VIRGINIA BEACH BAR ASSOCIATION

THE INS AND OUTS OF PUBLIC-SCHOOL DISCIPLINARY HEARINGS
AUGUST 6, 2020
3:00 PM TO 5:00 PM
ZOOM WEBINAR

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3:00 to 4:00:

Hot Topics in Student Discipline in Virginia Beach City Public Schools – Presented by Kevin E. Martingayle, Esq.

4:00 to 5:00:

Virginia Beach City Public Schools Student Discipline Procedures - Presented by Dannielle Hall-McIvor, Esq.

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HOT TOPICS IN STUDENT DISCIPLINE
IN VIRGINIA BEACH CITY PUBLIC SCHOOLS

Kevin E. Martingayle

I. Provisions of the Virginia Constitution and controlling authority from the Supreme Court of Virginia

1. Article VIII, §1 of the Constitution of Virginia (copy attached) provides that the "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."

2. Article VIII, §7 of the Constitution of Virginia (copy attached) provides that the "supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

3. In 2019, the Supreme Court of Virginia decided an important school discipline case, Fairfax County School Board v. S.C., 297 Va. 363 (2019) (copy attached). Upon review of a school board's appeal of a circuit court ruling that reversed discipline imposed against a student, the Supreme Court reversed the circuit court and made a number of important points and observations in doing so:

   (a) Each school board has the "fundamental power to supervise its school system." Id. at 375, quoting Russell County School Board v. Anderson, 238 Va. 372, 383 (1989) (copy attached).

   (b) Decisions of school boards in imposing discipline are entitled to a "well-deserved measure of deference", and each action of the school board "should be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." Id., quoting in part Code of Virginia §22.1-87.

   (c) The amount and degree of "due process" to which students are entitled is limited in nature. Id. at 376-78.

II. Example of a typical process from notice of allegations through review in circuit court

Attached to this outline is a copy of a "Petition for Judicial Review", the "School Board's Response to Petition for Judicial Review" and final "Order" resulting from the process. This particular case involved a student at a local high school who posted a "meme" on social media depicting a dark-skinned individual standing in front of three other individuals dressed in what appeared to be KKK attire, with the dark-skinned individual appearing to be smiling. The image did not provide any context, labels or explanations. Apparently, a fellow student at the school saw the meme, became offended, generated some discussion at the school, and that eventually resulted in the child who posted it ("A.S.") being initially recommended for expulsion. The initial recommendation was reduced to a recommendation for a long-term suspension and the matter was set for a hearing. A hearing officer then essentially sustained the recommendation for a long term suspension and imposed specified conditions. The matter was appealed to the Virginia Beach School Board and the "School Board Discipline Committee" upheld the decision of the hearing officer. A further appeal was taken to the circuit court, which then reversed for two primary reasons. First, the court was not convinced that the elements of the specific accusations were proved. Second, the court perceived a serious First

Amendment problem with punishing a student for engaging in expressive conduct that did not appear to fall within a recognized exception to free speech protections.

It should be noted that the issues in the A.S. case were briefed and argued extensively. Even before the Supreme Court issued its opinion in Fairfax County School Board v. S.C., supra, trial judges were already aware of the limited nature and scope of judicial review applicable to discipline situations. To state it plainly, it is difficult to overturn school discipline through a judicial challenge. The best opportunity to overturn or significantly reduce discipline is in a hearing with a hearing officer or before the school board.

III. Topics for potential study and/or reform

The members of the Virginia Beach School Board are all elected. They are public officials with whom members of the public - - including attorneys - - are entitled to communicate, even when cases are pending and the board is represented. See LEO 1891 (copy attached). Lawyers who are "in the trenches" handling school discipline cases should always feel free to contact school board and school administration officials to encourage studies, changes and reforms that they feel are necessary or advisable. (See attached letters spanning 2006-16.) Some of the "hot topics" for potential improvement and/or study include: (1) eliminating all *ex parte* communications between decision-makers sitting in a quasi-judicial capacity and other parties in interest, (2) speeding up some of the processes and empowering hearing officers and school boards to announce their decisions instantly if they are capable of doing so, (3) giving principals and their subordinates more discretion and authority for dealing with certain kinds of cases/situations, (4) empowering the school board to review VHSL interscholastic competition eligibility determinations, (5) eliminating hearsay (to the greatest extent possible) from disciplinary proceedings, and (6) avoiding disclosure and review of disciplinary/academic history before reaching the punishment stage of a proceeding.

Va. Const. Art. VIII, § 1

Current through the 2020 Regular Session of the General Assembly.

VA - Virginia Constitution > CONSTITUTION OF VIRGINIA [1971] > ARTICLE VIII. EDUCATION

§ 1. Public schools of high quality to be maintained

The 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.

Annotations

Case Notes

THIS SECTION READ WITH *VA. CONST., ART., VIII, § 10*. --This section should be read in connection with *Va. Const., Art. VIII, § 10*. *Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)*.

THIS SECTION IMPOSES A MANDATORY DUTY ON THE GENERAL ASSEMBLY. School Bd. v. Shockley, 160 Va. 405, 168 S.E. 419 (1933); *Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)*.

IT IS NOT DIRECTED TO LOCAL GOVERNING BODIES. --This section is plainly directed to the General Assembly and not to the local governing bodies. *Griffin v. Board of Supvrs., 203 Va. 321, 124 S.E.2d 227 (1962)*.

AND THE PUBLIC SCHOOLS OF A COUNTY ARE NOT UNDER THE SOLE CONTROL OF THAT COUNTY; the public schools of Virginia were established, and are being maintained, supported and administered in accordance with State law. *Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962)*.

RESPONSIBILITIES OF GENERAL ASSEMBLY AND LOCAL SCHOOL BOARDS. --The constitutional scheme with respect to educational matters in Virginia contemplates the role of the General Assembly as formulating policies which will maintain an efficient, high quality, statewide educational system. The local school boards, on the other hand, have full responsibility for the application of statewide and local policies, rules, and regulations adopted for the day-to-day management of the public schools. *Dennis v. County School Bd., 582 F. Supp. 536 (W.D. Va. 1984)*.

TITLE 22.1 OF THE CODE IMPLEMENTS THE PROVISIONS OF THIS ARTICLE. Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962).

The General Assembly complied with the requirement of this section, as it appeared in the Constitution of 1902, by the enactment of a School Code, Acts 1928, ch. 471, as amended, Code 1936, §§ 611 through 718, inclusive; and again by Acts of Assembly of 1936, ch. 314, p. 497 (see now *Title 22.1). Scott County School Bd. v. Scott County Bd. of Supvrs., 169 Va. 213, 193 S.E. 52 (1937)*.

THE GENERAL ASSEMBLY CANNOT BY DEFINITION IMPAIR OR DISREGARD CONSTITUTIONAL REQUIREMENTS. Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959); County School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963).

AND STATE'S RESPONSIBILITY FOR EDUCATION MUST BE EXERCISED CONSISTENTLY WITH FEDERAL CONSTITUTION. --The responsibility for public education is primarily the concern of the states, but such responsibilities, like all other State activity, must be exercised consistently with federal constitutional requirements as they apply to State action. *Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962).*

WHICH PROTECTS ACCESS TO NONSEGREGATED SCHOOLS. --Equality of opportunity to education through access to nonsegregated public schools is a right secured by the Constitution of the United States to all citizens regardless of race or color against state interference. Accordingly, every citizen of the United States, by virtue of his citizenship, is bound to respect this constitutional right, and all officers of the State, more especially those who have taken an oath to uphold the Constitution of the United States, including the Governor, the members of the state legislature, judges of the state courts, and members of the local school boards, are under constitutional mandate to take affirmative action to accord the benefit of this right to all those within their jurisdiction. *Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962).*

"SUBSTANTIAL EQUALITY" IN SPENDING OR PROGRAMS NOT REQUIRED. --Nowhere in this section or Art. VIII, § 2 is there any requirement for "substantial equality" in spending or programs among or within the school divisions in the *Commonwealth. Scott v. Commonwealth, 247 Va. 379, 443 S.E.2d 138 (1994).*

STATE MAY NOT REMOVE FROM SYSTEM SCHOOLS IN WHICH RACES ARE MIXED. --The provisions of Acts 1956, Ex. Sess., c. 68, Code, § 22-188.3 et seq. (now repealed), and the provisions of the Appropriation Act of 1958, Acts 1958, c. 642, violated this section as it appeared in the Constitution of 1902 in that they removed from the public school system any schools in which pupils of the two races were mixed, and made no provision for their support and maintenance as a part of the system. *Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959).*

The public schools of a county may not be closed to avoid the effect of the law of the land as interpreted by the United States Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers. *Allen v. County Sch. Bd., 207 F. Supp. 349 (E.D. Va. 1962).*

CHALLENGE TO SYSTEM OF APPOINTING SCHOOL BOARDS. --Even if the system of appointing district school boards was conceived and maintained until 1971 for the purpose of limiting black participation in the selection of and participation on school boards, in a challenge brought against the system under the federal Constitution and the Voting Rights Act, the State met its burden of showing that since 1971 the system has not been maintained for racially discriminatory reasons. *Irby v. Fitz-Hugh, 693 F. Supp. 424 (E.D. Va. 1988),* aff'd sub nom. *Irby v. Virginia State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989),* cert. denied, ***496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990).***

FORMER DOCTRINE OF SEPARATE BUT EQUAL FACILITIES. --See *Davis v. County Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952),* rev'd sub nom. *Brown v. Board of Educ., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); Corbin v. County Sch. Bd., 177 F.2d 924 (4th Cir. 1949).*

SECTIONS 22.1-304 AND 22.1-305 ARE VALID under the powers granted to the General Assembly through this section. *Dennis v. County School Bd., 582 F. Supp. 536 (W.D. Va. 1984).*

ACTS 1968, C. 806, ITEM 564, appropriating money for the operation of the school system, meets the obligation of this section and does not deny equal protection of the law to *Bath County. Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969),* aff'd, *397 U.S. 44, 90 S. Ct. 812, 25 L. Ed 2d 37 (1970).*

APPLIED in West v. Jones, 228 Va. 409, 323 S.E.2d 96 (1984).

CIRCUIT COURT OPINIONS

STANDING TO SUE SCHOOL BOARD. --Parents of elementary school children had standing to appeal a school board's adoption of new school attendance zones; as the change in school boundaries would have a direct and immediate effect on the delivery of educational services to petitioners' children, petitioners were "aggrieved" under § 22.1-87. Hunn v. Loudoun County Sch. Bd., 98 Va. Cir. 418, 2012 Va. Cir. LEXIS 63 (Loudoun County Aug. 20, 2012).

OPINIONS OF THE ATTORNEY GENERAL

LIABILITY FOR FALSE INFORMATION RELATING TO RESIDENCY. --A locality does not have the authority to enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child based on false information that indicates the parent and child are residents of the local government, or to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. See opinion of Attorney General to Delegate M. Kirkland Cox, 04-094 (4/7/05).

THE CATEGORIES IN § 22.1-3 ARE NOT EXCLUSIVE, therefore, a school district may not refuse to provide free education to a bona fide resident of the school division based solely on the categories in the section. See opinion of Attorney General to The Honorable, Frank D. Hargrove, Sr., Member, House of Delegates, 07-015 (6/14/07).

FEES CHARGED BY SCHOOL BOARD FOR ADVANCED PLACEMENT CLASSES. --Local school board cannot impose a mandatory fee on students taking advanced placement courses for the required taking of the Advanced Placement Examination. See opinion of Attorney General to The Honorable David W. Marsden, Member, Senate of Virginia, 10-121, 2011 Va. AG LEXIS 9 (01/28/11).

LOCAL SCHOOL BOARDS MAY NOT CHARGE FOR THE TRANSPORTATION OF STUDENTS TO AND FROM SCHOOL. See opinion of Attorney General to The Honorable John S. Reid, Member, House of Delegates, 07-053 (8/29/07).

TRANSPORTATION TO SPECIAL PROGRAM. --A local school board may not charge a fee for the transportation of a student enrolled in a specialty program located outside the boundaries of the student's base school. See opinion of Attorney General to The Honorable Jackson H. Miller Member, House of Delegates, 10-016, 2010 Va. AG LEXIS 24 (3/18/10).

SELECTION OF TEXTBOOKS. --A local school board may select and use textbooks that are not approved by the Board of Education, provided it complies with the Board's regulations governing such selection. Further, a local school board must give "official approval" of criteria to be used for review and assessment of textbooks at the local level. See opinion of Attorney General to The Honorable Robert G. Marshall, Member, House of Delegates, 09-022, 2009 Va. AG LEXIS 32 (7/27/09).

PHYSICAL CONDITION OF SCHOOLS. --Remedies for inequality in public education, whether arising from poor school physical plant conditions or otherwise, are available under the mandates of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; the Civil Rights Act of 1964; the Equal Educational Opportunities Act of 1974; and Title IX of the Education Amendments of 1972, which collectively prohibit discrimination on the basis of race and sex. See opinion of Attorney General to The Honorable William M. Stanley, Member, Senate of Virginia, 18-046, 2019 Va. AG LEXIS 2 (1/4/19).

The Virginia Supreme Court has held that education is a fundamental right under the Virginia Constitution but has not addressed the question of whether school physical plant conditions so poor as to adversely affect students' ability to learn violates the Virginia Constitution. See opinion of Attorney General to The Honorable William M. Stanley, Member, Senate of Virginia, 18-046, 2019 Va. AG LEXIS 2 (1/4/19).

