county's governing board to levy a special tax for construction of a particular school).

The Virginia Attorney General has rendered inconsistent opinions regarding the extent to which local school boards are subject to land use regulations by the governing body. Compare 1982-83 Op. Va. Att'y Gen. 458 (school boards must comply with the reasonable regulations contained in a properly enacted local zoning ordinance) with 1976-77 Op. Va. Att'y Gen. 193 (ordinarily, public property used for governmental purposes is exempt from zoning ordinances).

18-4.06 School Construction

Any construction must meet the minimum standards of the State Board of Education. Va. Code § 22.1-138(A). Prior to contracting, plans and specifications must be approved by the division superintendent and submitted, along with a statement by a properly licensed architect or engineer that the plans comply with State Board regulations and the Uniform Statewide Building Code, and a review by building security experts, to the Superintendent of Public Instruction. A copy of the final plans and specifications, the statement, and security review comments shall be submitted to the Superintendent of Public Instruction. Va. Code § 22.1-140.

Contracts for construction of new buildings or substantial additions must be competitively bid, or entered into on a design-build or construction management basis, in accordance with the Public Procurement Act, Va. Code § 2.2-4300 et seq., unless a school board adopts its own purchasing procedures in accordance with the requirements established by Va. Code § 2.2-4343(A)(11) and (A)(12). See [Chapter 25, Public Procurement Law](#). A school board may also participate in a cooperative procurement program with a county, city or town which has adopted alternative procedures. 1982-83 Op. Va. Att'y Gen. 433.

A school board may accept a donation of construction services under the Virginia State Government Volunteers Act and may condition its acceptance upon reasonable conditions, not unlike those found in a traditional construction contract. 2006 Op. Va. Att'y Gen. 104.

A school board may act as a responsible public entity under the Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code §§ 56-575.1 to 56-575.16, but it may enter into a comprehensive agreement under the Act to construct a school only after having received approval from the local governing body. 2004 Op. Va. Att'y Gen. 182.

A local governing body may not, pursuant to § 15.2-1305, assume control over the construction of public schools or the expenditure of funds for that purpose. 1997 Op. Va. Att'y Gen. 55.

In 2022, the School Construction Fund and Program was established to award grants to local school boards for the construction of new school buildings or the renovation or expansion of existing buildings. The grants will be funded by the Gaming Proceeds Fund. Va. Code §§ 22.1-140.1 and 58.1-4125.

18-4.07 Energy Efficiency

New public school buildings and facilities and improvements and renovations to existing public school buildings and facilities should be designed, constructed, maintained, and operated to generate more electricity than consumed. Va. Code § 22.1-141.1. Accordingly, a school board may contract with a private entity for the design, construction, financing, operation of the HVAC system, and "such other terms as mutually agreed upon." Va. Code § 22.1-141.2.

18-4.08 Fitness for Occupancy

The division superintendent is required to close school buildings unfit for occupancy and to report this action to the school board. Va. Code §§ 22.1-135 to 22.1-136.

18-4.09 Maintenance

A county school board may request that maintenance of school buildings, grounds, and buses be performed by the department of public works. A board may also request that construction be performed under the direction of the county department of public works. Va. Code § 22.1-134.

18-4.10 Use of Property**18-4.10(a) In General**

A school board may permit such use of school property, upon such terms and conditions as it deems proper, as will not impair the efficiency of the schools. The division superintendent may act as its designee in this regard. Va. Code § 22.1-131; *see also* Va. Code § 22.1-132.1 (giving school boards express authority to operate day care centers outside regular school hours). School boards may not deny equal access or a fair opportunity to use school board property, or otherwise discriminate against, the Boy Scouts of America or the Girl Scouts of the USA. Va. Code § 2.2-1147.2. This includes the ability of such youth-oriented, community organizations to distribute promotional materials at schools. Va. Code § 22.1-132.01.

Students may not be required to convey or deliver any materials that (i) advocate the election or defeat of any candidate for elective office, (ii) advocate the passage or defeat of any referendum question, or (iii) advocate the passage or defeat of any matter pending before a local school board, local governing body, the General Assembly of Virginia, or the Congress of the United States. Va. Code § 22.1-79.3(A).

The administration of questionnaires or surveys to students during the regular school day or at school-sponsored events without written, informed parental consent for the student's participation is prohibited when participation may subsequently result in the sale for commercial purposes of personal information regarding the individual student. Va. Code § 22.1-79.3(B).

In permitting a concert to be given on school property, the school board was acting pursuant to statutory authority and performing a governmental function so that it was immune from tort liability. *Kellam v. Norfolk City Sch. Bd.*, 202 Va. 252, 117 S.E.2d 96 (1960).

Boards may impose reasonable restrictions on the use of school property (e.g., limitations while classes in session, requiring lessee to return property in good condition). Va. Code § 22.1-132. If a school allows for occupational, professional, or educational recruitment of a high school's student body, it must allow equal access by military recruiters. Va. Code § 22.1-130.1.

18-4.10(b) Constitutional Concerns

A board is not required to permit non-school use of its property. However, once it has done so, the board may not discriminate among users. *Lamb's Chapel v. Center Moriches Union*

Free School District, 508 U.S. 384, 113 S. Ct. 2141 (1993), involved a school district that refused a church's request to use school facilities after hours for a religiously-oriented film series on family values and child rearing. The school district expressly allowed its property to be used for "social, civic, and recreational" programs. The United States Supreme Court held that the restriction violated the First Amendment because it was not viewpoint neutral since views regarding family issues and child rearing would be allowed under the "social, civic, and recreational" category except for those addressing the matter from a religious perspective. The Court held that allowing church use of school property would not violate the Establishment Clause because the program did not take place during school hours, it was not sponsored by the school, and it was open to the public, not just church members. Similarly, in *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093 (2001), the Court held the exclusion of an elementary school-age Christian club from after-school use of school property, based upon the school's community use policy, which prohibited use for religious purposes, was unconstitutional viewpoint discrimination and that such use would not violate the Establishment Clause. In *Child Evangelism v. Montgomery County*, 373 F.3d 589 (4th Cir. 2004), the court held that a Good News Club could participate in the school district's flier distribution forum, even though that activity took place during school hours and teachers passed out the fliers. In interpreting Supreme Court decisions and its own precedents, the Fourth Circuit found that the Establishment Clause is not violated by the presentation of a religious viewpoint in schools when they have merely provided a religious group with access equal to that afforded similar non-religious groups and have not advanced an inherently religious activity. Using this touchstone, the Fourth Circuit distinguished between school prayer cases, which were held to violate the Establishment Clause, and viewpoint discrimination cases, which did not.

A public school district's facility use policy, granting complete authority to local school officials whether to charge or waive user fees, was held unconstitutional in *Child Evangelism Fellowship v. Anderson School District*, 470 F.3d 1062 (4th Cir. 2006). There, Child Evangelism Fellowship had sought to use school facilities after school to conduct "good news club" meetings for students. The school district allowed the group to use the school facilities, but refused to waive the fees the school system customarily charged for use of the facilities. School policy gave administrators the discretion to waive fees for community groups where the administrator believed that the activity in question would be in the "best interests" of the school. The Fourth Circuit found that this policy was constitutionally infirm, both on its face and as applied by the school district. The principal defect was that it gave school administrators "unbridled discretion" to decide what groups and activities would or would not be charged fees for using school facilities. According to the court, such a standardless policy fails to protect against viewpoint discrimination, and effectively makes any decision excluding a particular speaker "unreviewable." The risks of illicit, viewpoint-motivated discrimination are too high in such a situation, in the court's view.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 137 S. Ct. 2012 (2017), the Supreme Court struck down as violative of the Free Exercise Clause a state law that prohibited a church day care from receiving a state playground material grant, stating it required the church to choose between receiving a government benefit and operating its daycare as a religious program. The Court drew a distinction between laws that discriminate on the basis of religious status versus those that do so because of religious use. The dissent suggests that the decision calls into question the constitutionality of Va. Const. art. IV, § 16 which forbids the appropriation of public funds to any sectarian institution.

In *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir. 1994), the Fourth Circuit held that a school board policy allowing school facilities to be rented to community organizations, but requiring churches to pay according to a progressively escalating rental rate, violated the First Amendment's free exercise and free

speech clauses. The Court also found that allowing a church's long-term use of school property did not violate the Establishment Clause. See also *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (holding that the school board's practice of permitting non-school groups to rent its auditorium had created a "public forum" so that the board could not deny the application based on the requestor's discriminatory membership policies).

In *Demmon v. Loudoun County Public Schools*, 342 F. Supp. 2d 474 (E.D. Va. 2004), having held that a public school's "walkway of fame" constituted a limited public forum, the court determined that excluding a cross symbol from the personalized inscribed bricks for the walkway was viewpoint discrimination.

In *Rosenberger v. University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), the United States Supreme Court held that withholding funds from a student newspaper solely because it "promotes or manifests a particular belief in or about a deity or an ultimate reality" constitutes viewpoint discrimination. In *Rosenberger*, the University of Virginia created a limited forum by authorizing the payment of outside contractors for the printing costs of a variety of student publications but denied funding to a student publication that offered a Christian perspective on personal and community issues. The Court found that it was impermissible to discriminate against religious speech that was otherwise within the forum's limitations.

In *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998), the Fourth Circuit held that a school policy allowing a day of passive distribution of religious material at middle and high schools with a disclaimer renouncing endorsement by the school did not violate the Establishment Clause.

18-4.11 Restrictions on Use of Property

18-4.11(a) Trespass

A person, whether or not a student, who enters on school property, including a school bus, in the nighttime without consent or who refuses to leave school property after being directed to do so shall be guilty of a Class 3 misdemeanor (punishable by a fine not to exceed \$500). See Va. Code §§ 18.2-11 and 18.2-128. Persons convicted of sexual offenses against children may not loiter within 100 feet of a school. Va. Code §§ 18.2-11 and 18.2-370.2. A school was permitted to ban a parent from school property in response to the parent's threats and antagonistic behavior, the ban did not constitute First Amendment retaliation or a violation of due process rights, and school officials who issued the no-trespass letters were entitled to qualified immunity. *Davison v. Rose*, 19 F.4th 626 (4th Cir. 2021).

The Attorney General has opined that an individual prohibited from entering school property may enter that portion of school property designated as a polling place solely for the purpose of casting his vote. 2006 Op. Va. Att'y Gen. 122.

Unless a court order has been issued to the contrary, the noncustodial parent of a student shall not be denied the opportunity to participate in any of the student's school activities in which such participation is supported or encouraged by the policies of the school solely on the basis of such noncustodial status and shall be included, upon the request of such noncustodial parent, as an emergency contact for the student's school. Va. Code § 22.1-4.3.

18-4.11(b) Alcoholic Beverages

A person who consumes or has in his possession any alcoholic beverage while on public school grounds during school hours or during school or student activities shall be guilty of a Class 2 misdemeanor (punishable by confinement for up to 6 months and/or a fine not to exceed \$1,000).

In addition, no person shall drink and no organization shall serve any alcoholic beverage on school grounds after school or at after school activities, except for religious congregations using wine for sacramental purposes only. Va. Code § 4.1-309.

18-4.11(c) Tobacco Use and Vaping

School boards must adopt policies prohibiting the use of tobacco and nicotine vapor products on school property, on a school bus, or at an off-site school-sponsored activity. Va. Code § 22.1-79.5. Annually, each school board shall provide educational information to parents of students in kindergarten through twelfth grade regarding the health dangers of tobacco and nicotine vapor products, consistent with Department of Education guidelines. Va. Code § 22.1-273.3.

18-4.11(d) Weapons

Virginia Code § 18.2-308.1 makes it unlawful for any person to knowingly possess or carry a weapon on school property, including any school bus, or on property that is open to the public and then used exclusively for school-sponsored functions. Excluded from this offense are unloaded firearms in closed containers, including a locked vehicle trunk, metal-bladed knives in or upon vehicles, and an unloaded shotgun or rifle on a rack in or upon a vehicle. Violation of such section constitutes a Class 1 misdemeanor, unless the weapon is a firearm, in which case possession is a Class 6 felony. *See also United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995) (the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A)), which makes it a federal offense to possess a firearm in a school zone, exceeds Congress' authority to regulate interstate commerce). Pursuant to Va. Code § 18.2-280, a person who willfully discharges a firearm on school property (unless it is pursuant to a school permitted event), or who discharges a firearm within 1,000 feet of school property (unless lawfully hunting), is guilty of a Class 4 felony. A person who has been issued a valid concealed weapons permit is not entitled to carry a gun onto school property or a school bus, unless the person is engaged in one of the exemptions specified in § 18.2-308.1. 2000 Op. Va. Att'y Gen. 100. However, such a person may possess a concealed handgun while in a motor vehicle in a parking lot, traffic circle, or other means of vehicular ingress or egress to the school. Va. Code § 18.2-308.1.

In an unpublished decision, the Fourth Circuit held that a "zero tolerance" suspension policy regarding weapons possession was not unconstitutional as long as procedural due process was observed. *Ratner v. Loudoun Cnty. Pub. Sch.*, No. 00-2157 (4th Cir. July 30, 2001) (unpubl.); *see also M.M. v. Chesapeake City Sch. Bd.*, 52 Va. Cir. 356 (City of Chesapeake 2000) ("zero-tolerance" policy not arbitrary). See section [18-5.05\(f\)](#) for suspension requirements.

The Attorney General has opined that there is no authority for a school board to prohibit possession of firearms at school board meetings that are not held on school property. 2007 Op. Va. Att'y Gen. 80. A school board may deem any non-school building it owns or leases, and where employees are regularly present performing their official duties, as a gun-free zone. Va. Code § 22.1-131.1. A school board may prevent its employees from storing a lawfully possessed firearm in a locked vehicle on school property; Va. Code § 15.2-915 (limiting the power of localities to take gun control measures) applies only to counties, cities, and towns, not school boards. 2013 Op. Va. Att'y Gen. 161.

No school board may authorize a person to possess a firearm on school property other than those persons expressly authorized by statute. Va. Code § 22.1-280.2:4. Note that school security officers are expressly authorized to carry a firearm if they meet specified qualifications. Va. Code § 22.1-280.2:1.

18-4.11(e) Electronic Devices

Schools may regulate the use of beepers, as well as other portable communication devices and laser pointers, pursuant to Va. Code § 22.1-279.6(B).

18-4.11(f) Threats

Any person who makes an oral threat to kill or injure any employee of any elementary, intermediate or secondary school, while on a school bus or school property, or at a school-sponsored activity shall be guilty of a Class 1 misdemeanor. Va. Code § 18.2-60(B). A person who makes a written threat, including by electronic transmission, to do bodily harm to any person while on a school bus or school property, or at a school-sponsored activity, is guilty of a Class 6 felony if the threat would place the person threatened in reasonable apprehension of death or bodily harm. Va. Code § 18.2-60(A)(2). Likewise, a person who makes that kind of threat with the intent to influence the activities of a local, state, or federal government, or to compel the emergency evacuation of a building, is guilty of a Class 5 felony or, if the person is younger than 18, a Class 1 misdemeanor. Va. Code § 18.2-60(A)(3).

18-4.12 Drills

Fire drills must be held in each school at least twice during the first twenty school days and at least twice more during the remainder of the school session. Va. Code §§ 22.1-137. There shall be at least one tornado and emergency situation drill every school year. Va. Code §§ 22.1-137.1 and 22.1-137.3. Schools must hold at least one lock-down drill during the first twenty days of school and at least one additional lock-down drill after the first sixty days of school. Va. Code § 22.1-137.2(A). Parents of enrolled students must be provided at least twenty-four hours' notice of any lock-down drill. *Id.* Pre-kindergarten and kindergarten students are exempt from mandatory participation in the lock-down drills occurring during the first sixty days, but not from those occurring thereafter. Va. Code § 22.1-137.2(B). School boards must develop policies to implement the exemption. *Id.*

18-4.13 Radon Testing and Carbon Monoxide Detectors

Every school building must be tested for radon, pursuant to procedures established by the United States Environmental Protection Agency (EPA). Buildings and additions opened after July 1, 1994, will be tested pursuant to EPA and State Board of Education regulations. Each school must maintain files of its radon test results and make such files available for review. The division superintendent shall report radon test results to the Department of Health. Va. Code § 22.1-138(B). Every school built before 2015 must be equipped with at least one carbon monoxide detector. Va. Code § 138.2.

18-4.14 Water Quality

School boards must develop and implement a plan to test and, if necessary, remediate, all potable water on school property, with priority given to school buildings constructed before 1986. Va. Code § 22.1-135.1. The plan must be consistent with EPA guidelines. Each school board must maintain a water management program for the prevention of Legionnaires' disease at each public school building and must validate the program annually "to maintain the health and decency of such buildings." Va. Code § 22.1-138(C).

18-4.15 Mold Testing and Remediation

Each school board shall test for and, if necessary, remediate mold in school buildings in accordance with EPA standards. Va. Code § 22.1-138(D). Testing plans and results must be submitted to the Department of Health. If mold is detected, school staff and the parents of all enrolled students must be notified. *Id.*

18-4.16 Safety Audits

Each school shall submit a safety audit, which must be conducted annually, to the division superintendent, who shall submit them to the Virginia Center for School and Campus Safety. The results, except for security plans and vulnerability assessments, must be made public

within ninety days of the completion of the audit. School boards are required to annually review their written school crisis, emergency management, and medical emergency response plans; the superintendent is required to certify this review in writing to the Virginia Center for School and Campus Safety no later than August 31 of each year. Va. Code § 22.1-279.8.

18-4.17 Sex Offenders Prohibited From Entering School Property

Any adult convicted of a sexually violent offense as defined in Va. Code § 9.1-902 is prohibited from entering or being present (i) during school hours, and during school-related or school-sponsored activities upon any property he knows or has reason to know is a public or private elementary or secondary school; (ii) on any school bus; or (iii) upon any property, public or private, during hours when such property is solely being used by a public or private elementary or secondary school for a school-related or school-sponsored activity, unless he is a registered voter entering the property for the sole purpose of voting, or unless he is a student enrolled at the school or he has obtained a court order (this exception does not apply to entry onto a school bus). Violations are punishable as a Class 6 felony. Va. Code § 18.2-370.5. Such adult may petition the circuit court for permission to enter such property after notice to the Commonwealth's Attorney, the Superintendent of Public Instruction, and the chairman of the school board. Published notice in a newspaper and a judicial hearing are required. Once a circuit court has lifted the ban imposed by Code § 18.2-370.5(A), the school board retains the authority to determine whether, and under what circumstances, an offender may enter onto school property. *Commonwealth v. Doe*, 278 Va. 223, 682 S.E.2d 906 (2009). A constitutional challenge to this statute was dismissed for lack of Article III standing as the plaintiff had not petitioned a court or school and thus her injury remained hypothetical. *Doe v. Va. Dep't of State Police*, 713 F.3d 745 (4th Cir. 2013) (plaintiff also failed to assert traceability or redressability).

18-5 STUDENTS

18-5.01 Compulsory School Attendance

"The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law." Va. Const. art. VII, § 3. Within one month of the opening of school, each school board shall send to the parent or guardian a copy of the compulsory attendance law and the school board's enforcement policies. Va. Code § 22.1-254(G).

18-5.01(a) Attendance Requirements

Pursuant to Va. Code § 22.1-254, every parent or guardian of a child who has reached his fifth birthday on or before September 30 of any school year, and who has not passed his eighteenth birthday shall cause such child to attend a public school or to a private school, or shall have such child taught by a tutor or teacher of qualifications prescribed by the State Board and approved by the division superintendent, or shall provide for home instruction of such child as described in Va. Code § 22.1-254.1. Virginia statutory law does not define the term "school" for purposes of the compulsory attendance laws. Whether a particular organization or entity constitutes a "school" within the meaning of the law is a fact-specific determination. Relevant factors include the duration of instruction, the curriculum, licensure, accreditation, and the qualifications of instructional personnel. 2003 Op. Va. Att'y Gen. 95. The term "send" in Va. Code § 22.1-254 means to enroll in school and does not refer to daily attendance. *Blake v. Commonwealth*, 288 Va. 375, 764 S.E.2d 105 (2014) (statute cannot be basis for misdemeanor conviction of parent whose children were habitually tardy).

Any person who has residing with him for a period of sixty days or more any child within the ages prescribed in § 22.1-254 whose parents or guardians reside in another state or the District of Columbia shall be subject to the provisions of § 22.1-254. Va. Code § 22.1-255.

The principal of each school must give an attendance report to the division superintendent within ten days of the opening of school. Va. Code § 22.1-260.

18-5.01(b) Residency

Children deemed residents of a school division are those living with a parent, with a person acting in loco parentis, with a guardian or person with legal custody, with an adult relative providing temporary kinship care as defined in Va. Code § 63.2-100, or who are homeless. Va. Code § 22.1-3. The categories of residency listed in § 22.1-3 are not exclusive and a school district may not refuse to provide free education to a student based solely on the categories if the facts show that the student is a bona fide resident of the school division. 2007 Op. Va. Att’y Gen. 84. It is a misdemeanor to make a knowing false statement regarding a child’s residency. Any person who makes such a false statement is liable to the school division in which the child was enrolled for tuition charges, pursuant to Va. Code § 22.1-5, for the time the student was enrolled in the school division. Va. Code § 22.1-264.1. A locality does not have the authority to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. 2005 Op. Va. Att’y Gen. 44.

If a place of residence is in more than one division, the child can attend either division. If the lot is located in more than one division, but the place of residence is only in one, the child attends the division in which the place of residence is located unless prior to July 1, 1999, that child or a sibling attended school in either division in which the lot is located, in which case the child is deemed to reside in either division. Va. Code § 22.1-3.

To determine residency, a school board may not inquire into a student applicant’s citizenship or visa status, nor may it require documentation to verify such status. 1999 Op. Va. Att’y Gen. 105.

If the local school division and the social services agency jointly determine in writing that it is in the best interests of the child, a foster care child placed across jurisdictional lines shall be allowed to remain in the school attended prior to the most recent placement. Va. Code §§ 22.1-3.4(B) and 63.2-900.3.

A school board may adopt a policy that allows any student to enroll in any school within the school division regardless of the location of the student’s residence. Va. Code § 22.1-7.1.

18-5.01(c) Tuition

No person may be charged tuition for admission or enrollment in the public schools of the Commonwealth, whether on a full-time or part-time basis, who meets the residency criteria set forth in § 22.1-3. Under Va. Code § 22.1-5, a school board has authority to admit non-school age resident children into its kindergarten program and charge tuition. 1993 Op. Va. Att’y Gen. 144. A school board has the discretion to admit and charge tuition to non-resident school-age children who live beyond the boundaries of the Commonwealth but near thereto in a state or the District of Columbia which grants the same privileges to residents of the Commonwealth. Va. Code § 22.1-5(A)(4). Persons who meet the criteria of Va. Code § 22.1-255 are subject to any tuition charges. Va. Code § 22.1-255.

18-5.01(d) Children of Military Families

To provide for a consistent policy across states, in 2009 Virginia joined the Interstate Compact on Educational Opportunity for Military Children, Va. Code §§ 22.1-360 to 22.1-361, which addresses transition issues encountered by military families. Key provisions include: acceptance of unofficial records prior to enrollment; the right to be in the same grade as the sending school regardless of receiving school requirements; meeting the sending school’s individualized education program requirements until the receiving school does its own evaluation; attending a school within that division without tuition when living with someone in loco parentis; and flexibility in meeting graduation requirements.

Students attending a school within a division who are relocated to military housing in another division may continue to attend school in their prior school division free of tuition. A child relocated because the parent was assigned a new duty station or deployed may continue to attend their current school until the end of the school year. If a permanent address is provided within 120 days after enrollment, tuition may not be charged by a school division when the parent's relocation occurs pursuant to orders received. Va. Code § 22.1-3(B). A school division may admit non-Virginia resident students living on a military base, and may only charge tuition if federal Impact Aid does not pay 50 percent of the per capita cost of education. Va. Code § 22.1-5(A)(5). School boards must establish open enrollment policies for students living on military installations. Va. Code § 22.1-7.2. Students in military housing who are attending school are eligible for interscholastic programs. Va. Code §§ 22.1-5(A)(5) and 22.1-5.1.

In 2023, Virginia added Chapter 27 to Title 22.1, for the purpose of removing barriers to educational success imposed on school-age children of federal employees under orders pursuant to Title 22 or 50 of the United States Code because of frequent moves and their parents' service. Va. Code §§ 22.1-369 et seq.

18-5.01(e) Home Instruction

Home instruction may be provided to children in lieu of public school attendance, provided that the parent either (1) holds a baccalaureate degree from an accredited institution of higher learning; (2) is a qualified teacher; (3) has enrolled the child in a correspondence course approved by the Superintendent of Public Instruction; or (4) provides a program of study which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics, or provides evidence that the parent is able to provide an adequate education to the child. Va. Code § 22.1-254.1(A). In crediting home school academic work, a school board may not impose requirements inconsistent with the standards of accreditation. 1997 Op. Va. Att'y Gen. 114.

School divisions must make available to home-instructed students advanced placement, PSAT, National Merit, and PreACT examinations. Va. Code § 22.1-254.1(F).

18-5.01(e)(1) Home School Annual Notice

Annual notice of intent to provide home instruction is required by August 15, although the division superintendent may accept notifications after that time in appropriate cases. 1983-84 Op. Va. Att'y Gen. 259. The notification must include a description of the curriculum and evidence that one of the four instructional criteria (stated above) has been met. A school board may not require parents to provide the child's birth certificate or proof of residency along with the notice of intent to homeschool. *Sosebee v. Franklin Cnty. Sch. Bd.*, 299 Va. 17, 843 S.E.2d 367 (2020). If a parent begins home instruction after the school year begins, the parent shall notify the division superintendent as soon as practicable and comply with the statutory requirements within thirty days of such notice. Va. Code § 22.1-254.1(B). In *Pollard v. Goochland Cnty. Sch. Bd.*, No. 3:00CV563 (E.D. Va. Sept. 27, 2001), a district court held that pending approval of the home school plan during that thirty-day period, the child must attend school or be considered truant.

18-5.01(e)(2) Required Reporting

A parent who has provided home instruction must furnish the division superintendent by August 1 with evidence that the child has made satisfactory progress, i.e., (i) the child has attained a composite score in or above the fourth stanine on any nationally normed standardized achievement test, ACT, SAT, or PSAT test or, (ii) an evaluation, which in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational progress. Va. Code § 22.1-254.1(C). If evidence of such progress is not provided, the home instruction program may be placed on probation for one year. *Id.*

18-5.01(e)(3) Appeal

Any party aggrieved by a decision of the division superintendent pertaining to home instruction may appeal such decision within thirty days to an independent hearing officer, who shall be chosen from the list of special education hearing officers. The hearing officer shall apportion the costs of the hearing in a manner consistent with his findings. Va. Code § 22.1-254.1(E).

18-5.01(f) Alternative Education Plan

A child at least sixteen years old may meet attendance requirements by following an individual student alternative education plan. Such plan must include, among other things, attendance at a high school equivalency examination preparatory or other alternative education program. Va. Code § 22.1-254(D). A child sixteen through eighteen in an adult correctional facility who is pursuing a high school equivalency examination satisfies the attendance requirements. Va. Code § 22.1-254(A).

The State Board of Education is required to develop guidelines and policies for permitting any high school student in grades eleven and twelve to earn one-half standard unit of credit per semester for employment in certain fields or industries or participation in certain fine arts programs in which such student works or participates a certain minimum number of hours per week for each week of the semester, as determined by the Board. Va. Code § 22.1-207.8.

18-5.01(g) Exemptions from Compulsory Attendance

Various children are exempted from the compulsory school attendance law (e.g., those with contagious diseases while they are suffering from those diseases, children living a certain distance from a public school, children who cannot benefit from education, children who (together with their parents), because of a bona fide religious training or belief, are conscientiously opposed to attendance). The term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code. Va. Code § 22.1-254. The precise standards for exemption on these grounds are set forth in § 22.1-254. The Virginia Supreme Court has ruled that the sole test for determining entitlement to exemption on the grounds of religious belief is whether those seeking the exemption are conscientiously opposed to attendance at school by reason of religious training or belief. *Johnson v. Prince William Cnty. Sch. Bd.*, 241 Va. 383, 404 S.E.2d 209 (1991) (wherein the Court declined to employ the two-pronged test articulated by the Attorney General in 1987-88 Op. Va. Att'y Gen. 330 and 1984-85 Op. Va. Att'y Gen. 255). A school board has no obligation to investigate alternative means of education for those excused on the basis of conscientious or religious objection. 1977-78 Op. Va. Att'y Gen. 355.

It is not possible for school officials to unilaterally exempt under Va. Code § 22.1-254 from school attendance a child with disabilities on the ground that he or she cannot benefit from education. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (the court rejected the school's determination that a severely disabled student could not benefit from education; all children, regardless of their disability, are entitled to a public education).