Research References & Practice Aids

CROSS REFERENCES. --

As to disposition of fines in criminal cases, see *§ 19.2-340.1.* For statutory provisions relating to public free schools, see Title 22.1, generally, and *§ 22.1-253.13:1* A.

LAW REVIEW. --

For note on school cases in the Supreme Court, particularly *Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)*, see 45 Va. L. Rev. 1410 (1959). For article, "In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971," see 5 U. Rich. L. Rev. 263 (1971). For discussion of the role of state constitutions in education, see 62 Va. L. Rev. 916 (1976). For article on state constitutional law processes, see *24 Wm. & Mary L. Rev. 169 (1983)*. For an article, "The Supreme Court and Public Schools," see *86 Va. L. Rev. 1335 (2000)*. For note, "Shuffling the Deck: Redistricting to Promote a Quality Education in Virginia," Va. L. Rev. 773 (2003). For note, "The Right to Education in Juvenile Detention Under State Constitutions," see *94 Va. L. Rev. 765 (2008)*. For article, "State Constitutions and Individual Rights: Conceptual Convergence in School Finance Legislation," see *18 Geo. Mason L. Rev. 301 (2011)*.

MICHIE'S JURISPRUDENCE REFERENCES. --

For related discussion, see *2A M.J. Attorney & Client, §§ 2, 55*; *3B M.J. Civil Rights, § 6*; *4C M.J. Constitutional Law, § 25*; *16 M.J. Schools, §§ 3, 4, 13*.

NOTES APPLICABLE TO ENTIRE CONSTITUTION

REVISION OF CONSTITUTION. --A general revision of the Constitution of Virginia was proposed and agreed to by the General Assembly at the 1969 Extra Session (Acts 1969, Ex. Sess., c. 27) and referred to the 1970 session. It was again agreed to at that session (Acts 1970, cc. 763, 786) and was ratified by the people on Nov. 3, 1970.

Three other constitutional amendments were ratified by the people at the election held Nov. 3, 1970. The amendment proposed and agreed to by Acts 1969, Ex. Sess., c. 30, and Acts 1970, cc. 763, 787, added subdivision (b) to Art. X, § 9. The amendment proposed and agreed to by Acts 1969, Ex. Sess., c. 31, and Acts 1970, cc. 763, 788, added subdivision (c) to Art. X, § 9. The amendment proposed and agreed to by Acts 1969, Ex. Sess., c. 28, and Acts 1970, cc. 763, 789, repealed § 60 of the Constitution of 1902, which prohibited lotteries and the sale of lottery tickets.

Annotations from cases construing the various sections of the Constitution of 1902 have been placed, where appropriate, under similar provisions of the revised Constitution.

End of Document

Va. Const. Art. VIII, § 7

Current through the 2020 Regular Session of the General Assembly.

VA - Virginia Constitution > CONSTITUTION OF VIRGINIA [1971] > ARTICLE VIII. EDUCATION

§ 7. School boards

The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

Annotations

Case Notes

SUPERVISION OF SCHOOLS VESTED IN SCHOOL BOARD. --Both the Constitution of Virginia and the corresponding statute mandate that the supervision of schools in each school division shall be vested in a school board. *Bristol Va. School Bd. v. Quarles, 235 Va. 108, 366 S.E.2d 82 (1988)*.

Summary judgment in favor of plaintiffs was reversed as the city could not be required to fund a federal court order mandating the system-wide retrofitting of city schools, under Title II of the Americans with Disabilities Act (ADA), *42 U.S.C.S. §§ 12131*-34, without any determination that the city discriminated against or otherwise excluded plaintiffs from its services and activities; to impose a funding obligation on the city in the absence of any underlying finding of liability disrespected the long-standing structure of local government and impaired the Commonwealth's ability to structure its state institutions and run its schools. The settlement terms ultimately reached by plaintiffs and the school board as a result of arms-length negotiation were obligations on the school board's part and it could present whatever ADA duties it had, not only to the city, but also to other funding entities. *Bacon v. City of Richmond, 475 F.3d 633, 2007 U.S. App. LEXIS 1404 (4th Cir. 2007)*.

THE POWER TO OPERATE, MAINTAIN AND SUPERVISE PUBLIC SCHOOLS in Virginia is, and has always been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the *State Board of Education. Bradley v. School Bd., 462 F.2d 1058 (4th Cir.)*, rev'g *338 F. Supp. 67 (E.D. Va. 1972)*, aff'd, *412 U.S. 92, 93 S. Ct. 1952, 36 L. Ed. 2d 771 (1973)*.

NO STATUTORY ENACTMENT CAN TAKE AWAY BOARDS POWER TO SUPERVISE. --No statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system. *Russell County School Bd. v. Anderson, 238 Va. 372, 384 S.E.2d 598 (1989)*.

RESPONSIBILITIES OF GENERAL ASSEMBLY AND LOCAL SCHOOL BOARDS. --The constitutional scheme with respect to educational matters in Virginia contemplates the role of the General Assembly as formulating policies which will maintain an efficient, high quality, statewide educational system. The local school boards, on the other hand, have full responsibility for the application of statewide and local policies, rules, and regulations adopted for the day-to-day management of the public schools. *Dennis v. County School Bd., 582 F. Supp. 536 (W.D. Va. 1984)*.

THE FUNCTION OF APPLYING LOCAL POLICIES, RULES AND REGULATIONS, ADOPTED FOR THE MANAGEMENT OF A TEACHING STAFF, is a function essential and indispensable to exercise of the power of supervision vested by this section. *School Bd. v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978)*.

POWER TO SUPERVISE DOES NOT INCLUDE AUTHORITY TO BARGAIN COLLECTIVELY. --The general power of school boards to supervise does not necessarily include the right to deal with the labor relations of employees in any manner the boards might choose, unfettered by legislative restriction. *Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977)*.

To say that the constitutional power to supervise includes authority to bargain collectively with labor organizations is to say, at the same time, that the General Assembly could not prohibit school boards from so bargaining; this would be not only unrealistic but also a subversion of the powers of the *General Assembly. Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977)*.

To the extent that the policies of a county board and school board permit collective bargaining and collective bargaining agreements with recognized labor organizations, the policies are invalid and because the contracts entered into are the products of such collective bargaining, the agreements are void. *Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977)*.

ENROLLMENT OR PLACEMENT OF PUPILS. --This section, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision. *DeFebio v. County School Bd., 199 Va. 511, 100 S.E.2d 760 (1957)*, appeal dismissed, *357 U.S. 218, 78 S. Ct. 1363, 2 L. Ed. 2d 1361 (1958)*.

CONTROL OVER FUNDS DERIVED FROM SALE OF SCHOOL BONDS. --Under the Constitution and pertinent statutes a county board of supervisors has no control over the funds derived from the sale of school bonds except temporarily to invest them until they are needed for the purpose for which the bonds were sold, and the board of supervisors has no authority to prohibit the school board from expending them for a legitimate purpose. *County School Bd. v. Farrar, 199 Va. 427, 100 S.E.2d 26 (1957)*.

DUE PROCESS IN STUDENT DISCIPLINARY PROCEEDINGS. --School board did not act arbitrarily in school disciplinary proceedings, in violation of a student's due process rights, because the assistant principal's oral description of the facts known to school personnel, coupled with the principal's letter and the discipline packet, notified the student of the allegations against the student. Furthermore, as the student's own testimony confirmed, the student knew of the school's prohibition against improper touching of another person before the student engaged in the student's conduct. ***Fairfax Cty. Sch. Bd. v. S.C., 297 Va. 363, 827 S.E.2d 592, 2019 Va. LEXIS 49 (2019)***.

STATUTES DIVESTING LOCAL SCHOOL BOARDS OF CONTROL OVER SCHOOLS INVALID. --Acts 1956, Ex. Sess., c. 68, Code, former § 22-188.3 et seq., providing for the closing of schools because of integration, divesting local authorities of all power and control over them, and vesting such authority in the Governor, violated this section, which vests the supervision of local schools in the local school boards. This section was likewise violated by Acts 1956, Ex. Sess., c. 69, Code, former § 22-188.30 et seq., providing for the establishment and operation of a state school system to be administered by the Governor and under supervision of the *State Board of Education. Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)*.

Acts 1958, c. 41, Code, former § 22-188.41 et seq., and c. 319, Code, former § 22-188.46 et seq., provided for the closing of schools in communities which might be disturbed because of the presence in, and policing of, such schools by federal troops and personnel. While the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and

vesting such authority in the Governor ran counter to this section. *Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)*.

Acts 1959, Ex. Sess., c. 68, p. 151, former § 22-161.1 et seq., providing for an election to determine whether school properties are or are not needed for public purposes, effectively divested school boards of an essential supervisory function and therefore violated this section of the *Constitution. Howard v. County School Bd., 203 Va. 55, 122 S.E.2d 891 (1961)*.

ATHLETIC ASSOCIATION RULES. --Parents of high school children failed to demonstrate a likelihood of success on the merits of their claim that a transfer rule implemented by a high school interscholastic athletic organization violated *Va. Const., Art. VIII, § 7,* because the organization was a voluntary association, and such associations were traditionally granted significant deference as to their internal affairs, rules, and bylaws unless enforcement would be arbitrary, capricious, or an abuse of discretion. *McGee v. Va. High Sch. League, 801 F. Supp. 2d 526, 2011 U.S. Dist. LEXIS 88941 (W.D. Va. 2011)*.

STATE BOARD PROCEDURE FOR ADJUSTING GRIEVANCES INVALID. --A State Board procedure for adjusting grievances compelling local school boards to submit certain grievances to binding arbitration was invalid as requiring unlawful delegation of supervision conferred on local boards by this section. *School Bd. v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978)*.

GOVERNMENTAL IMMUNITY. --School boards created pursuant to this section are quasi corporations acting in connection with public education as agents or instrumentalities of the State in the performance of a governmental function, and consequently they partake of the state's sovereignty with respect to tort liability. *Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960)*.

SCHOOL BOARDS ARE SUBJECT TO STATUTES OF LIMITATION, since they are incorporated within the meaning of *§ 8.01-231*. *County School Bd. v. Whitlow, 223 Va. 157, 286 S.E.2d 230 (1982)*.

IMMUNITY OF EMPLOYEE. --A physical education teacher was immune from a negligence action for damages brought by a student who was injured while under the teacher's supervision, because the governmental entity employing the teacher, the local school board, had official interest and direct involvement in the function of student instruction and supervision, and it exercised control and direction over the employee through the school principal. *Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988)*.

EXPULSION FOR KNIFE POSSESSION NOT VIOLATIVE OF DUE PROCESS. --Public school division did not abridge student's due process rights when it expelled the student for possessing a knife where the assistant principal, who initially suspended the student, gave the student an opportunity to explain his version of the facts, and the student was informed of what he was accused of doing and the basis of the accusation. *Wood v. Henry County Pub. Sch., 255 Va. 85, 495 S.E.2d 255 (1998)*.

APPLIED in West v. Jones, 228 Va. 409, 323 S.E.2d 96 (1984); *School Bd. v. Wescott, 254 Va. 218, 492 S.E.2d 146 (1997)*.

CIRCUIT COURT OPINIONS

INTERFERENCE WITH SCHOOL BOARD'S DUTIES. --There was no substitute for the video of school bus misconduct, and to deny the school board access to this video footage unreasonably interfered with the school board's constitutionally-mandated duties, which included the obligation to conduct these disciplinary proceedings. *Shenandoah Cnty. Sch. Bd. v. Carter, 93 Va. Cir. 253, 2016 Va. Cir. LEXIS 85 (Shenandoah County Apr. 29, 2016)*.

SCHOOL BOARD'S AUTHORITY TO ADOPT REGULATIONS REGARDING GRIEVANCES. --Because a local school board violated the board's own regulation by denying a teacher the right to use the grievance process to challenge the substance of the teacher's performance evaluation by the principal, the teacher was able to grieve the board's actions under *§ 22.1-306*, even though the substance of the appeal was expressly excluded by other

provisions of § 22.1-306. Pursuant to Va. Const., Art. VIII, § 7, the school board was free to adopt the board's own regulations, expanding the scope of what a teacher could grieve. Fairfax County Sch. Bd. v. Faber, 75 Va. Cir. 290, 2008 Va. Cir. LEXIS 82 (Fairfax County 2008); Hunn v. Loudoun County Sch. Bd., 98 Va. Cir. 418, 2012 Va. Cir. LEXIS 63 (Loudoun County Aug. 20, 2012).

THE POWER TO OPERATE, MAINTAIN AND SUPERVISE PUBLIC SCHOOLS. --Virginia Constitution was violated because the statutes at issue purported to establish a statewide school division that was not supervised by a school board, purported to divest local school boards of authority to supervise public schools within their respective school divisions, and purported to require local school boards to relinquish control of school property to the Opportunity Educational Institution (OEI) and purported to prohibit school boards from selling real property without OEI's permission. Sch. Bd. v. Opportunity Educ. Inst., 88 Va. Cir. 317, 2014 Va. Cir. LEXIS 53 (Norfolk June 10, 2014).

NO PRIVATE RIGHT OF ACTION. --Courts do not infer a private right of action when the General Assembly expressly provides a different method of judicial enforcement, and Virginia Code Title 22.1 is no exception to this longstanding legal principle; to hold that aggrieved individuals can seek relief outside of Title 22.1 would create an unprecedented scope of judicial authority and violate the constitution's mandate. Martinson v. Evans, 2018 Va. Cir. LEXIS 18 (Fairfax County Feb. 15, 2018).

GOVERNMENTAL IMMUNITY. --County public school's plea in bar of sovereign immunity was granted because a contractor's unjust enrichment and quantum meruit causes of action were barred by the doctrine of sovereign immunity. Akian, Inc. v. Spotsylvania Cty. Pub. Schs, 100 Va. Cir. 80, 2018 Va. Cir. LEXIS 329 (Spotsylvania County Sept. 21, 2018).

Sovereign immunity protection provided to a school board, as an agency or arm of the Commonwealth, for tort claims encompasses quasi-contract claims as well, and neither the common-law obligation of the Commonwealth to abide by its contracts nor the statute subjects the Commonwealth to quasi-contract claims of unjust enrichment and quantum meruit; these causes of action are not subject to the theories and remedies of contract law nor are they "immixed" with contract or "arise therefrom." Akian, Inc. v. Spotsylvania Cty. Pub. Schs, 100 Va. Cir. 80, 2018 Va. Cir. LEXIS 329 (Spotsylvania County Sept. 21, 2018).

SCHOOL BOARD'S AUTHORITY TO DISCIPLINE STUDENTS. --When the statutes are read in light of the supervisory power provided by the constitutional provision, they do not act to limit the school board's authority or duties, and instead they reiterated the school board's authority to investigate and discipline its juvenile students; it appeared that the school board would be an institution with a legitimate interest in the video of school bus misconduct, and that its access to the video should not be barred by the statute. Shenandoah Cnty. Sch. Bd. v. Carter, 93 Va. Cir. 253, 2016 Va. Cir. LEXIS 85 (Shenandoah County Apr. 29, 2016).

SCHOOL BOARD'S AUTHORITY TO CONDUCT HEARINGS. --Section vests in the school board a supervisory power, and pursuant to this power, the school board holds the authority to monitor and manage the safety and welfare of its students; the school board may make decisions about how to best conduct these hearings, including deciding what evidence is necessary and how to best protect the rights of the students and the institution. Shenandoah Cnty. Sch. Bd. v. Carter, 93 Va. Cir. 253, 2016 Va. Cir. LEXIS 85 (Shenandoah County Apr. 29, 2016).

OPINIONS OF THE ATTORNEY GENERAL

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; such decisions regarding any particular materials, however, would require the school board to make a factual determination. See opinion of Attorney General to The Honorable Frank S. Hargrove, Sr., Member, House of Delegates, 02-097 (4/22/03).

SELECTION OF TEXTBOOKS. --A local school board may select and use textbooks that are not approved by the Board of Education, provided it complies with the Board's regulations governing such selection. Further, a local

school board must give "official approval" of criteria to be used for review and assessment of textbooks at the local level. See opinion of Attorney General to The Honorable Robert G. Marshall, Member, House of Delegates, 09-022, *2009 Va. AG LEXIS 32 (7/27/09)*.

LEGAL COUNSEL FOR SCHOOL BOARD. --The charter of a city does not require that the district school board rely on the sole legal advice of the attorney for the City, and the Board may retain its own counsel. See opinion of Attorney General to The Honorable G. Glenn Oder, Member, House of Delegates, 10-001, *2010 Va. AG LEXIS 6 (2/2/10)*.

COUNTY SCHOOL BOARD IS SOLELY RESPONSIBILITY FOR SCHOOL CONSOLIDATION. --A school board is solely responsible for the decision whether and how to consolidate schools, and a county board of supervisors may not instruct the school board to consolidate schools or how to consolidate schools, but may make a recommendation. See opinion of Attorney General to The Honorable Terry C. Kilgore, Member, House of Delegates, 10-118, *2010 Va. AG LEXIS 85 (12/08/10)*.

MODIFICATION OF DECISIONS REGARDING CONSOLIDATION. --When circumstances change, a school board may revisit any decision regarding consolidation of schools. See opinion of Attorney General to The Honorable Dan C. Bowling, Member, House of Delegates, 08-034 (7/10/08).

SCHOOL START DATE. --Attorney General unable to conclude that *§ 22.1-79.1*, which directs school boards to set the starting date for students after Labor Day, is unconstitutional. See opinion of Attorney General to The Honorable Robert Tata, Member, House of Delegates, 10-034, *2010 Va. AG LEXIS 31 (5/24/10)*.

OUTSOURCING OF ADMINISTRATIVE FUNCTIONS BY SCHOOL BOARD. --Outsourcing of certain functions by a school board is permissible so long as school boards and localities comply with statutory and constitutional restrictions. See opinion of Attorney General to The Honorable T. Scott Garrett, M.D., Member, House of Delegates, 10-122, *2011 Va. AG LEXIS 3 (01/21/11)*.

CONSOLIDATION OF SCHOOL BOARD AND COUNTY ADMINISTRATIVE FUNCTIONS. --A school board can consolidate certain functions with a locality, but in doing so the school board may not abrogate its duties or compromise its independence with respect to its core responsibilities. See opinion of Attorney General to The Honorable T. Scott Garrett, M.D., Member, House of Delegates, 10-122, *2011 Va. AG LEXIS 3 (01/21/11)*.

PROTECTION OF STUDENTS FROM DISCRIMINATION. --Because the power to protect students and employees from discrimination in the public school system is a power fairly implied from the express grant of authority to school boards under *Article VIII, § 7 of the Constitution of Virginia* and from the specific authority granted to boards by the General Assembly in *§§ 22.1-28*, *22.1-78* and *22.1-253.13.7*, the Dillon Rule does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity. See opinion of Attorney General to The Honorable Adam P. Ebbin, Member, Senate of Virginia, No. 14-080, *2015 Va. AG LEXIS 9 (3/4/15)*.

Research References & Practice Aids

CROSS REFERENCES. --

As to county school boards generally, see *§ 22.1-34* et seq. As to county boards in counties having county manager or county board form of government, see *§ 22.1-47.1* et seq. As to boards of cities and towns, see *§ 22.1-48* et seq. As to boards of school divisions composed of less than one county or city or part or all of more than one county or

city, see § 22.1-52 et seq. As to appointment, qualifications and duties of division superintendents, see § 22.1-58 et seq.

PROPOSED AMENDMENTS NOT AGREED TO BY GENERAL ASSEMBLY. --An amendment to this section was proposed and agreed to by the General Assembly at the 1995 Regular Session (Acts 1995, c. 711) and was referred to the 1996 Session. At the 1996 Session of the General Assembly, the General Assembly did not again agree to the amendment.

An amendment to this section was proposed and agreed to by the General Assembly at the 1989 Session (Acts 1989, c. 669), and referred to the 1990 Session. At the 1990 Session the General Assembly did not again agree to the amendment.

LAW REVIEW. --

For survey of Virginia law on municipal corporations in the year 1971-1972, see 58 Va. L. Rev. 1301 (1972). For comment, "'Working to the Contract' in Virginia: Legal Consequences of Teachers' Attempts to Limit Their Contractual Duties," see 16 U. Rich. L. Rev. 449 (1982). For annual survey article, "Education Law," see *48 U. Rich. L. Rev. 103 (2013)*.

MICHIE'S JURISPRUDENCE REFERENCES. --

For related discussion, see *13B M.J. Municipal Corporations, § 5.1*; *16 M.J. Schools, §§ 4*, *8*, *13*.

USER NOTE:

For more generally applicable notes, see notes under the first section of this article or title.

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Fairfax Cty. Sch. Bd. v. S.C.

Supreme Court of Virginia

May 30, 2019, Decided

Record No. 180497

Reporter
297 Va. 363 *; 827 S.E.2d 592 **; 2019 Va. LEXIS 49 ***; 2019 WL 2292752

FAIRFAX COUNTY SCHOOL BOARD v. S.C., BY HER NEXT FRIEND, FAREN COLE

Prior History: [***1] FROM THE CIRCUIT COURT OF FAIRFAX COUNTY. David Bernhard, Judge.

Fairfax Cty. Sch. Bd. v. S.C., 2018 Va. LEXIS 125 (Va., Sept. 25, 2018)

Disposition: Reversed, vacated, and final judgment.

Outcome
Circuit court judgment reversed, final order vacated, and final judgment entered dismissing petition with prejudice.

Core Terms

disciplinary, touching, sexual, battery, discipline, assault, touch-student, suspension, notice, referral, nonconsensual, packet, infraction, reassignment

Case Summary

Overview
ISSUE: Whether a school board, by affirming a hearing officers' disciplinary decision, acted arbitrarily in violation of a student's procedural due process rights. HOLDINGS: [1]-The school board did not act arbitrarily in the school disciplinary proceedings because due process required the school officials to inform the student of her alleged dereliction and to give her a fair opportunity to tell her side of the story to make sure that an injustice was not done. Furthermore, the assistant principal's oral description of the facts known to school personnel, coupled with the principal's letter and the discipline packet, notified the student of the allegations against her, and, as her own testimony confirmed, the student knew of the school's prohibition against improper touching of another person before she engaged in her conduct, while she was doing so, and afterwards.

LexisNexis® Headnotes

Education Law > ... > Student Discipline > Disciplinary Proceedings > Appeals & Reviews

Governments > Courts > Creation & Organization

HN1[] **Disciplinary Proceedings, Appeals & Reviews**

Va. Code Ann. § 22.1-87 authorizes petitions for judicial review of school board actions. The circuit court sits as an appellate tribunal when hearing these petitions and may consider the school board's orders, the hearing

transcript, and any other evidence found relevant to the issues on appeal by the court. Section 22.1-87. When the parties do not offer any evidence outside of the administrative record, an appellate court's review, as well as the circuit court's review, is limited to that record. When an appellate court, like the circuit court, independently reviews the record from the perspective of an appellate court, the appellate court will give no deference to the circuit court's recitation of the facts or to its interpretation of the inferences arising from the underlying record.

Evidence > Judicial Notice > Legislative Facts > Domestic Laws

HN2[] **Legislative Facts, Domestic Laws**

A court may take judicial notice of any book, record, register, journal, or other official document or publication purporting to contain, state, or explain the law of the Commonwealth of Virginia or its political subdivisions or agencies, Va. Code Ann. § 8.01-386; Va. Sup. Ct. R. 2:202, as well as all official publications of the Commonwealth and its political subdivisions and agencies required to be published pursuant to the laws thereof, Va. Code Ann. § 8.01-388; Va. Sup. Ct. R. 2:203.

Education Law > Students > Student Discipline > Disciplinary Proceedings

HN3[] **Student Discipline, Disciplinary Proceedings**

Va. Code Ann. §§ 22.1-277.05(A) and 22.1-277.2:1(B) authorize the adoption of school board regulations that allow the division superintendent to appoint a designee to make disciplinary decisions regarding suspension and attendance in an alternative education program subject to review by the school board.

Education Law > Students > Student Discipline > Disciplinary Proceedings

HN4[] **Student Discipline, Disciplinary Proceedings**

Va. Code Ann. § 22.1-279.3:1 requires division superintendents statewide annually to report data of certain incidents regarding discipline, crime, or violence to the Virginia Department of Education. To do this, division superintendents use uniform reporting codes.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN5[] **Procedural Due Process, Scope of Protection**

Broadly speaking, due process violations are remedied by providing the aggrieved party the process he or she was deprived (or an equivalent).

Constitutional Law > State Constitutional Operation

Education Law > ... > Student Discipline > Disciplinary Proceedings > Appeals & Reviews

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN6[] **Constitutional Law, State Constitutional Operation**

In Virginia, judicial review of school disciplinary decisions must take into account the unique constitutional status of school boards. The Constitution of Virginia has created school boards and vested them with constitutional powers. Va. Const. art. VIII, § 7 grants school boards the general power of the supervision of schools. While this provision does not define the powers and duties involved in that supervision, certain decisions regarding the safety and welfare of students are manifestly a part of the supervisory authority granted the school boards under Va. Const. art. VIII.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Appeals & Reviews

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Administration & Operation > Elementary & Secondary School Boards > School Board Proceedings

HN7[] Disciplinary Proceedings, Appeals & Reviews

Given the constitutional status of school boards, no statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system. A well-deserved measure of deference, therefore, must be factored into any application of Va. Code Ann. § 22.1-87, which authorizes judicial review with the qualification that the action of a school board shall be sustained unless the school board has exceeded its authority, acted arbitrarily or capriciously, or abused its discretion. A school board's actions are arbitrary and capricious when they are willful and unreasonable and taken without consideration or in disregard of facts or law or without determining principle.

Education Law > Students > Student Discipline > Disciplinary Proceedings

HN8[] Student Discipline, Disciplinary Proceedings

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. By and large, public education in the Nation is committed to the control of state and local authorities. Consequently, maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > State Constitutional Operation

HN9[] Procedural Due Process, Scope of Protection

Procedural due process protections afforded under the Constitution of Virginia are coextensive with those of the Federal Constitution, and thus, the corresponding provisions of the Virginia Constitution go no further than their federal counterparts.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

HN10[] Disciplinary Proceedings, Due Process

In the context of school disciplinary procedures, the interpretation and application of the Due Process Clause are intensely practical matters, and the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. Due process protects the opportunity to be heard by requiring, at a minimum, some kind of notice and some kind of hearing. The sufficiency of the timing and content of the notice will depend on appropriate accommodation of the competing interests involved.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

HN11[] Disciplinary Proceedings, Due Process

Due process in connection with suspending a student from school for 10 days or less requires that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. This minimal process does not include the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident or any other truncated trial-type procedures. Longer suspensions or expulsions for the remainder of the school term, or permanently, however, may require more formal procedures.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

HN12[] Disciplinary Proceedings, Due Process

Typically, in suspending a student from school for 10 days or less, since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. That said, 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. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > Elements

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Adults > Elements

Criminal Law & Procedure > ... > Sexual Assault > Sexual Imposition > Elements

HN13[] **Abuse of Children, Elements**

The statutory definition of "sexual battery" requires a showing that the act was accomplished by force, threat, intimidation, or ruse. *Va. Code Ann. § 18.2-67.4*.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

Education Law > Departments of Education > State Departments of Education > State Boards of Education

HN14[] **Elementary & Secondary School Boards, Authority of School Boards**

Va. Code Ann. § 22.1-279.6(A) requires the Virginia Board of Education to establish guidelines and to develop model policies for codes of student conduct to aid local school boards in the implementation of such policies. Moreover, *Va. Code Ann. § 22.1-279.6(B)* requires local school boards to adopt regulations on codes of student conduct that are consistent with, but may be more stringent than, the guidelines of the Board.