18-5.01(h) Truancy

Whenever a student is absent on a regularly scheduled school day and there is no indication the parent supports the student's absence, a reasonable effort to notify the parent by telephone to obtain an explanation for the student's absence shall be made. Va. Code § 22.1-258. If a student is absent for a total of five scheduled school days with no indication the parent supports the absence, and a reasonable effort to notify the parent has failed, the school principal or his designee shall make a reasonable effort to ensure that personal, telephonic, or other means of direct communication is made with the parent to obtain an explanation for the student's absence and to explain to the parent the consequences of

continued nonattendance. *Id.* The principal or his designee, the student, and the student's parent shall jointly develop a plan to resolve the student's nonattendance. Such plan shall include documentation of the reasons for the student's nonattendance. *Id.*

If the student is absent for more than one additional day after direct contact with the student's parent, and school personnel have received no indication that the parent is aware of and supports the student's absence, the school principal or his designee shall schedule a conference to be held no later than ten days after the tenth absence, with the student, his parent, and school personnel, and, if desired, other community service providers. Va. Code § 22.1-258. The conference team must monitor the student's attendance. *Id.* If the parent is intentionally noncompliant or the student is resisting parental efforts to comply, the principal or his designee shall make a referral to the attendance officer, who must schedule a conference with the student and his parent within ten school days and may (i) file a complaint with the juvenile and domestic relations court alleging the student is a child in need of supervision or (ii) institute proceedings against the parent pursuant to §§ 18.2-371 or 22.1-262. *Id.* In the event both parents have been awarded joint physical custody pursuant to § 20-124.2 and the school has received notice of such order, both parents shall be notified at the last known addresses of the parents. Va. Code § 22.1-258.

If a student is absent in observance of a religious holiday, the absence must be excused. Va. Code § 22.1-254(C).

Subject to Department of Education guidelines, any student who is absent from school due to mental or behavioral health issues shall be granted an excused absence. Va. Code § 22.1-254(J).

Enforcement of truancy and tardiness rules should be addressed pursuant to Va. Code §§ 22.1-258 and 22.1-279.3, not § 22.1-254. *Blake v. Commonwealth*, 288 Va. 375, 764 S.E.2d 105 (2014).

18-5.01(i) Sanctions for Violation of Compulsory Attendance

Violation of the compulsory attendance law constitutes a Class 3 misdemeanor, Va. Code § 22.1-263, and is punishable by a fine not to exceed \$500. Va. Code § 18.2-11(c). Once convicted, if a person knowingly violates the statute again, he will be guilty of a Class 2 misdemeanor. Such violation includes the making of a false statement with regard to a child's age and inducing or attempting to induce a child to absent himself from school. Va. Code §§ 22.1-264 to 22.1-265. The juvenile and domestic relations court is the applicable tribunal. Va. Code § 22.1-262. The Commonwealth Attorney is charged with prosecuting these cases. Va. Code § 22.1-268. The affected child may be proceeded against as a child in need of supervision. Va. Code § 22.1-267. If a child has not been previously adjudicated truant on more than two occasions, and the immediate prior occasion was more than three years ago, a truancy complaint petition may be deferred for ninety days. If the child successfully participates in a written truancy plan agreed to by the child and the parents or guardians, the petition is not filed. Va. Code § 16.1-260. Additionally, if the child violates the attendance and meeting requirements, a court must suspend the child's driver's license, or if the child is between thirteen years and sixteen years and three months, delay the period for which a license can be applied, for not less than thirty days. The period of denial for a second or subsequent offense may be up to one year or until the child reaches eighteen, whichever is longer, and up to one year for a delay. Va. Code § 16.1-278.9.

18-5.01(j) School Choice

The 1993 General Assembly directed the Board of Education to promulgate regulations for the voluntary participation of school divisions in programs allowing pupils to attend another public school within the division of their residence or in another school division. Va. Code § 22.1-269.1.

18-5.01(k) Charter Schools

Charter schools may be established divisionally or regionally as public, nonsectarian, nonreligious, or non-home-based public schools, either as a new public school or through conversion of all or part of an existing public school. Va. Code § 22.1-212.5. Such schools remain subject to the same federal and state anti-discrimination laws, the Standards of Quality, FOIA, IDEA, and health and safety regulations applicable to public schools, but may otherwise be exempt from school division policies and state regulations as requested in the charter contract. Va. Code §§ 22.1-212.6; 22.1-212.6:1. As their express exemption has been removed, charter schools are now subject to the Public Procurement Act.

The Board of Education and each local school board must receive, review, and, in the case of local school boards, rule upon charter school applications. The extensive requirements of the application are set forth in Va. Code § 22.1-212.8. The State Board first reviews the application (except for those initiated by the local school board) to determine if it meets state feasibility criteria. Local boards must give public notice of the application and have a procedure for receiving public comment. Va. Code § 22.1-212.9. If the local school board denies the application, it must give its reasons in writing and reconsider the application if such reconsideration is sought by the applicant within sixty days of the denial. Upon reconsideration, the decision of the local school board is final and not subject to appeal, although the local school board must document to the Board of Education the rationale for its decision, and for those divisions in which more than half the schools receive Title 1 funding, the Board may issue findings relating to the rationale for the school board's decision. Va. Code § 22.1-212.10.

Within ninety days of approval of a charter application (extendable by thirty days), the school board and charter school management committee must execute a charter contract, which must contain the extensive academic and operational performance measures detailed in Va. Code § 22.1-212.7.

The Conflict of Interests Act provides an exemption to the prohibition on a personal interest in a government contract for any ownership or financial interest of members of the governing body, administrators, and other personnel serving in a public charter school in renovating, lending, granting, or leasing public charter school facilities, as the case may be, provided such interest has been disclosed in the public charter school application as required by Va. Code § 22.1-212.8. Va. Code § 2.2-3109(C)(6).

Charter schools and charter school employees and volunteers have the same sovereign immunity as public schools and public school employees and volunteers. Va. Code § 22.1-212.16. Charter school employees may be employees of the local school board, if the school board approves. Va. Code § 22.1-212.13(A).

School divisions may also create residential charter schools for at-risk students. Va. Code § 22.1-26. Applications are to include a description of the program, facilities, and staffing, funding sources, and counseling or other social services to be provided. Va. Code § 22.1-212.8(14).

A local school board is required to provide funding to an approved charter school commensurate with the average school-based costs of educating students in the existing schools of the division, unless the cost of operating the charter school is less than the average school-based cost. Va. Code § 22.1-212.14(B). A local school board is not permitted to provide preferential funding to a charter school. Va. Code § 22.1-212.14(D).

A public charter school may negotiate and contract with a school division, the governing body of an institution of higher education, or any third party for the use or construction of a school building and grounds, the operation and maintenance thereof, and the provision of any service, activity, or undertaking which the public charter school

is required to perform in order to carry out the educational program described in its charter. Va. Code § 22.1-212.6(C) & (D). A limited liability company is an appropriate "third party" with which the charter school may contract. 2003 Op. Va. Att'y Gen. 89. See 2010 Op. Va. Att'y Gen. 115 and 2010 Op. Va. Att'y Gen. 117 for opinions regarding the funding of charter schools pursuant to Va. Code § 22.1-212.14.

A Public Charter School Fund has been established. Va. Code § 22.1-212.5:1.

Virginia statutory law also provides for the establishment of college partnership laboratory schools, following a parallel structure to a public charter school, which can involve contracts with a local school board for operations and other features. Va. Code § 22.1-349.1 et seq.

18-5.01(l) School Divisions of Innovation

Virginia Code §§ 22.1-212.28 through 22.1-212.32 authorizes a school division or a school therein to become a "school division of innovation" upon approval by the Board of Education of a five-year innovation plan that is in accordance with Board standards. If approved, the school division or designated school will be exempt from certain regulatory provisions. The intent is to grant schools flexibility to incorporate innovative teaching and learning models.

18-5.01(m) Satellite Classrooms

School boards may enter into agreements with private business and industry for the establishment, installation, renovation, remodeling, or construction of satellite classrooms for kindergarten through third grade on a site owned by the business or industry and leased to the school board at no cost. Va. Code § 22.1-26.1. Children of employees of the private business may attend the classrooms even though the business is located outside of their attendance zone. The locality may exempt a business that provides satellite classrooms from local license taxes.

18-5.01(n) Public Safety Schools

Two or more school boards may, with the consent of the State Board, establish joint or regional schools, including regional public charter schools, to serve as high schools offering, in addition to a comprehensive high school curriculum, specialized training to students desiring to pursue careers in law enforcement, firefighting, emergency and rescue services, and other occupations addressing public safety and welfare. Such schools may be designed to incorporate the instructional services of retired or disabled emergency, fire, rescue, and law enforcement personnel and internships with local agencies and organizations providing such emergency, fire, rescue, and law enforcement services. Va. Code § 22.1-26.

18-5.02 Transportation

18-5.02(a) In General

Provision of student transportation is not required except for children with disabilities as provided in § 22.1-221. Va. Code § 22.1-176(A). A school board that provides transportation for field trips and for extra-curricular activities may accept contributions to defray costs. Va. Code § 22.1-176(B)-(C). A school board may charge a fee for transportation associated with extra-curricular activities, Va. Code § 22.1-176(B), but it may not charge a fee for transportation of students to a specialty program located outside of the boundaries of the students' base school, 2010 Op. Va. Att'y Gen. 123. Va. Code § 22.1-176(B). A school board may enter into an agreement with a non-public school in the school division to provide student transportation to and from the non-public school under such terms that the school board deems appropriate. Va. Code § 22.1-176.1.

Each school board that provides for the transportation of students and excludes students who reside a certain distance from the school from accessing such transportation must establish a waiver process. Va. Code § 22.1-176.2. The waiver process shall permit, on a case-by-case and space-available basis, the transportation of a student otherwise

ineligible for transportation when the student's parent is unable to provide transportation for the child because the parent is providing medical care to another family member who resides in the same household. *Id.* The family must provide a written explanation from a licensed health care provider. *Id.*

18-5.02(b) School Buses

The State Board of Education promulgates regulations relating to public school buses. Va. Code § 22.1-177. Requirements for bus drivers are contained in Va. Code §§ 22.1-178 through 22.1-181. Bus drivers hired may be required to submit to drug and alcohol testing as a condition of employment. Va. Code § 22.1-178(C). A school board may sell or transfer its school buses to another division or school bus dealer, Va. Code § 22.1-177(D), and may contract with other agencies or third-party logistics companies for use of school buses, Va. Code § 22.1-182. The school bus warning lights and identifications shall be covered when used to transport persons or commodities other than pupils, school personnel, elderly individuals, or individuals with mental or physical disabilities. Va. Code § 22.1-183. Within the first ninety days of each school session, each public school having school buses shall conduct a drill in leaving school buses under emergency conditions. Va. Code § 22.1-184. Provisions dealing with insurance requirements relating to school bus operation, and school board liability for actions arising out of school bus accidents, are set forth in Va. Code §§ 22.1-188 through 22.1-198. Any person operating a school bus must wear the appropriate safety belt when the bus is in motion. Violation of this section constitutes a Class 3 misdemeanor. Va. Code § 46.2-1091.

By statute, school boards may be sued for claims arising out of school bus accidents. Liability extends to either the available insurance or the statutory minimum insurance. Va. Code § 22.1-194. The statutory minimum, however, is not available to participants in a self-insurance pool unless they individually obtain a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles, as required by Va. Code § 22.1-290(D). The provision under the general self-insurance pool statute that a certificate is not required for pool participants, Va. Code § 15.2-2704, does not prevail over the specific requirement of § 22.290(D). *Frederick Cnty. School Bd. v. Hannah*, 267 Va. 231, 590 S.E.2d 567 (2004) (also holding Va. Code § 22.1-194 applies to self-insurance pool protection and the pool's insurance proceeds are not "school funds"); see also *VACORP v. Young*, 298 Va. 490, 840 S.E.2d 334 (2020) (statutory minimum of \$50,000 coverage through insurance pool does not cap coverage; school boards can contract for more coverage).

In *Newman v. Erie Insurance Exchange*, 256 Va. 501, 507 S.E.2d 348 (1998) (4-3), the Virginia Supreme Court overruled in part *Stern v. Cincinnati Insurance Co.*, 252 Va. 307, 477 S.E.2d 517 (1996), and held that a student who approached a stopped school bus with its gate down and flashing lights was "using" the bus for purposes of a school board's uninsured motorist insurance coverage. The Court followed *Stern*, however, in holding that the child was not "getting on" the bus as the term was intended in the insurance policy. See also *Graphics Arts Mut. Ins. Co. v. Burge*, No. 5:03CV00005 (W.D. Va. Jan. 29, 2004) (extending *Newman* to cover situation where only yellow lights were flashing); *Wagoner v. Benson*, 256 Va. 260, 505 S.E.2d 188 (1998) (distinguishing *Stern* and holding in a factually similar situation that insurance is applicable, and sovereign immunity is waived pursuant to Va. Code § 22.1-194, to such a situation when an insurance policy covers the "loading" of a school bus); *Roach v. Botetourt Cnty. Sch. Bd.*, 757 F. Supp. 2d 591 (W.D. Va. 2010) (a school bus is "involved in an accident" if a student is approaching or leaving a school bus).

18-5.03 Placement Considerations

18-5.03(a) Single-Gender Education

In *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264 (1996), the United States Supreme Court held that Virginia Military Institute's exclusion of women violated the equal

protection clause of the Constitution. Virginia law nonetheless provides that, consistent with constitutional principles, a school board may establish single-sex classes or school as long as participation is voluntary and there is a substantially equal co-ed option. Va. Code § 22.1-212.1:1.

18-5.03(b) Consideration of Race

In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S. Ct. 2738 (2007), the Supreme Court held that school districts may not voluntarily adopt student assignment plans that rely upon race to determine which public schools certain children may attend. While a plurality found that the goal of racial diversity could not be a compelling state interest, a majority found that the schools' plans were not narrowly tailored because race was *the* decisive factor in the admissions decisions, and the schools had not shown that they could not achieve their goals of avoiding racial isolation by facially race-neutral means such as attendance zones, or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race only as a component.

The Court in *Seattle School* distinguished its decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003), in which it held in the higher education context that the race of applicants could be considered in achieving that goal.⁴ In *Grutter*, the Court determined that the policy of the University of Michigan's Law School provided for "individualized consideration" of applicants and thus was sufficiently narrowly tailored to achieve the diversity goal. The Court in *Seattle School District* found the public school's policy to be more like the policy of the University of Michigan's undergraduate school, which assigned automatic admission points to minority applicants, and which was struck down as unconstitutional in *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003). The Court in *Seattle School* stated that the considerations that apply to the higher education context do not apply to elementary and secondary schools.

Fisher v. University of Texas, 570 U.S. 297, 133 S. Ct. 2411 (2013), emphasized that favorably factoring in race in admissions decisions is subject to strict scrutiny and no deference is given to the school's determination as to best way to achieve permissible racial diversity. Despite that demanding standard, the Court subsequently held that a university's consideration of race a part of a "holistic" review process did not violate the Equal Protection Clause. *Fisher v. Univ. of Tex.*, 579 U.S. 365, 136 S. Ct. 2198 (2016). The Court held that the university sufficiently (i) articulated its compelling interest in considering race beyond merely asserting the educational benefits of diversity, (ii) showed it had not sufficiently achieved racial diversity, (iii) demonstrated that its plan improved the goal diversity at the university, and (iv) showed that race-neutral alternatives would not better serve the university's compelling interest.

Prior to *Fisher*, *Seattle School*, *Grutter*, and *Gratz*, the Fourth Circuit had assumed without holding that diversity in student placement can be a compelling government interest. *Eisenberg v. Montgomery Cnty. Public Sch.*, 197 F.3d 123 (4th Cir. 1999). The Fourth Circuit held, however, that the policy in *Montgomery* of balancing racial percentages in schools was not narrowly tailored to meet that interest. Similarly, in *Tuttle v. Arlington County School Board*, 195 F.3d 698 (4th Cir. 1999), the court held a weighted lottery based on racial classifications for determining admissions to an "alternative" school was not narrowly tailored because it unconstitutionally depended on racial balancing. Both holdings are probably still valid under *Seattle School District*. See also *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001) (en banc), in which a fragmented court held that while a race-based magnet school program was

⁴ Note that it is not unconstitutional for a state to prohibit the use of race-based preferences as part of the admissions process for state universities. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 134 S. Ct. 1623 (2014) (plurality decision).

unconstitutional, the school board was not liable for nominal damages or attorney's fees for implementing it because the program was adopted while the school was subject to a desegregation order. The court also found that the school had achieved unitary status, and with such status, was not subject to the prior desegregation orders or new injunctions based on actions taken while subject to such orders. A school division that has been released from desegregation orders and is subsequently found to have reverted to a system of racial segregation may be subject to a complaint to the Office for Civil Rights of the U.S. Department of Education, or legal action brought by the Department of Justice or private parties under the Civil Rights Act of 1964 or the Equal Educational Opportunities Act of 1974. 2019 Op. Va. Att'y Gen. 6.

In *Everett v. Pitt County Board of Education*, 678 F.3d 281 (4th Cir. 2012), plaintiffs sought an injunction against a school assignment plan, claiming it increased racially-identified school disparities in violation of 1960s desegregation orders and a 2009 consent decree. The district court placed the evidentiary burden on the plaintiffs as the parties moving for an injunction but the Fourth Circuit reversed, holding that the school system had the burden of proving that the school assignment plan moved the school system toward a unitary status. The Fourth Circuit subsequently affirmed the district court's determination that the system has achieved unitary status. *Everett v. Pitt Cnty. Bd. of Educ.*, 788 F.3d 132 (4th Cir. 2015) (also holding that unitary status determination can relate back in time).

In *Coalition for TJ v. Fairfax County School Board*, a Virginia district court held that a new admissions policy adopted by a Fairfax County Governor's School, Thomas Jefferson High School for Science and Technology (TJ), was unconstitutional because it had a disparate impact on Asian-American student applicants and that the policy was not narrowly tailored to further a compelling government interest. No. 1:21-CV-296 (E.D. Va. Feb. 25, 2022). Prior to the changes to the admissions policy, eighth-grade students faced a competitive academic admissions process requiring completion of three standardized tests. Applicants who achieved certain minimum scores on those tests were then considered on a "holistic" basis, including a review of GPA, test scores, teacher recommendations, and responses to writing prompts and essays. During the academic year before the changes, 72 percent of TJ's students were Asian American, 3 percent were Hispanic, and less than 2 percent were African American, even though the County's overall student population was only 27 percent Asian American and 47 percent Hispanic or black. Following a process the court characterized as "remarkably rushed and shoddy," the school board approved the new admissions policy, which removed the standardized testing requirement and moved from a multi-stage to a single-stage "holistic" process. It also guaranteed a specific number of seats to students at each public middle school. In the academic year following the adoption of the new policy, the proportion of admitted Asian American students dropped from 72 percent to 54 percent.

The court applied strict scrutiny because the school board had explicitly stated that its goal was to create a student body more racially aligned with the County's population, and had considered several admissions models in an attempt to find one that resulted in the admission of more black and Hispanic students and fewer Asian-American students. It then found that Asian-American applicants were disproportionately "deprived of a level playing field" in competing for admission. The court also found that the government's interest was not compelling—indeed, it stated that "racially balancing for its own sake is 'patently unconstitutional,'" (quoting *Fisher v. University of Texas*, 570 U.S. 297, 133 S. Ct. 2411 (2013)), even if relabeled as an attempt to achieve "racial diversity." Finally, the court found that the school board's actions were not narrowly tailored, suggesting that the board could have first tried increasing the sizes of the school's student body or offering free test preparations before implementing the revised admissions policy. The court granted the plaintiff's motion for summary judgment and permanently enjoined the school from enforcing the new policy. However, the Fourth Circuit granted the school's request

to stay the decision pending appeal. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280 (4th Cir. Mar. 31, 2022). The plaintiff's emergency application to the U.S. Supreme Court to vacate the stay pending appeal was denied. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 596 U.S. ___, 142 S. Ct. 2672 (2022).

The Fourth Circuit reversed and remanded. *Coal. for TJ v. Fairfax Cnty Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023). On appeal, the Fourth Circuit examined whether (1) the policy exacts a disproportionate impact on a certain racial group, and (2) whether such impact is traceable to an "invidious" discriminatory intent. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). On the first prong, the court held that the district court erred in applying a year-to-year examination of Asian-American student admissions. The court found that the policy did not exact a disproportionate impact on Asian-American students when they evaluated Asian-American students' share of the number of applications versus their share of the offers extended. Despite reversing on those grounds, the court also examined the second prong of the *Arlington Heights* test. The court found it was not traceable to "invidious" discriminatory intent in this case because the application process was racially neutral and contained no quotas or goals regarding "racial balancing." The court also rejected the Coalition's argument that the Board was discriminating against Asian-American students by "proxy" because increasing the population of other racial groups would inherently decrease that of Asian-Americans.

In 2022, the General Assembly passed legislation in direct response to *Coalition for TJ*. The statute, Va. Code § 22.1-26.2(A), prohibits Governors Schools from discriminating against any individual or group on the basis of race, sex, color, ethnicity, or national origin in the process of admitting students to the school. An earlier version of the bill would have banned "proxy discrimination," including the use of a facially neutral factor if its use was intended to discriminate against or grant a preference to certain groups of students. The new law also directs the boards of such schools to collaborate with the public middle schools that feed into the Governor's Schools to ensure that the curriculum of the various middle schools is "comparable in content and rigor." Va. Code § 22.1-26.2(B).

18-5.04 Health

18-5.04(a) Required Medical Records

No pupil shall be admitted to public school without a comprehensive medical examination as reported by a licensed physician, licensed advanced practice registered nurse, or physician's assistant and a statement of immunization or records showing that such have been submitted to another school division together with the information contained in such a report. Va. Code § 22.1-270(A). Those who do not have a medical record because they are homeless shall be immediately admitted and assisted by the school division liaison in obtaining the physical from a clinic or the local health department as soon as practicable. *Id.* A physical examination shall not be required of any child whose parent objects on religious grounds and who shows no visual evidence of sickness, if the parent submits a written statement that, to the best of his knowledge, such child is in good health and free from contagious disease. Va. Code § 22.1-270(D).

No student shall be admitted by a school unless he has documentary proof of immunization or unless he is exempted from the immunization requirement. Va. Code § 22.1-271.2(A). A student may be exempted from the requirement where (1) an affidavit is furnished by the student or his parent stating that immunization conflicts with the student's religion, (2) the school has written certification from a licensed physician, advanced practice registered nurse (see Va. Code § 54.1-2957.02), or local health department that immunization may be detrimental to the student's health, or (3) the child is homeless or in foster care without the necessary documentation (Va. Code § 22.1-3.4(A)). Homeless children shall be admitted immediately and assisted by the school division liaison in obtaining the necessary documentation or immunizations. Va. Code

§ 22.1-271.2(C). The placing social services agency shall ensure compliance with such requirements for the foster child within thirty days after the child's enrollment. Va. Code § 63.2-900. A student may be admitted conditionally if he has had at least one dose of the required immunizations and if he presents a schedule for completion of immunization within ninety days. Va. Code § 22.1-271.2(B). The immunization requirements apply to home-instructed, exempted or excused children as if they attended school. Va. Code § 22.1-271.4.

Students must receive two doses of properly spaced human papillomavirus (HPV) vaccine; the first dose must be administered before the student enters the seventh grade. Va. Code § 32.1-46(A)(12). A parent or guardian may elect for the child not to receive the HPV vaccine after having reviewed the materials describing the link between HPV and cervical cancer. Va. Code § 32.1-46(D)(3). Students must also receive two properly spaced doses of meningococcal conjugate vaccine, the first dose before seventh grade and the second dose before twelfth grade. Va. Code § 32.1-46(A)(15).

In certain emergency circumstances, vaccinations may be given to students without regard to standard compulsory attendance procedures. Va. Code § 32.1-47.1.

18-5.04(b) Contagious Diseases

Pupils suffering contagious diseases shall be excluded from the public schools while in that condition. Va. Code § 22.1-272. The responsibility to determine whether a child has an infectious disease requiring exclusion from the public schools is vested in local school authorities who should act on a case-by-case basis and who should consider qualified medical advice and information furnished from such sources as the child's physician, public health officials and school nurses. 1985-86 Op. Va. Att'y Gen. 178. In *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987), the Supreme Court decided that a person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of Section 504 of the Rehabilitation Act of 1973. The question of whether a school system was required by law to permit such a person to continue her employment as an elementary school teacher can be answered only after a detailed factual inquiry which should include:

[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id.

Each school board must have adopted guidelines, based on the Board of Education's model guidelines, for school attendance of students infected with the human immunodeficiency virus (HIV). Va. Code § 22.1-271.3. All school personnel having contact with students must have training related to the effects and prevention of transmission of Hepatitis B, HIV, and certain other infectious diseases. An investigation of the incident shall be conducted by the local health director if a school employee notifies the superintendent that he may have been exposed to the blood or body fluids of a student. Va. Code § 22.1-271.3(C) & (D).

In *Colona v. Accomack County School Board*, 52 Va. Cir. 421 (Accomack Cnty., 2000), a circuit court held that Va. Code § 22.1-271.3(C) and (D), read together, implied a duty to inform teachers as to which students have certain infectious diseases, including HIV.

18-5.04(c) Health Screenings & Information

With certain specified exceptions, each school is required to test the sight and hearing of students in specified grade levels and to maintain a record. If a defect is found in a student's vision or hearing, the principal must report it in writing to the child's parent or guardian. Va. Code § 22.1-273. Children in the fifth through tenth grades shall either be screened for scoliosis or parental information regarding scoliosis shall be provided. Va. Code § 22.1-273.1. School divisions must provide parents of students in grades 5-12 with educational material on eating disorders. Va. Code § 22.1-273.2.

18-5.04(d) Medication & Medical Devices

Students with a diagnosis of asthma, pursuant to an individualized health care plan, may possess and self-administer asthma medication. Va. Code § 22.1-274.2. School employees who supervise the self-administration of such medication are generally immune from civil liability. Va. Code § 8.01-226.5:1. Any school nurse or other school employee who is authorized by the local health director and trained in the administration of albuterol inhalers may possess and administer albuterol inhalers to a student diagnosed with a condition requiring an albuterol inhaler when the student is believed to be experiencing or about to experience an asthmatic crisis. Va. Code § 54.1-3408(D).

Every local school board must have a policy for possessing and administering epinephrine in each school for any student believed to be having an anaphylactic reaction. Va. Code § 22.1-274.2; *see also* Va. Code § 22.1-321.1 and Pub. L. No. 113-48 (School Access to Emergency Epinephrine Act). Any school nurse or other school employee who is authorized by a prescriber and trained in the administration of epinephrine may possess and administer epinephrine. Va. Code § 54.1-3408(D). At least one nurse or other employee authorized by a prescriber and trained in the administration of epinephrine shall have the means to access epinephrine at all times during regular school hours. Va. Code § 22.1-274.2(C).

Any student diagnosed with diabetes may possess and self-administer food or medicine as needed and self-conduct blood glucose levels checks. Va. Code § 22.1-274.01:1.

School personnel are prohibited from recommending the use of psychotropic medications for any student. School health staff, classroom teachers or other school professionals, however, may recommend that a student be evaluated by an appropriate medical practitioner, and school personnel may consult with such practitioner with the written consent of the student's parent. Va. Code § 22.1-274.3.

School boards shall develop a plan for the placement, care, and use of an automated external defibrillator in every public elementary and secondary school in the local school division, and shall place an automated external defibrillator in every school. Va. Code § 22.1-274.4.

School boards are required to provide menstrual supplies and to make them available, at all times and at no cost to students, in accessible locations in elementary schools and in the bathrooms of middle and high schools. Va. Code § 22.1-6.1.

Students may possess and use unscented topical sunscreen in its original packaging on a school bus, on school property, or at a school-sponsored event without a note or prescription from a health care provider. Va. Code § 22.1-274.5.

18-5.04(e) Medical Employees

School boards are authorized to employ nurses, physicians, and therapists who meet the standards of the State Board. Each school board should strive to employ nursing services consistent with a ratio of at least one nurse per 1,000 students. The State Board shall

monitor the progress of achieving the aspired-to ratio and the associated costs. Va. Code § 22.1-274(B) to (C). A school building with a staff of ten or more must have two employees with recent CPR training and, if two or more students have diabetes, at least one employee trained in the administration of insulin and glucagon. If the building is staffed by less than ten, one employee must have recent CPR training, and if there is a student with diabetes, one employee must have insulin and glucagon administration training. Va. Code § 22.1-274(E). Civil immunity regarding such administrations is provided pursuant to Va. Code § 8.01-225.

A coach may not direct or administer the use of a whirlpool, apply heat or ice or other physical treatment, or tape a student's joint unless licensed by the Board of Medicine as an athletic trainer. Va. Code § 54.1-2957.4. A non-licensed coach may render first aid as needed and conduct exercise or conditioning programs. 2002 Op. Va. Att'y Gen. 158. There is no statutory duty imposed on the school board to hire a certified athletic trainer. A school board would be entitled to sovereign immunity for failure to hire a certified athletic trainer for its athletic programs. *Id.* A school board employee, such as the school division superintendent or high school principal, would be entitled to claim sovereign immunity should a plaintiff file a suit alleging simple negligence on the part of the employer for failing to hire an athletic trainer. *Id.*

18-5.04(f) Non-Medical Employee Responsibilities

With the exception of those hired to deliver health-related services, no teacher, aide, or clerical employee shall be disciplined, placed on probation, or dismissed for refusal to perform nonemergency health-related services for students or to obtain insulin or glucagon administration training. However, aides and clerical employees may not refuse to dispense oral medications. Va. Code § 22.1-274(D).

An administrator or teacher aware of a risk of suicide from communication by the suicidal student shall contact one of the student's parents, or if parental abuse is indicated by the student, the local or state department of social services, as soon as practicable. Va. Code § 22.1-272.1. Guidelines were issued in 1999 and may be obtained from the Board of Education.