Education Law > Students > Student Discipline > Disciplinary Proceedings

HN15[] **Student Discipline, Disciplinary Proceedings**

Va. Code Ann. § 22.1-279.3:1 requires all division superintendents in Virginia annually to report data to the Virginia Department of Education regarding certain incidents of discipline, crime, and violence.

Education Law > ... > Student Discipline > Disciplinary Proceedings > Due Process

HN16[] **Disciplinary Proceedings, Due Process**

A school is an academic institution, not a courtroom or administrative hearing room. The proper exercise of judicial review, therefore, recognizes that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures. Especially in the context of school discipline, the interpretation and application of the Due Process Clause are intensely practical matters.

Judges: PRESENT: Lemons, C.J., Mims, McClanahan, Powell, Kelsey, and McCullough, JJ., and Russell, S.J. OPINION BY JUSTICE D. ARTHUR KELSEY.

Opinion by: D. ARTHUR KELSEY

Opinion

[593] [*367]** OPINION BY JUSTICE D. ARTHUR KELSEY

The Fairfax County School Board disciplined S.C., a high-school student, for nonconsensual, sexual touching of three students at school. S.C. appealed to the circuit court and sought a judicial vacatur of the School Board's decision. Finding that the School Board's decision was arbitrary in violation of S.C.'s due process rights, the circuit court dismissed the disciplinary proceedings against S.C. with prejudice. The School Board appeals, arguing that the circuit court misapplied the governing legal **[*368]** standards and misinterpreted the factual record of the disciplinary proceedings. We agree and reverse.

I.

HN1[↑] Code § 22.1-87 authorizes petitions for judicial review of school board actions. The circuit court sits as an appellate tribunal when hearing these petitions and may consider the school board's orders, the hearing transcript, "and any other evidence found relevant to the issues on appeal by the court." Code § 22.1-87. In this case, **[***2]** the parties did not offer any evidence outside of the administrative record, and thus, our review, as well as the circuit court's, is limited to that record.[1] Because we, like the circuit court, independently review the record from the perspective of an appellate court, we give no deference to the circuit court's recitation of the facts or to its interpretation of the inferences arising from the underlying record.[2]

A.

In 2016, S.C. began her freshman year at a high school in Fairfax County. At that time, one of S.C.'s parents received a copy of the school's policy entitled "Student Rights and Responsibilities: A Guide for Families" (the "SR&R"). 2 J.A. at 318. This policy addressed "Acts for Which Students May Be Disciplined." *Id.* at 382. Those acts included "any behavior incompatible with a K-12 educational environment and good citizenship." *Id.* at 383. The policy then identified specific "examples of prohibited conduct" after twice clarifying that these were mere examples. *Id.*

In pertinent part, the SR&R stated that "[a]cts for which students may be disciplined include, but are not limited to . . . [a]ssault." *Id.* Under the category of "[a]ssault," a list of various prohibited acts appeared, including "[i]mproper touching of another **[*369]** **[***3]** person (whether or not consensual)" as well as "[s]exual assault or battery upon any person." *Id.* at 384; *see id.* at 355 (listing "Improper Touching and/or Sexual Activity" as an "Offense and/or Violation"). The school tests the students at the beginning of each school year to measure their understanding of the SR&R. In September 2016, S.C. answered "T" for "True" to a test question asking whether "[a] student who touches another student intentionally in his or her private areas will face disciplinary action and may be reported to the police." *Id.* at 319-21.

On February 22, 2017, three female students reported to a school counselor that S.C. had touched them in a sexually inappropriate manner. In detailed, written statements and in oral statements to the assistant principal, the students alleged that the sexual touching was intentional on S.C.'s part and **[**594]** nonconsensual on their part. One of three students stated that she was "being sexually harassed" and that she felt "a bit unsafe" and "uncomfortable" seeing S.C. in the hallways at school. *Id.* at 294, 299. A second student felt not only "uncomfortable" but also "anxious" around S.C. *Id.* at 301. The third student was "extremely nervous" seeing S.C. at school because "if she gets mad it's bad. She has others **[***4]** gang up on people." *Id.* at 295, 300. Even though S.C. "knows not to confront me," this student worried, "if she confronts others they don't have [the] capability to defend themselves verbally or physically that I can." *Id.* at 300.

The school administration responded promptly. On February 23, the assistant principal informed S.C. of the "suspected infraction" and explained "the facts known to school personnel," *id.* at 542, who had interviewed the three alleged victims. *See id.* at 288. On that same day, S.C. provided the school with a written statement in response to the allegations. In it, S.C. admitted to touching students while at school but claimed that the touching was consensual, adding that "[t]hese people are really good and close friends of mine." *Id.* at 293.

Later on that day, the principal suspended S.C. for 10 days. The principal also referred the matter to the division superintendent's hearing officer for a disciplinary hearing to determine "whether [S.C.] should be long-term suspended, reassigned to an alternative educational setting, or recommended to the School Board for **[*370]** expulsion." *Id.* at 541; *see also id.* at 546.[3] The referral letter stated that the referral was

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[1] By its order, the circuit court has sealed portions of the administrative disciplinary record, and accordingly, we have sealed one of the two joint appendices filed in this appeal. To the extent that we mention facts found only in the sealed record, we unseal only those specific facts, finding them relevant to our decision. The remainder of the previously sealed record remains sealed.

[2] HN2[↑] We also may take judicial notice of "any book, record, register, journal, or other official document or publication purporting to contain, state, or explain [the] law" of the Commonwealth or its political subdivisions or agencies, Code § 8.01-386; Rule 2:202, as well as "all official publications of this Commonwealth and its political subdivisions and agencies required to be published pursuant to the laws thereof," Code § 8.01-388; Rule 2:203.

[3] HN3[↑] Code §§ 22.1-277.05(A) and 22.1-277.2:1(B) authorize the adoption of school board regulations that allow

"necessary because [S.C.] was involved in a sexual assault against another student." **[***5]** *Id.* at 541. On the same day, the principal informed S.C.'s parents — both orally and in writing — that the reason for the suspension and referral was that S.C. had "engaged in the sexual battery of other students while on school grounds." *Id.* at 542.

The principal's letter also informed S.C. that, upon request, S.C. could obtain "a redacted copy of the discipline packet that is submitted in support of the disciplinary referral." *Id.* at 543. That packet included written victim-impact statements by the accusing students. *See* R. at 757, 763. Before the disciplinary hearing, S.C. and her parents obtained the "discipline packet," 2 J.A. at 331-32, which informed them of the allegations that would be presented at the hearing.

B.

The Office of the Division Superintendent scheduled the hearing for March 7 (Day 8 of S.C.'s 10-day suspension) but rescheduled it at the request of S.C.'s father for March 9 (Day 10 of the 10-day suspension).[4] Two hearing officers representing the division superintendent presided over S.C.'s disciplinary hearing. S.C. appeared at the hearing represented by legal counsel. A court reporter transcribed the proceedings. Before the hearing began, S.C. acknowledged that she understood that she was accused of "[s]exual assault against other **[***6]** students." *Id.* at 424.

Early during the hearing, S.C.'s counsel sought to establish that S.C.'s conduct was not "sexual battery," a "criminal charge" with elements defined by statute. *Id.* at 450-52. "I'll be happy to submit the statute," S.C.'s counsel declared, "so that we can all get on the same page as to what battery and sexual battery is because that's what's been alleged here." *Id.* at 452. Counsel returned to this theme later in her appeal to the School Board by adding that **[*371]** "Section 18.2-67.4 of the Code of Virginia defines 'sexual battery'" as sexual abuse that is "against the will of the complaining witness, by force, threat, intimidation, or ruse." 2 J.A. at 564.

In her testimony at the disciplinary hearing, S.C. stated that the allegations against her were only "somewhat accurate." *Id.* at **[**595]** 486. Among her qualifications, S.C. indicated that she had touched one student's vagina once, not twice as the student had alleged, and that she had done this only after the student had agreed to the touching by saying, "yes, I would let anyone touch me there." *Id.* In response to her counsel's immediate request for clarification, S.C. testified that she had only touched the student's "inner thigh." *Id.* at 487. S.C. also testified that one of the other accusers had asked to be touched "under the **[***7]** shirt" and that while doing so S.C. "accidentally" had touched the student's breast. *See id.*

S.C. did not equivocate, however, regarding the prohibition in the school's disciplinary policy. When asked whether "school rules allow[ed] [her] to touch anyone in a sexual manner," S.C. admitted, "No." *Id.* at 490-91. She then admitted, without qualification, that she had violated this disciplinary policy:

> [Hearing Officer]: Did you touch someone in a sexual manner on school grounds?
> [S.C.'s Counsel]: When you say a sexual manner, what do you mean?
> [Hearing Officer]: Breasts, vaginal area, buttocks.
> [S.C.]: Yes.

Id. at 491. After this admission, S.C.'s counsel requested that the hearing officers limit S.C.'s discipline to a reassignment to another regular public school. Counsel also conceded that S.C.'s conduct, even under S.C.'s version of events, could constitute a violation of the SR&R policy:

> I read the Rules and Responsibilities packet, and even though the definition of assault and what is sexual battery is different than what is in the statute, it specifically talks about touching that is consensual or nonconsensual if it's improper. So despite [S.C.'s] **[*372]** intentions and what she said today, there's a very good possibility **[***8]** that this does fall within a disciplinary realm.

Id. at 506.

The hearing officers found that S.C. had "committed serious offenses in violation of School Board policy by committing multiple acts of offensive touching of three fellow students." *Id.* at 554. The acts involved "various incidents of sexual touching" that "were not

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the division superintendent to appoint a designee to make disciplinary decisions regarding suspension and attendance in an alternative education program subject to review by the school board.

[4] The SR&R defines a "Day" to mean "a school day unless the context requires otherwise," 2 J.A. at 363, 407, and specifically defines a "Short-Term Suspension" as a "[d]isciplinary action that denies school attendance for a period not to exceed ten days," *id.* at 364, 409.

consensual." *Id.* The hearing officers made clear that they did "not believe [S.C.'s] denials." *Id.* Instead, they found that S.C.'s actions had been "willful, deliberate, and far outside the bounds of acceptable student conduct." *Id.*

The hearing officers added that they "were unable to determine . . . whether [S.C.'s] inappropriate touching of students rose to the level of sexual battery." *Id.* The hearing officers' inability to make this determination was irrelevant, however, because they had already found that "'improper touching of another person (whether or not consensual)' is a violation of SR&R," *id.* The discipline for S.C. included reassignment to an alternative learning center, probationary conditions for a minimum of one year, and reassignment to a different, regular high school at the beginning of the 2017-2018 school year if S.C. could complete the year successfully at the alternative **[***9]** learning center and if she could comply with all of the probationary conditions.

HN4[↑] Code § 22.1-279.3:1 requires division superintendents statewide annually to report data of certain incidents regarding discipline, crime, or violence to the Virginia Department of Education ("VDOE"). To do this, division superintendents use uniform reporting codes. The hearing officers in S.C.'s case ordered that her "discipline record" be amended by removing any reference to "battery/assault of student-no injury" and replacing it with the expression "offensive touch-student." 2 J.A. at 554. A reiteration of the later phrase, "Offensive Touching Against Student," is a generic reporting code "designated by the [VDOE] for school systems to use when reporting a student's 'improper physical contact against [another] student that is offensive, undesirable, and/or unwanted, as determined by the victim.'" *Id.* at 570 n.2 **[*373]** (second alteration in original) (citation omitted).[5] The hearing officers' finding that S.C. had sexually touched students without **[**596]** their consent — thus violating the SR&R prohibition against "improper touching of another person (whether or not consensual)," *id.* at 554 — fit within the generic reporting code of "Offensive Touching Against Student" required **[***10]** by the VDOE, R. at 726-27.

C.

After an unsuccessful appeal to the Fairfax County School Board, S.C. filed a petition for judicial review under Code § 22.1-87 in the circuit court. The court reviewed the record of S.C.'s disciplinary proceedings, received briefs and arguments from counsel, and entered a final order holding that the School Board had acted arbitrarily in disciplining S.C. because its decision had violated S.C.'s constitutional right to due process.

In response to a motion to reconsider by the School Board, the court entered an amended final order amplifying its reasoning and restating that "the disciplinary proceedings against [S.C.] are therefore dismissed with prejudice by this Court." 1 J.A. at 277.[6] In its amended final order, the circuit court reasoned that:

- Prior to the disciplinary hearing, the school had notified S.C. of the allegations of "sexual battery" made against her by three students. *Id.* at 272 (citation omitted).

- "[I]n seeming contradiction" to that finding, the hearing officers could not determine whether S.C.'s conduct "rose to the level of sexual battery" and directed that the "battery/assault of student-no injury" **[*374]** phrase be removed from S.C.'s disciplinary record. *Id.* at 273 (citation omitted).