Virginia Code § 63.2-1509 requires teachers or other school employees to make a report within twenty-four hours whenever such persons have "reason to suspect" that a child has been abused or neglected as defined in § 63.2-100. That report must be made to either (1) the department of social services in the jurisdiction where the abuse or neglect is believed to have occurred or the child resides; (2) the state's toll-free child abuse and neglect hotline; or (3) if the place where the abuse occurred or the child resides is unknown, the department of social services where the abuse or neglect was discovered. If the information regarding suspected child abuse or neglect is received by a teacher or school staff member in the course of professional services in the school, then such person may, instead of making a direct report, immediately inform the person in charge of the school, "or his designee." That person must then make the report "forthwith." The person making the initial report to the person in charge or his designee must be informed of when the report is made to DSS or the hotline and any subsequent actions taken. Furthermore, no person is required to make a report if the person has actual knowledge that the same matter has already been reported. The Attorney General has interpreted these statutes to require a teacher or school employee who becomes aware of consensual sexual relations between one student and another who is thirteen or fourteen years old (a violation of Va. Code § 18.2-63) to make the appropriate report of suspected abuse or neglect. 2001 Op. Va. Att'y Gen. 94. A notice regarding the mandatory reporting requirements for school personnel under § 63.2-1509 and immunity from liability must be posted in each school. Va. Code § 22.1-291.3.

18-5.04(g) Protective Devices

Pupils and teachers are required to wear protective eye devices when involved in certain career and technical activities and in certain laboratory sessions. Va. Code § 22.1-275.

18-5.04(h) Health Advisory Board

School boards may establish a school health advisory board to assist the school board in developing a health care policy. Va. Code § 22.1-275.1.

18-5.04(i) Sudden Cardiac Arrest Prevention in Student-Athletes

Each school division must develop and biennially update policies and procedures regarding the identification and handling of symptoms that may lead to sudden cardiac arrest in student-athletes. Va. Code § 22.1-271.8(B). These policies shall require that in order to participate in any extracurricular physical activity, each student-athlete and his or her parent shall review, annually, information regarding the symptoms of sudden cardiac arrest and acknowledge in writing receipt of such information. Va. Code § 271.8(B)(1). Any student-athlete experiencing symptoms that may lead to sudden cardiac arrest must be immediately removed from play and shall not return until he or she is evaluated by and receives written clearance to return to physical activity by an appropriate health care provider. Va. Code § 271.8(B)(2).

18-5.04(j) Meals

All Virginia schools must participate in the federal National School Lunch Program and School Breakfast Program to make meals available to any student who requests such a meal, regardless of whether the student has the money to pay for the meal or owes money for meals previously provided. Va. Code § 22.1-79.7:1. School boards may distribute unexpired and unopened excess food to students eligible for those programs or students otherwise determined by the board to be eligible. Va. Code § 22.1-207.3:1. School boards may not sue a student or the student's parent because the student cannot pay for a meal at school or owes a school meal debt, and such a student cannot be denied the opportunity to participate in any extracurricular school activity. Va. Code § 22.1-79.7.

Each school board governing a school division that meets eligibility requirements of the federal Community Eligibility Provision (i.e., 40 percent or more of the student population qualifies for free meals) must apply to participate in the meal service program. Va. Code § 22.207.4:1. A waiver may be issued in certain circumstances. *Id.* Schools and other locations offering afterschool care where 50 percent or more of the student population qualifies for free or reduced-price meals must also apply to the federal Afterschool Meal Program. Va. Code § 22.207.4:2.

18-5.05 Discipline**18-5.05(a) Search and Seizure****18-5.05(a)(1) State Law**

School personnel may conduct warrantless searches of students and their lockers when they have reasonable grounds to believe that the student is in possession of drugs, contraband, or weapons, provided that the search is conducted primarily for enforcing order and discipline in the schools and not for criminal prosecution. 1977-78 Op. Va. Att'y Gen. 375.

18-5.05(a)(2) Constitutional Considerations

In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985), the Supreme Court established a "reasonableness" standard for searches in the school context. This standard is less restrictive than the general "probable cause" standard applied in most other search and seizure contexts. The Court envisioned a balancing process in which the need to search is weighed against the invasion which the search entails: "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order."

must be assessed in terms of probable cause. 2001 Op. Va. Att’y Gen. 109. The Fourth Circuit has held, however, that when school officials act in a constitutional manner in seizing a student for suspected criminal activity and transmit the basis for their suspicion to the police, the continued detention of the pupil by the police is necessarily justified in its incipience. A school official may detain a student if there is a reasonable basis for believing that the pupil has violated the law or a school rule. *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004). Moreover, there is no constitutional right to parental notification before school officials or police may detain and question a student while investigating an allegation of student misconduct. *Id.*

In *J.D. v. Commonwealth*, 42 Va. App. 329, 591 S.E.2d 721 (2004), the court held that school officials need not give Fifth Amendment *Miranda* warnings prior to questioning a student for any resulting statement to be admissible in a criminal proceeding. The mere presence of a school security officer did not convert the questioning into a custodial interrogation. In *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394 (2011), however, the Supreme Court stated that a child’s age must be a factor in determining whether custody that warrants *Miranda* warnings has taken place. The Court remanded the case for a determination of whether a thirteen-year-old was in custody when he was questioned for less than an hour in a school conference room while a policeman, a school resource officer, and a principal were present. *J.D.B.* does not, however, apply to student disciplinary interviews or proceedings. Simply stated, there is no requirement that *Miranda* warnings be given by school officials in connection with student disciplinary cases. Nor is there any requirement that public school officials notify parents prior to questioning students at school about actions which could be in violation of school rules. *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004).

In *E.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018), the Fourth Circuit held that it was objectively unreasonable for a police officer to handcuff, three days after the incident, a ten-year-old student for having participated in a fight on a bus.

For a lengthy and substantive discussion of the state law issues surrounding searches of students, see *Smith v. Norfolk City Sch. Bd.*, 46 Va. Cir. 238 (City of Norfolk 1998). The court held that scanning by hand-held metal detectors was not a search and thus no constitutional protection applied, and alternatively, that if it were a search, individualized suspicion was not required. See also *Austin v. Lambert*, No. 97-0465-R (W.D. Va. May 1, 1998) (qualified immunity granted because not clearly established constitutional violation to partially strip-search student in front of window).

Although the Supreme Court has not directly addressed this issue, a school official who wishes to conduct a mass search of student lockers may need individualized suspicion that those students possess unlawful substances or dangerous weapons. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985) (Court explained that it was not ruling on the issue of whether individualized suspicion is an essential element of the reasonableness standard it adopted for searches by school officials, but the Court noted that individualized suspicion was required in other search and seizure contexts). In *Burnham v. West*, 681 F. Supp. 1169 (E.D. Va. 1988), the court found as impermissible the conducting of general student searches for drugs without reasonable grounds for suspecting that the search would turn up evidence that those students were violating either the law or rules of the school.

However, a school official may conduct a general exploratory search of all student lockers when the school has notified the students at the beginning of the school year that the lockers are subject to inspection. See *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (the court approved of the school’s use of drug sniffing dogs to search student lockers where the school had given the students prior notice); see also *Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313 (5th Cir. 1989) (the court approved of the use of sniffer-

dogs to search student automobiles in a school parking lot where the students had access to their automobiles during the school day). *But see Kuehn v. Renton Sch. Dist.*, 694 P.2d 1078 (Wash. 1985) (the court found that a school policy, requiring that all student band members must submit their luggage to a warrantless search by parent chaperons or forgo participation in a field trip, violated the Fourth Amendment for lack of individualized suspicion).

School boards must develop policies for the conduct of student searches, including strip searches and random locker searches, consistent with Board of Education guidelines. Va. Code § 22.1-279.7. School boards may develop policies regarding voluntary and mandatory drug testing consistent with state guidelines. Va. Code §§ 22.1-279.6 and 22.1-279.7.

18-5.05(a)(3) Drug Testing

In *Vernonia School District v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995), the United States Supreme Court held that random urinalysis drug testing of student athletes was permissible when motivated by the discovery that athletes were leaders in the student drug culture and by concern that drug use increases the risk of sports-related injury. In *Board of Education v. Earls*, 536 U.S. 822, 122 S. Ct. 2559 (2002) (5-4), the Supreme Court extended the rationale of *Vernonia* and held that all students who participate in extracurricular activities, including non-athletic activities, may be constitutionally required to submit to drug testing. A school district need not demonstrate a pervasive drug problem before implementing such a system. The Court de-emphasized the role model and specific safety concerns and emphasized the custodial role of schools and the general health and safety concerns of children using drugs.

In light of these constitutional decisions, the Board of Education is to establish policies which may be adopted at the discretion of the local school board regarding voluntary and mandatory drug testing in schools, including, but not limited to, which groups may be tested, use of test results, confidentiality of test information, privacy considerations, consent to the testing, need to know, and release of the test results to the appropriate school authority. Va. Code § 22.1-279.6.

The Attorney General opined that schools may adopt a drug testing policy for students who are seeking readmission after suspension or expulsion for violation of school policy or state laws regarding controlled substances. 1989 Op. Va. Att’y Gen. 205. A school board may not require students suspended for drug abuse to be tested and treated at their parents’ expense as a condition for converting suspensions to excused absences. 2000 Op. Va. Att’y Gen. 114.

A school board may require that any student found to be in violation of the school’s drug or alcohol policy undergo an evaluation for drug or alcohol abuse, and with the consent of the parents, participate in a treatment program. Va. Code § 22.1-277.1.

18-5.05(b) Classroom Control

Teachers have the initial authority to remove disruptive students from their classrooms. Removed students, unless suspended or expelled, must continue to receive an education. Criteria for removal are to be established by the local school board in accordance with guidelines established by the Board of Education. Va. Code §§ 22.1-276.2, 22.1-279.6.

In general, no teacher, principal, or other school board employee may administer corporal punishment to a student. Va. Code § 22.1-279.1. Exceptions include:

1. the use of incidental, minor, or reasonable physical contact to maintain order and control, see *Mulvey v. Jones*, 41 Va. App. 600, 587 S.E.2d

- 728 (2003) (bruising indicates that force was not incidental, minor, or reasonable);
2. the use of reasonable and necessary force to quell a disturbance, or to remove a student from the scene of a disturbance that threatens injury to persons or damage to property;
 3. the use of reasonable and necessary force to prevent a student from harming himself;
 4. the use of reasonable and necessary force for self-defense or the defense of others;
 5. the use of reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or paraphernalia which a student has on his person or within his control (the use of force to search a student is subject to the Fourth Amendment's prohibition against unreasonable search and seizures (see section [18-5.05\(a\)](#)); and
 6. physical pain, injury or discomfort caused by participation in an interscholastic sport, physical education, or an extracurricular activity.

Va. Code § 22.1-279.1. The offenses of simple assault and assault and battery do not include the use of force by a full- or part-time school employee or school security officer under the above circumstances. Va. Code § 18.2-57. However, if, after accepting the school employee's version of events, the trier of fact concludes that the use of force was unreasonable, then the Va. Code § 18.2-57 exception is inapplicable. *Commonwealth v. Lambert*, 292 Va. 748, 793 S.E.2d 805 (2016). If a school board employee is suspected of abuse or neglect of a child in the course of his education employment, the local department of social services must investigate accordingly and determine if any of the exceptions to § 22.1-279.1 reasonably apply. If the employee was acting in good faith within the scope of employment, the actions or omissions can be found to be abuse or neglect only if they constitute gross negligence or willful misconduct. Va. Code § 63.2-1511. See *Brown v. Ramsey*, 121 F. Supp. 2d 911 (E.D. Va. 2000) for a thorough discussion of cases addressing constitutional claims regarding corporal punishment.

The Board of Education adopted regulations on the use of seclusion and restraint, 8 VAC 20-750-5 through 20-750-110; Va. Code § 22.1-279.1:1, and published on its [website](#) a frequently asked questions document and professional development videos regarding them. See *also* the U.S. Department of Education [Restraint and Seclusion: Resource Document](#).

The Departments of Education, Criminal Justice Services, and Juvenile Justice must annually collect, report, and publish data on the use of force against students; detention or arrests of students; student referrals to court or court service units; and other disciplinary actions by school resource officers involving students. Va. Code § 22.1-279.10. Such reports must include the age, grade, race, ethnicity, gender, and disability of the students, if such data are available. *Id.*

18-5.05(c) Bullying

Bullying is defined by statute as

any aggressive and unwanted behavior that is intended to harm, intimidate, or humiliate the victim; involves a real or perceived power imbalance between the aggressor or aggressors and victim; and is repeated over time or causes severe emotional trauma. "Bullying" includes cyber bullying. "Bullying" does not include ordinary teasing, horseplay, argument, or peer conflict.

Va. Code § 22.1-276.01. All school boards must have policies and procedures prohibiting bullying. Policies are “not [to] be interpreted to infringe upon the First Amendment rights of students and are not intended to prohibit expression of religious, philosophical, or political views, provided that such expression does not cause an actual, material disruption of the work of the school.” Va. Code § 22.1-279.6(D). Within twenty-four hours of the report to school officials of the allegation of bullying, the principal or his designee must notify the parent of any student involved of the status of any investigation. *Id.* School employees must be instructed on the need to create a bully-free environment. Va. Code § 22.1-291.4.

A federal district court held that without some impact on a student’s enrollment, the management of a student’s behavioral issues cannot implicate a protected liberty interest. The court found that a reputational injury (school record of bullying), even coupled with the impact of that record on college acceptances, did not implicate a liberty interest because there is no property right to a higher education. *M.B. v. McGee*, No. 3:16cv3334 (E.D. Va. Mar. 24, 2017).

18-5.05(d) Destruction of Property

A school board may take action against a pupil or the pupil’s parent for any destruction of or failure to return school property committed by such pupil in pursuit of his studies. Such action may include seeking reimbursement from a pupil or the pupil’s parent. Va. Code § 22.1-280.4. A school board may institute suit against the parents of a minor living with the parents for willful or malicious damage to school property, provided that the recovery is limited to \$2,500. Va. Code § 8.01-43; see 1977-78 Op. Va. Att’y Gen. 232 (previous monetary limit of \$500 is valid).

18-5.05(e) Discipline for Conduct Not on School Property or at School Event

Public school officials have always had authority to impose student disciplinary consequences for misconduct which occurs at school or at school-sponsored activities. In addition, the Code of Virginia, the Attorney General of Virginia, and court decisions have for some time recognized the authority of school officials to impose student disciplinary consequences upon public school students for actions committed away from school property and outside school hours where the conduct is detrimental to the interest of the school, adversely affects school discipline, and/or results in a certain type of criminal charge or conviction.

The Attorney General of Virginia opined in 1961 that public schools in Virginia “may subject pupils to punishment for acts committed away from school property and outside of school hours which are detrimental to the interests of the school or adversely affect school discipline.” 1961 Op. Va. Att’y Gen. 274. An example of such misconduct is the vandalism of a school principal’s house by students during the weekend. Even though the act did not occur during school hours, and even though the act did not take place on school property, it is apparent that such misconduct is detrimental to the interests of the school.

The Virginia Code authorizes a local school board to adopt rules regarding the discipline of students, “including their conduct going to and returning from school.” Va. Code § 22.1-78.

The courts also have long recognized the authority of public school officials to impose disciplinary consequences for conduct that occurs off-campus and at non-school related activities, where the conduct has a nexus (or connection) to, or effect upon, the discipline or general welfare of the school. For example, in *Collins v. Prince William County Public Schools*, No. CA-03-1455-A (E.D. Va. Apr. 21, 2004), a federal district court, construing Virginia law, upheld the expulsion of a student who, during spring break and off of school grounds, assembled and exploded several bottle bombs.

In *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), the Fourth Circuit upheld the jurisdictional authority of public school officials to impose an out-of-school suspension upon a student who after school hours used her home computer to ridicule a classmate through an internet social website, and invited other students to join in, because it was reasonably foreseeable that the posting would reach the school and create a substantial disruption there. A federal district court in *M.B. v. McGee*, No. 3:16cv3334 (E.D. Va. Mar. 24, 2017), distinguished *Kowalski* in finding that a student who sent a private email to a college that had accepted a student, claiming the second student had been punished for cheating, had stated a free speech claim when the school punished him for sending the email. The court found that unlike *Kowalski*, the email did not substantially disrupt the work or discipline of the school.

The Virginia Code requires that reports of certain criminal charges and convictions be made to school officials. Va. Code §§ 22.1-279.3:1, 16.1-260, and 16.1-305.1. The Code also authorizes school officials to assign to alternative education programs students who have been charged or convicted of certain criminal offenses, “regardless of where the crime occurred.” Va. Code § 22.1-277-2:1. These offenses include criminal street gang activities (including recruitment), sexual assault, and illegal drug distribution, among others. The Code of Virginia also permits, where authorized by local school board regulations, a school principal to impose a short-term suspension upon a student who has been charged with an offense involving intentional injury to another student in the same school, pending a decision of whether to require the charged student to attend an alternative education program. Va. Code § 22.1-277.2:1(C).

18-5.05(f) Suspension and Expulsion

Pupils may be suspended or expelled “for sufficient cause.” Va. Code § 22.1-277(A). School boards are required to adopt regulations governing suspension and expulsion of pupils. The procedures set forth in the Code are the minimum procedures. Va. Code § 22.1-279.6(A).⁵ If the regulations provide for a disciplinary hearing before the school board or a committee thereof, it may be held in a closed meeting. Va. Code § 2.2-3711(A)(2).

18-5.05(f)(1) Suspension and Expulsion of Young Students

No student in pre-school through third grade may be suspended for more than three days or expelled unless the student violated specified weapons or drug policies, caused serious bodily harm, or the school board of superintendent finds that aggravating circumstances exist. Va. Code § 22.1-277(B).

18-5.05(f)(2) Short-term Suspension Procedure

Pursuant to Va. Code § 22.1-277.04, a principal, assistant principal, or, in their absence, a teacher may suspend a student for ten days or less. The pupil must be given oral or written notice of the charges. See *Doe v. Fairfax Cnty. Sch. Bd.*, 403 F. Supp. 3d 508 (E.D. Va. 2019) (lack of explicit presumption of innocence or minimum burden of proof did not deprive student of due process for suspension and reassignment to alternative school when he had notice and opportunity to be heard); *McLean v. Hatrick*, 52 Va. Cir. 211 (Loudoun Cnty., 2000) (suspension invalid because issue for which notice was given was different from issue hearing officer decided). If the pupil denies the charges, he shall be given an explanation and an opportunity to present his version of what happened. However, if a pupil’s presence presents a continuing danger or an ongoing disruption, he may be removed immediately and the notice, explanation and opportunity to present his version given as soon as practicable thereafter.

⁵ Pursuant to statutory directive (Va. Code § 22.1-16.6), the Board of Education has developed model guidelines for alternatives to suspension that include positive behavior incentives, mediation, peer-to-peer counseling, and community service. See [Model Guidance for Positive and Preventive Code of Student Conduct Policy and Alternatives to Suspension](#).

The parent must be notified in writing upon suspension of any pupil. The notice to the parent must include notification of the length of suspension, availability of alternative educational options, and the student's right to return to regular school attendance at the end of the suspension.

The division superintendent or his designee must review the decision upon petition for review and approve or disapprove the action taken based on the record of the student's behavior. The division superintendent's decision may be appealed to the school board in accordance with its regulations. However, a school board may eliminate the right of appeal to the school board and provide that the decision of the division superintendent or his designee is final. Judicial review of the school board's decision is governed by Va. Code § 22.1-87. (See section 18-2.14(c)). The procedural protections for the imposition of short-term suspensions (ten or fewer school days) were outlined by the Supreme Court in *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). A student's claims that her due process rights were violated in connection with a ten-day suspension for classroom misconduct were rejected when school officials used procedures satisfying the *Goss* standard. *BM v. Chesterfield Cnty. Sch. Dist.*, No. 3:09CV727 (E. D. Va. Apr. 9, 2010).

School boards must adopt policies and procedures to ensure that suspended students are able to access and complete graded schoolwork during and after the suspension. Va. Code § 22.1-277.04.

18-5.05(f)(3) Long-Term Suspension Procedure

Virginia Code § 22.1-277.05 governs suspensions for periods of eleven to forty-five school days.⁶ Written notice must be furnished to the pupil and his parent(s) or guardian. Such notice must explain the proposed action, the reasons therefor, the rights regarding a hearing, the availability of alternative education options, and whether the student may return to regular school attendance or attend an appropriate alternative education program during or after the suspension.

A school board may provide that the hearing in the first instance is before the school board, a committee of the board (which must consist of at least three members), or the superintendent. An appeal to the school board must be allowed from the decision of the superintendent. The decision of the committee shall be final unless the decision is not unanimous, in which case an appeal to the full board must be available. Any appeals must be decided by the school board within thirty days.

In *R.M.B. v. Bedford Cnty. Sch. Bd.*, No. 6:15cv04 (W.D. Va. July 7, 2015), the court addressed the constitutional requirements for procedural due process for a greater than ten-day suspension, and held that the three factors in the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976) apply:

1. the private interest affected by the official action;
2. the risk of an erroneous deprivation of such interest with the process used and any probable value of additional or substitute procedural safeguards; and
3. the fiscal and administrative burdens on the government that would entail if additional or substitute procedural requirement were imposed.

Id. Using that standard, the *R.M.B.* court found a due process right to exculpatory evidence in such a hearing. A school division failed to reveal to the parents that the substance for

⁶ Students may be suspended up to 364 days if the student violated specified weapons or drug policies, caused serious bodily harm, or the school board or superintendent finds that aggravating circumstances (as defined by the Department of Education) exist.

which the child was suspended did not test positive for marijuana content. This allegation sufficiently alleged a violation of procedural due process. *Id.* However, at the summary judgment stage, the same judge appeared to retreat from this holding. Without mentioning his prior holding, the judge held that due process was satisfied with “notice of the charges . . . and a meaningful opportunity to be heard” and noted that “neither the Supreme Court nor the Fourth Circuit have ever held that [the right to exculpatory evidence and the right to call witnesses] are required in an academic, non-criminal context.” *R.M.B. v. Bedford Cnty. Sch. Bd.*, 169 F. Supp. 3d 647 (W.D. Va. 2016).

As with short-term suspensions, school boards must adopt policies to ensure students on long-term suspension are able to complete schoolwork during and after the suspension. Va. Code § 22.1-277.05(B).

18-5.05(f)(4) Expulsion

Expulsions are governed by Va. Code § 22.1-277.06. For expulsions not based on weapon or firearm violations, the statute lists several factors to be considered, although failure to consider such factors does not constitute grounds for reversing an expulsion. Written notice must be furnished to the pupil and his parent(s) or guardian. Such notice must explain the proposed action, the reasons therefor, the rights regarding a hearing, the length of the expulsion, the availability of educational, training, or intervention programs, whether the student is eligible to return to regular school attendance or attend an alternative educational program, and the conditions thereon. If the student is ineligible to return to school, the parents may petition for readmission pursuant to a schedule established by the school board. The schedule must allow for readmittance one year after the date of expulsion if the petition is granted. The petition must be heard by the school board, a committee thereof, or the division superintendent. If heard by a committee or superintendent, the school board must hear any petition for review of a denial of readmission.

The rights regarding hearings are like those for long-term suspensions except that a superintendent may not hear the initial appeal. If the student does not exercise his or her right to a hearing, the school board or committee must nonetheless confirm or disapprove of the proposed expulsion.

A court may not order a school board to reenroll a juvenile expelled in accordance with Va. Code § 22.1-277.06. Va. Code § 16.1-293.

18-5.05(f)(5) Expulsion for Firearm or Drug Violations

In compliance with the federal Improving America’s Schools Act of 1994, a school board is authorized to expel any student possessing a firearm or bringing marijuana or a controlled substance (which by statute includes synthetic versions) on school property or to a school-sponsored activity. The period of expulsion may not be less than one year. A school board, or a school administrator pursuant to school board policy, may determine that special circumstances exist and another disciplinary action or term of expulsion is appropriate. The school board may authorize the division superintendent to conduct a preliminary review to determine if a different disciplinary action for possession of weapons or drugs is warranted. Va. Code §§ 22.1-277.07, 22.1-277.08. The Attorney General opined that a school board may not have a per se rule expelling all students who bring a firearm onto school property if such policy includes a student who has an unloaded firearm in a locked vehicle trunk as allowed by Va. Code § 18.2-308.1. It may discipline such conduct, however, if it is coupled with other conduct for which discipline is warranted. 2003 Op. Va. Att’y Gen. 65. In response to this opinion, the General Assembly enacted as declaratory of existing law Va. Code § 22.1-277.07:1, which provides: “Notwithstanding any other provision of law to the contrary, each school division may develop and implement procedures addressing disciplinary actions against students, and may establish disciplinary policies prohibiting the possession of firearms on school property, school buses, and at school-sponsored activities.” The General Assembly has also emphasized, however, that “[n]othing in [these] section[s]

shall be construed to require a student's expulsion regardless of the facts of the particular situation." Va. Code §§ 22.1-277.07, 22.1-277.08.

Discipline of students with disabilities raises additional issues and entails additional requirements. See section [18-7.06](#).

18-5.05(f)(6) Students Suspended or Expelled From Other Schools

A student who has been expelled or suspended for more than thirty days by a school board or a private school in Virginia or in another state may be excluded from attendance by a local school board upon a finding of dangerousness and after written notice to the student and his parent, regardless of whether such student has been admitted to another school division or private school in this Commonwealth or in another state subsequent to such exclusion. Va. Code § 22.1-277.2 (A). In the case of a suspension of more than thirty days, the term of the exclusion may not exceed the duration of such suspension. In excluding any such expelled student from school attendance, the local school board may accept or waive any or all of any conditions for readmission imposed upon such student by the expelling school board pursuant to § 22.1-277.06. The excluding school board shall not impose additional conditions for readmission to school. A right of appeal to the school board is provided. See *also* 1975-76 Op. Va. Att'y Gen. 303 (hearing must be held before a school board can revoke a student's right to attend public school after expulsion from a private school).

As an alternative procedural method to that provided under § 22.1-277.2(A), a school board may provide for a hearing by the division superintendent or his designee, instead of the school board, of appeals of decisions to exclude such students. Under this procedure, the student has the right to petition the school board to review the record. Va. Code § 22.1-277.2(B).

Upon the expiration of the period of expulsion, the student may petition for readmission. If such petition is denied, the school board must identify when the student may re-petition for admission. The school board may permit excluded students to attend an alternative educational program. Va. Code § 22.1-277.2(C) & (D).

18-5.05(f)(7) Alternative Education Requirements

A school board or, if so empowered by the board, the superintendent or his designee may require any student who has been (i) charged with an offense relating to the Commonwealth's laws, or with a violation of school board policies on weapons, alcohol, drugs, or intentional injury to others; (ii) found guilty or not innocent of a crime related to weapons, alcohol, or drugs or which resulted in, or could have resulted in, injury to others, or which is required to be disclosed pursuant to Va. Code § 16.1-305.1; (iii) found to have committed a serious offense or repeated offenses of school board policies; or (iv) expelled or suspended long-term, to attend an alternative education program, including, but not limited to night school, adult education, or any other educational program designed to offer instruction to students for whom the regular program of instruction would be inappropriate. Va. Code § 22.1-277.2:1. When the superintendent or his designee makes the determination, written notice and an opportunity for a hearing must be provided. The decision of a superintendent is final unless altered by the school board after a review of the record. Va. Code § 22.1-277.2:1(B). Costs of all alternative programs not offered by the school division are to be borne by the parents. Va. Code §§ 22.1-277.04, 22.1-277.05, 22.1-277.06.

In lieu of suspension or expulsion of elementary school students, school boards may establish an optional education program within the school with a purpose of teaching appropriate behavior and maintaining academic skills during the period of exclusion. Va. Code § 22.1-200.1.

In *Fairfax County School Board v. South Carolina*, 297 Va. 363, 827 S.E.2d 592 (2019), the Supreme Court of Virginia assumed without deciding that a student has some liberty or property interest implicated by a disciplinary transfer from one school to another. The Court found that notice of the allegations and an opportunity to respond was sufficient.

18-5.05(f)(8) Constitutional Considerations

18-5.05(f)(8)(i) Basic Principles

The procedures outlined in the Code for suspension and expulsion of students are required by the Due Process Clause of the Fourteenth Amendment. Because other Virginia statutes extend the right of education to pupils of certain ages, that right may not be withdrawn on the grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. In *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), the Court stated: "We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." *Id.*; see *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, No. 4:18cv63 (E.D. Va. Nov. 20, 2020), *aff'd in relevant part*, 28 F.4th 529 (4th Cir. 2022) (*Goss* requirements satisfied when school met with student and parent and issued formal Notice of Suspension giving reason for suspension, even though reason changed from that given during initial oral notice); *Wood v. Henry Cnty. Pub. Sch.*, 255 Va. 85, 495 S.E.2d 255 (1998) (due process satisfied at initial suspension stage when informed of charge and given opportunity to explain).

The Supreme Court has recognized that there are situations in which prior notice and hearing cannot be insisted upon: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Goss v. Lopez, supra*. In such cases, the necessary and rudimentary hearing should follow as soon as practicable. *Doe v. Rockingham Cnty. Sch. Bd.*, 658 F. Supp. 403 (W.D. Va. 1987) (school officials are under a duty to provide a hearing within a reasonable period of time after the date of the suspension, which would not normally exceed seventy-two hours); *Hillman v. Elliott*, 436 F. Supp. 812 (W.D. Va. 1977) (due process requirements were satisfied where a suspended student was given notice and afforded a hearing by the principal in his office prior to suspension); *Kirtley v. Armentrout*, 405 F. Supp. 575 (W.D. Va. 1975) (the court found that notice given at the school board hearing as to the standard which the board would apply did not violate the Due Process Clause).

However, not every disciplinary measure requires the invocation of due process procedures. *Bernstein v. Menard*, 557 F. Supp. 90 (E.D. Va. 1982) (student's dismissal from the school band did not require the provision of due process, although due process procedures were provided in the case). In *Bernstein*, the court suggested that, upon proper application, the defendants would be entitled to their attorney's fees due to the "frivolous" nature of the lawsuit.