- "The effect **[***11]** of [the hearing officers'] ruling was to impose on this Court deference to a finding of fact that no 'assaults' occurred." *Id.*

- After exonerating S.C. of assault or battery, the hearing officers held that S.C. had committed "offensive touch-student." *Id.* at 273-74.

- The SR&R provided "notice to students" that they could be disciplined for "some variant of 'assault' or 'improper touching of another person (whether or not consensual).'" *Id.* But the SR&R did not provide notice to students that they could be disciplined for

[5] *See also* 1 J.A. at 99-100; R. at 726-27 (VDOE, Comprehensive User Guide for Discipline, Crime, and Violence (DCV) Data Collection and Submission (rev. 2017)).

[6] Given our holding, we need not address whether the circuit court's dismissal with prejudice of the disciplinary proceedings was a proper remedy for the alleged due process violation. *See generally* United States v. Stoltz, 720 F.3d 1127, 1133 (9th Cir. 2013) (HN5[↑] "Broadly speaking, due process violations are remedied by providing the aggrieved party the process he or she was deprived (or an equivalent)." (citation omitted)); Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016, 1021 (4th Cir. 1974) (remanding for district court to enter order adjudicating that a school board's decision is of "no effect" and specifying that the court's order is "without prejudice" to the board's right to determine the issue on the merits — this time affording the appellant due process).

"offensive touch-student." *Id.* at 274.

- "The main difficulty" identified by the circuit court was that the hearing officers had rejected a holding that S.C. had committed "assaults" yet had held that S.C. had committed "offensive touch-student," an undefined disciplinary offense not found in the SR&R. *Id.*

Based upon this reasoning, the court concluded: "The Court HOLDS . . . that the contradictory findings of fact and resultant disciplinary transgression of 'offensive touch-student' ascribed to S.C. by [the hearing officers], as affirmed by the School Board, are sufficiently dissonant from the process due to constitute arbitrary action" in violation of Code § 22.1-87. 1 J.A. at 276-77. As a remedy, the court **[***12]** thus ordered that S.C.'s disciplinary record "be changed to vacate the finding of 'offensive touch-student.'" *Id.* at 277.

II.

On appeal, the School Board finds fault with the circuit court's legal reasoning as well as its interpretation of the factual record of the disciplinary proceedings. We agree with the School Board's argument on several points.

A.

HN6[↑] In Virginia, judicial review of school disciplinary decisions must take into account the unique constitutional status of school **[*375]** boards. **[**597]** The Constitution of Virginia created school boards and vested them with constitutional powers. Wood ex rel. Wood v. Henry Cty. Pub. Sch., 255 Va. 85, 91, 495 S.E.2d 255 (1998); DeFebio v. County Sch. Bd., 199 Va. 511, 513, 100 S.E.2d 760 (1957). Article VIII, Section 7 of the Constitution of Virginia grants school boards the general power of "[t]he supervision of schools." While this provision "does not define the powers and duties involved in that supervision," DeFebio, 199 Va. at 513, we have held that certain "decisions regarding the safety and welfare of students are manifestly a part of the supervisory authority granted the school boards under Article VIII," Commonwealth v. Doe, 278 Va. 223, 230, 682 S.E.2d 906 (2009).

We have gone even further and observed that, HN7[↑] given the constitutional status of school boards, "[n]o statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system." Russell Cty. Sch. Bd. v. Anderson, 238 Va. 372, 383, 384 S.E.2d 598, 6 Va. Law Rep. 512 (1989). A well-deserved measure of deference, therefore, **[***13]** must be factored into any application of Code § 22.1-87, which authorizes judicial review with the qualification that "[t]he action of the school board shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." A school board's actions are "arbitrary and capricious when they are 'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle.'" School Bd. v. Wescott, 254 Va. 218, 224, 492 S.E.2d 146 (1997) (quoting Black's Law Dictionary 105 (6th ed. 1990)).

B.

HN8[↑] "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." Goss v. Lopez, 419 U.S. 565, 578, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (citation omitted). Consequently, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures." New Jersey v. T.L.O., 469 U.S. 325, 339-40, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).[7]

[*376] HN10[↑] In this context, "the interpretation and application of the Due Process Clause are intensely practical matters[,] and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" Goss, 419 U.S. at 578 (alteration and citation omitted). Due process **[***14]** protects "the opportunity to be heard" by requiring, at a minimum, "*some* kind of notice" and "*some* kind of hearing." Id. at 579 (emphases in original) (citation omitted); *accord* Wood, 255 Va. at 91. The sufficiency of "the timing and content of the notice . . . will depend on appropriate accommodation of the competing interests involved." Goss, 419 U.S. at 579.

HN11[↑] Due process in connection with suspending a student from school for "10 days or less" requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of

[7] HN9[↑] Procedural due process "protections afforded under the Constitution of Virginia are coextensive with those of the federal constitution," Shivaee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570 (2005), and thus, "[t]he corresponding provisions of the Virginia Constitution go no further than their federal counterparts," Lilly v. Commonwealth, 50 Va. App. 173, 184, 647 S.E.2d 517 (2007).

the evidence the authorities have and an opportunity to present his side of the story." Id. at 581; accord Wood, 255 Va. at 91-92; cf. Code § 22.1-277.04 (tracking closely the *Goss* requirements).[8] This minimal process does not include "the **[**598]** opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident" or any other "truncated trial-type procedures." Goss, 419 U.S. at 583. "Longer suspensions or expulsions for the remainder of the school term, or permanently," however, "may require more formal procedures." Id. at 584.

The United States Supreme Court has never specifically addressed the amount of process due, if any, when a student is transferred to another **[***15]** school because of a disciplinary infraction. In *Goss*, two of the students had received disciplinary transfers. *See* id. at 569-70 nn. 4-5. Without comment, the Supreme Court nonetheless calibrated the requisite due process protections based solely upon the 10-day-or-less suspensions that these students also **[*377]** had received. *See* id. at 569-70 nn. 4-5, 581.[9] Since *Goss*, many lower courts have held that a disciplinary transfer to an alternative school does not deprive a student of a property interest in education "absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school," Buchanan v. City of Bolivar, 99 F.3d 1352, 1359 (6th Cir. 1996) (collecting cases), *superseded by statute on other grounds, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 § 221(2), 122 Stat. 5044, 5067* (codified as amended at 18 U.S.C. § 1595(a) (2008)).[10]

Other courts deem a disciplinary transfer sufficiently punitive to warrant due process protections, without contrasting the education at the transferor and transferee schools. *See, e.g.*, Everett v. Marcase, 426 F. Supp. 397, 400-01 (E.D. Pa. 1977) (stating that "[a]ny disruption in a primary or secondary education, whether by suspension or involuntary transfer, **[***16]** is a loss of educational benefits and opportunities" and applying due process procedures under *Goss* because a transfer is "as detrimental to the pupil's interests as a short term suspension"); D.C. v. School Dist. of Phila., 879 A.2d 408, 419 (Pa. Commw. Ct. 2005).

C.

We assume, without deciding, that S.C. had some liberty or property interest implicated by her disciplinary transfer from one **[*378]** school to another. Even if she had such an interest, however, S.C. received all the process she was constitutionally due. The circuit court erred in concluding otherwise.

1.

In this case, three students provided detailed, written statements to the school administration alleging that S.C. had sexually assaulted them. The school principal promptly suspended S.C. for 10 school days and referred the matter for a hearing. The hearing was initially scheduled for Day 8 of the suspension but was postponed until Day 10 at the request of S.C.'s father.

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[8] *HN12*[↑] Typically, in this situation, "[s]ince the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school." Goss, 419 U.S. at 582. That said, "[s]tudents 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. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . ." Id. at 582-83.

[9] *See* Wayne v. Shadowen, 15 Fed. Appx. 271, 290 n.31 (6th Cir. 2001) (interpreting *Goss* to suggest, "by negative implication, that discipline less invasive of the student's state-given property right to an education, than physical suspension from the school, which would bring his consequent extirpation from all of the academy's educational opportunities and options, may not trigger *any* predicate due process requirements" (emphasis in original) (citing Goss, 419 U.S. at 580-84)); Donovan v. Ritchie, 68 F.3d 14, 18 (1st Cir. 1995) ("But the mere fact that other sanctions are added to a short suspension does not trigger a requirement for a more formal set of procedures. In *Goss* itself one of the plaintiffs had not only been suspended, but had been transferred to another school."); Patrick v. Success Acad. Charter Sch., Inc., 354 F. Supp. 3d 185, 215 (E.D.N.Y. 2018) (recognizing that some courts "note that in *Goss* itself, although one of the plaintiffs 'had been transferred to another school,' the Supreme Court did not find that he was entitled to any additional procedural due process protections other than those he was given in connection with his short-term suspension, implying that no procedural due process protections are required where the punishment is a transfer" (citation omitted)).

[10] *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662, 669 (10th Cir. 1981); Patrick, 354 F. Supp. 3d at 216-18, 247-50 (collecting cases); Lindsey v. Matayoshi, 950 F. Supp. 2d 1159, 1169-70 (D. Haw. 2013); J.K. ex rel. Kaplan v. Minneapolis Pub. Sch., 849 F. Supp. 2d 865, 871, 873 (D. Minn. 2011); J.S. ex rel. Duck v. Isle of Wight Cty. Sch. Bd., 362 F. Supp. 2d 675, 685 (E.D. Va. 2005).

As the circuit court implicitly acknowledged, the 10-day **[**599]** suspension violated no due process principles. Under *Goss*, S.C. received "oral or written notice" of the accusations against her and "an opportunity to present [her] side of the story." *419 U.S. at 581*.

Apparently unconcerned about the 10-day suspension, the circuit court focused exclusively **[***17]** on the hearing officers' decision to reassign S.C. to an alternative school and to impose probationary conditions on her readmittance to a regular public school. The court focused its analysis on the specific wording of the principal's letter to S.C. before the hearing (which referred to a "sexual battery" charge) and the referral letter, issued the same day to the division superintendent's hearing officer (which recited a "sexual assault" charge). *See* 1 J.A. at 272-74. These two letters, the court presumed, constituted the only legally relevant notice that S.C. had received.

The court then determined that S.C. was exonerated of these charges because the hearing officers had declined to find that S.C. had committed "sexual battery" and ordered the deletion of any mention of "battery/assault of student-no injury" from S.C.'s disciplinary record. *Id.* at 273-74, 276-77. "The effect of the [hearing officers'] ruling," the circuit court reasoned, "was to impose on [the circuit court] deference to a finding of fact that no 'assaults' occurred." *Id.* at 273. From there, the court observed that the disciplinary infraction that S.C. had allegedly committed — "offensive touch-student" — was not an infraction at all because this term was "neither **[***18]** contained in nor defined by the SR&R." *Id.* at 274. It followed, the court concluded, that "the contradictory findings of fact and resultant disciplinary transgression of 'offensive **[*379]** touch-student' . . . are sufficiently dissonant from the process due to constitute arbitrary action" in violation of *Code § 22.1-87*. *Id.* at 276-77.

2.

We find the circuit court's factual predicates mistaken and its rationale legally erroneous. Our disagreement begins with the circuit court's view that the hearing officers boxed themselves in by stating that they "were not able to determine" whether S.C.'s nonconsensual sexual touching "rose to the level of sexual battery." *Id.* at 273 (citation omitted). That finding, according to the circuit court, precluded the hearing officers from later finding that S.C. had offensively touched other students because battery (apparently according to its common-law definition) includes nonconsensual, offensive touching. The court's reasoning fails, however, because the hearing officers were not considering common-law battery. They were responding to *HN13*[↑] the *statutory* definition of "sexual battery" that S.C.'s counsel had asserted. *See* 2 *id.* at 450-52. That definition requires a showing that the act was accomplished "by force, threat, **[***19]** intimidation, or ruse," *Code § 18.2-67.4*, a qualification that the VDOE's statutory policy guidelines recognize.[11]

Thus, for good reason, the hearing officers found it unnecessary to determine whether S.C.'s sexual touching of other students had been accomplished by force, threat, intimidation, or ruse. It was enough that they specifically found that S.C. had sexually touched several students without their consent **[**600]** and that **[*380]** they expressly rejected S.C.'s claims to the contrary. S.C.'s nonconsensual touching, the hearing officers found, had been "willful, deliberate, and far outside the bounds of acceptable student conduct." 2 J.A. at 554. These factual findings fully justified the hearing officers' determination that S.C. had violated the SR&R's express prohibition against "improper touching of another person (whether or not consensual)," *id.*

The circuit court similarly misunderstood the hearing officers' use of the phrase "offensive touch-student." The hearing officers never asserted that this phrase is a specific, verbatim disciplinary infraction in the SR&R.

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[11] *HN14*[↑] *Code § 22.1-279.6(A)* requires the Virginia Board of Education to establish guidelines and to develop "model policies for codes of student conduct to aid local school boards in the implementation of such policies." Moreover, *Code § 22.1-279.6(B)* requires local school boards to adopt "regulations on codes of student conduct that are consistent with, but may be more stringent than, the guidelines of the Board." The Board of Education's "Student Code of Conduct Policy Guidelines" provides: "Definitions of offenses that are also violations of law should be consistent with statutory definitions. When offenses are not defined in the Code of Virginia, definitions developed for the VDOE Annual Discipline, Crime, and Violence Report may be helpful in establishing local operational definitions." Virginia Bd. of Educ., Student Code of Conduct Policy Guidelines 13 (2015) (emphases omitted), http://www.doe.virginia.gov/boe/guidance/safety/student_conduct.pdf. The VDOE's reporting code for "Sexual Battery Against Student" ("SB2") requires "an offensive or intentional threat, intimidation or ruse or physical helplessness of sexual abuse. Sexual battery is a Class I misdemeanor." VDOE, Discipline, Crime, and Violence Annual Report 71 (2016) [hereinafter 2016 Report], http://www.doe.virginia.gov/statistics_reports/school_climate/discipline_crime_violence/14-15_annual_report.pdf (referencing *Code § 18.2-67.4*).