In a college setting, a federal district court first held that a student has a property interest in continued enrollment in a public university and thus was entitled to due process before being expelled. *Doe v. Alger*, 228 F. Supp. 3d 713 (E.D. Va. 2016). The court then held that the university's appeal process for charges of sexual misconduct failed to provide constitutional due process when it (1) did not provide reasons for its decision; and (2) deprived the student of a meaningful opportunity to be heard.

18-5.05(f)(8)(ii) Right to Have Counsel Present at Hearing

In the context of disciplinary hearings for suspensions of less than ten days, the Supreme Court concluded in *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), that a school board is not required to provide a student an opportunity to secure counsel to be present at the hearing or to represent the student. Although the Court has not addressed the issue of whether a student has a right to secure counsel for disciplinary hearings involving more

severe sanctions, such as suspensions greater than ten days or expulsions, some lower courts have concluded that a student has this right. *See, e.g., Black Coalition v. Portland Sch. Dist.*, 484 F.2d 1040 (9th Cir. 1973).

18-5.05(f)(8)(iii) Judicial Review

It is not the duty of the federal courts to re-litigate the evidentiary issues arising out of school disciplinary proceedings. *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992 (1975).

18-5.05(g) Parental Responsibility

Each parent of a student enrolled in a public school has a duty to assist the school in enforcing the standards of student conduct and attendance so that education may be conducted in an atmosphere free of disruption and threats to person or property, and supportive of individual rights. Va. Code § 22.1-279.3. Schools must send parents a copy of the standards of student conduct, compulsory school attendance law, and a notice of the requirements of the statute, receipt of which parents are to acknowledge in writing.

The school board may, by petition to the juvenile and domestic relations court, proceed against one or both parents for willful and unreasonable refusal to participate in efforts to improve the student's behavior or attendance. The procedure is as follows:

1. If the court finds that the parent has willfully and unreasonably failed to meet to review the school board's standards of student conduct and the parent's responsibility to assist the school in disciplining the student maintaining order, ensure attendance, and to discuss improvement of the child's behavior and educational progress, it may order the parent to do so.
2. If the court finds that the parent has willfully and unreasonably failed to accompany a suspended student to meet with school officials, or upon the student's receiving a second suspension or being expelled, it may order (i) the student or his parent to participate in such programs or such treatment as the court deems appropriate to improve the student's behavior or school attendance, including parental counseling or a mentoring program, or (ii) the student or his parent to be subject to such conditions and limitations as the court deems appropriate for the supervision, care, and rehabilitation of the student or his parent. In addition, the court may order the parent to pay a civil penalty not to exceed \$500.

This code provision, and not Va. Code § 22.1-254, is the proper one to enforce standards for behavior, tardiness, and absence. *Blake v. Commonwealth*, 288 Va. 375, 764 S.E.2d 105 (2014). The court may use its contempt power to enforce its orders. Va. Code §§ 16.1-241.2 and 22.1-279.3(G). Violation of the parental responsibility provisions in § 22.1-279.3 relating to compulsory school attendance is a Class 3 misdemeanor. Va. Code § 22.1-263.

18-5.05(h) Required Reporting

18-5.05(h)(1) Acts Committed on School Property or at School Functions

Virginia Code § 22.1-279.3:1 mandates that incidents involving the following, when occurring on school property or at a school-sponsored event, must be reported to the division superintendent and the principal:

1. Alcohol, marijuana, a controlled substance, an imitation controlled substance, or an anabolic steroid;
2. Assault and battery that results in bodily injury;

3. Sexual assault, death, shooting, stabbing, cutting, or wounding of any person, abduction of any person, or stalking;
4. Written threats against school personnel;
5. Illegal carrying of a firearm;
6. Illegal conduct involving firebombs, explosive materials or devices, hoax explosive devices, or chemical bombs;
7. Threats or false threats to bomb;
8. Arrest of any student, including the charge therefor.

The principal must notify the parent of any student involved in such act, regardless of whether disciplinary action is taken. Va. Code § 22.1-279.3:1(D). Such information may not include information concerning other students. *Id.* The parents of a minor student who is the object of conduct described above must also be notified, and the principal must tell the parents whether the incident was reported to law enforcement. Va. Code § 22.1-279.3:1(B)(4). Except as otherwise required by federal law, principals must “immediately” report to the local law enforcement agency any act described above that may constitute a felony offense, except that they have the discretion to report certain incidents committed by a student who has a disability. Va. Code § 22.1-279.3:1(B)(2). Information regarding the annual frequency of such incidents must be made available to the public. Va. Code § 22.1-279.3:1(D). When any student commits any reportable incident, such student shall be required to participate in prevention and intervention activities as deemed appropriate by the superintendent or his designee. Va. Code § 22.1-279.3:1(D). When a reportable incident occurs, there is no requirement to file delinquency charges with the juvenile court. Va. Code § 22.1-279.3:1(H).

A school board may establish an alternative discipline process to respond to an assault and/or battery that does not cause bodily injury that occurs on school property or at a school-sponsored event. Va. Code § 22.1-279.3:3(A). The involved parties must agree to the process. *Id.* If such an alternative process is established by the school board and the student completes the process, the principal may not report the incident to law enforcement as would be normally required by Va. Code § 22.1-279.3:1(D). Va. Code § 22.1-279.3:3.

At registration, the parent or guardian must provide a sworn statement as to whether the child has been expelled from any public or private school in Virginia or any state because of an offense in violation of school board policies relating to drugs, alcohol, weapons, personal injury or destruction of property. Va. Code § 22.1-3.2. If such an offense resulted in expulsion, a local school board is authorized to exclude the child from school attendance if the child is a danger to other students and school staff. Va. Code § 22.1-277.2; see section [18-5.05\(f\)\(6\)](#).

School board employees enjoy immunity from all civil liability arising from their investigation and reporting of activities of students or other persons relating to such acts, provided that the employee acts in good faith and without malice. Va. Code § 8.01-47. School boards must develop programs to prevent violence and crime on school property and at school events. Va. Code § 22.1-279.9.

School boards must develop programs to prevent violence and crime on school property and at school events. Va. Code § 22.1-279.9.

18-5.05(h)(2) Criminal Acts Committed By Students

The chief law enforcement officer of a jurisdiction must disclose to a school principal that a student has been charged with, and may disclose when a student is a suspect in, a violent juvenile felony, arson, or a weapons violation as specified in Va. Code § 16.1-301(B). If the law enforcement officer so discloses the information, he must also inform the principal of the subsequent disposition of the matter. *Id.* Additionally, any offense, wherever committed, that would be (i) a felony if committed by an adult; (ii) a drug offense that occurred on a school bus, on school property, or at a school-sponsored activity; or (iii) would be an adult misdemeanor involving any incidents described in the first paragraph of the preceding section must be reported by law enforcement authorities to the superintendent and the principal. Law enforcement authorities are authorized, but not required, to report the offense and subsequent disposition if it would have been classified as an adult misdemeanor. Va. Code § 22.1-279.3:1(B). There is no requirement under Va. Code § 22.1-279.3:1(B) that the law enforcement official inform the principal of the subsequent disposition. Principals also have reporting obligations and authority under Va. Code § 22.1-279.3:1(C) & (D).

An intake office must file a report with the division superintendent after a petition is filed in juvenile court alleging that a juvenile committed an act that would be a crime if committed by an adult. If the violation involves one of the crimes specified in Va. Code § 16.1-260(G)⁷, the report must notify the superintendent of the filing of the petition and the nature of the offense. Va. Code § 16.1-260(G). The superintendent may disclose the information derived from the notice to the juvenile's school principal if it is necessary to ensure the physical safety of the juvenile, other students, or school personnel within the division. The principal may further disseminate the information, after the juvenile has been taken into custody, whether or not the child has been released, only to those students and school personnel having direct contact with the juvenile and in need of the information to ensure physical safety or the appropriate educational placement or other educational services. Va. Code § 16.1-305.2.

The clerk of the juvenile court must notify the division superintendent within fifteen days of the expiration of the appeal period of the disposition of a proceeding where a child is charged with a crime listed in Va. Code § 16.1-260(G). If the proceedings do not result in a court disposition, e.g., if the charges are withdrawn or handled informally, the clerk shall notify the superintendent of the action taken within fifteen days of such action. Va. Code § 16.1-305.1. A superintendent who receives such notification may disclose the information to persons who had been informed, pursuant to Va. Code § 16.2-305.2, of the filing of the petition. Otherwise, only information regarding an adjudication of delinquency or conviction for an offense listed in § 16.1-260(G) shall be disclosed to school personnel responsible for the management of student records and the school principal. The principal shall further disseminate such information to school personnel who provide direct educational or support services to the student if they have a legitimate educational interest in such information. Va. Code § 22.1-288.2.

A student may be suspended or expelled as the result of a report received pursuant to § 16.1-305.1 of a delinquency adjudication or conviction of any offense listed in § 16.1-260(G). Va. Code § 22.1-277(C). Records of the delinquency adjudication or conviction are to be maintained separately from the student's other records, unless the school disciplines the student because of the incident that formed the basis for the adjudication or conviction. Va. Code § 22.1-288.2.

⁷ E.g., murder, felonious assault, certain drug offenses, arson, burglary, and street gang activity. Virginia Code § 19.2-83.1 contains a similar notice requirement for students over the age of eighteen.

18-5.06 Pupil Records

All students are assigned a unique student identification number, which may not include or be derived from the student's social security number. Va. Code § 22.1-287.03. "Scholastic record" is defined in Va. Code § 22.1-289 and includes material related to a child's educational development as well as disciplinary records, test data, health records, and assessments for special education. Upon the request of a division superintendent into whose division a child is transferring, the entire scholastic record must be forwarded. Schools must annually notify parents of their rights under the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (FERPA). Unless the general policy is included in the annual notice, schools must notify parents of a request for transfer of scholastic records and the identity of the requestor. A parent's or guardian's permission is not required for transfer, but they and the student may inspect the records. Unlawful disclosure of a scholastic record is a Class 3 misdemeanor. *Id.* However, FERPA does not provide a right of action under § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002).

A school may permit access to student records only to those persons listed in Va. Code § 22.1-287 (e.g., parents, guardians, current teachers, law enforcement personnel, employees of a local agency responsible for protective services to children). Virginia Code § 22.1-287 states that a principal or his designee may disclose identifying information from a pupil's scholastic record for the purpose of furthering the ability of the juvenile justice system to effectively serve the pupil prior to adjudication. The principal or his designee may also disclose identifying information from a pupil's scholastic record to attorneys for the Commonwealth, court services units, juvenile detention centers or group homes, mental and medical health agencies, state and local children and family service agencies, and the Department of Juvenile Justice and to the staff of such agencies. Prior to disclosure, the persons to whom the records are to be disclosed shall certify in writing that the information will not be disclosed to any other party, except as provided under state law, without the prior written consent of the parent or the pupil if he or she is eighteen years of age or older. However, personally identifiable information from a student's record may not be given to a federal government agency unless required by federal law or regulation. Va. Code § 22.1-287.01.

Virginia Code § 22.1-3.1 provides that when a certified copy of a student's birth record is presented upon enrollment in school, the principal or designee may retain a copy in the pupil's permanent school record.

Note that FERPA also governs the disclosure of certain educational records by public agencies that receive federal funds. An implementing regulation provides that an educational agency may presume that either parent has access to a student's records unless the agency has been provided with evidence that there is a legally binding document to the contrary. 34 C.F.R. § 99.4. Student classwork and homework, at least until turned into the teacher, are not education records under FERPA. *Owasso Independent Sch. Dist. v. Falvo*, 534 U.S. 426, 122 S. Ct. 934 (2002). See 2013 Op. Va. Att'y Gen. 167 for a discussion of the interaction between Va. Code § 22.1-187 and FERPA.

Directory information as defined by federal law (e.g., student's name, sex, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance and degrees received) may be disclosed in accordance with federal and state law and regulations, provided notice has been given to the parent or eligible student and an opportunity to withhold from disclosure any or all of the information is provided. Affirmative consent is required before a student's address, telephone number, or email address can be disclosed. Va. Code § 22.1-287.1.

School boards may develop a single, standardized form to obtain parental consent for the release of student data. Va. Code § 22.1-79.3(I).

Federal law also restricts dissemination of pupil's records. Note that a school board must notify parents and pupils in advance of its intended compliance with any subpoena or order requiring disclosure of a pupil's records. 20 U.S.C. § 1232(g).

Certain disclosures to colleges, professional schools, and the military forces are permitted. Va. Code § 22.1-288.

The Department of Education will provide any school division with a model data security plan. Va. Code § 22.1-20.2. The school division must notify the parent of any affected student if it believes that electronic records containing personally identifiable information have been disclosed in violation of federal or state law. Va. Code § 22.1-287.02. If a school division has a contract with a school service provider that collects student personal information, that provider must meet specified privacy and security requirements. Va. Code § 22.1-289.01.

18-5.07 First Amendment Issues

18-5.07(a) Free Exercise Clause

"Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. Amend. I; see *also* Va. Const. art. I, § 16. The U.S. Supreme Court has stated that the protection provided by Article 1, Section 16 of the Virginia Constitution is co-extensive with that of the First Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 67 S. Ct. 504 (1947).

Analysis of a free exercise claim has two distinct parts. The first question asked is whether state action creates a constitutionally cognizable burden upon claimant's free exercise rights. Only when this question is answered in the affirmative need a court proceed to the second question of whether there is a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) (holding that the Amish were not required to comply with compulsory high school attendance law where to do so would violate their religious beliefs); see *also Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995) (refusal to provide interpreter did not violate Free Exercise Clause); section [18-4.10\(b\)](#).

A violation of the Free Exercise Clause is predicated on coercion. *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974) (holding that since attendance at a high school graduation ceremony was voluntary, the inclusion of a brief invocation and benediction in such a ceremony would not violate the free exercise rights of plaintiff-students). But see *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (benediction at a high school graduation invoking a deity, administered by a clergy member violates the Establishment Clause).

"The First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech." *Hanover Cnty. Unit of the NAACP v. Hanover Cnty.*, 461 F. Supp. 3d 280 (E.D. Va. 2020) (quoting *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)). In a compelled-speech action, the plaintiff must establish: "(1) speech; (2) to which he objects; that is (3) compelled by some governmental action." *Id.* (quoting *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015)) (internal quotation marks omitted). The NAACP does not have associational standing to bring a compelled-speech suit on behalf of its members claiming a school's name (Stonewall Jackson) and school team and student body name (Rebels) compels students to express a view with which they disagree, i.e., the endorsement and glorification of slavery and other Confederate values. *Hanover, supra*. Although associational standing does not always require individualized proof, in this case "the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof." *Id.* (quoting *Jefferson v. Norfolk City Sch. Bd.*, No. 2:10-cv-316 (E.D. Va. Nov. 18, 2010)). Thus, NAACP would need to produce evidence regarding "which members objected to which speech and how each of the members were compelled to speak." Moreover, even absent the standing

problem, the NAACP's compelled-speech claim failed because the complaint did not allege that students refused to wear the school uniforms or otherwise objected to the school and team names, and there was no allegation that the School Board punished or threatened to punish the students for such objections. Likewise, the complaint failed to support an Equal Protection claim because the school and team names "are the same for students of all races" and did not plead facts showing its members were disproportionately impacted by the names.

18-5.07(b) Establishment Clause

"Congress shall make no law respecting an establishment of religion" U.S. Const. Amend. I. Its counterpart is found in Va. Const. art. I, § 16.

This clause requires school boards to be religiously neutral. However, the Supreme Court has not required an absolute separation between church and state and it has upheld limited governmental support of parochial and sectarian schools. *See Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062 (1983) (permitting state tax deduction for tuition, transportation, and textbooks for parents of children attending private schools, including sectarian schools); *see also Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 131 S. Ct. 1436 (2011) (no taxpayer standing to challenge constitutionality of tax credits for contributions to school tuition organizations which provide scholarships to students attending private schools, including religious schools); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020) (when challenged by parents of children denied scholarships to religious schools, state program granting tax credits for contributions to organizations that award scholarships for private school tuition violated Free Exercise Clause when it did not allow funds to be used for tuition at religious schools).

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), the Supreme Court outlined a three-pronged test to determine whether a school policy is consistent with the Establishment Clause: (1) the governmental policy must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion. *See also Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460 (2002) (a voucher program that is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of genuine and independent private choice, does not violate the Establishment Clause); *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997) (5-4) (overruling *Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232 (1985), and holding the expenditure of Title I funds within sectarian schools does not violate the Establishment Clause) and *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530 (2000) (plurality opinion) (fact that aid is direct and divertible to religious use does not automatically violate Establishment Clause; rejects pervasively sectarian inquiry and focuses on neutrality of aid criteria); *Columbia Union College v. Oliver*, 254 F.3d 496 (4th Cir. 2001) (religious school's receipt of state funds does not violate Establishment Clause when funds have a secular purpose and neutral criteria, and there is no evidence of actual diversion of funds to sectarian purposes).

Teaching about Islam in a world history class has a secular purpose and does not advance that religion or inhibit Christianity. *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019) (applying *Lemon* test). Having a school break that coincides with the Christmas season or the Easter season does not violate the Establishment Clause. *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999); 1995 Op. Va. Att'y Gen. 1.

See also Rosenberger v. Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510 (1995) (Establishment Clause not violated if a public university provides funding to a student publication written from a Christian perspective when the university provides funds to a broad spectrum of student publications); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S. Ct. 2462 (1993) (providing interpreter in sectarian school under a program that

provided benefits to disabled children in a religion-neutral manner did not violate Establishment Clause); *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (posting of Ten Commandments in Kentucky public schools held unconstitutional); *Sch. Dist. v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) (daily reading of Bible verses and Lord's Prayer in public schools held unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962) (state-composed and -mandated prayer to be recited in public schools held unconstitutional); *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952) (release time program for public school students to attend religious classes off campus held constitutional); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 68 S. Ct. 461 (1948) (religious instruction in public school facilities on school time at no cost to district held unconstitutional).

Unlike the Establishment Clause, the Virginia Constitution specifically prohibits any governmental appropriation of public funds or personal property (i) to any church or sectarian society, or (ii) to any institution which is in any part or way controlled by any church or sectarian society. Va. Const. art. IV, § 16 (1971). Thus, although a particular governmental expenditure may not violate the Establishment Clause, Virginia's Constitution could prohibit the action. 1991 Op. Va. Att'y Gen. 49 (discussion of constitutionality of proposed legislation requiring school boards to provide transportation, at cost, for parochial and sectarian school students; subsequent to the opinion, Va. Code § 22.1-176.1 was added to permit school boards to provide such transportation).

18-5.07(c) Religious Activities on School Grounds

18-5.07(c)(1) Student Prayer

In *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992), the United States Supreme Court held that nonsectarian prayer at a school graduation violated the Establishment clause when school officials decided there would be a prayer, selected the clergyman, and provided guidelines for the contents of the prayer. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000), the Court held student-led, student-initiated non-sectarian prayer at football games violated the Establishment Clause. The court rejected an argument that such prayer was more akin to private student speech.

Students in public schools may voluntarily engage in student-initiated prayer. Va. Code § 22.1-203.1. The Board of Education, in consultation with the Office of the Attorney General, developed [guidelines](#) on constitutional rights and restrictions regarding prayer and other religious expression in public schools See Va. Code § 22.1-203.2. There is federal [guidance](#) as well.

Each school board must authorize the daily observance of one minute of silence in each classroom for meditation, prayer, or other silent activity. Va. Code § 22.1-203. The constitutionality of the statute was upheld by the Fourth Circuit. *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *see also Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985) (holding Alabama's "moment of silence" statute unconstitutional because the expressed purpose for the enactment was to return prayer to the public schools). The Court did observe that "the legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." *Id.*

18-5.07(c)(2) Prayer by Teacher or Staff

The Supreme Court signaled a somewhat different view of religious liberty and the separation of church and state in *Kennedy v. Bremerton School District*, 597 U.S. ___, 142 S. Ct. 2407 (2022). There, the Court held that a public school district violated the free exercise and free speech rights of a high school football coach when it prohibited him from praying midfield after school football games. The Court found, and the district conceded, that its policy prohibiting the coach's "public and demonstrative religious conduct" was neither neutral nor generally applicable. Likewise, the Court found his prayer to constitute

private speech because his job description permitted short periods of time after games to call home, socialize, or engage in other secular activities; that the coach used the same time to engage in prayer did not transform his speech into government speech. The Court also characterized the *Lemon* endorsement test—regarding whether a reasonable observer would conclude that the government was endorsing religion—as problematic and “abandoned.” It called for a return to “reference to historical practices” and “the understanding of the Founding Fathers” when interpreting the Establishment Clause, and held that the coach was entitled to summary judgment on his First Amendment claims.

18-5.07(c)(3) Equal Access Act

Congress passed the Equal Access Act in 1984. 20 U.S.C. § 4071(d). The Act prohibits public secondary schools that receive federal funds and maintain a “limited open forum” from denying equal access to students, who wish to meet on school grounds, based on the religious, philosophical or other content at such meetings. The Act applies when

- a. secondary students are involved,
- b. the meetings are voluntary and student-initiated,
- c. the meetings do not substantially interfere with the operation of school and are held during noninstructional time,
- d. non-school persons do not direct or regularly attend the meetings,
- e. there is no school sponsorship and any school personnel present at any,
- f. religious meetings are there in a non-participatory capacity, and
- g. the school system maintains a “limited open forum.”

20 U.S.C. § 4071(c).

A “limited open forum” exists when the school offers an opportunity for one or more non-curriculum related student groups to meet on school premises. Although the act does not define “non-curriculum related student groups,” the Supreme Court, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356 (1990), stated that the term meant any student group not directly related to the body of courses offered by the school. A group directly relates to a school’s curriculum if the group’s subject matter is taught in the school or if participation in the group is required for a particular course.

The Court in *Mergens* also found that the Act does not violate the Establishment Clause because the Act grants equal access to both secular and religious groups and the Act does not have the effect of advancing religion or fostering an excessive entanglement between government and religion.

18-5.07(c)(4) Bible Study

A public school system may offer a course of Bible study provided that: (i) its supervision and control is vested in the school board; (ii) its teachers are certified and hired by the board in the same manner as other teachers; (iii) its materials are selected by the board; (iv) it is offered as an elective; (v) any contributions earmarked for a Bible course exclusively are otherwise with “no strings attached”; and (vi) it is taught in an objective manner. *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983). See *Deal v. Mercer Cnty. Bd. of Ed.*, 911 F.3d 183 (4th Cir. 2018), which addresses standing, ripeness, and mootness in a suit challenging a bible study program as violative of the Establishment Clause.

18-5.07(c)(5) Postings

Each school must have prominently placed for all students to read the Bill of Rights of the U.S. Constitution, 2003 Va. Acts ch. 902, and the statement “In God We Trust, the national motto, enacted by Congress in 1956,” 2002 Va. Acts ch. 895; see *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005) (posting of motto upheld as constitutional);

Lambeth v. Davidson Cnty. Bd. of Comm'rs, 407 F.3d 266 (4th Cir. 2005) (posting of national motto on façade of government building does not violate Establishment Clause).

18-5.07(d) Release-Time Programs

Release-time programs involve the religious instruction of public school pupils during the school day, the precise terms of which must be analyzed in light of the requirements of the Establishment Clause.

The United States Supreme Court has decided two so-called "release-time" cases. *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 68 S. Ct. 461 (1948). In *McCollum*, the religious instructors took over the regular public school classrooms and nonparticipating students went elsewhere in the building. The school system approved the religious instructors and participated in recording the attendance of students in the religious instruction classes. The Court declared this program unconstitutional.

In *Zorach*, the school system simply released students during the school day upon the written request of their parents. These students attended religious classes off the public school premises, and the school system received verification of the student's attendance at the religious classes. The Court upheld this release-time program.

There are at least three distinctions between *Zorach* and *McCollum* that account for their differing results. First, *Zorach* did not involve religious instruction in public school classrooms. Second, *Zorach* did not involve the expenditure of public funds for religious purposes. Third, the public school system had arguably placed its imprimatur upon the religious program through its provision of classroom space and other activities in *McCollum*.

In *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975), the Fourth Circuit upheld the constitutionality of a release-time program in three Harrisonburg elementary schools. In that case, the religious organization mailed enrollment cards directly to the parents asking if they consented to their children's participation in the program. The children deposited the completed cards at school and the religious organization collected them. Public school officials did not encourage participation in the program, and the religious organization did not enter the schools to solicit students' participation. Public school officials and representatives of the religious organization worked together to coordinate schedules and to verify attendance. The program was conducted one hour per week. Nonparticipating students remained in their regular public school classroom during this period, but they did not receive formal instruction. In upholding the constitutionality of the program, the Fourth Circuit relied upon *Zorach* and the tripartite test discussed above.

Again, focusing on the distinction between *Zorach* and *McCollum*, the Fourth Circuit held in *Moss v. Spartanburg County School District Seven*, 683 F.3d 599 (4th Cir. 2012), that the provision of academic credit for release-time religious studies did not excessively entangle the public schools in religion. Although not necessarily determinative, the court indicated the lack of entanglement was strengthened by the public school's requirement of having a private school approve of the Bible school's curricula and pass on the grades so that the school system treated the Bible school's courses in a manner similar to credit for religious courses at private schools. Significantly, the court denied standing to one family challenging the program, finding that the child and family merely had "abstract knowledge" of the school's release time policy and had shown no injury in fact. The other family members, however, testified that they experienced feelings of "marginalization and exclusion" which the court found conferred standing.

A federal district court rejected a release-time program because of the school system's apparent endorsement of religion. *Doe v. Shenandoah Cnty. Sch. Bd.*, 737 F.

Supp. 913 (W.D. Va. 1990) (the school system permitted religious instructors to enter the public classrooms to recruit students for the program and to park the bus, where the private group held the religious classes, on school grounds).

The Attorney General found constitutional a release-time program that occurred one hour per week in private facilities off public school grounds, where school personnel took no part in the enrollment of the students for the program. 1974-75 Op. Va. Att'y Gen. 358. On the other hand, the Attorney General has declared unconstitutional a release-time program that involved the use of mobile classrooms in the parking lots of various public schools. 1973-74 Op. Va. Att'y Gen. 353.

18-5.07(e) Student Expression

With respect to the First Amendment right to freedom of expression, students do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969) (wearing of arm bands was symbolic speech protected by First Amendment). However, students' First Amendment rights are not co-extensive with those of adults. *Id.* Thus, although students possess First Amendment rights while at school, they may not exercise them in such a fashion as to disrupt class work, create substantial disorder, or materially interfere with the rights of others. *Id.*; *Pleasant v. Commonwealth*, 214 Va. 646, 203 S.E.2d 114 (1974). For example, the First Amendment does not prevent a school division from suspending a student for giving an offensively lewd and indecent speech at an assembly. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986). Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use and the school is not required to demonstrate that the speech gave rise to a substantial risk of disruption. *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618 (2007) (display of banner during school-sanctioned activity: Bong Hits 4 Jesus).

Construing *Tinker*, *Fraser*, *Morse*, and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988), the Fourth Circuit explained:

Although *Tinker* provides the basic constitutional framework for reviewing student speech, the Supreme Court has created three exceptions to *Tinker* in which school officials may regulate student speech without undertaking *Tinker's* substantial-disruption analysis. First, school officials can "prohibit the use of vulgar and offensive terms" as part of their role in teaching students the "fundamental values of 'habits and manners of civility' essential to a democratic society." *Fraser*, 478 U.S. at 683, 681. Second, school officials have greater latitude to regulate student speech when the school "lend[s] its name and resources to the dissemination of student expression" such that "students, parents, and members of the public might reasonably perceive [that student expression] to bear the imprimatur of the school." *Kuhlmeier*, 484 U.S. at 272-73, 271. Third, school officials can regulate student speech that can plausibly be interpreted as promoting illegal drugs because of "the dangers of illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 410 (2007).

Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013). The court went on to analyze the wearing of Confederate flag apparel in school under a *Tinker* school disruption framework and found that, given that racial tension still existed in the community, the school's concern that the shirts could materially and substantially disrupt the work and discipline of the school was reasonable. When a student's speech is likely to cause a substantial disruption, school officials can prohibit or punish the speech.

In *Broussard v. School Board of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992), a school administrator found the word "suck," in the context of a T-shirt containing the

phrase “Drugs Suck,” to be offensive and disruptive. The district court held that the administrator’s decision was a permissible means of regulating children’s language and channeling their expression into socially acceptable speech. By contrast, the Fourth Circuit in *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003), granted a preliminary injunction against a school dress code that prohibited depictions of weapons on clothing, finding there was no evidence it would cause disruption of school activities and that there was a strong likelihood that the prohibition was constitutionally overbroad. Citing but not distinguishing *Newsom*, the Fourth Circuit in *Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013), upheld a dress code against overbreadth and vagueness challenges after noting that because of the duties and responsibilities of the public elementary and secondary schools, the overbreadth and vagueness doctrines warrant a more hesitant application in the public school setting than in other contexts. Also, given a school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.

A school board may not regulate the length of a student’s hair. *Mick v. Sullivan*, 476 F.2d 973 (4th Cir. 1973) (applying the Fourth Circuit rule “that the right to choose one’s hairstyle is one aspect of the right to be secure in one’s person guaranteed by the due process clause and the equal protection clauses of the Fourteenth Amendment.”) *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972). A school board may include in its code of student conduct a dress or grooming code and, if it does so, must permit students to wear any “religiously and ethnically specific or significant head covering or hairstyle, including hijabs, yarmulkes, headwraps, braids, locs, and cornrows.” Va. Code § 22.1-279.6(I). Moreover, the dress or grooming code must maintain gender neutrality by applying the same set of standards to all students regardless of gender; prohibit any school board employee from enforcing the dress or grooming code by direct physical contact with a student or a student’s attire; and must prohibit any school board employee from requiring a student to undress in front of any other individual, including the school board employee, to comply with the dress or grooming code. *Id.*

Two lines of cases have developed for dealing with student speech and press issues. One line of cases consists of those situations where student speech or conduct occurs outside of the realm of official school sponsorship. The symbolic speech of *Tinker* (wearing of black arm bands) was private conduct which was carried out independent of any school-sponsored programs. Student free speech rights are at their strongest where they are private, non-school-sponsored and nonprogram related. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (regulation that restrained distribution of private student newspaper held invalid); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (regulations that restrained distribution of non-school-sponsored literature held invalid); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971) (prior restraint on distribution of underground newspaper held invalid); *Leibner v. Sharbaugh*, 429 F. Supp. 744 (E.D. Va. 1977) (school officials enjoined from disciplining student for his role in distribution of underground newspaper).

The second line of cases involves those situations where educators attempt to regulate speech or conduct in the context of school-sponsored activities. School officials are entitled to regulate the content of such speech in any reasonable manner to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of immaturity, and that the views of the individual speaker are not erroneously attributed to the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988); see also *Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282 (4th Cir. 2021) (fourth grade student’s First Amendment rights not infringed when principal refused to include her essay regarding LGBTQ equality in class booklet on basis that it was not age-appropriate); *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989) (student elections and

assemblies are school-sponsored events, within the meaning of *Hazelwood*). Although the results of regulation in this area prior to *Hazelwood* were mixed, student free speech rights here have never been as broad as they are in the private, non-school-sponsored context. *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) (prepublication review of official newspaper produced in journalism class upheld). A school's regulation of offensive, non-student speech in school-sponsored, curricular publications was upheld in *Myers v. Loudoun County School Board*, 500 F. Supp. 2d 539 (E.D. Va. 2007) (such publications were not found to be public forums and a father's use of the term "sucks," or a phonetic variation thereof could be rejected by school officials). School officials were entitled to halt distribution of a non-school-sponsored newspaper that contained advertisement for a store that specialized in the sale of drug paraphernalia. *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980).

In *Mahanoy Area School District v. B. L.*, 594 U.S. ___, 141 S. Ct. 2038 (2021), the Supreme Court held that a public high school violated a student's First Amendment rights after she transmitted vulgar language and gestures to her Snapchat friends criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student from the cheerleading team for a year. The Supreme Court rejected the lower court's reasoning that *Tinker* did not apply to off-campus speech because the distinction between whether the speech is on-campus or off-campus is not appropriate. Instead, the Court explained there were "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech." First, "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." Second, courts have to be skeptical of schools' efforts to regulate off-campus speech, particularly political or religious speech, which will require a heavy burden to justify intervention. And third, schools themselves have an interest in protecting the "marketplace of ideas," which includes the protection of unpopular opinions.

In *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529 (4th Cir. 2022), the Fourth Circuit held that a student plausibly asserted a First Amendment claim after being suspended for remarks he made to other students the day after a mass school shooting in another state. The court determined that the School Board, when it upheld Starbucks' suspension, was "the moving force behind the asserted constitutional violation—the alleged punishment of protected speech." *Id.*, citing *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975) (the suspension "could seriously damage [Starbuck's] standing with [his] fellow pupils and [his] teachers as well as interfere with later opportunities for higher education and employment"). The court determined that the "First Amendment does not permit schools to prohibit students from engaging in the factual, nonthreatening speech alleged" by Starbuck. However, the appeals court upheld the dismissal of the student's Fifth and Fourteenth Amendment claims. In *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), the Fourth Circuit upheld the jurisdictional authority of public school officials to suspend a student who, after school hours, used her home computer to ridicule a classmate through an internet social website and invited other students to join in, because it was reasonably foreseeable that the posting would reach the school and create a substantial disruption there. A district court in *M.B. v. McGee*, No. 3:16cv3334 (E.D. Va. Mar. 24, 2017), distinguished *Kowalski* in finding that a student who sent an email to a college that had accepted a student, claiming the second student had been punished for cheating, had stated a free speech claim when the school punished him for sending the email. The court found that unlike *Kowalski*, the email did not substantially disrupt the work or discipline of the school.

If the conduct or speech occurs within the context of school-sponsored programs, then one must ask whether the particular program is a public forum of free expression, see *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973), or

an integral part of the curriculum. Where speech occurs in a public forum, it may not be prohibited unless such prohibition is justified by a compelling interest on the part of the schools. Where the speech occurs in a particular program that is a part of the curriculum, the school official will have to demonstrate only a reasonable basis for the action taken (e.g., material may be prohibited in an official newspaper in order to avoid an implied endorsement by school officials or material may be prohibited if it is inappropriate for an audience of a given age or because the material is ungrammatical, poorly written, inadequately researched, vulgar or profane). See *Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004) (prohibition of religious song at graduation ceremony justified as avoidance of Establishment Clause violation under either the reasonable basis or compelling interest standard).

The Fourth Circuit, in *Crosby v. Holsinger*, 852 F.2d 801 (4th Cir. 1988), applied the reasoning of *Hazelwood* in upholding a principal's decision to discontinue the use of a depiction of a confederate soldier as the official symbol of a public high school.

Generally, the First Amendment disfavors attempts at prior restraint of free speech (i.e., pre-distribution censorship of written work). Although prior restraint regulations may be valid in the public schools, they are presumptively unconstitutional. The Fourth Circuit has advised that in order to pass constitutional muster a prior restraint regulation must contain: (1) precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may or may not write; (2) a definition of "distribution" and its application to different materials; (3) identity of the school official to whom the material must be submitted for approval, and a description of what the submission process will entail; (4) a provision for prompt approval or disapproval of what is submitted and what is the effect of the official's failure to act; and (5) an adequate and prompt procedure for student appeal from the school official's decision. *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975); *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971).

Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox, in politics, nationalism, religion, or other matters of opinion." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982) (plurality opinion). Construing *Pico*, the Attorney General opined that a school board has the authority to remove books from a public school library for reasons such as pervasive vulgarity, educational unsuitability, or age inappropriateness based on its good-faith educational judgment. 2003 Op. Va. Att'y Gen. 21.

A public school district's take-home flier program was found to violate the First Amendment because the program's regulation of expressive content was found not to be viewpoint neutral and reasonable inasmuch as the program gave school administrators "unbridled discretion" to restrict access by certain groups without any protection against viewpoint discrimination. *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006). The school district's policy allowed school officials to refuse any flier that "undermines the intent of the policy" of the program (that policy being simply to provide a forum for distributing informational materials and announcements in a manner that avoided disruption of learning). This, the Court found, provided no protection against school officials' restriction of expression on the basis of viewpoint, and therefore rendered the policy illegal.

18-5.08 Voter Registration

Public high schools must provide Virginia voter registration information and applications to any enrolled student who is of voting age, and the opportunity to complete the application during the normal course of the school day. Va. Code § 22.1-203.4.

18-6 COURSES OF INSTRUCTION

18-6.01 Instructional Programs

18-6.01(a) Kindergarten

Each school division shall include a program suitable for children who will reach their fifth birthday on or before September 30 of the school year. The school division must furnish a plan for the program to the State Board and the program must include the characteristics contained in Va. Code § 22.1-199. The school system must offer counseling and provide information prepared by the State Board to parents whose children are in the kindergarten age group, and the parent must request enrollment in order to admit a child to the kindergarten program. Va. Code § 22.1-199(B) & (C).

18-6.01(b) Elementary Courses

Elementary courses required to be taught are contained in Va. Code § 22.1-200. At least 680 hours of instructional time must be in English, math, science, and history/social studies. Up to 15 percent of unstructured recreational time may count toward the calculation of total instructional time. Va. Code § 22.1-200.2.

18-6.01(c) Required Courses

The historical documents listed in Va. Code § 22.1-201 must be taught in elementary, middle and high schools. Va. Code § 22.1-201. Instruction in the history and principles of the flags of Virginia and of the United States must be given in at least one grade in each school division. Va. Code § 22.1-202. The State Board of Education prescribes the requirements relating to physical education and instruction concerning alcohol abuse, underage drinking, drunk driving, tobacco use, vaping, and drug abuse. *Id.* §§ 22.1-206, 22.1-207. Moral education is to be emphasized. Va. Code § 22.1-208. Each secondary school shall offer employment counseling and placement services. Va. Code § 22.1-209. School districts must develop educational objectives for financial literacy for grades kindergarten through twelfth grade. Va. Code §§ 22.1-200.03, 22.1-209.1:2, 22.1-225, and 22.1-253.13:1.

18-6.01(d) Driving Education

A school board may offer, as an elective or as a requirement, a driving education course established by the State Board. Va. Code § 22.1-205. The Board of Education shall approve correspondence courses for the classroom training component of driver education. Students who take the correspondence course may receive behind the wheel training from the school, a licensed commercial driving school, or a home-schooling parent who uses a training course approved by the Board of Education. Va. Code § 22.1-205(F).

18-6.01(e) Family Life Education

The Board of Education is required to develop family life curriculum guidelines for kindergarten through twelfth grade, which must include, among other topics: the benefits, challenges and responsibilities of marriage; human reproduction; the benefits of abstinence; the benefits of adoption in the event of an unwanted pregnancy; dating violence and abusive relationships; personal privacy; deterrence of sexual assault and human trafficking; and available resources in the event of a sexual assault. Va. Code §§ 22.1-207.1, 22.1-207.1:1. These guidelines may require instruction on contraception. 1989 Op. Va. Att’y Gen. 202. A pupil’s parent or guardian may request to review a school’s family life curricula. Va. Code § 22.1-207.2. All printed family life curricula not subject to copyright and a description of all audio-visual materials must be made available in the school library or office and through any available parental portal. *Id.* A summary of such curriculum must be distributed to parents or guardians of students participating in the program and posted on the school division’s website. *Id.* Each school board shall conduct a review of its family life curricula at least once every seven years, evaluating whether it reflects “contemporary community standards” and revising the curricula if necessary. Va. Code § 22.1-207.1(D).

18-6.01(f) Character Education

School boards shall establish a character education program to instill in students civic virtues and personal character traits, which may include trustworthiness, respect, responsibility, fairness, caring, and citizenship. The Board of Education is to establish the program's criteria in cooperation with students, parents, and the community, and also provide resources and technical assistance. Va. Code § 22.1-208.01.

18-6.01(g) Standards of Learning

Literary Passport testing was phased out and replaced with Standards of Learning (SOL) assessments. The SOL tests are given each year to students in third, fifth, and eighth grades as well as to high school students. Passing the tests is a graduation requirement beginning with the class of 2004. Alternatives to the English SOLs may be available to students who are English language learners, see Va. Code § 22.1-20.4. The percentage of students passing the tests affects a school's accreditation. See 8 VAC 20-131-380.

18-6.01(h) Remedial Courses

Any student who does not pass the SOLs in the third, fifth, or eighth grades, or an end-of-course test required for graduation, must attend a summer school program or participate in another form of remediation. Any students who pass one or more, but not all, of the tests may be required to attend a remediation program. Va. Code § 22.1-253.13:1.

18-6.01(i) Pledge of Allegiance

All students are required to learn the Pledge of Allegiance. The Pledge of Allegiance must be recited daily in each classroom by each student unless the student or the student's parent objects, in which case the child stays in the classroom, either quietly sitting or standing. Va. Code § 22.1-202(C); see *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005) (upheld as constitutional). The U.S. Supreme Court avoided deciding on the merits whether the recitation in school of the Pledge with the phrase "under God" was unconstitutional by determining the plaintiff father did not have legal custody of the child and thus had no prudential standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301 (2004).

18-6.01(j) Online Instruction & Virtual Schools

School boards may implement online courses and virtual schools programs, defined as a series of online courses with instructional content that (1) is delivered by a multi-division online provider primarily electronically using the Internet or other computer-based methods; (2) is taught by a teacher primarily from a remote location, with student access to the teacher given synchronously, asynchronously, or both; (3) is delivered as a part-time or full-time program; and (4) has an online component with online lessons and tools for student and data management. Va. Code §§ 22.1-212.23 through 22.1-212.27. Teachers must be licensed and students must be enrolled in a school division. *Id.* Teachers who teach only online courses may have a different license. Va. Code § 22.1-298.1. Full-time virtual school students are not included in the calculation for determining the student/teacher ratios. Va. Code § 22.1-253.13:2(P). Graduation requirements must include the successful completion of one virtual course, which may be non-credit-bearing. Va. Code § 22.1-253.13:4.

Without becoming a multi-division online provider, a school division may provide any of its online courses to other divisions through the statewide electronic classroom known as Virtual Virginia. Course content and any fee structure must be approved by the Department of Education. Va. Code § 22.1-212.2. The Department may also charge an evaluation fee to the content provider. Va. Code § 22.1-212.24.

If a child with disabilities is enrolled in a full-time virtual school program, the division that provides that program is entitled to any applicable state and federal funds

and the providing division is responsible for meeting the requirements of the Individuals with Disabilities Education Act. Va. Code § 22.1-215; see section 18-7.

18-6.02 Additional Courses of Instruction

18-6.02(a) Night schools

Any school board may operate night schools, Va. Code § 22.1-210, or vacation schools or camps. Va. Code § 22.1-211.

18-6.02(b) Adult Education

School boards must provide adult education programs for individuals functioning below the high school completion level and may charge therefor. Va. Code § 22.1-225.

18-6.02(c) Career and Technical Education

A school board may establish career and technical educational projects, provided that the projects are approved by the State Board of Education. Va. Code § 22.1-231. A school board may operate the project itself or contract with a private corporation, provided that the corporation's charter and bylaws have been approved by the State Board. Va. Code § 22.1-230. A school board may acquire sites for such projects, Va. Code § 22.1-229, although the power of eminent domain may not be used for such purpose. Va. Code § 22.1-234. A career and technical education credential is an alternative graduation requirement to advanced placement, honors, or International Baccalaureate courses. Va. Code § 22.1-253.13:4. The school board may also create a "high-quality work-based learning experience" as a third alternative. *Id.*

Where a school board contracts with a corporation for a career and technical education project, Va. Code § 22.1-232 governs the contract's terms. School board members and the officers/directors of a corporation are immune from suits arising out of the negligence of a student or agent in connection with such projects. Va. Code § 22.1-236. The State Board may provide academic credit for participation in such projects. Va. Code § 22.1-237.

School boards may enter into agreements for postsecondary credential, certification, or license attainment with community colleges or other public institutions of higher education or educational institutions that offer a career and technical education curriculum. Va. Code § 22.1-253.13:1.

School boards may also create joint or regional schools offering a specialized curriculum leading to a high school diploma and a postsecondary credential, such as industry certification, career certificate, or degree. School boards may, by agreement, establish alternative school day and year schedules for the delivery of instruction, subject to any necessary Board of Education waivers. Such school boards may contract with an accredited institution of higher education or other postsecondary school licensed or certified by the Board of Education or the State Council of Higher Education to deliver such instruction. Va. Code § 22.1-26. There is no general statute making regional schools subject to all statutory requirements for local school divisions, nor is there a separate statute making Va. Code § 22.1-100 (addressing the disposition of surplus funds for local school divisions) applicable to regional schools. Thus, reversion of surplus funds to the participating local school divisions, and thence to the local governing bodies, is not required by law. 2015 Op. Va. Att'y Gen. 129.

School boards may also participate in High School to Work Partnerships between public high schools and local businesses to create opportunities for students. Under the program students may (i) participate in an apprenticeship, internship, or job shadow program in a variety of trades and skilled labor positions or (ii) tour local businesses and meet with owners and employees. Va. Code § 22.1-227.1.

As part of each student's academic and career plan, the school board shall provide a list of the top one hundred professions in Virginia by median pay and the education, training, and skills required for each, and the top ten degree programs at Virginia colleges and universities by median pay of program graduates. Va. Code § 22.1-253.13:1. The lists are to be compiled and provided to each school board by the Department of Education. *Id.*

18-6.02(d) Miscellaneous Programs

The General Assembly has provided for several programs to assist students, teachers, and schools with various needs.

18-6.02(d)(1) For Students

- *At-Risk Four-Year-Olds Program*, Va. Code § 22.1-289.09
- *At-Risk Student Academic Achievement Program*, Va. Code § 22.1-199.4
- *School Breakfast Programs*, Va. Code § 22.1-207.3
- *Advancement Via Individual Determination (AVID) Programs*, Va. Code § 22.1-209.1:3
- *Innovative Remedial Education Program*, Va. Code § 22.1-209.1:4
- *Gifted Education Pilot Program*, Va. Code § 22.1-209.1:5
- *Academic Opportunities Pilot Program*, Va. Code § 22.1-209.1:8

18-6.02(d)(2) For Teachers

- *Minorities in Teaching Program*, Va. Code § 22.1-212.2:1
- *Elementary School Reading Specialists*, Va. Code § 22.1-199.1

18-6.02(d)(3) Others

- *Educational Technology*, Va. Code §§ 22.1-199.1(B), 22.1-146(ii) (financing), 22.1-212.2:2 (technology foundations), 22.1-191.1(B) (technology resource assistant), 22.1-253.13:5(E) (training)

18-6.03 Textbooks

A school board may use textbooks specifically approved by the State Board or textbooks consistent with the regulations of the State Board. Va. Code § 22.1-238; 2009 Op. Va. Att'y Gen. 77. Textbooks approved by the State Board must be used for at least six years, unless the book becomes obsolete or unless a change would result in a decrease in price. Va. Code § 22.1-239. Textbooks may be in printed form, printed with electronic files, or electronic textbooks separate and apart from printed versions of the same textbook. Va. Code § 22.1-741(B).

The State Board contracts with publishers for those textbooks it approves. The conditions of this relationship are governed by Va. Code §§ 22.1-241 to 22.1-246 (1993 & Supp. 1995). Every school board shall order textbooks directly from the publisher and pay the publisher therefor, Va. Code § 22.1-247, unless a central depository is established by the State Board. Va. Code § 22.1-249. The State Board has general supervisory authority over the textbook system. Va. Code § 22.1-250. Any failure to fill an order promptly and completely shall be reported by the division superintendent to the Superintendent of Public Instruction. Va. Code § 22.2-248.

Each school board shall provide, free of charge, such textbooks and workbooks required for courses of instruction for each child attending public schools. The cost of such books may be paid from school operating or other funds as available. Va. Code § 22.1-251. Consumable material such as workbooks, writing books, and drawing books may be purchased and donated by school boards or sold at wholesale plus seven percent. Va. Code § 22.1-253; Va. Const. art. VIII, § 3; 1973-74 Op. Va. Att'y Gen. 467 (foster home children).

The parameters of a local school board's authority to remove certain books from the school library are described in *Board of Education v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982) (see section 18-5.07(e)). See Note, "The Right to Know and School Board Censorship of High School Book Acquisitions," 34 Wash. & Lee L. Rev. 1115 (1977). In a plurality opinion, the Court in *Pico* announced a two-part test: (i) if the school board's intent in removing the books was to deny the students access to ideas that were repugnant to the board; and (ii) if this intent was the "decisive factor" in the decision, then the board would have exercised its discretion in violation of the Constitution. *Id.* The Court noted, however, that a school board may lawfully remove any book it considers "pervasively vulgar" or that lacks "educational suitability." *Id.*

18-6.04 Fees

Except as expressly provided by statute or regulation of the State Board, a school board may not levy any fees or charges on a pupil. Va. Code § 22.1-6. Fees may be charged for extracurricular activities but not for any required course or as a prerequisite for admission to school. 2011 Op. Va. Att'y Gen. 126 (school board cannot charge fee for taking AP exam when it is a requirement of the course); 1981-82 Op. Va. Att'y Gen. 144 (a school board could not require students to pay for a drug counseling program that the school required students to take as an alternative to expulsion); 1976-77 Op. Va. Att'y Gen. 248 (a school board could lawfully charge a student for the use of a musical instrument in a music class because instruction in musical instruments was not required as part of the curriculum); 1964-65 Op. Va. Att'y Gen. 294 (a school board could lawfully charge students a locker fee). Fees may also be charged for loss or damage of a textbook. Va. Code § 22.1-243. Textbook fees do not violate Article III, Section 1 of the Virginia Constitution, which requires a system of "free" public schools. 1976-77 Op. Va. Att'y Gen. 364. A local school board may not charge a fee for transporting a student enrolled in a specialty program located outside the boundaries of the student's base school because the specialty program is interwoven with the standard mandatory curriculum and is not a separate, optional component that merely augments a student's instructional day or diploma requirement. 2010 Op. Va. Att'y Gen. 123.

A school board may not withhold a pupil's report card because of nonpayment of any fee (other than tuition where applicable, etc.). Va. Code § 22.1-6.

18-6.05 Grading and Promotion

"Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context." *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981) (holding that a claim of educational malpractice does not rise to constitutional levels and is, therefore, not cognizable under 42 U.S.C. § 1983).

Each school board may devise a mechanism for calculating class ranking that takes into consideration whether the student had taken a required course more than one time and has had any prior earned grade for such required course expunged. Va. Code § 22.1-253.13:4.

18-7 SPECIAL EDUCATION

18-7.01 Legal Framework

The legal framework in the area of special education involves comprehensive and often overlapping federal and state law.

18-7.01(a) Federal Law

In 1975, Congress passed the Education For All Handicapped Children Act, (hereinafter "the Act"), P.L. 94-142, which requires all participating states to provide a "free appropriate public education to all handicapped children between the ages of 3 and 21 years." 20 U.S.C. § 1400 et seq. The Act was amended in October 1990 by P.L. 101-476, in 1997, P.L. 105-

17, and in 2004, P.L. 108-446. The Act is now called the "Individuals with Disabilities Education Act," (IDEA), and all references to "handicapped children" have been changed to "children with disabilities." The Federal Department of Education has promulgated extensive regulations that implement the Act. 34 C.F.R. § 300.1, et seq.

Also applicable is Section 504 of the Rehabilitation Act of 1973 (hereinafter "§ 504"), which prohibits discrimination against otherwise qualified disabled persons in any activity receiving federal funding. 29 U.S.C. § 794 et seq. The Department of Education has promulgated regulations implementing § 504 at 34 C.F.R. § 104.1, et seq. Section 504 does not confer standing on parents to assert individual claims for damages based on discrimination against their disabled children. *D.N. v. Louisa Cnty. Pub. Sch.*, 156 F. Supp. 3d (W.D. Va. 2016). Plaintiffs must show bad faith or gross misjudgment by the school system to establish Section 504 discrimination in the education context. *Id.*

18-7.01(b) State Law

Virginia, a participating state under the Act, has adopted Va. Code § 22.1-213 et seq. Virginia requires that a "free and appropriate education" be provided to eligible children between the ages of two and twenty-one years. *Id.* In 1994, Va. Code § 22.1-213 et seq. was amended to substitute the term "child with disabilities" for the term "handicapped child."

This Virginia statutory law meets the minimum federal requirements. *Amelia Cnty. Sch. Bd. v. Va. Bd. of Educ.*, 661 F. Supp. 889 (E.D. Va. 1987). The state's regulations are 8 VAC 20-81-10 et seq.

18-7.02 Entitlement to Services

Children with disabilities are entitled to receive a free appropriate public education. The term "children with disabilities," in Virginia, means those children ages two to twenty-one who suffer from one or more defined impairments who, because of these impairments, need special education and related services. Va. Code § 22.1-213; *cf.* 20 U.S.C. § 1401(1).

18-7.03 Child Find

Each local school division must maintain an active and continuing child find program designed to identify, locate and evaluate children residing in the jurisdiction who are in need of special education and related services, including children who are highly mobile, such as migrant and homeless children; are wards of the state; attend private schools, including children who are home-instructed or home-tutored; are suspected of being children with disabilities and in need of special education, even though they are advancing from grade to grade; and are under age eighteen, who are suspected of having a disability who need special education and related services, and who are incarcerated in a regional or local jail in its jurisdiction for ten or more days. 34 C.F.R. §§ 300.102, 300.111; 8 VAC 20-81-50.

18-7.03(a) Definition of "Children with Disabilities"

Children with disabilities, as defined by state regulations, are those children evaluated as having as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disability, an orthopedic impairment, autism spectrum disorder, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities who, by reason thereof, need special education and related services. This also includes developmental delay if the local educational agency recognizes this category as a disability. Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder (ADD and ADHD) are included in the regulatory definitions of "other health impairment." 8 VAC 20-81-10.

Alcohol and drug abuse, school absenteeism, and car theft (i.e., juvenile delinquency or social maladjustment) were not sufficient evidence to support the

conclusion that a child had a serious emotional disturbance; thus, the child was not disabled. *Springer v. Fairfax Cnty. Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998); *see also Bd. of Educ. of Frederick Cnty. v. J.D.*, No. 99-2180 (4th Cir. Oct. 26, 2000) (unpubl.) (not disabled because behavior sprang from social maladjustment and drug involvement, not educational disability).

18-7.03(b) Graduation

A student's eligibility for special education ends if, prior to age twenty-one, he completes the graduation requirements. 8 VAC 20-81-10; *Gorski v. Lynchburg Sch. Bd.*, No. 88-3834 (4th Cir. May 11, 1989) (unpubl.). Disabled students who do not meet the requirements for any named diploma but who complete the requirements of their individualized education program and meet certain other requirements are awarded an Applied Studies diploma. Va. Code § 22.1-253.13:4(B).

18-7.04 Components of a "Free Appropriate Public Education"

A "free, appropriate public education" (FAPE) means special education and related services provided at public expense and without charge that meet State standards and that are provided in conformity with a child's individualized education program (IEP) in the least restrictive environment. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. A Virginia Appropriation Act that includes a temporary 2 percent cap on increases in the rates of private day special education providers is not expressly prohibited by IDEA's requirement to provide a FAPE; however, Virginia local educational agencies will nevertheless be expected to provide a FAPE to all children with disabilities, even if this means contracting with providers who have raised their rates by more than 2 percent. 2019 Op. Va. Att'y Gen. 128.

If necessary to provide a free and appropriate education, the school board must purchase assistive technology devices for use at home and/or provide services beyond the school year. 34 C.F.R. §§ 300.305, 300.306; 8 VAC 20-81-100; *see also* Va. Code § 22.1-129.1 (such devices can follow the student if the student attends another school division and may be sold or donated to the student upon graduation).

18-7.04(a) Special Education and Related Services

18-7.04(a)(1) Special Education

"Special Education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a disabled child, including classroom instruction, instruction in physical education, home instruction, and instruction provided in hospitals and institutions. It may include instruction in speech pathology, travel training, and vocational education. 20 U.S.C. § 1401(25); 34 C.F.R. § 300.39. A slightly different definition is provided by Va. Code § 22.1-213. *See also* 8 VAC 20-81-10. A school district has no duty to provide religious or cultural instruction under the IDEA. *M.L. v. Smith*, 867 F.3d 487 (4th Cir. 2017).

In *MM v. Greenville County School District*, 303 F.3d 523 (4th Cir. 2002), the Fourth Circuit held that extended school year (ESY) services are necessary to a free and appropriate education only when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. While a showing of actual regression is not required, the mere fact of likely regression is not a sufficient justification for ESY services, because all students, disabled or not, may regress to some extent during lengthy breaks from school. *Accord J.H. v. Henrico Cnty. Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003). On remand, the district court in *J.H.* cited specific reasons for reversing the hearing officer's determination that extensive ESY services were required. *J.H. v. Henrico Cnty. Sch. Bd.*, No. 3:01cv519 (E.D. Va. Mar. 17, 2004). The court of appeals nonetheless remanded again, because the hearing officer had placed the burden of proof on the school system rather than the parents. *See Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005) (party initiating the proceeding has the burden of proof); *J.H. v. Henrico Cnty. Sch. Bd.*, 395 F.3d 185 (4th Cir. 2005).

18-7.04(a)(2) Related Services

"Related Services" means transportation and such developmental, corrective, and other supportive services as are required to assist the child to benefit from special education. Such services can include speech pathology and audiology, interpreting services, psychological services, physical and occupational therapy, recreation or counseling services, medical services for diagnostic and evaluation purposes only, and early identification and assessment of disabilities in children. It also can include orientation and mobility services, school health services, social work services in schools, and parent counseling and training. 34 C.F.R. 300.34; *see also* Va. Code § 22.1-213; 8 VAC 20-81-10. It expressly does not include medical devices surgically implanted (e.g., cochlear implants). 20 U.S.C. § 1401.

The requirement to provide special education and "related services" means that a school district may need to provide continuous individual nursing services during school hours if needed by a disabled child. Only (non-diagnostic or evaluative) medical care required to be provided by physicians is excluded. The cost is immaterial; there is no undue burden analysis under the IDEA. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 119 S. Ct. 992 (1999). If a child has a disability but needs only a "related service" and not "special education," then the child is not a "child with a disability" unless the related service is considered special education under state standards. 8 VAC 20-81-10.

18-7.04(b) "Individualized Educational Program" (IEP)

An IEP is a written statement for each child with disabilities developed in a meeting by one or more representatives of the school system qualified to provide or supervise the provision of special education, the child's special education teacher (and a regular education teacher if the child may participate in a regular education environment), and the parent or guardian of the child with disabilities and, whenever appropriate, the child. 34 C.F.R. § 300.22; 8 VAC 20-81-110. The IEP must include assessment of the child's present level of educational performance, annual goals, including short-term instructional objectives, the specific educational services to be provided to such child, the extent to which the child will be mainstreamed, the dates during which services will be provided, appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether instructional objectives are being achieved. An IEP must also include information regarding the participation of the child in district or statewide assessments, a statement regarding needed transition services, and a statement as to whether the student will participate in Family Life Education. A new IEP must be drafted at least annually. 20 U.S.C. § 1414(d); 8 VAC 20-81-110.