Compare 1 *id.* at 273-74, *with* 2 *id.* at 554. Nor did the hearing officers hold, as the court presumed, that S.C. had violated some undefined disciplinary prohibition against "offensive **[***20]** touch-student." *Compare* 1 *id.* at 276, *with* 2 *id.* at 554. Instead, they held that S.C.'s nonconsensual, offensive, and sexual touching had violated the clearly stated SR&R prohibition against "improper touching of another person (whether or not consensual)," 2 *id.* at 554.

As noted earlier, "offensive touch-student" merely referred to a state-wide, uniform *reporting code* used for statistical purposes. *See id.* at 570; *see also* 1 *id.* at 99; R. at 726-27.[12] ***HN15***[↑] Code § 22.1-279.3:1 requires all division superintendents in Virginia annually to report data to the VDOE regarding certain incidents of discipline, crime, and violence. The hearing officers' finding that S.C. had sexually touched students without their consent — thus violating the SR&R prohibition against "improper touching of another person (whether or not consensual)," 2 J.A. at 554 — fit within "Offensive Touching Against Student," a generic reporting code required by the VDOE, R. at 726-27.[13] The circuit court erred, **[*381]** therefore, in presuming that the latter, and not the former, was the specific SR&R violation committed by S.C. that the hearing officers had found.

3.

With these factual predicates corrected, we can now answer the question whether the School Board (by affirming the hearing officers' disciplinary decision) acted arbitrarily in violation of S.C.'s procedural due process rights. We see no legal basis for concluding that the School Board did so.

HN16[↑] "A school is an academic institution, not a courtroom or administrative hearing room." *Board of Curators v. Horowitz*, 435 U.S. 78, 88, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). The proper exercise of judicial review, therefore, recognizes that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures," *T.L.O.*, 469 U.S. at 339-40. Especially in the context of school discipline, "the interpretation and application of the *Due Process Clause* are intensely practical matters," *Goss*, 419 U.S. at 578.

Viewed from this pragmatic perspective, the notice afforded to S.C. was constitutionally sufficient. The circuit court mistakenly treated the principal's referral letter as if it were a criminal indictment. It was not, of course, and did not need to be. The letter simply summarized **[***22]** in a single phrase ("sexual battery") the allegations that S.C. had already been told in detail. The assistant principal orally notified S.C. of "the facts known to school personnel," 2 J.A. at 542, which were later disclosed in detailed, written, **[**601]** victim-impact statements from the students, *see* R. at 757, 763. In response, S.C. provided a detailed, written reply to the allegations. Before the hearing, the school offered to provide S.C. with "a redacted copy of the discipline packet that is submitted in support of the disciplinary referral." 2 J.A. at 330-32, 543. The victim-impact statements were included in the packet. *See* R. at 757, 763.

[*382] Due process required the school officials to "inform [S.C.] of [her alleged] dereliction"[14] and to give her a fair opportunity to "tell [her] side of the story in order to make sure that an injustice is not done." *Goss*, 419 U.S. at 580. The assistant principal's oral description of the "facts known to school personnel," 2 J.A. at 542, coupled with the principal's letter and the discipline packet, notified S.C. of the allegations against

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[12] Counsel for the School Board pointed out this fact during oral argument before the circuit court:

> [T]he offensive touching [phrase] is not just a term that's made up out of thin air. It's actually a term used by the [VDOE]. And one of the things the schools have to do, Your Honor, **[***21]** is file periodic reports with the state as to how many disciplinary incidents you had in this or that category . . . . One of those Virginia definitions is called offensive touching against a student.

1 J.A. at 99.

[13] The VDOE's annual reports consistently use the reporting code of "Offensive Sexual Touching Against Student" ("SX2") for this type of incident. VDOE, Discipline, Crime, and Violence Annual Report 4, 8, 15 (2018), http://www.doe.virginia.gov/statistics_reports/school_climate/index.shtml; VDOE, Discipline, Crime, and Violence Annual Report 12, 15, 56, 74 (2017), http://www.doe.virginia.gov/statistics_reports/school_climate/discipline_crime_violence/15-16_annual_report.pdf; 2016 Report, *supra* note 11, at 12, 15, 55, 73; *see also* R. 726-27.

[14] *See, e.g.*, *J.S.*, 362 F. Supp. 2d at 683 (concluding that written notice "that there were allegations of 'sexual activity'" was a sufficient "explanation of the evidence" pursuant to due process because "the court finds it doubtful that a more detailed description of [the victim's] allegations would have enabled [the student] to defend himself better at the hearing before the Disciplinary Committee").

her.[15] This conclusion is corroborated by the fact that S.C.'s counsel never once expressed surprise or claimed to have been misinformed regarding the factual allegations against her.

The circuit **[***23]** court's focus on the phrase "sexual battery" in the principal's letter to S.C. and on the phrase "sexual assault" in the principal's referral letter to the hearing officers presumed that due process principles required the school to itemize disciplinary infractions in granular detail. That has never been the proper standard. "Given the 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." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *see also* Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 442 (4th Cir. 2013). *See generally* Emily Suski & Angela Ciolfi, Education Law and Advocacy § 5.202(A), at 22 (8th ed. 2018) (stating that "school board policies . . . may be written in fairly broad terms as long as they give 'adequate warning' that certain conduct may subject a student to sanction" (quoting Fraser, 478 U.S. at 686)).

[*383] In *Fraser*, for example, the United States Supreme Court held that a student disciplined for violating a school rule that prohibited "obscene" language after he had given a lewd speech could not complain that "he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions." **[***24]** 478 U.S. at 686. This word may have a technical definition in the argot of a criminal code, but it carries a far less precise meaning in the context of a rule of conduct designed for maintaining discipline and order in a school. It was not just wrong, the Supreme Court said, but "wholly without merit," *id.*, to believe that due process principles require school disciplinary rules to have the detail of "a criminal code," *id.*

Just as the principal's prehearing notice cannot be treated like an indictment, the school's disciplinary rules cannot be treated like criminal statutes. The SR&R broadly prohibited "any behavior incompatible with a K-12 educational environment and good citizenship." 2 J.A. at 383. The policy then identified "examples of prohibited conduct," stating that acts for which a student might be disciplined "include, but are not limited to" **[**602]** various, specific acts. *Id.* Within the broad category entitled "[a]ssault," a list of numerous prohibited acts appeared, including "[i]mproper touching of another person (whether or not consensual)" and "[s]exual assault or battery upon any person." *Id.* at 384. As her own testimony confirmed, S.C. knew of this prohibition before she engaged in her conduct, while she was doing **[***25]** so, and afterwards.

III.

Applying the "intensely practical" principles of due process applicable to school disciplinary proceedings, Goss, 419 U.S. at 578, we find nothing in this record suggesting that the School Board acted arbitrarily in violation of S.C.'s due process rights. Because the circuit court erred in concluding otherwise, we vacate the court's final order and enter final judgment dismissing S.C.'s petition with prejudice.

Reversed, vacated, and final judgment.

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[15] *Cf., e.g.*, Santiago-Lugo v. Warden, 785 F.3d 467, 475-76 (11th Cir. 2015) (holding, in the context of habeas corpus, that an inmate was not denied due process by a disciplinary hearing officer's finding that he had violated a different rule from the one contained in the notice because the inmate had notice of the "conduct" constituting the basis for his rule violation); Northern v. Hanks, 326 F.3d 909, 911 (7th Cir. 2003) (per curiam) ("Because the factual basis of the investigation report gave [the inmate] all the information he needed to defend against the trafficking charge, the reviewing authority's modification [from a different charge] did not deprive [the inmate] of his due process rights."); Holt v. Caspari, 961 F.2d 1370, 1373 (8th Cir. 1992) (concluding that an inmate was not denied due process by a prison disciplinary committee's finding that he had violated a different rule from the one contained in the notice because an inmate had notice of "the factual charge" constituting the basis for his rule violation).

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

[redacted], Father of Juvenile A.S.,

Petitioner,

v. CASE NO.: CL18-_____

SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH,
Serve: Beverly M. Anderson, Chairman
School Board of the City of Virginia Beach
2512 George Mason Drive
Virginia Beach, VA 23456

Respondent.

PETITION FOR JUDICIAL REVIEW

NOW COMES your petitioner, [redacted], natural father of a juvenile whose initials are "A.S.", and seeks judicial review pursuant to Code of Virginia §22.1-87, and in support thereof, states as follows:

1. Petitioner [redacted]") is the natural father and is a legal custodian of a juvenile with the initials A.S. [redacted] and A.S. reside in the City of Virginia Beach.

2. Until recently, A.S. was enrolled in the Legal Studies Academy program at First Colonial High School in the City of Virginia Beach.

3. In a letter dated April 16, 2018, principal of First Colonial High School notified Dr. Aaron Spence, Superintendent of Virginia Beach City Public Schools ("VBCPS"), that A.S. was suspended "for disruption to the educational process, unauthorized use of technology and harassment based on race." A redacted copy of the notification letter is attached hereto as Exhibit A.

4. Thereafter, in a letter dated April 18, 2018 (redacted copy attached as Exhibit B), the Director of the Officer of Student Leadership notified the parents of A.S. that a hearing would be conducted April 24, 2018.

5. On April 24, 2018, a hearing was conducted by a hearing officer appointed by VBCPS and in a letter dated April 27, 2018 (redacted copy attached as Exhibit C), the hearing officer's decision was announced to the parents of A.S. In essence, the decision was to leave A.S. on a suspended status for the remainder of the school year, with a return to First Colonial High School in September 2018 as a "non-Legal Studies Academy student on strict probation through January 28, 2019." Other terms and conditions were imposed on A.S. as described in the letter.

6. An appeal to the School Board was initiated on behalf of A.S., and a hearing before a panel of the School Board ("School Board Discipline Committee") was conducted on May 8, 2018. The result was announced in a letter of the same date (redacted copy attached as Exhibit D) and it essentially affirmed the prior decision of the hearing officer.

7. At the hearing before the School Board Discipline Committee, counsel for A.S. presented a document entitled "Argument Summary Regarding Discipline of [A.S.]", a redacted copy of which is attached hereto as Exhibit E.

8. Unfortunately, the School Board Discipline Committee either did not understand the free speech argument advanced on behalf of A.S. or decided to disregard constitutional guarantees relating to freedom of speech. Notably, the letter of May 8, 2018 (Exhibit D) failed to provide any factual or legal analysis whatsoever. None of the prior written notifications provided any analysis, and the VBCPS administrators and School Board members have utterly failed to explain factually and legally any grounds for punishing A.S. based upon her actions.

9. A.S. is an outstanding student in the 9th grade and has done nothing threatening or illegal in any way.

10. The behavior that led to the discipline imposed on A.S. consists of a social media communication or post that depicts three individuals dressed as members of the Ku Klux Klan, with a dark-skinned person standing in front of these individuals smiling and appearing to have a good time. A.S. has repeatedly explained that she thought the picture showed individuals getting along, and that she meant no harm. Such an image is open to many different interpretations and meanings, and there is no basis for VBCPS selecting a negative meaning or interpretation to justify punishment of a 9th grade student.

11. It is particularly disturbing and ironic that A.S. is a 9th grade student who was participating in the Legal Studies Academy. Instead of there being an appropriate discussion of and focus on freedom of speech

and expression guarantees, VBCPS has engaged in a knee-jerk over-reaction that ignores and/or disrespects free speech guarantees enshrined in the Constitution of the United States of America and the Constitution of Virginia.

12. There is not a shred of evidence in the record indicating that A.S. intended any harm, holds any racist or bigoted views whatsoever or violated any clearly established policies that comport with constitutional guarantees.

13. Code of Virginia §22.1-87 (copy attached as Exhibit F) provides for judicial review of a decision of this nature. As stated in §22.1-87, the "review shall proceed upon the petition, the minutes of the meeting at which the school board's action was taken, the orders, if any, of the school board, an attested copy of the transcript, if any, of any hearing before the school board, and any other evidence found relevant to the issues on appeal by the court."

14. The record in this matter establishes that the School Board has violated constitutional freedoms, acted arbitrarily and capriciously, and abused its discretion. Not only does this matter involve free speech issues, but it also involves due process considerations because of the vague and uncertain nature of the rules and policies that have been cited as a basis for punishing A.S.

15. The damage to this child's education and disciplinary record is significant and ongoing.

WHEREFORE, for the foregoing reasons, petitioner respectfully requests that this Honorable Court conduct a judicial review pursuant to the provisions of Code of Virginia §22.1-87, reverse the discipline imposed on A.S., and enter such further orders and make such further provisions as deemed necessary and appropriate to protect petitioner's and A.S.'s legal rights, educational opportunities and disciplinary record. Petitioner requests such other and further relief as deemed appropriate under the circumstances of this matter.

[redacted] Father of Juvenile A.S.