An IEP may be modified after the annual IEP meeting by written documentation instead of a full meeting if the local educational agency (LEA) and the parent agree. 20 U.S.C. § 1414(d)(3)(D) and (F).

The DOE must establish, and IEP teams must consider, guidelines to ensure children with disabilities receive age-appropriate and developmentally appropriate instruction regarding sexual health, self-restraint, self-protection, respect for personal privacy, and the personal boundaries of others. Va. Code § 22.1-217.03.

A failure to implement a material portion of an IEP violates the IDEA. *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011).

18-7.04(c) The Standard of "Appropriateness"

A local school system is required to provide a child with disabilities with a "free appropriate public education." The United States Supreme Court held that a FAPE is a substantive right that requires a local school system to provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Educ. of Hendrick Hudson Cen. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The

Court held a school system is not required to furnish a child with disabilities with a program that maximizes educational benefit, but the Court declined to endorse a single standard for determining when a disabled child was receiving sufficient educational benefits to satisfy the requirements of the Act.

In *Endrew F. v. Douglas County School District*, 580 U.S. 386, 137 S. Ct. 988 (2017), the Court held that the “overarching” standard to evaluate the adequacy of the FAPE was that the IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” Thus, for a child fully integrated in the regular classroom, an IEP typically should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. The Court noted, however, that mere advancement is not automatically proof that a FAPE has been provided. For children not fully integrated into a regular classroom, the educational program must be “appropriately ambitious in light of [the student's] circumstances,” so that the child has the chance to meet “challenging objectives.” See also *D.H. v. Fairfax Cnty. Sch. Bd.*, No. 1:19-cv-1342 (E.D. Va. Jan. 19, 2021) (emphasizing that the FAPE must be “reasonable” but not necessarily “ideal”).

18-7.04(d) The Least Restrictive Environment

Public educational agencies are required to provide a continuum of alternatives for the placement of students with disabilities, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. Va. Code § 22.1-213; 34 C.F.R. § 300.115; 8 VAC 20-81-130. Within this continuum, a child with disabilities must be educated in the “least restrictive environment” appropriate for his or her needs. This requirement has two parts:

1. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This is often referred to as “mainstreaming.” The requirement to mainstream a child to the maximum extent appropriate applies not only to academic classes, but to non-academic activities as well.
2. A child’s educational placement must also be “as close as possible to the child’s home.” 34 C.F.R. § 300.552(a)(3).

In *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996 (4th Cir. 1997), the Fourth Circuit reversed the opinion below finding that the district court had impermissibly substituted its judgment over that of school officials as to the best means of educating an autistic child when the district court held that the IDEA required that the child be mainstreamed. When a school has failed to provide a FAPE, however, parents are not required to place their child in a least restrictive environment. *Sumter Cnty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009) (court may, however, consider the restrictiveness of the private placement as a factor when determining the appropriateness of the placement); see also *R.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019) (least restrictive environment addresses education of children with disabilities alongside children without disabilities; it does not require placement in a private school of children with disabilities).

18-7.04(e) Placement in Private Schools

If a local school board determines that it can provide an appropriate public program for a student, it has no duty to consider the appropriateness of private educational programs. *Hessler v. Md. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983). Similarly, "if the school system can supply an appropriate education in a day-only program, [private residential placement] is not required." *Matthews v. Davis*, 742 F.2d 825 (4th Cir. 1984). Even though a residential placement might provide greater educational benefits, a day program placement is appropriate if it provides the disabled child with educational benefits. *Martin v. Sch. Bd.*, 3 Va. App. 197, 348 S.E.2d 857 (1986).

Virginia Code § 22.1-218 requires that if a school division is unable to educate a child with disabilities in its own public program or in a state program, it must then offer to educate the child in a nonsectarian private school for the disabled approved by the State Board of Education. "State-approved placements" are those private nonsectarian educational facilities for children with disabilities that have been found to meet state educational standards. Parents are not entitled to receive from a local school board tuition reimbursement for unilateral placement of their child at a private school, when the school board has offered an appropriate program in an approved private school. 8 VAC 20-81-150(B); *see also Jennings v. Fairfax Cnty. Sch. Bd.*, No. 00-1898 (E.D. Va. Aug. 14, 2001).

The parents' arguments that a school district committed procedural violations in failing to propose in writing placement at a specific private day school and to include a representative of that school at the IEP team meeting were rejected in *K.J. v. Fairfax County School Board*, No. 97-0095-C (4th Cir. July 16, 2002) (unpubl.).

Even if a child with a disability is placed by a Children's Services Act team in a private special education school or facility for noneducational reasons, the local school division is still responsible for ensuring compliance with the state's special education regulations. 8 VAC 20-81-150; *see also* Va. Code § 2.2-5211(D) (placing jurisdiction responsible for costs of private school placement across jurisdictional lines for disabled schoolchildren aged eighteen to twenty-one).

A case worth noting is *Henrico County School Board v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006), regarding the provision of a FAPE to a young autistic child. The court awarded tuition reimbursement for a private school that provided individual-based instruction after finding the public school's group-based instruction inadequate. The decision includes a lengthy discussion of autism; ABA v. TEACCH models; burden of proof; FAPE and LRE; IEP goals; measurable progress; and what deference should be provided to school board programs and testimony of school board witnesses.

The court held in *A.K. v. Alexandria City School Board*, 544 F. Supp. 2d 487 (E.D. Va. 2008), that the IEP was not reasonably calculated to provide a FAPE when it offered an unspecified "private day school." This unspecified IEP failed to comply with the IDEA.

18-7.04(f) Children Below the Compulsory School Attendance Age.

Special education for children below the compulsory school attendance age may be provided in nonsectarian child-day programs licensed in accordance with state law. Va. Code §§ 22.1-216, 22.1-220.

18-7.05 Procedural Safeguards

The Act provides extensive procedural safeguards to children with disabilities and their parents. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.500 to 300.517; 8 VAC 20-81-170. The importance of these procedural rights is substantial; failure to meet the Act's procedural requirements can itself be adequate grounds for holding that a local school board has failed to provide a free and appropriate education. The 2004 amendments to the IDEA provide that a procedural violation deprives a child of a FAPE if it i) impedes the child's right to a

FAPE; ii) significantly impedes the parent's opportunity to participate in the decision-making process; or iii) causes a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E). In *R.F. v. Cecil County Public Schools*, 919 F.3d 237 (4th Cir. 2019), the Fourth Circuit held that even though the school had violated procedural safeguards with regard to notifying parents of a change in placement, that violation did not result in a denial of a FAPE because it was calculated to enable the student to make appropriate progress and did not significantly impede parental participation. See also *T.B., Jr. ex rel. T.B., Sr. v. Prince George's Cnty. Bd. of Educ.*, 897 F.3d 566 (4th Cir. 2018).

See generally these pre-amendment cases: *DiBuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184 (4th Cir. 2002) (procedural violation must actually interfere with the provision of a free and appropriate education); *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523 (4th Cir. 2002) (same); *Bd. of Educ. of Frederick Cnty. v. J.D.*, No. 99-2180 (4th Cir. Oct. 26, 2000) (unpubl.) (a procedural violation of the IDEA, without more, does not result in a duty to reimburse the cost of placing student in a private school); *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990) (mere technical violations of procedural requests do not render IEP invalid); *White v. Sch. Bd. of Henrico Cnty.*, 36 Va. App. 137, 549 S.E.2d 16 (2001) (procedural violations that do not deprive child of appropriate education or seriously hamper the parents' opportunity to participate in the formulation process do not invalidate an IEP).

The Board of Education must provide to parents of students who are enrolled in special education programs or for whom a special education placement has been recommended information regarding current federal law and regulation addressing procedures and rights related to the placement and withdrawal of children in special education. Va. Code § 22.1-215.1. Each school board must enact a policy requiring timely written notification to the parents of any student who undergoes literacy or intervention screening or services, and who does not meet any assessment benchmark used to determine at-risk learners. Va. Code § 22.1-215.2. The notification must include all such assessment scores and any intervention plan that results from such scores. *Id.*

18-7.05(a) Review of Educational Records and Parent Participation

Parents of disabled children are entitled to inspect and review all educational records with respect to the identification, evaluation and educational placement of their child. 20 U.S.C. § 1415(b)(1); 8 VAC 20-81-170.

If neither parent can participate in a meeting in which a decision is to be made regarding placement, the school division must use other methods to ensure parental participation, including individual or conference telephone calls or video conferencing. If parental participation is not obtained, the school division must keep a record of its attempts to ensure parental participation. Interpreters may be required for those who are deaf or do not speak English.

In *J.V. v. Stafford County School Board*, 67 Va. App. 21, 792 S.E.2d 286 (2016), the school board contended that the failure to "agree" with the eligibility determination meant that no consent to the determination was given such that the child never became a child with disabilities and the parent did have any concordant due process rights. See 8 VAC 20-81-170(E)(1)(b) (parental consent required before initial eligibility determination). The court of appeals held that such a construction of the regulation would violate federal law that allowed such parental consent requirements so long as a parent's refusal would not result in the child's failure to receive a FAPE. Accordingly, Virginia's regulation must be construed so that a parent may consent to an initial eligibility determination without agreeing to it.

18-7.05(b) Independent Educational Evaluation

Parents of disabled children are entitled to obtain an "independent educational evaluation" (IEE) of their child by a qualified examiner not employed by the school system. If the parent disagrees with the evaluation performed by the public agency, the evaluation must be at public expense⁸ unless the educational agency initiates and prevails at a due process hearing by showing that its evaluation is appropriate. A school system may not require advance approval as a condition of granting an IEE. *See Hudson v. Wilson*, 828 F.2d 1059 (4th Cir. 1987) (awarding parents reimbursement for cost of one private evaluation).

18-7.05(c) Written Notice and Consent

Parents of children with disabilities must be given written notice within a reasonable time before the school system proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child. 20 U.S.C. § 1415(b)(3); 8 VAC 20-81-170.

The form and content of the notice:

1. The notice must be written in language understandable to the public, and must be (or must be translated) in the parents' native language.
2. The notice must explain the procedural safeguards available or how notice of them can be obtained; however, it need not specify the applicable statute of limitations periods for due process hearings, *R.R. v. Fairfax Cnty. Sch. Bd.*, 338 F.3d 325 (4th Cir. 2003).
3. The notice must describe the action proposed or refused by the agency, and the reasons therefor, including a description of the other options considered and the reasons for their rejection, and any other factors relevant to the agency's decision.
4. The notice must describe the nature, purpose, and use of any evaluation procedure, test, record, or request used as a basis for the agency's action.

Written parental consent must be obtained for (1) evaluations other than those reviewing existing data; (2) any change in identification; and (3) placement in, or termination from, a special education program, other than expulsion or graduation. If a parent fails to give consent, a school system may request an administrative hearing to obtain that consent. In addition, the Virginia Regulations set forth certain instances where consent may be presumed. 8 VAC 20-81-170.

18-7.05(d) Due Process Appeal

If parents and the school system disagree on the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, either party may initiate a due process appeal. 20 U.S.C. § 1415(f); 8 VAC 20-81-210. Virginia is a "one-tier" state that provides for an appeal to a state hearing officer. Va. Code § 22.1-214(C); 8 VAC 20-81-210. The use of mediation is encouraged as an informal means of resolving disputes, but it shall not be used to delay or deny the due process rights of parents. Va. Code § 22.1-214(B); see 20 U.S.C. § 1415(e); 8 VAC 20-81-190 (non-mandatory requirement of mediation procedures). A mediated agreement is, however, binding and enforceable in court. 20 U.S.C. § 1415(e)(2)(F).

⁸ Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation. 20 U.S.C. § 1415(b)(1); 8 VAC 20-81-170.

In *Bernard v. Norfolk City School Board*, 58 F. Supp. 2d 669 (E.D. Va. 1999), the court held that parents of a child (who subsequently died) had standing in their own right under the IDEA to seek recovery of allegedly unnecessary expenditures as a result of the school's failure to provide appropriate services. There is no right of action under the IDEA, however, to challenge the nature of the administrative complaint proceedings. *Va. Office of Protection & Advocacy v. Va. Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003); see also *Power v. Sch. Bd. of Va. Beach*, 276 F. Supp. 2d 515 (E.D. Va. 2003) (no private cause of action under § 504 of the Rehabilitation Act for violation of procedural rights).

During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved must remain in his or her current (i.e., last agreed-upon) "educational placement." 20 U.S.C. § 1415(j); 8 VAC 20-81-210. If that placement is unavailable, however, the school system is not obligated under this provision to provide an equivalent, alternative placement. *Wagner v. Bd. of Educ. of Montgomery Cnty.*, 335 F.3d 297 (4th Cir. 2003). This "stay-put" provision does not mean that a child is entitled to remain in the same physical location, but the educational setting, i.e., the level and type of educational instruction, must remain the same. *A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004) (allowing transfer of child from gifted program at one school to materially similar program at another during pendency of a manifest determination appeal). If the parent requests a hearing to challenge a disciplinary interim alternative education setting or a manifestation determination, the student shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the disciplinary action expires, whichever occurs first. 20 U.S.C. § 1415(k)(4); 8 VAC 20-81-160. When a hearing officer has decided that an IEP is inappropriate and that a private placement is appropriate, that decision constitutes an agreement by the state for purposes of § 1415(j) such that the public agency must pay private school fees during the pendency of state or federal court review. *Cnty. Sch. Bd. v. R.T.*, 433 F. Supp. 2d 692 (E.D. Va. 2006) (construing *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996 (1985)).

18-7.05(d)(1) Administrative Hearing

In the case of a disagreement regarding the identification, evaluation, or placement of a child with disabilities, on the provision of a free appropriate public education, the parents or a school system may request an administrative hearing. The party initiating the proceeding has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). The notice by the complaining party must specify the issues and indicate the relief sought and any issues not included in the notice may not be raised in the hearing unless the parties agree. 20 U.S.C. § 1415(f)(3)(B). If the school system has not sent a prior written notice to the parent about the issues raised in the complaint, it must provide a response to the notice within ten days of its receipt, specifically addressing the issues raised in the notice. 20 U.S.C. § 1415(c)(2)(B).

The statute of limitations is two years from the date of the alleged violation, but the state may also expressly establish a different time limitation. 20 U.S.C. § 1415(f)(3)(C); see *C.M. v. Bd. of Educ. of Henderson Cnty.*, 241 F.3d 374 (4th Cir. 2001) (upholding sixty-day limitation as provided in North Carolina law). The timeline does not apply if the school system specifically misrepresented that the problem had been resolved or it withheld required information from the parent. 20 U.S.C. § 1415(f)(3)(D).

Within fifteen days of receiving the complaint and prior to the due process hearing, the parties and IEP team must meet in a resolution session, unless waived by both parties or mediation is agreed to. 20 U.S.C. § 1415(f)(1)(B). Within thirty days of the receipt of the complaint, either the matter is resolved as executed in a binding written agreement or the due process hearing may occur and all applicable timelines commence.

At least five business days prior to the hearing, each party shall disclose all evaluations and recommendations based thereon on which the party will rely at the hearing and failure to do so may result in the prohibition of the introduction of such evidence. 8 VAC 20-81-210.

The hearing must be conducted by an impartial hearing officer who has no personal or professional interest in the case and who is not otherwise an employee of the school system. The hearing officer must have the knowledge and ability to understand the IDEA and its implementing regulations and case law, conduct hearings in accordance with standard legal practice, and render and write decisions in accordance with standard legal practices. 20 U.S.C. § 1415(f); 8 VAC 20-81-210. In Virginia, the Executive Secretary of the Supreme Court maintains a list of attorneys who serve as special education hearing officers.

The hearing officer has the authority to issue subpoenas compelling witnesses or the production of documents or other physical evidence. Va. Code § 22.1-214.1. The hearing officer is required to administer an oath or affirmation to anyone providing testimony. Va. Code § 22.1-214(B).

Any party has the right:

- a. to be accompanied and advised by counsel and/or by other individuals with special knowledge or training with respect to the problems of the disabled. Va. Code § 22.1-214(C);
- b. to present evidence and cross-examine witnesses, and to request the hearing officer to compel the attendance of witnesses;
- c. to prevent the introduction of any evidence at the hearing that has not been disclosed to that party at least five administrative working days before the hearing;
- d. to obtain a written or electronic verbatim record of the hearing and in connection with an appeal to obtain written findings of fact and decisions rendered by the hearing officer; and
- e. to receive the record of the hearing and findings of fact and decisions at no cost to the parent.

8 VAC 20-81-210.

Parents involved in hearings are entitled to have the child who is the subject of the hearing present, and to open the hearing to the public. *Id.* The school system shall ensure that, absent a specifically granted extension by the hearing officer, a final decision is issued within forty-five days of a request for an appeal. *Id.*

If the hearing officer determines that the school system has offered a FAPE, he (and the court) has no duty to consider or compare any benefits that may be offered by private placement. *C.C. v. Fairfax Cnty. Bd. of Educ.*, 879 F. Supp. 2d 512 (E.D. Va. 2012); *S.H. v. Fairfax Cnty. Bd. of Educ.*, 875 F. Supp. 2d 633 (E.D. Va. 2012).

18-7.05(d)(2) Civil Action

Any party aggrieved by the decision of the administrative hearing officer has the right to bring an action in a state circuit court or in federal district court. 8 VAC 20-81-210. This is an original action, not an appeal. *Kirkpatrick v. Lenoir Cnty. Bd. of Educ.*, 216 F.3d 380 (4th Cir. 2000); *Newport News Sch. Bd. v. Commonwealth*, 279 Va. 460, 689 S.E.2d 731 (2010); *J.V. v. Stafford Cnty. Sch. Bd.*, 67 Va. App. 21, 792 S.E.2d 286 (2016). The court receives the record of the administrative proceeding, as well as any additional evidence the parties may introduce. Va. Code § 22.1-214(D); 34 C.F.R. § 300.516; *J.V. v. Stafford Cnty. Sch. Bd.*, 67 Va. App. 21, 792 S.E.2d 286 (2016) (“the circuit court must hear and weigh the

evidence presented as it would in any other civil action"). The court may not remand the case for additional administrative consideration. *DeVries v. Spillane*, 853 F.2d 264 (4th Cir. 1988).

A federal court must give proper deference to the factual findings of the hearing officer, including on appellate review. *E. L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509 (4th Cir. 2014); *Henrico Cnty. Sch. Bd. v. Z.P.*, 399 F.3d 298 (4th Cir. 2005); *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295 (4th Cir. 2003); *Doyle v. Arlington Cnty. Sch. Bd.*, No. 92-2313 (4th Cir. Oct. 31, 1994) (unpubl.) (district court assumed the prima facie correctness of hearing officer's findings and demonstrated such by discussing in detail its reasons for accepting or rejecting such findings). A district court that does not follow an administrative hearing officer's decision is required to explain why, under the due weight standard, it chose not to accept a factual finding. Whether a court has given proper deference to that administrative decision is a question of law. See *N.P. v. Maxwell*, No. 16-1164 (4th Cir. Dec. 8, 2017) (unpubl.) (giving "due weight" means that "findings of fact made in administrative proceedings are considered to be prima facie correct"); *J.P. v. Sch. Bd. of Hanover Cnty.*, 516 F.3d 254 (4th Cir. 2008) (when reviewing hearing officer's findings of fact, court should focus "on the process through which the findings were made"; if district court does not accept the factual findings, it must explain its reasons); *Henrico Cnty. Sch. Bd. v. Z.P.*, 399 F.3d 298 (4th Cir. 2005); *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *D.B. v. Bedford Cnty. Sch. Bd.*, 708 F. Supp. 2d 564 (W.D. Va. 2010); *Arlington Cnty. Sch. Bd. v. Smith*, 230 F. Supp. 2d 704 (E.D. Va. 2002).

In dicta in *Endrew F. v. Douglas County School District*, 580 U.S. 386, 137 S. Ct. 988 (2017), the Court noted that deference should be given to the "expertise and exercise of judgment by school authorities" and courts are not to "substitute their own notions of sound educational policy." Prior to *Endrew*, in *Faulders v. Henrico County School Board*, 190 F. Supp. 2d 849 (E.D. Va. 2002), the district court stated that in general, the opinions of the child's classroom educators are entitled to greater weight than that of outside experts (who in the instant case had not observed the child in the school program, reviewed the entire student file, or spoken with the student's teachers and other service providers). See also *E. L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509 (4th Cir. 2014) (stating opinions of local educators entitled to deference); *J.H. v. Henrico Cnty. Sch. Bd.*, 395 F.3d 185 (4th Cir. 2005) (same). Construing these cases together, it appears that a hearing officer must give deference to the opinion of the local educators over that of parents' witnesses or experts. If the hearing officer credits the opinion of outside experts over that of the local educators, he must explain why. If the hearing officer disagrees with the local educators, it is unclear after *Endrew* whether the district court should give deference to the local educators or the hearing officer.

A state court is not required to find the administrative decision prima facie correct, but is to make an independent decision based on a preponderance of the evidence, while giving "due weight" to the administrative proceedings. *Campbell Cnty. Sch. Bd. v. Beasley*, 238 Va. 44, 380 S.E.2d 884 (1989); *White v. Henrico Cnty. Sch. Bd.*, 36 Va. App. 137, 549 S.E.2d 16 (2001).

Because the IDEA creates a statutory right to a new cause of action every time an IEP is reevaluated, claim preclusion does not apply when the claim relates to a new year even though the circumstances have not changed. However, issue preclusion applies to factual or legal issues already decided but raised under a new school year where no material change of circumstances exists. *Capuano v. Fairfax Cnty. Pub. Bd.*, No. 1:13cv568 (E.D. Va. Oct. 29, 2013).

18-7.05(d)(2)(i) Rights of Parents

The IDEA grants parents independent, enforceable rights that are not limited to procedural and reimbursement-related matters but encompass the entitlement to a free appropriate public education for their child. The IDEA's goals include ensuring that the rights of children with disabilities and parents of such children are protected, 20 U.S.C. § 1400(d)(1)(B), and many of its terms mandate or otherwise describe parental involvement. Because parents enjoy rights under the IDEA, they are entitled to prosecute IDEA claims on their own behalf and are not required to have counsel. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994 (2007).

However, the rights of parental participation do not mean that they exercise a "parental veto" such that parents may usurp or otherwise hinder an LEA's authority to educate disabled children. *L.G.B. v. Norfolk City Sch. Bd.*, 54 F. Supp. 3d 466 (E.D. Va. 2014).

18-7.05(d)(2)(ii) Statute of Limitations

The applicable limitations period in Virginia for a federal action is ninety days. 20 U.S.C. § 1415(i)(2)(B). An action in state circuit court must be brought within 180 days of the issuance of the decision. 8 VAC 20-81-210; *see also R.R. v. Fairfax Cnty. Sch. Bd.*, 338 F.3d 325 (4th Cir. 2003) (injury in an IDEA case accrues at the time of the allegedly faulty IEP or disagreement over the educational choices); *Richards v. Fairfax Cnty. Sch. Bd.*, 798 F. Supp. 338 (E.D. Va. 1992) (when administrative procedures are not followed, cause of action accrues from date of injury, even if plaintiffs are not aware injury is actionable).

18-7.05(d)(2)(iii) Exhaustion of Administrative Remedies

State administrative remedies must be exhausted prior to filing suit under the Act. *See, e.g., E. L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509 (4th Cir. 2014) (addressing state law that provides for a two-tiered due process procedure); *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523 (4th Cir. 2002) (when multiple IEPs are challenged in court, the administrative remedies for each academic year must be exhausted); *Scruggs v. Campbell*, 630 F.2d 237 (4th Cir. 1980); *Pullen v. Botetourt Cnty. Sch. Bd.*, No. 94-686-R (W.D. Va. Feb. 13, 1995) (lack of availability of monetary and injunctive relief does not relieve plaintiff from the exhaustion of administrative remedies requirement). *But see Doe v. Rockingham Cnty. Sch. Bd.*, 658 F. Supp. 403 (W.D. Va. 1987) (recognizing futility as an exception to the general rule requiring exhaustion of administrative remedies). Plaintiffs must exhaust the administrative remedies available under the IDEA, even if they bring their claims under the Americans With Disabilities Act and Title V of the Rehabilitation Act, if the relief they seek is available under the IDEA. *A.W. v. Fairfax Cnty. Sch. Bd.*, 548 F. Supp. 2d 219 (E.D. Va. 2008). The unavailability of the specific relief sought in the administrative process does not render resort to the administrative process futile for purposes of exhaustion. *Bills v. Va. Dep't of Educ.*, 605 F. Supp. 3d 744 (W.D. Va. 2022), *appeal filed*, No. 22-1709 (4th Cir. July 6, 2022), (where parents were seeking return to full in-person learning, which was beyond the authority of the hearing officer to grant during the COVID pandemic, parents were still required to exhaust administrative remedies) (citing *C.G. Pamlico Cnty. Pub. Schs. Bd. of Educ.*, 744 F. App'x 769 (4th Cir. 2018)).

18-7.05(d)(2)(iv) Additional Claims

In addition to claims under the Act, a parent may join other constitutional or statutory claims, including claims under Section 504, so long as administrative remedies are first exhausted. 20 U.S.C. § 1415(f).

18-7.05(d)(2)(v) Remedies

Equitable Relief and Reimbursement. Under the Act, a court is empowered to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(e)(2). Such relief includes placement in an appropriate public or private program. Relief may also include retroactive reimbursement for tuition or related services to parents who have funded their child's placement in an appropriate educational facility where the school system has offered an

inappropriate placement. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996 (1985). If the hearing officer decides in the parents' favor, pendent lite payments for private school tuition must be paid during the course of state or federal court review. *Cnty. Sch. Bd. of Henrico Cnty. v. R.T.*, 433 F. Supp. 2d 692 (E.D. Va. 2006). If the district court determines such relief is appropriate, the state may be liable to parents for private school tuition even when the local educational authority's failure to prepare an IEP caused the private placement and the local educational authority failed to comply with statutory requirements for seeking tuition reimbursements from the state. *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997).

An award of "compensatory education"—educational services ordered by the court to be provided prospectively to compensate for a past deficient program—may be "appropriate relief" under the IDEA in some circumstances. *G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295 (4th Cir. 2003). The failure of parents to object to the services being received does not bar them from seeking remedies if those services are found to be inadequate. *Id.* Rotely awarding a block of compensatory education equal to the amount of lost instructional time is an inappropriate method of awarding the equitable remedy of compensatory education. *Hogan v. Fairfax Cnty. Sch. Bd.*, 645 F. Supp. 2d 554 (E.D. Va. 2009).

The federal law specifies that parents may receive reimbursement for unilateral private school placement if the hearing officer or court determines that the placement offered by the schools was inappropriate and that the one chosen by the parents was appropriate. 20 U.S.C. § 1412(a)(10); 8 VAC 20-81-150; *see Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009) (no bar to reimbursement for private special-education services even if child never received special-education services through the public school); *Florence Cnty. Sch. Bd. v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993) (a court may order reimbursement for parents who unilaterally withdrew their child from a public school that provided an inappropriate education under IDEA and placed their child in a private school that did provide an appropriate education, even though such private school did not meet all the requirements of IDEA); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996 (1985); *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). However, the reimbursement may be reduced or denied if the parents did not notify the public school of their rejection of the school's IEP and their intent to enroll the child in private school, or if the parents do not make the child available for a requested evaluation prior to removal, or if the court finds the parents acted unreasonably. 8 VAC 20-81-150.

Damages. General damages are not available under the Act. *See Sellers v. Manassas City Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998) (concluding the Act does not provide for compensatory or punitive damages and that a claim of failure to evaluate and specially educate an eighteen-year-old LD student was indistinguishable from a claim of educational malpractice and thus not a cause of action under the Act); *Vipperman v. Hanover Cnty. Sch. Bd.*, No. 3:94cv490 (E.D. Va. June 15, 1995) (no IDEA violations regarding failure to identify and failure to inform of rights); *Barnett v. Fairfax Cnty. Sch. Bd.*, 721 F. Supp. 755 (E.D. Va. 1989) (damages for emotional distress of allegedly inappropriate placement unavailable), *aff'd*, 927 F.2d 146 (4th Cir. 1991); *see also Sch. Bd. v. Commonwealth*, 279 Va. 460, 689 S.E.2d 731 (2010) (school board entitled to indemnification under Virginia Local Government Risk Management Plan).

Attorney's fees. Attorney's fees are available to successful parents in any administrative or court proceeding under the Act. 20 U.S.C. § 1415(e)(4)(B); Va. Code § 22.1-214(D)(1); *Prince William Cnty. Sch. Bd. v. Malone*, 662 F. Supp. 999 (E.D. Va. 1987) (awarding attorneys' fees for administrative and court proceedings). The Supreme Court has noted that even an award of nominal damages makes a party the prevailing party. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Resources*,

532 U.S. 598, 121 S. Ct. 1835 (2001). An award of attorney's fees conditioned on a party's having prevailed does not require the party to have prevailed on every claim; the party's obtaining judicially sanctioned and enforceable final relief on some claims is sufficient. *G v. Fort Bragg Dependent Sch.*, 343 F.3d 295 (4th Cir. 2003); *see also J.D. v. Kanawha Cnty. Bd. of Educ.*, 571 F.3d 381 (4th Cir. 2009) (attorney's fees awarded despite more favorable settlement offer made during mediation because of mediation confidentiality agreement).

Although the school agreed to the residential placement that was the issue in upcoming hearing, parents did not prevail so as to be entitled to attorney's fees because the agreement to change the IEP was not an enforceable settlement. *Baptiste v. York Cnty. Sch. Bd.*, No. 4:cv9700080 (E.D. Va. Dec. 17, 1997) (relying on *S-1 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994)). *But cf. Pullen v. Botetourt Cnty. Sch. Bd.*, No. 96-0963-R (W.D. Va. May 7, 1997) (attorney's fees awarded although parent failed to prove student did not receive appropriate education because school agreed to reimbursement for psychiatric counseling).

A parent who represents his or her child in an IDEA proceeding, and who prevails, is not entitled to attorney's fees. *Doe v. Baltimore Cnty. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998). No matter what the outcome, school divisions are not entitled to recover their attorneys' fees. *But see Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994 (2007) (explicitly rejecting rationale used by Fourth Circuit in reaching its decision that the child is the real party in interest in any IDEA proceeding and noting that IDEA empowers courts to award attorneys' fees to prevailing educational agencies if a parent files an action for an "improper purpose," § 1415(i)(3)(B)(i)(III)).

The school system may recover attorney's fees from (i) an attorney who files or continues to litigate a frivolous complaint, or (ii) an attorney or parent if the parent's complaint or cause of action was presented for an improper purpose such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. 20 U.S.C. § 1415(i)(3)(B); Va. Code § 22.1-214(D1).

The statutory authority to award "costs" to the prevailing party does not, however, include expert fees. *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455 (2006).

18-7.05(d)(3) State Complaint Procedure

18-7.05(d)(3)(i) Written Complaint

In addition to or in lieu of a due process appeal, a parent may file a written complaint regarding alleged violation of rights with the Virginia Department of Education. 8 VAC 20-81-200. The State Superintendent is responsible for the operation of the complaint procedure.

18-7.05(d)(3)(ii) Investigation

The Department must initiate an investigation of the complaint, to determine whether the school board is in compliance with applicable law and regulations. This must include a written response from the school board, and may also include an on-site investigation by the Superintendent of Public Instruction or his designee. 8 VAC 20-81-200.

18-7.05(d)(3)(iii) Decision and Corrective Action

The Department must issue a written determination of compliance or noncompliance within sixty days from the receipt of a complaint. This time period may be extended in exceptional circumstances or if the parties agree to an alternative dispute proceeding. In the case of a finding of noncompliance, the local agency has fifteen administrative days to respond and initiate a corrective action plan. 8 VAC 20-81-200.

18-7.05(d)(3)(iv) Appeal

An appeal of a compliance decision by the State Board of Education is in accordance with Va. Code § 22.1-214(D) and not the Administrative Process Act. *Loudoun Cnty. Sch. Bd. v. Va. Bd. of Educ.*, 45 Va. App. 466, 612 S.E.2d 210 (2005) (circuit court will hear the matter de novo).

18-7.06 Discipline of Students With Disabilities

A school board has the right to discipline special education students. However, special rules apply. See 34 C.F.R. 300.530(a); 34 C.F.R. 300.324(a)(2)(i); 8 VAC 20-81-160.

18-7.06(a) Short-Term Suspensions

Short-term suspensions (those involving removal from class or school for less than ten days) do not constitute a "change in placement." The child is subject to normal disciplinary procedures. If there is a "pattern" of behavior that results in a series of short-term suspensions, however, then the procedures for long-term discipline apply.

18-7.06(b) Long-Term Suspensions or Expulsions

Long-term suspensions or expulsions of a student with disabilities involve greater procedural protections. Long-term suspensions that constitute a change in placement include removal from school or class for ten or more consecutive school days, and may also include a series of suspensions that aggregate to more than ten days.

Within ten business days of suspending a disabled student for more than ten days in a school year or commencing a removal that constitutes a change in placement, an IEP team must conduct a functional behavioral assessment and prepare a behavioral intervention plan (or review an existing plan). Within ten school days of deciding to take disciplinary action that constitutes a change in placement, a review must be conducted to determine whether the misconduct was a manifestation of the disability. The "manifestation" test replaces the "causality" test under prior law. The conduct was a manifestation if it was caused by or had a direct and substantial relationship to the child's disability or the conduct was a direct result of a failure to implement the IEP. 20 U.S.C. § 1415(k)(1)(E)(i)(I) and (II). If the misconduct was a manifestation of the disability, the child may not be suspended or expelled. Students may invoke the protections of the IDEA if school officials knew or should have known that the student had a disability prior to the misconduct.

If misconduct was not a manifestation of the disability, disciplinary procedures may be applied to the child in the same manner in which they would be applied to children without disabilities. See *A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674 (4th Cir. 2004) (child's threatening note not a manifestation of ADHD). However, students with disabilities who have been suspended for more than ten school days or expelled must receive an expedited hearing and alternative educational services. 20 U.S.C. § 1415(k).

A similar inquiry must be undertaken in cases of long-term suspensions and expulsions for any student who is disabled within the meaning of Section 504, except for those students who are to be disciplined for use or possession of illegal drugs or alcohol and who are currently using illegal drugs or alcohol. The procedural safeguards of 34 C.F.R. § 104.36 do not apply to such disciplinary actions. 29 U.S.C. § 705(c)(iv).

18-7.06(c) Dangerous Students With Disabilities

For weapons and drug violations, and for infliction of serious bodily injury at school, on school property, or at a school function, school officials may order a change in placement of a disabled student to an interim alternative educational setting for not more than forty-five days. 20 U.S.C. § 1415(K)(1)(G). For other situations, an independent special education hearing officer not employed by the school system may order such placement if the school demonstrates by substantial evidence that the current placement is substantially likely to

result in injury to the student or others. During an appeal, the hearing officer may order an additional forty-five-day placement if the same standards are met. The interim alternative educational setting must be selected to enable the student to progress in the general curriculum and receive IEP services and the services required under the behavioral modification plan.

18-7.07 Section 504 of the Rehabilitation Act

While the Individuals With Disabilities Education Act guarantees a right to a free appropriate public education, Section 504 simply outlaws discrimination on the basis of disabilities in federally funded programs. The Federal Regulations at 34 C.F.R. § 104.1 et seq. parallel many of the IDEA's regulations. Compliance with the IDEA regulations may demonstrate compliance with the Section 504 regulations. See *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). To establish a violation of Section 504 in the context of education of students with disabilities, a plaintiff must prove bad faith or gross misjudgment on the part of school officials' own direct conduct. *Sellers v. Manassas City Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998) (discrimination under Section 504 means more than an incorrect evaluation or a substantively faulty individualized education plan). Section 504 claims predicated upon student-on-student harassment, like their Title IX counterparts, require a showing of deliberate indifference on the part of school officials. Moreover, officials must know that any bullying or harassment is based on the student's disability. *S.B. v. Harford Cnty. Bd. of Educ.*, 819 F.3d 69 (4th Cir. 2016) (following *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999)).

Section 504 does not compel educational institutions to make substantial modifications to their educational programs but rather requires only that an "otherwise qualified" individual with disabilities not be excluded from a program solely by reason of his disability. *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991).

In *J.S. v. Isle of Wight County School Board*, 402 F.3d 468 (4th Cir. 2005), the court held that a one-year statute of limitations borrowed from the Right of Persons With Disabilities Act, Va. Code § 51.5-46, applied to § 504 claims but not the statute's 180-day notice provision. The notice of claim provision could not be imposed on a Rehabilitation Act claim because the Act was not deficient without it and its inclusion would violate the Supremacy Clause by adding through state law an essential element to a federal right of action.

Section 504 does not impose an affirmative obligation on school districts to provide services to private school students, even if they are willing to come to a public school to receive services. Because all students who are eligible for services under the IDEA are also covered for those services under § 504, to do so would allow under § 504 what is not allowed under the IDEA. *D.L. v. Baltimore City Bd. of Sch. Comm'rs*, 706 F.3d 256 (4th Cir. 2013).

18-7.08 Americans With Disabilities Act

Title II of the Americans With Disabilities Act (ADA) provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity. 42 U.S.C. § 12132. In *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999), the court held a depressed student's allegation that her depression was a motivating reason for being refused participation in a choir stated a claim under the ADA. In *Bacon v. City of Richmond*, 386 F. Supp. 2d 700 (E.D. Va. 2005), the district court held that a disabled student, her parent, a disabled parent, and an advocacy organization stated claims under the ADA against the school board, the city, the city council and the mayor regarding neighborhood schools that were not handicapped-accessible. The school board subsequently settled with the plaintiffs and agreed to bring the schools into ADA compliance within five years, contingent upon the school board receiving funding from the city. The

district court then ordered the city to provide adequate funding to the school board to ensure ADA compliance within the five years. *Bacon v. City of Richmond*, 419 F. Supp. 2d 849 (E.D. Va. 2006). Reversing, the Fourth Circuit held that “[t]o impose a funding obligation on the city in the absence of any underlying finding of liability would disrespect the long-standing structure of local government and impair the Commonwealth’s ability to structure its state institutions and run its schools.” *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir. 2007) (LGA filed an amicus brief).

See also 2010 Op. Va. Att’y Gen. 110 (school board’s requirement that a charter school’s buildings comply with the Americans With Disabilities Act is not a financial disincentive to the establishment of the charter school in violation of Va. Code § 22.1-212.14(D)).

The United States Supreme Court held that when a student or parent files suit under the ADA or the Rehabilitation Act seeking damages for failure to accommodate a disability, they do not need to first exhaust the administrative proceedings set forth in the IDEA unless the gravamen of the complaint is that the student did not receive a “free, appropriate education.” Compare section 18-7.05(d)(2)(iii). A common-sense test of whether the case must be brought under the IDEA is that the claim could not be made by the child for an accommodation in a public facility other than a school or that an adult at the school, either employee or visitor, could not have raised such a claim. A plaintiff’s initial choice of forum may also indicate the gravamen of the complaint: if IDEA administrative hearings were initially sought, a shift to judicial proceedings might indicate a strategic calculation rather than a non-IDEA complaint. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 137 S. Ct. 743 (2017).

18-8 TEACHERS, OFFICERS & EMPLOYEES

18-8.01 Teachers

18-8.01(a) Licensure

No teacher shall be regularly employed by a school board without a license or provisional license issued by the Board of Education. A person not meeting the requirements for a license or provisional license may be employed and paid from public funds by a school board temporarily as a substitute teacher to meet an emergency. Va. Code § 22.1-299. Reciprocity licensure is acceptable for individuals holding a valid out-of-state teaching license and national certification from the National Board for Professional Teaching Standards or a nationally recognized certification program approved by the Board of Education and for individuals who have obtained a valid out-of-state license that is in force at the time the application for a Virginia license is made. Other means of licensure reciprocity are detailed in the statute. Va. Code § 22.1-298.1(K). Teach for America participants will receive a two-year provisional license but such licensure is not eligible for continuing contract status. Va. Code § 22.1-299.4. Former members of the Armed Services who do not meet the requirements for full licensure may receive a provisional license for up to three years if they have the appropriate level of experience or training. Va. Code § 22.1-298.1(J). Spouses of active duty or reserve members of the military may obtain a provisional license to teach in Virginia if they hold a valid out-of-state teaching license. Va. Code § 22.1-298.1(K)(2).

The Board is developing regulations for an alternate route for licensure for elementary education and special education. Va. Code § 22.1-298.1(L).

18-8.01(a)(1) Career and Technical Education

Special three-year licenses are available to qualified individuals to teach high school career and technical education courses in specific subject areas. Extensions are provided. Va. Code § 22.1-299.6.

Licensure requirements may also be waived under specified circumstances for teachers in a trade and industrial education program. Va. Code § 22.1-299.5.

18-8.01(b) Annual or Probationary Contract Teachers**18-8.01(b)(1) Probationary Term**

A probationary term of service of three years in the same school division shall be required before a teacher is issued a continuing contract. Once a continuing contract has been attained in a Virginia school division, another probationary period need not be served in any other school division unless such probationary period—not to exceed two years—is made a part of the contract. Va. Code § 22.1-303. Probationary teachers are said to be on an “annual” contract. Except for those with prior teaching experience, probationary teachers shall be assigned a mentor teacher for their first year. Va. Code § 22.1-303.

Probationary teachers shall be evaluated at least annually (for first year of probation, each semester) based on student academic progress, instructional methodology, classroom management, and subject matter knowledge. Any teacher hired on or after July 1, 2001, as a condition of achieving continuing contract status, shall complete training in strategies and techniques for the intervention for or remediation of students who fail or are at risk of failing the Standards of Learning. Va. Code § 22.1-303(A). Before recommending non-renewal of an annual contract, the division superintendent must consider the annual performance evaluation, although cause is not required for non-renewal. Va. Code § 22.1-303.

Upon response by the Virginia Supreme Court to a certified question of law (249 Va. 343, 454 S.E.2d 728 (1995)), the Fourth Circuit held in *Corns v. Russell County School Board*, 52 F.3d 56 (4th Cir. 1995), that a probationary term of service for three years is a unitary period of three consecutive school years. Therefore, a teacher does not acquire continuing contract status upon the signing of a fourth contract after three years of contractual employment when, because of extensive sick leave, the teacher had not given three years of actual service. Moreover, any lapse in service occurring during the probationary period and extending past the beginning of the follow year defeats the completion of that probationary period and requires the beginning of a new period.

The period of employment as a “family training specialist” does not count toward continuing contract status because the employee primarily interacted with parents, not students. *Thurston v. Roanoke City Sch. Bd.*, 26 F. Supp. 2d 882 (W.D. Va. 1998).

18-8.01(b)(2) Nonrenewal of an Annual Contract Teacher

A school board has no obligation to employ an annual contract teacher beyond the school year for which it has contracted. If a school board does not wish to rehire the teacher, however, written notice of such nonrenewal must be given to the teacher by the school board on or before June 15 of each year. Va. Code § 22.1-304; see *Dennis v. Rappahannock Cnty. Sch. Bd.*, 582 F. Supp. 536 (W.D. Va. 1984) (the court required strict compliance with all terms of § 22.1-304); see also *Norfolk City Sch. Bd. v. Giannoutsos*, 238 Va. 144, 380 S.E.2d 647 (1989) (teacher not entitled to money damages because of school board’s failure to provide nonrenewal notice; the teacher’s sole remedy is entitlement to a contract for the ensuing year); *Thurston v. Roanoke City Sch. Bd.*, 26 F. Supp. 2d 882 (W.D. Va. 1998) (teacher equitably estopped from asserting right to be notified of non-renewal by April 15, when knew school board would rely on resignation letter that was subsequently withdrawn). Before recommending non-renewal of an annual contract, the division superintendent must consider the annual performance evaluation, although cause is not required for non-renewal. Va. Code § 22.1-303.

An annual contract teacher must receive a notice of the division superintendent’s proposed recommendation that the school board not renew the contract. The teacher may then request the reasons for the recommendation and the performance evaluation, as well as a conference with the division superintendent. Va. Code § 22.1-305.

The right of the teacher to this conference does not mean that the school system must show cause for the nonrenewal (see *Flinn v. Fairfax Cnty. Sch. Bd.*, 87 Va. Cir. 262 (Fairfax Cnty. 2013) (employee can be denied renewal of contract for any other reason, at any time, or for no reason at all)); it is simply to provide the teacher with an opportunity to discuss the reasons for nonrenewal. A conference is not required if the reason for the nonrenewal recommendation is the abolition of a subject or a reduction in the enrollment in classes of a particular subject. If a conference is requested, the June 15 deadline is not applicable, but the school board must give notice of nonrenewal within thirty days after the division superintendent notifies the teacher of his intention with respect to the recommendation.

18-8.01(b)(3) Reemployment Notice

An annual contract teacher who receives a notice of reemployment must accept or reject within fifteen days. Va. Code § 22.1-304.

18-8.01(c) Continuing Contract Teachers

After completing the probationary period, a teacher is entitled to a continuing contract during good behavior and competent service and prior to retirement. However, in *Underwood v. Henry County School Board*, 245 Va. 127, 427 S.E.2d 330 (1993), the Virginia Supreme Court held that a school board has the authority to change its policy regarding reductions in staff and can terminate a teacher even though she has a continuing contract agreement with the school board. Teachers employed by a local school board who have achieved continuing contract status shall be formally evaluated at least every three years and no later than one year after receiving an unsatisfactory formal evaluation. Teachers must be informally evaluated in other years. Va. Code § 22.1-295(C). Instructional personnel employed by local school boards who have achieved continuing contract status must be evaluated not less than once every three years. Any instructional personnel who have achieved continuing contract status and who have received an unsatisfactory evaluation and continue to be employed by the school board must be evaluated no later than one year after receiving such unsatisfactory evaluation. The evaluation must be maintained in the employee's personnel file. Every superintendent must annually certify school division compliance with this requirement to the Virginia Department of Education. Va. Code § 22.1-295. Teacher performance indicators, or other data able to be used by the DOE or a local school board for performance evaluations, are confidential but may be disclosed in a form that does not personally identify any student or other teacher if required by law, a court order, or for the purposes of a grievance proceeding involving the teacher. Va. Code § 22.1-295.1. Interpreting a prior version of the statute, the Virginia Supreme Court held that student growth percentiles are teacher performance indicators and are confidential even if not actually used in teacher evaluations. *Va. Educ. Ass'n v. Davison*, 294 Va. 109, 803 S.E.2d 320 (2017).

18-8.01(d) Substitute Teachers

Substitute teachers must be at least eighteen years old and have a high school diploma or have passed a high school equivalency examination, although school boards may establish higher qualifications. Va. Code § 22.1-302.

18-8.01(e) Employment and Placement

Teachers are employed and placed in appropriate schools by the school board upon recommendation of the division superintendent. Va. Code § 22.1-295. The extent to which individual members of a school board may be involved in the preliminary process of hiring teachers is an employment practice to be established by the board. 1998 Op. Va. Att'y Gen. 78.

Teachers must be qualified in their relevant subject areas. Va. Code § 22.1-295(A). A separate written contract is required for teacher sponsorship of an extracurricular activity if the teacher is paid for such sponsorship. Termination of such contract shall not

constitute cause for the termination of the separate contract for teaching. Va. Code § 22.1-302. Teachers are to be annually evaluated, either formally or informally, based on student academic progress, instructional methodology, classroom management, and subject matter knowledge. The school board must adopt policies that provide incentives for excellence in teaching. Va. Code § 22.1-295(B).

18-8.01(f) Reduction of Number of Teachers

An important exception to the laws outlined above is that “a school board may reduce the number of teachers, whether or not such teachers have reached continuing contract status because of decrease in enrollment or abolition of particular subjects.” Va. Code § 22.1-304. This reduction can take place after June 15 of each year. *See Underwood v. Henry Cnty. Sch. Bd.*, 245 Va. 127, 427 S.E.2d 330 (1993) (during reduction in force, all teachers can be treated as though they have not reached continuing contract status). The reduction in the workforce cannot be based solely on the basis of seniority but must include consideration of, among other things, the performance evaluations of the teachers potentially affected by the reduction in workforce. Va. Code § 22.1-304(G).

Within two weeks of the approval of the school budget by the appropriating body, but no later than June 1, school boards must notify all teachers who may be subject to a reduction in force due to a decrease in the school board’s budget. Va. Code § 22.1-304(F).

18-8.01(g) Data on Child Abuse or Molestation and Felony Convictions Required

School boards are required to include on their applications for full-time, part-time, temporary or permanent employment a certification that the applicant has not been convicted of a felony, any offense involving the sexual molestation, physical or sexual abuse or rape of a child, or a crime of moral turpitude. Any person making a materially false statement regarding such an offense shall be guilty of a Class 1 misdemeanor (punishable by confinement for up to twelve months and/or a fine not to exceed \$2,500, see Va. Code § 18.2-11, and the fact of such conviction shall be grounds for revocation of the person’s certificate to teach. Va. Code § 22.1-296.1. An applicant for employment must also certify that the applicant has not been the subject of a founded case of child abuse or neglect and consent to a search of the Department of Social Services (DSS) registry of such cases. Va. Code §§ 22.1-296.1(B) and 22.1-296.4. The DSS did not deprive a teacher of due process by placing the teacher’s name on the Central Registry for a “founded” finding of sexual abuse of students. *Carter v. Gordon*, 28 Va. App. 133, 502 S.E.2d 697 (1998). Virginia Code § 22.1-296.1(A) prohibits the initial employment of a person convicted of *any* felony. *Butler v. Fairfax Cnty. Sch. Bd.*, 291 Va. 32, 780 S.E.2d 277 (2015) (also holding if person was hired in contravention of the statute, employment cannot continue). Virginia Code § 22.1-307(A) permits school boards to decide whether to terminate or retain a teacher who is convicted of a felony *after* he or she has been hired.

School boards may not share the results of criminal records checks, fingerprinting, and sexual registry checks made pursuant to Va. Code § 22.1-296.2, regardless of whether the applicant or employee approves. 1998 Op. Va. Att’y Gen. 77. A school board employee may not assist a school employee, contractor, or agent in obtaining a new job if there is probable cause to believe that person engaged in sexual misconduct involving a minor or student. Va. Code § 22.1-79.8.

18-8.01(g)(1) Child Abuse Complaints

Teachers seeking an initial or renewed license must complete a study in child abuse recognition and intervention. Va. Code § 22.1-298.

If a child abuse or neglect complaint is made against school personnel, procedures in addition to a standard social services department investigation must be followed. Va. Code § 63.2-1511. Virginia Code § 63.2-1516.1 provides that the initial interview with the alleged abuser or person accused of neglect must be face-to face. At the initial interview,

the accused must be provided a written statement describing the general nature of the complaint, the right to representation, and the identity of the alleged victim. Written notification of the findings must also be provided, which must include a summary of the investigation and notice of the right of appeal. *Id.* Each local department of social services and local school division must adopt a written interagency agreement as a protocol for investigating child abuse and neglect reports against school personnel. Va. Code § 63.2-1511(C).

When a local department learns that an individual who is the subject of a founded complaint is a licensed school employee, it must notify the State Superintendent of Public Instruction and the local school board “without delay.” Va. Code §§ 63.2-1503(P), 63.2-1505(A)(7).

18-8.01(h) Criminal Records Check and Fingerprinting

As a further condition of employment, all school boards must require any applicant seeking employment to submit to fingerprinting and to provide descriptive information for the purpose of obtaining criminal history record information about the applicant. Convictions of a felony or Class 1 misdemeanor are reported to the school by the Central Criminal Records Exchange. Reciprocity among school boards is allowed under specified circumstances. At the discretion of the school board, such individual may be required to pay the cost of such fingerprinting or criminal records check. Va. Code § 22.1-296.2.

18-8.01(i) Salary

Although the school board and the teacher must commit themselves to a contract pursuant to the rules outlined above, the salary for the teacher cannot be set until after the school board’s budget has been approved. This will typically happen well after each party is committed to a contract. The school board must furnish each teacher, as soon after June 15 as the budget has been approved, with a statement confirming continuation of employment, the teaching assignment, and the salary. Va. Code § 22.1-304; 1969-70 Op. Va. Att’y Gen. 342. Teachers are also eligible for performance incentive grants paid through the Strategic Compensation Grant Initiative. Va. Code § 22.1-318.2.

18-8.01(j) Resignations

While any teacher may resign before June 15, permission of the school board, or, if the board so authorizes, the superintendent, is needed after that date. If the board declines to grant the permission and the teacher breaches the contract, the teacher’s license may be revoked by the State Board of Education. The superintendent must notify the school board of his decision at the end of one week after the request is made. The school board may reverse the superintendent’s decision within two weeks thereafter. Va. Code § 22.1-304.

18-8.01(k) Immunity

Teachers who act within the scope of their employment and who are exercising judgment and discretion will be immune from suit for acts or omissions constituting ordinary negligence. Va. Code § 8.01-220.1:2; *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988), *overruling Short v. Griffiths*, 220 Va. 53, 255 S.E.2d 479 (1979) and *overruling in part Crabbe v. Northumberland Cnty. Sch. Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968). Any school employee or volunteer is immune from any civil damages arising from the prompt good faith reporting of alleged acts of bullying or crimes against others to the appropriate school official in compliance with specified procedures. Va. Code § 8.01-220.1:2(B).

18-8.02 Principals

18-8.02(a) Employment and Qualifications

Principals and assistant principals are employed by the school board upon recommendation of the division superintendent. Principals must hold licenses prescribed by the State Board of Education. Va. Code §§ 22.1-293(A) and 22.1-298. The extent to which individual

members of a school board may be involved in the preliminary process of hiring principals is an employment practice to be established by the board. 1998 Op. Va. Att'y Gen. 78.

18-8.02(b) Duties

Principals are responsible for the administration, operation, and management of their respective schools in accordance with the rules and regulations of the school board and under the supervision of the division superintendent. Principals may submit recommendations to the division superintendent for the appointment, assignment, promotion, transfer, and dismissal of all personnel assigned to his supervision. A principal shall perform such other duties as may be assigned by the division superintendent pursuant to the rules and regulations of the school board. Va. Code § 22.1-293(A). Principals must receive training in the evaluation and documentation of employee performance. Va. Code § 22.1-293(C). Principals shall be subject to performance evaluations based on administrative skills, student academic progress, school safety, and enforcement of student discipline. Va. Code § 22.1-294(B).

18-8.02(c) Term of Service

18-8.02(c)(1) Probationary Term

A person employed as a principal or supervisor⁹ must serve three years in such position in the same school division before acquiring continuing contract status as a principal or supervisor. Va. Code § 22.1-294; *Lee-Warren v. Cumberland Cnty. Sch. Bd.*, 792 F. Supp. 472 (W.D. Va. 1991) (a school principal who obtained continuing contract status in one school division did not retain that status when she accepted a job as a principal in another school division). If funded by the General Assembly, the school board must provide a first-year probationary principal with a mentor. Va. Code § 22.1-294(A). Probationary principals and assistant principals must be evaluated every year. Va. Code § 22.1-294(B).

18-8.02(c)(2) Effect of Continuing Contract

Continuing contract status acquired by a principal or supervisor shall not be construed as (i) prohibiting a school board from reassigning such persons to a teaching position if notice of such action is given by June 15; or (ii) entitling such persons to the salary paid to him or her as a principal or supervisor in the case of reassignment to a teaching position. Va. Code § 22.1-294(C). Principals and assistant principals with continuing contract status must be evaluated formally at least every three years and informally evaluated the other years. Va. Code § 22.1-294(B).

18-8.02(d) Reassignment and Salary Reduction

No reassignment and salary reduction may be made without the principal or supervisor being provided with written notice of the reason for such recommendation and an opportunity to present his or her position at an informal meeting with the division superintendent or his designee or the school board (according to the choice of the principal or supervisor). At this meeting the principal or supervisor has an opportunity to discuss the reasons for the salary reduction and reassignment and "cause" as defined in Va. Code § 22.1-209. See *Wooten v. Clifton Forge Sch. Bd.*, 655 F.2d 552 (4th Cir. 1981); see also 1980-81 Op. Va. Att'y Gen. 294 (a teacher does not abandon continuing contract status by merely accepting probationary employment as a principal with the same employer); *West v. Jones*, 228 Va. 409, 323 S.E.2d 96 (1984). Whether legal representation of the principal or supervisor is to be permitted at an informal meeting under Va. Code § 22.1-294 is within the sole discretion of the school board. 1997 Op. Va. Att'y Gen. 115.

⁹ A "supervisor" is defined in Va. Code § 22.1-294 as a "person who holds an instructional supervisory position as specified in the regulation of the Board of Education and who is required to hold a license as prescribed by the Board of Education."

18-8.02(e) Immunity

Because a school principal performs a large number of discretionary and managerial functions in the school, he is entitled to immunity in an action for simple negligence under certain circumstances. *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982). In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), the Fourth Circuit upheld a jury's finding that a school principal had been deliberately indifferent to the risk presented by a teacher who was allowed to continue teaching despite prior known instances of sexual abuse of a student.

18-8.03 Grievance Procedure**18-8.03(a) Definition**

A "grievance" is defined in Va. Code § 22.1-306 as a "complaint" or dispute by a teacher¹⁰ relating to his or her employment including but not necessarily limited to:

1. disciplinary action including dismissal;
2. the application or interpretation of:
 - a. personnel policies,
 - b. procedures,
 - c. rules and regulations,
 - d. ordinances,
 - e. statutes,
3. any acts of reprisal as the result any participation in the grievance procedure; and
4. complaints of discrimination on the basis of race, color, creed, religion, political affiliation, disability, age, national origin, sex, pregnancy, childbirth or related medical conditions, marital status, sexual orientation, gender identity, or military status.

A "grievance" does not include a complaint or dispute by a teacher relating to:

1. establishment and revision of wages or salaries, position classifications, or general benefits;
2. suspension of a teacher or nonrenewal of a contract of a teacher who has not achieved continuing contract status;
3. the establishment or contents of ordinances, statutes or personnel policies, procedures, rules, and regulations;
4. failure to promote;
5. discharge, layoff or suspension from duties because of decrease in enrollment, decrease of enrollment in or abolition of a particular subject or insufficient funding;
6. hiring, transfer, assignment, and retention of teachers within the school division. See *Tazewell Cnty. Sch. Bd. v. Gillenwater*, 241 Va. 166, 400 S.E.2d 199 (1991);
7. suspension from duties in emergencies;
8. the methods, means and personnel by which the school division's operations are to be carried on; or
9. coaching or extracurricular activity sponsorship.

Va. Code § 22.1-306.

Failure to apply, where applicable, the rules, regulations, policies or procedures as written and established by the school board is grievable. Va. Code § 22.1-306. However, in *York County School Board v. Epperson*, 246 Va. 214, 435 S.E.2d 647 (1993), an

¹⁰ The grievance procedure established by the State Board of Education, 8 VAC 20-90-10 et seq., applies to principals for disputes regarding dismissals or probation. *Tazewell Cnty. Sch. Bd. v. Brown*, 267 Va. 150, 591 S.E.2d 671 (2004).

involuntary teacher transfer was not grievable even though the transfer did not follow school policies and was allegedly a reprisal resulting from school board criticism. In *Epperson*, the teacher failed to specify facts regarding the departure from school board policy on transfers and because a transfer was not regarded as a penalty.