By _____
Of Counsel

Kevin E. Martingayle, Esquire (VSB #33865)
BISCHOFF MARTINGAYLE, P.C.
3704 Pacific Avenue, Suite 300
Virginia Beach, VA 23451
(757) 233-9991 (main)
(757) 416-6009 (direct dial)
(757) 428-6982 (facsimile)
E-mail: martingayle@bischoffmartingayle.com

First Colonial High School
Legal Studies Academy

EXHIBIT
tabbies
A

Dr. Nancy B. Farrell, Principal
Ann M. Bissell, Assistant Principal
Gary D. Clark, Assistant Principal
Dr. David B. Judge, Assistant Principal
Deborah M. Shelton, Assistant Principal
Angelique Phillips, Academy Coordinator

1272 Mill Dam Road
Virginia Beach, VA 23454
www.firstcolonialhs.vbschools.com
757-648-5300 FAX 757 498-6719
Guidance FAX 757-498-6745

April 16, 2018

Dr. Aaron C. Spence, Superintendent
Virginia Beach City Public Schools
P. O. Box 6038
Virginia Beach, VA 23456

Re: [redacted]
Grade: 9
Special Ed: No

Dear Dr. Spence:

A[redacted] S[redacted] has been suspended from school effective April 16, 2018, for disruption to the educational process, unauthorized use of technology, and harassment based on race.

As a result of investigation of this matter, I am hereby recommending for expulsion from the school system.

Substantiating information will be submitted under separate cover.

A[redacted]'s parents have been advised of this recommendation. A copy of the letter will confirm such advisement.

Sincerely,

Dr. Nancy B. Farrell
Principal

NF:jm

pc: Mr. & Mrs. Thomas Silberberg
[redacted]

VIRGINIA BEACH CITY PUBLIC SCHOOLS
CHARTING THE COURSE

EXHIBIT
tabbies
B

VIRGINIA BEACH CITY PUBLIC SCHOOLS
CHARTING THE COURSE

April 18, 2018

Mr. & Mrs. T[redacted]

RE: A[redacted] S[redacted]

Dear Mr. & Mrs. Silberberg:

The principal of First Colonial High School has written to inform you that A[redacted] has been suspended and recommended for expulsion from the school division for disruption of the educational process, unauthorized use of technology, and harrassment based on race.

Acting as the Superintendent's designee, I have reduced the expulsion recommendation to a recommendation for a long-term suspension, and scheduled a hearing before a discipline hearing officer. The hearing is scheduled for **Tuesday, April 24, 2018, at 1:30 p.m.** in the School Administration Laskin Road Annex, 1413 Laskin Road, Virginia Beach, VA 23451, to consider the recommendation. A map is attached for your convenience. A packet of material is being prepared for presentation at the hearing. You may pick up the packet between 2:00 p.m. and 5:00 p.m the day before the hearing If you have documents that you would like the hearing officer to consider, please produce those documents at the time you pick up the packet or no later than 5:00 p.m. the day before the hearing

You and A[redacted] are requested to be present for the hearing. **Please plan on arriving at least fifteen minutes prior to the hearing to allow time to review materials.** A school administrator will also attend the hearing and present relevant information regarding the events that led to the disciplinary action. School administrators may elect to participate by webcam.

If you plan to bring an attorney, advocate, or representative, please notify this office forty-eight (48) hours prior to the hearing. Failure to do so may delay the proceedings until such time that this office secures representation as well. In the event that you do not attend the hearing, it will be held in your absence and you will be notified in writing of the results.

If you have any questions or concerns regarding the hearing, please do not hesitate to contact me at 263-2020

Sincerely,

Michael B. McGee, Director
Office of Student Leadership

MBM:ti

pc: Dr. Aaron C. Spence, Superintendent
Dr. Nancy B. Farrell, Principal, First Colonial High School

VIRGINIA BEACH CITY PUBLIC SCHOOLS
CHARTING THE COURSE

EXHIBIT
tabbies
C

April 27, 2018

Mr. & Mrs. [redacted]

RE: A[redacted] S[redacted]

Dear Mr. & Mrs [redacted]

On April 24, 2018, a hearing was held by Ms. Emilie Tilley to consider the recommendation of Dr. Nancy B. Farrell, principal of First Colonial High School, that your student, A[redacted], be expelled from the Virginia Beach school system for disruption of the educational process, unauthorized use of technology, and harassment based on race.

The decision has been made to reduce the expulsion recommendation to a one year suspension. A[redacted] will remain on suspension for the remainder of the 2017-2018 school year. During the period of this suspension, A[redacted] is not permitted on any Virginia Beach City Public Schools' property or at school-sponsored events. Should this occur, A[redacted] will be charged with trespassing and the police notified. It should be noted that any violation of these conditions might result in the activation of the suspension. First Colonial High School will provide A[redacted] with any assignments required to successfully complete the 2017-2018 school year. Please contact First Colonial High School to schedule a time to pick up A[redacted]'s schoolwork and a time to take any SOL's or final exams. A[redacted] may attend summer school on strict probation. A[redacted] will be expected to abide by the conditions of good behavior, regular attendance and academic progress.

In September 2018, the remainder of the suspension will be deferred, and A[redacted] will be permitted to return to First Colonial High School, as a non-Legal Studies Academy student on strict probation through January 28, 2019. A[redacted] will be expected to abide by the conditions of good behavior, regular attendance and academic progress. It should be noted that any violation of these conditions may result in the activation of the suspension. Please contact the Office of Student Leadership if you would like a listing of community-based educational, training, and intervention programs. The cost for participation in programs not offered by the school division is borne by you.

If you wish to appeal this decision to a discipline committee of the school board, you must file your appeal with me within five (5) school days of the receipt of this decision. In your written request, please state specifically the reason for your appeal and include all supporting documentation, if any. Please understand that if the decision is appealed to a discipline committee that the decision may be upheld, rejected, or altered.

Sincerely,

Michael B. McGee, Director
Office of Student Leadership

MBM tp

pc: Dr. Aaron C. Spence, Superintendent
Dr. Nancy B. Farrell, Principal, First Colonial High School

VIRGINIA BEACH CITY PUBLIC SCHOOLS
CHARTING THE COURSE

May 8, 2018

EXHIBIT
Exhibit
D

Mr. & Mrs. [redacted]

RE: A[redacted] S[redacted]

Dear Mr. & Mrs. [redacted]

The School Board Discipline Committee considered your request to appeal a hearing officer's decision. The decision had been made to reduce an expulsion recommendation to a one-year suspension. A[redacted] will remain suspension for the remainder of the school year with First Colonial High School providing work to successfully complete the 2017-2018 school year. In September 2018, the remainder of the suspension will be deferred, and A[redacted] would be permitted to return to First Colonial High School, as a non-Legal Studies Academy Student on strict probation for disruption of the educational process, unauthorized use of technology, and harrassment based on race.

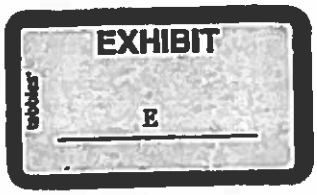
On May 8, 2018, a unanimous decision was made to uphold the decision of the hearing officer to suspend A[redacted] for the remainder of the year, with First Colonial High School providing any assignments to successfully complete the 2017-2018 school year. In September 2018, the remainder of the suspension will be deferred, and the student will be permitted to return to First Colonial High School as a non-Legal Studies Academy student on strict probation through January 28, 2019.

Sincerely,

Michael B. McGee, Director
Office of Student Leadership

MBM/rp

pc: Dr. Aaron C. Spence, Superintendent
Dr. Nancy B. Farrell, Principal, First Colonial High School
Mr. Kevin E. Martingayle, Esq. 3704 Pacific Ave, Suite 300, Virginia Beach, Va. 23451



ARGUMENT SUMMARY REGARDING DISCIPLINE OF A[redacted] S[redacted]

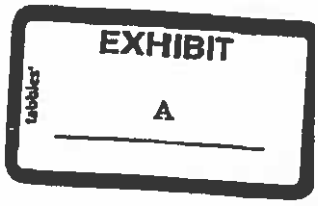
"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost fifty years." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

A "true threat" that goes beyond hyperbole, opinion, sarcasm, humor or other protected forms of expression may be subject to censorship or punishment under appropriate circumstances, but it is the obligation of the government to avoid mischaracterizing offensive or inappropriate speech as constituting a "true threat". See Watts v. United States, 395 U.S. 705 (1969).

In People ex rel. R.D., 2016 COA 186 (2016) (Exhibit A), the Court of Appeals of Colorado decided a case in which a juvenile's social media Tweets were violent and explicit, but did not constitute "true threats" or "fighting words" because they could not be deemed to be a serious expression of an intent to commit an act of unlawful violence against a particular individual or group. The Tweets included a picture of a gun with the message "this all I'm saying. We don't want another incident like Arapahoe. My 9 never on vacation." Among the factors that led the Court of Appeals to conclude that the Tweets did not constitute "true threats" pursuant to a proper First Amendment analysis was the fact that the Tweets were posted on a widely available public platform instead of directed specifically through an email or other targeted message.

The Bottom Line

A[redacted] should not be punished for making a bad joke or conveying a message misinterpreted by some as "racist". Putting her social media post in proper context, it cannot be viewed as a "true threat", certainly does not constitute "fighting words" and, therefore, cannot be punished without violating free speech and expression rights.



Document:People ex rel. R.D., 2016 COA 186

People ex rel. R.D., 2016 COA 186

Copy Citation

Court of Appeals of Colorado, Division Three

December 29, 2016, Decided

Court of Appeals No. 14CA1800

Reporter

2016 COA 186 * |

The People of the State of Colorado, Petitioner-Appellee, In the Interest of R.D., Juvenile-Appellant.

Notice: THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

Subsequent History: Writ of certiorari granted

Prior History: Arapahoe County District Court No. 13JD868, Honorable Judge.

Disposition: JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS.

Core Terms

true threat, fighting words, message, e-mails, delinquency, harassment, network, fuck

Case Summary

Overview

HOLDINGS: [1]-The district court erred in adjudicating a juvenile delinquent based on conduct that, if committed by an adult, would constitute harassment by communication under because the juvenile's rights were violated as applied where, while the juvenile's social media Tweets were violent and explicit, they were neither true threats nor fighting words inasmuch as they were not a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, he did not know the recipient personally, the recipient did not appear threatened or take precautionary measures to protect himself from the juvenile, and the juvenile was not in close physical proximity to the recipient at the time of the incident.

Outcome

Judgment reversed and case remanded.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > ... > >

Coercion & Harassment, Elements

stated that a person commits harassment if, with intent to harass, annoy, or alarm another person, he or she initiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene.

Constitutional Law >
>

Criminal Law & Procedure >
>
>

Case or Controversy, Constitutionality of Legislation
Courts review the constitutionality of a statute as applied de novo.

Constitutional Law > ... >
>
>

Evidence >
>

Evidence >
>

Constitutionality of Legislation, Inferences & Presumptions
A statute is presumed to be constitutional, and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt.

Constitutional Law >
>
>

Case or Controversy, Constitutionality of Legislation
Where a statute is not facially unconstitutional, a challenger must show that the statute is unconstitutional as applied to his or her conduct.

Constitutional Law >
>
>

Fundamental Freedoms, Freedom of Speech
The provides that Congress shall make no law abridging the freedom of speech. Colorado's counterpart, provides that no law shall be passed impairing the freedom of speech.

Constitutional Law > ... >
>

Criminal Law & Procedure > ... >
>

Freedom of Speech, Fighting Words

While the protects the right to free speech, its protection is not absolute. Some categories of speech, such as true threats and fighting words, are unprotected by the and, thus, may be regulated by the government.

Criminal Law & Procedure > ... >
>

Coercion & Harassment, Elements

A threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another, by committing an unlawful act. The critical inquiry is whether the statements, viewed in the context in which they were spoken or written, constitute a "true threat." A true threat is not merely talk or jest, and it is evaluated by whether those who hear or read the threat reasonably consider that an actual threat has been made.

Constitutional Law >
>
Criminal Law & Procedure > ... >
>

Fundamental Freedoms, Freedom of Speech

While whether a statement is a true threat is a question of fact to be determined by the fact finder, where concerns are implicated, the court has an obligation to make an independent review of the record to assure that the judgment does not impermissibly intrude on the field of free expression. In determining this, courts first consider the plain import of the words used. Then they look to the context in which the statements were made. Among other contextual factors, courts may consider (1) to whom the statement is communicated; (2) the manner in which the statement is communicated; and (3) the subjective reaction of the person whom the statement concerns.

Constitutional Law > ... >

>

Freedom of Speech, Fighting Words

Fighting words are personal abusive epithets that when directed to the ordinary citizen are inherently likely to provoke a violent reaction.

Constitutional Law > ... >

>

Freedom of Speech, Fighting Words

In determining whether a statement constitutes fighting words, courts must consider the context or circumstances in which the language is used.

Constitutional Law > ... >

>

Freedom of Speech, Fighting Words

Fighting words, by their definition, can occur only when the speaker is in close physical proximity to the recipient. Statements that are made from a distance cannot incite an immediate breach of the peace because a remote recipient would necessarily have a cooling off period before he or she could confront the speaker. Even a brief cooling off period ensures that statements will not "incite an immediate breach of the peace.

Constitutional Law > ... >

>

Freedom of Speech, Fighting Words

In the context of fighting words, the potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity.

Counsel: , Attorney General, Joseph G. Michaels, Assistant Attorney General, Denver, Colorado, for Petitioner-Appellee.

, Colorado State Public Defender, , Deputy State Public Defender, Denver, Colorado, for Juvenile-Appellant.