18-8.03(b) Procedure

The procedure is set out in detail in the regulations issued by the State Board of Education pursuant to the mandate of Va. Code § 22.1-308. If the division superintendent recommends dismissal of any teacher, written notice of the proposed dismissal must be sent to the teacher and it must inform the teacher that within ten business days after receiving the notice the teacher may request a hearing before the school board or, at the option of the local school board, a hearing officer appointed by the school board as provided for in § 22.1-311. Va. Code § 22.1-309. The hearing must be held within fifteen days of the teacher's request. The hearing is public only if requested by the teacher and should be held if feasible at the school in which most witnesses work. Va. Code § 22.1-311.

A record or recording of such proceedings must be made. The parties share the cost of the recordings equally. If the grievance is not related to a dismissal, the parties may mutually agree to dispense with a recording. If either party requests a transcript, that party shall bear the expense of its preparation. Recordings related to dismissals must be kept for six months, and if the school board requests a transcript within that period it must provide a copy to both parties and bear the cost. Va. Code § 22.1-311.

18-8.03(c) Hearing Before a Hearing Officer

A school board may appoint an impartial hearing officer from outside the school division to conduct grievance hearings. A hearing officer cannot have been involved in the recommendation of dismissal as a witness or a representative. A hearing officer must possess some knowledge and expertise in public education and education law and be capable of presiding over an administrative hearing.

Within ten business days after the hearing, the hearing officer must make a written recommendation and transmit the record or recording to the school board, a copy of which shall be provided to the teacher. Va. Code § 22.1-311. The school board must give a written decision to the teacher within thirty days of receiving the record or recording. Va. Code § 22.1-313.

18-8.03(d) Hearing Before the School Board

If there has been a hearing before a hearing officer, the school board may make its decision upon the record or recording of such hearing, pursuant to § 22.1-313, or the school board may elect to conduct a further hearing to receive additional evidence by giving written notice of the time and place to the teacher and the division superintendent within ten business days after the board receives the record or recording of the initial hearing. Such notice must specify each matter to be inquired into by the school board. Va. Code § 22.1-311. The school board must give the teacher a written decision within thirty days.

If the initial hearing is by the school board, the board must also give its written decision within thirty days.

A teacher may be dismissed or suspended by a majority of a quorum of the school board. Va. Code § 22.1-313.

18-8.03(e) Use of School Board Counsel

It is constitutional for counsel for the school board both to present the superintendent's case and then to advise the school board that must make the independent decision on the dismissal recommendation. *Breitling v. Solenberger*, 585 F. Supp. 289 (W.D. Va.), *aff'd*, 749 F.2d 30 (4th Cir. 1984).

18-8.03(f) Exchange of Documents Prior to Hearing

In the event that a teacher requests a hearing, the division superintendent shall provide, within ten days of the request, the teacher or his representative with the opportunity to inspect and copy his personnel file and all other documents relied upon in reaching the decision to recommend dismissal. Within ten days of the request of the division superintendent, the teacher or his representative shall provide the division superintendent with the opportunity to inspect and copy the documents to be offered in rebuttal to the decision to recommend dismissal. The cost of copying such documents shall be paid by the requesting party.

For the purposes of this section, "personnel file" means any and all memoranda, entries or other documents included in the teacher's file as maintained in the central school administration office or in any file on the teacher maintained within a school in which the teacher serves. Va. Code § 22.1-309.

18-8.03(g) Decision of the School Board

"The School Board shall retain its exclusive final authority over matters concerning employment supervision of its personnel, including dismissals and suspensions." Va. Code § 22.1-313. It would be a violation of the Virginia Constitution for the General Assembly to impose binding arbitration on a school board. *See Richmond City Sch. Bd. v. Parham*, 218 Va. 950, 243 S.E.2d 468 (1978); *see also Russell Cnty. Sch. Bd. v. Anderson*, 238 Va. 372, 384 S.E.2d 598 (1989).

Proceedings for review of the decision of the school board are instituted by filing a notice of appeal with the school board within ten business days after the date of the decision and giving a copy thereof to all other parties. Va. Code § 22.1-314. The grievant's participation in a school board hearing after the expiration of ten days did not waive the school board's procedural rule that its failure to render a decision within ten days renders the matter grievable. *Jones v. Richmond City Sch. Bd.*, 56 Va. Cir. 333 (City of Richmond, 2001).

The notice of appeal from a school board's grievance decision must be physically received by the school board within the ten days. *Loudoun Cnty. Sch. Bd. v. Burk*, 249 Va. 163, 455 S.E.2d 228 (1995). Within ten business days thereafter, the school board shall transmit to the clerk of the court to which the appeal is taken a copy of its decision, a copy of the notice of appeal, and the exhibits. Va. Code § 22.1-314. A common-law breach of contract claim is not allowed when the employee has failed to appeal the grievance decision pursuant to the statutory requirements. *Williams v. Northampton Cnty. Sch. Bd.*, 58 Va. Cir. 158 (Accomack Cnty. 2002).

18-8.04 Suspension of an Employee**18-8.04(a) Grounds****18-8.04(a)(1) Good Cause**

A public school employee may be suspended for good and just cause when the safety or welfare of the school division or its students is threatened or when the employee has been charged by summons, warrant, indictment, or information with the commission of a felony or misdemeanor involving sexual assault or abuse, obscenity, drugs, physical or sexual abuse or neglect of a child, or moral turpitude. No employee shall be suspended solely on the basis of the employee's refusal to submit to a polygraph examination requested by the school board. Va. Code § 22.1-315(A).

18-8.04(a)(2) Criminal Charge

An employee suspended because of a criminal charge as described above may be suspended with or without pay but if it is without pay, an amount equal to the salary must be placed in an interest-bearing demand escrow account, and the employee shall receive this amount if he or she is not convicted, less any earnings received by the teacher during the suspension

period. In no event shall the payment exceed one year's salary. Va. Code § 22.1-315(B). If the employee is found guilty of the charges, or placed on probation, and all appeals have been exhausted, the money in the escrow account shall be repaid to the school board. Va. Code § 22.1-315(C).

18-8.04(b) Period of Suspension

Except where a suspension is based on a criminal charge, a division superintendent (or his designee) shall not suspend an employee for more than sixty days, and when a suspension exceeds five days, the employee must be advised in writing of the reasons and afforded an opportunity for a hearing before the school board in accordance with Va. Code §§ 22.1-311 and 22.1-313. Any employee so suspended shall receive his or her salary until the school board, after a hearing, determines otherwise. Va. Code § 22.1-315.

18-8.04(c) When Hearing Not Required

A hearing is required only if a suspension is for more than five days. Va. Code § 22.1-315(A); *Payne v. Fairfax Cnty. Sch. Bd.* 288 Va. 432, 764 S.E.2d 40 (2014) (rejecting holding of *Wilkinson v. Henrico Cnty. Sch. Bd.*, 566 F. Supp. 766 (E.D. Va. 1983)).¹¹

18-8.05 Dismissal of a Teacher

18-8.05(a) Grounds

Teachers may be dismissed for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence when in compliance with federal law, conviction of a felony or a crime of moral turpitude, or other good and just cause.¹² Va. Code § 22.1-307; see, e.g., *Spotsylvania Cnty. Sch. Bd. v. McConnell*, 215 Va. 603, 212 S.E.2d 264 (1975); *Gwathmey v. Atkinson*, 447 F. Supp. 1113 (E.D. Va. 1976). However, no teacher shall be dismissed solely for refusing to take a polygraph test. Va. Code § 22.1-315(A).

A teacher who is the subject of a founded complaint of child abuse or neglect shall be dismissed after administrative appeals of the founded complaint are exhausted. The finding of abuse or neglect shall be grounds for revocation of the teacher's license. Va. Code § 22.1-307.

18-8.05(b) Constitutional Considerations

Teachers do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969). A continuing contract teacher on probation is still entitled to invoke the procedural guarantees available to a continuing contract teacher. *Williams v. Charlottesville Sch. Bd.*, 940 F. Supp. 143 (W.D. Va. 1996), *aff'd*, 149 F.3d 1172 (4th Cir. 1998). Due process requires that review of a teacher's termination be by an impartial decision-maker. *Bird v. Bland Cnty. Sch. Bd.*, 205 F.3d 1332 (4th Cir. Jan. 14, 2000).

18-8.05(b)(1) Freedom of Expression

A teacher may not be dismissed from employment or otherwise reprimanded in his employment evaluation for exercising his First Amendment right to protest or comment on conditions existing within the school system. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972); *Seemuller v. Fairfax Cnty. Sch. Bd.*, 878 F.2d 1578 (4th Cir. 1989). The initial inquiry in determining whether a teacher's speech is entitled to first amendment protection is whether his speech addresses "a matter of public concern." *Seemuller, supra*. Speech "upon matters only of personal interest" is not afforded constitutional protection. Because a high school teacher does not have any First Amendment right to participate in the makeup

¹¹ The school board employee in *Payne* was not a teacher and thus the Court did not address *Payne's* argument that a suspension of any length would violate the due process rights of teachers.

¹² Being in default or delinquent with regard to a student loan shall not constitute grounds for dismissal. Va. Code § 22.1-292.3.

of school curriculum, it was not a constitutional violation to prohibit her from producing a certain play. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc) (7-6). Similarly, under some circumstances, the school may limit the material a teacher posts on a classroom door. *Newton v. Slye*, 116 F. Supp. 2d 677 (W.D. Va. 2000) (denying preliminary injunction sought by teacher who wanted to post banned books list on classroom door). Whether a teacher's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983); *see also Seemuller, supra*; *Scruggs v. Keen*, 900 F. Supp. 821 (W.D. Va. 1995) (issue of whether school adequately investigated nature of teacher's speech was a jury question).

If a teacher's speech addresses a matter of public concern, the teacher's and the audience's interests in the speech must outweigh the harm caused by the speech to the school board's interests in maintaining discipline and order in the school. *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987); *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992) (a letter inciting other faculty to be absent from classes in violation of their contract was not protected by the First Amendment). In *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), the Fourth Circuit held that the substantial public interest in speech relating to racial discrimination in school discipline outweighed the disharmony the assistant principal caused within the school. *Hall v. Marion School District*, 31 F.3d 183 (4th Cir. 1994), sets forth a three-prong test for determining whether a teacher is terminated in retaliation for exercising of free speech: (a) the speech must involve an issue of public concern; (b) the employee would not have been dismissed but for her protected speech; and (c) the employee's interest in exercising free speech must outweigh the countervailing interest of the state in providing the public service that the employee was hired to provide. *See also Hanton v. Gilbert*, 36 F.3d 4 (4th Cir. 1994).

A teacher can recover damages only if the teacher proves that his speech was a substantial, motivating factor in the school board's actions against him, and if the school board is unable to show by a preponderance of the evidence that it would have reached the same decision in the absence of such protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977); *Johnson v. Butler*, 433 F. Supp. 531 (W.D. Va. 1977).

However, courts have permitted school officials to impose significant sanctions on a teacher when the teacher's speech was in a school-sponsored setting, such as the classroom. *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991). In *Miles*, the court applied the *Hazelwood* standard (see section [18-5.07\(e\)](#)) for evaluating the school officials' actions in placing a teacher on leave without pay, where the teacher had commented during class on a controversial incident at the school. The court determined that, because the teacher's speech was in a classroom and, therefore, constituted school-sponsored expression, the school board had a greater interest in restricting the teacher's speech than it would have with speech in other, non-school sponsored situations.

The Virginia Supreme Court considered the issue of teacher speech and the use of a transgender student's pronouns in *Vlaming v. W. Point Sch. Bd.*, ___ Va. ___, 895 S.E.2d 705 (2023). Vlaming was a high school French teacher who had a transgender student in his class. Vlaming referred to the student by their preferred name but refused to refer to the student by their gender-affirming pronouns, instead opting to only refer to the student by their preferred name. The school principal specifically directed Vlaming to use the student's gender-affirming pronouns. Vlaming refused, asserting that referring to a student by anything other than the pronouns associated with the student's gender assigned at birth is a lie, and that lying is against his deeply held religious beliefs. The School Board terminated Vlaming's employment, and he brought suit asserting various

claims under the Virginia Constitution.¹³ The lower court dismissed Vlaming's claim on demurrer. Presuming the facts alleged in the complaint as true and viewing all reasonable inferences in the light most favorable to Vlaming, the Supreme Court determined that Vlaming had properly alleged (1) a legally viable free-exercise claim under the Virginia Constitution and the Virginia and the Virginia Religious Freedom Restoration Act, (2) prima facie claims of viewpoint discrimination and retaliation for his expressed statements in violation of his right of free expression, (3) an as-applied procedural due process claim under the Virginia Constitution, and (4) a state law breach of contract claim. The Court did not address the intersection between the student's right to be free from discrimination and harassment and Vlaming's right to Freedom of Religion. The case was remanded for further proceedings.

A public employer need not tolerate action (such as an employee circulating questionnaire among his co-workers concerning office morale and office policies) that it reasonably believes would disrupt the office, undermine authority and destroy close working relationships. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983); *Daniels v. Quinn*, 801 F.2d 687 (4th Cir. 1986).

An inquiry into whether a school board employee's speech at school is protected by the First Amendment turns on the balance between the interests of the employee, as a citizen, in commenting upon matters of public concern, and the interests of the school board, as an employer, in promoting the efficiency of the public service it performs through its employees. Thus, a court performs a two-step analysis. First, a court determines if the speech at issue was that of a private citizen speaking on a matter of public concern. This question turns on whether the speech is made primarily in the employee's role as citizen or primarily in his role as an employee. If the speech does not involve a matter of public concern, but instead addresses a personal interest, then the speech is not protected by the First Amendment. In such a case, there is no need to proceed to the second step of scrutinizing the reasons for the regulations.

If, however, the speech does touch a matter of public concern, then it is necessary to proceed to the second step of the analysis and conduct a balancing test. This balancing determines if the employee's interest in expressing himself outweighs the employer's interest in what the employer has determined to be the appropriate operation of the workplace. If the employee's speech fails either part of this two-step test, then it is accorded no protection under the First Amendment. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998).

Curricular speech does not touch on a matter of public concern and is not protected under the First Amendment. *Boring, supra*. That is, it is the school, not the teacher, that has the right to fix the curriculum.

A school was allowed to remove certain religious postings in a teacher's classroom as the postings were held to be curricular in nature and thus per se not of public concern. *Lee v. York Cnty. Sch. Division*, 484 F.3d 687 (4th Cir. 2007).

See also 2005 Op. Va. Att'y Gen. 27 (the blanket prohibition of principals and other staff members from speaking at private baccalaureate events is constitutionally

¹³ The Court recognized that the "fulsome language" of Article I, Section 16 of the Constitution of Virginia "stands in stark contrast to the single clause in the First Amendment addressing religious liberty: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'" *Id.* (quoting U.S. Const. amend I).

unwarranted and would be a violation of their First Amendment rights of free speech as private citizens).

An employee who was demoted by a school board because of her political activities and membership in a political party was awarded both compensatory and punitive damages in *Chadwell v. Lee County School Board*, 535 F. Supp. 2d 586 (W.D. Va. 2008).

See generally Chapter 19, 42 U.S.C. § 1983, section [19-6.04\(b\)](#).

18-8.05(b)(2) Property Interest

The fact that an assistant superintendent is employed for eleven years, pursuant to a series of two-year contracts, is not sufficient to create a protected property interest in continued employment. *Robertson v. Rogers*, 679 F.2d 1090 (4th Cir. 1982). In order to implicate a former employee's liberty interest so as to require due process, his employer's comments to prospective employers must involve an attack on the employee's honor or integrity. Allegations of incompetence do not imply the existence of such serious character defects. *Id.*; accord *Bristol Va. Sch. Bd. v. Quarles*, 235 Va. 108, 366 S.E.2d 82 (1988) (comments such as "ineffective leadership" and "lack of communication with personnel" are not the type of charges which so damage a person's standing in the community or result in the sort of stigma that forecloses other employment opportunities and do not, therefore, implicate a person's constitutionally protected liberty interest); *Schneeweis v. Jacobs*, 771 F. Supp. 733 (E.D. Va. 1991) (no property interest was deprived when a basketball coach was suspended from duty with pay), *aff'd mem.*, 966 F.2d 1444 (4th Cir. 1992); see also *Hibbitts v. Buchanan Cnty. Sch. Bd.*, 685 F. Supp. 2d 599 (W.D. Va. 2010) (probationary status does not implicate property interests when paid full salary and continued working), *aff'd*, No. 10-1814 (4th Cir. June 1, 2011).

18-8.05(b)(3) Liberty Interest

A substitute teacher, whose name was removed from the list of eligible substitutes on the ground that several administrators had complained about her job performance and requested that she not be assigned to their schools, had no viable claim that she was deprived of a liberty interest to pursue future employment because the reasons for removal of her name from the eligibility list were true. *Golding v. Montgomery Cnty. Pub. Sch.*, No. 7:09-cv-00036 (W.D. Va. Apr. 22, 2010), *aff'd*, No. 10-1517 (4th Cir. Sept. 30, 2010). Because Golding was not an employee with any associated administrative rights, she had no property right in having her name on the eligibility list. While a liberty interest is implicated by public announcement of reasons for an employee's discharge, a plaintiff must meet four requirements in order to demonstrate a violation of this liberty interest: the charges against the plaintiff (1) placed a stigma against her reputation; (2) were made public by the employer; (3) were made in conjunction with the adverse employment action; and (4) were false. When a superintendent publicly stated that the employee had "deliberately and egregiously misused purchase cards," he insinuated that the employee "engaged in dishonest conduct and therefore implied the existence of a serious character defect" for purposes of alleging a liberty interest implicating the need for due process. *Socol v. Albemarle Cnty. Sch. Bd.*, 399 F. Supp. 3d 523 (W.D. Va. 2019). The same is not true for a press release that merely stated the employee was no longer employed by the school system. *Id.*

18-8.05(c) Discrimination in the Workplace

Title VII of the Civil Rights Act of 1964 outlaws discrimination in the workplace on the basis of race, color, religion, sex, or national origin. In *Bostock v. Clayton Cnty.*, 590 U.S. ___, 140 S. Ct. 1731 (2020), the United States Supreme Court extended Title VII to apply to discrimination on the basis of sexual orientation and/or transgender status. The Court held that for an employer to discriminate on those bases, they must intentionally discriminate, in part, on the basis of sex which has always been prohibited by Title VII. *Id.* For example,

but for a transgender woman's sex assigned at birth being male, an employer would have no concern with her conforming to female gender norms.

18-8.06 Threats and Assaults

Any person making an oral threat to kill or do bodily injury to any employee of an elementary, middle or secondary school, while on a school bus, on school property, or at a school-sponsored activity, shall be guilty of a Class 1 misdemeanor. Va. Code § 18.2-60. It is a Class 1 misdemeanor with a mandatory incarceration period to commit a battery against a person known to be a full- or part-time school employee who is performing his duties as such. Va. Code § 18.2-57(D).

18-8.07 Volunteers

Under the Fair Labor Standards Act, employees who volunteer to perform duties for a school system wholly distinct from those within the scope of their employment for no or nominal compensation are not entitled to overtime pay for such volunteer activity. *Purdham v. Fairfax Cnty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011) (school security assistant volunteered as a golf coach and received an annual stipend of approximately \$2,100).

18-9 FINANCE

18-9.01 Limitation on Expenditures

A school board cannot expend or contract to expend in a fiscal year any sum in excess of the funds available for school purposes without the consent of the governing body. It is malfeasance for a school board member to violate this provision. Va. Code § 22.1-91.

18-9.02 School Budget

18-9.02(a) Estimate

Each year the division superintendent must prepare a budget and, after receiving school board approval, submit this "estimate" to the governing body by the date prescribed by Va. Code § 15.2-2503. The budget must contain the estimate of the amount of money deemed to be needed during the next fiscal year for the school system, and it should set out in line item form the specific amount needed for each of several major classifications which are prescribed by the State Board of Education. Va. Code §§ 22.1-92 and 22.1-93.

Upon preparing the estimate, each division superintendent must prepare and publish on the school website notification of (i) the estimated average cost per pupil for public education in the school division for the coming year and (ii) the actual state and local education expenditures per pupil for the previous year. Before the school board gives final approval to its budget for submission to the governing body, the school board must hold at least one public hearing to receive the views of the citizens within the school division. Va. Code § 22.1-92. The school board must give public notice of any hearing on the budget at least seven days prior to the hearing in a newspaper with general circulation in the school division. *Id.* The governing body does not have line-item veto power over the budget and can adjust only the totals. *Id.*; see *Peters v. Moses*, 613 F. Supp. 1328 (W.D. Va. 1985); *Bd. of Sup'rs v. Cnty. Sch. Bd.*, 182 Va. 266, 28 S.E.2d 698 (1944). Moreover, a county administrator cannot dictate the maximum amount the school board may request; however, a county may require the school board budget to be presented in a particular form. 1993 Op. Va. Att'y Gen. 135. A school board may transfer funds among major classifications when it receives a lump sum appropriation. 1983-84 Op. Va. Att'y Gen. 302.

18-9.02(b) Approval by County or Municipality

The governing body of a county or municipality must approve an annual budget for educational purposes by May 15 or within thirty days of the receipt of the estimate of state funds to be supplied, whichever is later. Va. Code § 22.1-93.

18-9.02(c) Appropriations by County or Municipality

The school board must receive appropriations that are not less than the cost apportioned to the governing body for maintaining an educational program that will meet the Standards of Quality. Va. Code § 22.1-94. The governing body has a duty to levy a property tax to raise this sum. Va. Code § 22.1-95. If a governing body refuses to do so, the Attorney General shall institute a mandamus action on behalf of the State Board of Education to require the governing body to make this appropriation. Va. Code § 22.1-97. Once funds are appropriated, however, the governing body is without authority to reduce the appropriation without the consent of the school board. 2010 Op. Va. Att’y Gen. 120. Nevertheless, if a local governing body has divided its appropriation into classifications (e.g., debt service), the school board may not use funds designated for one classification for expenses belonging in another. 2013 Op. Va. Att’y Gen. 165; *see also Chesterfield Cnty Bd. of Sup’rs of v. Chesterfield Cnty Sch. Bd. of.*, 182 Va. 266, 28 S.E.2d 698 (1944) (once the board of supervisors appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as it stays within the limits set up in the budget); 1979-1980 Op. Va. Att’y Gen. 122 (once the appropriation is made, the funds automatically vest within the exclusive dominion of the school board, and a locality has no authority to divert such funds for any other purpose without the consent of the school board).

18-9.02(d) Reduction of State Aid

State aid is proportionally reduced if the length of the school term falls below 180 days or 990 hours. Under certain circumstances such as severe weather conditions, unscheduled remote learning days, or other emergency situations, including natural or manmade disasters, energy shortages or power failures, the State Superintendent and State Board shall allow a reduction in the length of term without a reduction in funds if the makeup schedule prescribed in Va. Code § 22.1-98 is followed.

The Board may waive these requirements if the school closing resulted from a declared state of emergency, severe weather conditions, or other emergency situations. If the school division has achieved a savings in personnel costs as a result of the closings, however, State aid is proportionally reduced. Va. Code § 22.1-98.

When severe weather conditions or other emergency situations have resulted in the closing of any school in a school division for in-person instruction, the school division may declare an unscheduled remote learning day whereby the school provides instruction and student services that are consistent with guidelines established by the Department of Education to ensure the equitable provision of such services. No school division shall claim more than ten unscheduled remote learning days in a school year unless the Superintendent of Public Instruction grants an extension. Va. Code § 22.1-98(C)(4).

18-9.03 Reimbursement for Special Students

To the extent funds are appropriated by the General Assembly, a local school board must be reimbursed for the cost of educating a child who resides within the school division under certain conditions, such as placement in an orphanage or foster care facility. Under certain circumstances, a current or prior custodial parent may have to cover the educational costs. Va. Code § 22.1-101.1.

18-9.04 Special Tax

A governing body, in addition to the levy and appropriations required by Va. Code §§ 22.1-94 and 22.1-95, can levy a special county tax, a special district tax, a special city tax, or a special town tax, on all property subject to local taxation. Va. Code § 22.1-102. The local school board can require the local governing body to petition the court for a referendum on the question of whether a uniform county tax should be required instead of district taxes. Va. Code §§ 22.1-103 to 22.1-106; *see also* 2021 Op. Va. Att’y Gen. 33 (discussing

assessment by Board of Supervisors of special tax to fund certain expenditures for the county school system).

18-9.05 School Board Borrowing

"No school board shall borrow any money in any manner for any purpose without express authority of law." Va. Code § 22.1-110; see *generally* Chapter 12, Financing Virginia's Local Governments, section [12-7.05\(h\)](#). Situations where a school board may borrow money are discussed below.

18-9.05(a) Revenue Anticipation Loans

A loan to be repaid within one year in an amount not to exceed one-half of the school levy or one-half of the cash appropriation for the preceding year or half of both. Va. Code § 22.1-110.

18-9.05(b) School Bus Loans

A loan made to purchase new school buses to replace obsolete or worn-out equipment. Va. Code § 22.1-146.

18-9.05(c) Literary Fund Loans

With the authorization of the governing bodies, local, regional, or joint school boards are empowered to borrow from the State Literary Fund for the purpose of erecting, altering, or enlarging school buildings to be repaid in installments of from five to thirty years. Va. Code §§ 22.1-142 to 22.1-175. The local governing body must supply the Board of Education with a bond counsel's legal opinion as to the validity of the loan and whether the interest is exempt from federal income tax. Va. Code § 22.1-157(C).

In *Harold v. Warren County Board of Supervisors*, 38 Va. Cir. 467 (Warren Cnty., 1996), the court held that approval by the board of supervisors is required before a school board can make a Literary Fund loan application. The board of supervisors also can withdraw its consent to a Literary Fund loan application before the loan has been approved by the State Board of Education.

18-9.05(d) General Obligation Bonds

Counties may issue bonds pursuant to the Public Finance Act (§ 15.2-2600 et seq.) following a resolution requesting the county to conduct a referendum and voter approval in the referendum. Va. Code § 15.2-2640.

18-9.05(e) Virginia Public School Construction Grants Fund

The Fund provides grants to eligible school divisions for construction, additions, and site acquisition. Guidelines are established by the Board of Education. The Fund is administered by the Department of the Treasury and Board of Education approval is required for Fund disbursement. Va. Code §§ 22.1-175.1 to 22.1-175.5.

18-9.05(f) Municipal Loans

Towns and cities may issue bonds for school purposes after complying with the Public Finance Act or their respective city charters. Va. Code § 15.2-2633.

18-9.05(g) Refunding Issues

In the event the Virginia Public School Authority refunds any bonds issued to finance the purchase of local school bonds, the Authority shall pass-through to the issuers of such local bonds an allocable share of any savings realized. No savings shall be passed-through to issuers of local school bonds where interest rate subsidy has been paid or where such bonds were issued at below market interest rates. If an interest rate subsidy was paid from the Literary Fund, the savings shall be transferred to the Literary Fund and used exclusively for Literary Fund loans to local school boards. Va. Code § 22.1-167.1. The VPSA may issue bonds to finance and refinance acquisition of local school bonds for capital projects and may

pledge to the bonds all or any combination of the following sources: (i) payments on the local school bonds, (ii) state aid intercept payments, (iii) funds appropriated from the Literary Fund, and (iv) appropriations by the General Assembly from the general fund. Va. Code §§ 22.1-167.2, 22.1-167.3; see also Va. Code § 22.1-146.1 (school modernization loans).

18-9.06 School Board Funds

18-9.06(a) Funds Available

The funds available to the school board consist of State funds appropriated for school purposes and apportioned to the school board, local funds appropriated to the school board or income raised by a local levy, federal funds appropriated for educational purposes, donations and any other funds which are set aside for public school purposes. Va. Code § 22.1-88. Lottery proceeds are required to be appropriated for public education purposes unless redirected by four-fifths of the members voting in each house of the General Assembly. Va. Const. art. X, § 7-A; 2008 Op. Va. Att’y Gen. 33 and 2008 Op. Va. Att’y Gen. 36. *Scott v. Commonwealth*, 247 Va. 379, 443 S.E.2d 138 (1994), held that while the Virginia Constitution guarantees a minimum standard of quality for educational funding to districts, it does not guarantee equality of funding among all districts.

18-9.06(b) Custody of Funds

The treasurer of the county, city or town is responsible for the receipt, custody and disbursement of school board funds and shall keep the funds in a separate account. Va. Code § 22.1-116. Section 22.1-116 is satisfied if the treasurer maintains separate internal accounts of the funds of the locality and of the school division for accounting purposes; the treasurer is not required to maintain a separate bank account for school board funds. 2011 Op. Va. Att’y Gen. 120. Under special circumstances, a school board may establish limited accounts (such as instructional materials and petty cash funds which are in the custody of school officials). Va. Code §§ 22.1-122.1 and 22.1-123. The school board has the authority and responsibility to institute a legal proceeding to compel disbursement of appropriated funds. Va. Code § 22.1-121; *Richmond City Sch. Bd. v. Wilder*, 73 Va. Cir. 251 (Richmond City 2007) (wherein the Court denied the school board’s request for a preliminary injunction, observing that the school board had the remedy available under § 22.1-121 in the event the city failed to furnish the full complement which it had promised at fiscal year-end).

18-9.06(c) Approval and Payment of Claims

Payment for claims is made by the school board (or its agent appointed by it) approving the claim and authorizing a warrant to be drawn on the treasurer who has custody of the funds. Va. Code § 22.1-122.