Judges: Opinion by JUDGE and , JJ., concur.

Opinion by:

Opinion

[*P1] R.D., a juvenile, appeals the district court's adjudication of delinquency. We reverse and remand with directions to vacate the adjudication of juvenile delinquency and dismiss the proceeding.

I. Background

[*P2] This case arises out of an argument between students from Littleton High School and Thomas Jefferson High School on the social networking website Twitter. The argument began after a student from Thomas Jefferson High School posted a Tweet expressing support for Arapahoe High School after a shooting had occurred there. A student from Littleton High School Tweeted that students from Thomas Jefferson High School did not care about the shooting, leading to an argument between students from both schools.

[*P3] As the argument progressed, R.D., a student at Littleton High School, joined the conversation. R.D. directed multiple Tweets at A.C., a student from Thomas Jefferson High School. These Tweets included:

- "[i]f I see your bitch ass outside of school you catching a bullet bitch";
- "you a bitch, ill come to Tgay and kill you nigga";
- "all you fuck niggas will get your ass beat real shit"; and
- "you think this shit a game, I'm not playing."

R.D. also Tweeted a picture of a gun with the message "this all I'm saying. We don't want another incident like Arapahoe. My 9 never on vacation."

[*P4] A.C. directed multiple Tweets at R.D. in response. These Tweets included:

- "I'll see u tomorrow fuck boy";
- "you are all talk so go the fuck to bed come up to TJ and get slept";
- "shoot then pussy"; and
- "you ain't never shot no one so sit down and get off google images bruh."

[*P5] The People filed a petition in delinquency charging R.D. with conduct that if committed by an adult would constitute harassment by communication under . At a bench trial, A.C. and another student testified that they believed R.D.'s statements were threats. The district court adjudicated R.D. a juvenile delinquent based on conduct that would constitute harassment if committed by an adult.

II. As-Applied Constitutional Challenge

[*P6] R.D. argues that the application of to his conduct violated his right to free speech. The People respond that R.D.'s statements were not protected by the because they were true threats and fighting words. We conclude that because R.D.'s statements were neither true threats nor fighting words, the statute as applied violated his right to free speech.

A. Standard of Review

[*P7] We review the constitutionality of a statute as applied de novo. ; A statute is presumed to be constitutional, and the party challenging the statute has the burden of proving unconstitutionality beyond a reasonable doubt. . Where a statute is not facially unconstitutional, a challenger must show that the statute is unconstitutional as applied to his or her conduct. .

B.

[*P8] The provides that "Congress shall make no law . . . abridging the freedom of speech." Colorado's counterpart to the , provides that "[n]o law shall be passed impairing the freedom of speech." ,

[*P9] While the protects the right to free speech, its protection is not absolute. (citing . Some categories of speech, such as true threats and fighting words, are unprotected by the and, thus, may be regulated by the government. *Id.* (citing); *see also* (citing . Because R.D. does not assert that he is entitled to greater protection under the Colorado Constitution, we address only the .

C. True Threat

[*P10] A threat is a statement of purpose or intent to cause injury or harm to the person, property, or rights of another, by committing an unlawful act. (citing But the critical inquiry is "whether the statements, viewed in the context in which they were spoken or written, constitute a **'true threat.'**" (quoting (, J., specially concurring)). A **true threat** is not merely talk or jest, and it is evaluated "by whether those who hear or read the threat reasonably consider that an actual threat has been made." *Id.* (quoting (, J., specially concurring)). *Id.* (citing .

While whether a statement is a **true threat** is a question of fact to be determined by the fact finder, where concerns are implicated,

the court has an obligation to make an independent review of the record to assure that the judgment does not impermissibly intrude on the field of free expression.

(citations omitted). In determining this, we first consider the plain import of the words used. (citing). Then we look to the context in which the statements were made. *Id.* (citing). Among other contextual factors, we may consider (1) to whom the statement is communicated; (2) the manner in which the statement is communicated; and (3) the subjective reaction of the person whom the statement concerns.

[*P11] After independently reviewing the record, we conclude that R.D.'s Tweets did not constitute true threats because they were not "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (quoting). While the language of R.D.'s Tweets was violent and explicit, the context in which the statements were made mitigated their tone in three ways. *Id.* (citing).

[*P12] The first contextual factor we consider is to whom the statements were communicated. R.D. Tweeted "you don't even know me. Mf I don't even know were tf your lame bitch ass school is." This Tweet showed that he did not know A.C. personally and did not know where Thomas Jefferson High School was located. *See* (stating that defendant personally knowing the victims and knowing where they lived supported the conclusion that his e-mails were true threats). And, R.D. never referred to A.C. by name. He addressed him only by his Twitter username of "iTweetYouShutUp." *See id.* (finding that defendant expressly referred to the named victims in his e-mails supported the conclusion that the e-mails were true threats).

[*P13] Next we consider the manner in which the statements were communicated. R.D. posted his messages to Twitter, a public forum. While he did use "@" to direct his messages toward A.C., the messages could be viewed on R.D.'s Twitter homepage and were not sent to A.C. in a private message. So, Tweets can be differentiated from e-mails and other social media messages, which are sent directly — and usually privately — to a person or specified group of people. *See* (e-mails sent to named victims can constitute a true threat).

[*P14] Finally, we consider the subjective reaction of the person whom the statements concern. When R.D. indicated that he did not know where Thomas Jefferson High School was located, A.C. responded by Tweeting the school's address: "3950 S. Holly street. I'll see u tomorrow fuck boy." A.C. subsequently Tweeted "you are all talk so go the fuck to bed come up to TJ and get slept" and "shoot then pussy." And, when R.D. Tweeted a picture of a gun, A.C. responded "you ain't never shot no one so sit down and get off google images bruh." A.C.'s Tweets demonstrate that he did not appear threatened by R.D.'s Tweets and that he did not take precautionary measures to protect himself from R.D. *See* (stating that victims having taken specific precautionary measures to protect themselves from defendant supported the conclusion that his e-mails were true threats).

[*P15] While A.C. later testified that he believed R.D.'s Tweets were threats against him, the critical inquiry in true threat analysis is "whether the statements, viewed in the context in which they were spoken or written, constitute a 'true threat.'" (quoting (, J., specially concurring)). A.C.'s reaction to R.D.'s Tweets shows that he did not view the statements as true threats when they were received.

[*P16] In sum, based on the context in which R.D.'s statements were made, we conclude that the Tweets did not constitute true threats.

D. Fighting Words

[*P17] Fighting words are "personal abusive epithets that when directed to the ordinary citizen are inherently likely to provoke a violent reaction." (citing). In determining whether a statement constitutes fighting words, again we must consider "[t]he context or circumstances in which the language is used." *Id.* (citing .

[*P18] After independently reviewing the record, we conclude that R.D.'s Tweets did not constitute fighting words. Fighting words, by their definition, can occur only when the speaker is in close physical proximity to the recipient. Statements that are made from a distance cannot "incite an immediate breach of the peace" because a remote recipient would necessarily have a cooling off period before he or she could confront the speaker. . Even a brief cooling off period ensures that statements will not "incite an *immediate* breach of the peace." *Id.* (emphasis added).

[*P19] While this issue has not been specifically addressed in Colorado, a number of states have concluded that "[t]he potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity." ; *see also* ("This case does not fall within the fighting words exception to the . The statements at issue were made in a letter to the editor, not in a face-to-face confrontation with the target of the remarks."); ("[E]ven if a fact finder could conclude that in a face-to-face confrontation, [defendant's] speech would have provoked an immediate retaliation, [the recipient] could not have immediately retaliated. [He] did not know who sent the e-mails, let alone where to find the author."); *but see* . (upholding a permanent injunction prohibiting the sending of e-mails and letters based on the fighting words doctrine, where the enjoined party also engaged in verbal attacks and made vulgar gestures in the presence of the parties requesting the injunction).

[*P20] We consider these cases well reasoned and follow them here. So, because R.D. was not in close physical proximity to A.C. at the time of the incident, his Tweets could not have constituted fighting words.

[*P21] Because we have concluded that R.D.'s Tweets were not true threats or fighting words, applying , to R.D.'s conduct violated his rights. For these reasons, we further conclude that the statute is unconstitutional as applied.

III. Conclusion

[*P22] We reverse the district court's judgment and remand with directions to vacate the adjudication of juvenile delinquency and dismiss the proceeding.

JUDGE and JUDGE concur.

Footnotes

When a user posts a Tweet, it can be viewed on the user's Twitter homepage. A user can mention another person in a Tweet by using "@" followed by the person's username. The person is then notified that he or she has been mentioned in a Tweet. Posting a Tweet that mentions another person is different from sending a direct message on Twitter. A Tweet that mentions another person can be viewed on the sender's Twitter

homepage, while a direct message can only be seen by the recipient. *Using Twitter*, Twitter,

R.D. mentioned A.C. by beginning his Tweets with "@iTweetYouShutUp" (A.C.'s username).

that , which has since been amended, stated

> [a] person commits harassment if, with intent to harass, annoy, or alarm another person, he or she . . . [i]nitiates communication with a person, anonymously or otherwise, by telephone, telephone network, data network, text message, instant message, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene.

Content Type: Cases

Terms: first amendment w/200 true threat w/200 school w/200 social media

Narrow By: -None-

Date and Time: Apr 17, 2018 06:00:47 p.m. EDT

5/21/2018

Code of Virginia
Title 22.1. Education
Chapter 7. General Powers and Duties of School Boards

§ 22.1-87. Judicial review.

Any parent, custodian, or legal guardian of a pupil attending the public schools in a school division who is aggrieved by an action of the school board may, within thirty days after such action, petition the circuit court having jurisdiction in the school division to review the action of the school board. Such review shall proceed upon the petition, the minutes of the meeting at which the school board's action was taken, the orders, if any, of the school board, an attested copy of the transcript, if any, of any hearing before the school board, and any other evidence found relevant to the issues on appeal by the court. The action of the school board shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion.

Code 1950, § 22-57; 1968, c. 139; 1980, c. 559; 1981, c. 229.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

THOMAS SILBERBERG,
Father of Juvenile A.S.,

Petitioner,

v. CASE NO. CL18002479-00

THE SCHOOL BOARD FOR THE
CITY OF VIRGINIA BEACH, VA,

Respondent.

SCHOOL BOARD'S RESPONSE TO PETITION FOR JUDICIAL REVIEW

Respondent, the School Board for the City of Virginia Beach, VA (the "School Board"), for its Response to petitioner Thomas Silberberg, father of juvenile, A.S. ("Petitioner")'s Petition for Judicial Review under Virginia Code § 22.1-87 respectfully states:

1. Upon information and belief, the School Board admits the factual allegations in paragraph 1 of the Petition.

2. The School Board admits the factual allegations in paragraph 2 of the Petition.

3. The School Board admits the factual allegations in paragraph 3 of the Petition.

4. The School Board admits the factual allegations in paragraph 4 of the Petition.

5. The School Board admits the factual allegations in paragraph 5 of the Petition.

6. The School Board admits the factual allegations in paragraph 6 of the Petition.

7. The School Board admits the factual allegations in paragraph 7 of the Petition.

8. Paragraph 8 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

9. Paragraph 9 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

10. Paragraph 10 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

11. Paragraph 11 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

12. Paragraph 12 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

13. The School Board admits the factual allegations in paragraph 13 of the Petition.

14. Paragraph 14 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

15. Paragraph 15 of the Petition contains a legal conclusion requiring no response. The School Board denies the remaining factual allegations in this paragraph.

16. The School Board denies all allegations not specifically admitted.

17. The School Board affirmatively asserts that it did not exceed its authority, act arbitrarily or capriciously, or abuse its discretion in upholding the hearing officer's decision.

For these reasons, the Petitioner respectfully requests this Court enter an order: (a) finding the School Board it did not exceed its authority, act arbitrarily or capriciously, or abuse its discretion in upholding the hearing officer's decision; (b) sustaining the School Board's May 8, 2018 decision; (c) denying the Petitioner's requests for relief; and (d) award such further relief as this Court deems appropriate under the circumstances of this matter.

Respectfully submitted,

THE SCHOOL BOARD FOR THE
CITY OF VIRGINIA BEACH, VA

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Counsel for the School Division

CERTIFICATE OF SERVICE

I certify that on June 18, 2018, I sent a copy of the School Board's Response to the Petitioner's Petition for Judicial Review via first-class mail to:

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

[redacted], Father of Juvenile A.S.,

Petitioner,

v. CASE NO.: CL18-2479

SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH,

Respondent.

ORDER

This matter came to be heard on August 1 and 17, 2018 upon the petitioner's Petition for Judicial Review, and was argued;

Upon consideration of the pleadings, briefs, School Board's record and arguments presented;

It is ADJUDGED, ORDERED AND DECREED that for the reasons stated on the record the discipline imposed against A.S. should be and hereby is reversed.

Enter: 8/22/2018

The Honorable Stephen C. Mahan

I ASK FOR THIS:

Kevin E. Martingayle, Esquire
Counsel for Petitioner

SEEN and OBJECTED TO:

Kamala H. Lannetti, Deputy City Attorney
Dannielle C. Hall-McIvor, Associate City Attorney
Counsel for Respondent

CERTIFIED TO BE A TRUE COPY
OF RECORD IN MY CUSTODY
TINA E. SINNEN, CLERK
CIRCUIT COURT, VIRGINIA BEACH, VA.
BY _____
DEPUTY CLERK

Approved by the Supreme Court of Virginia
January 9, 2020

LEGAL ETHICS OPINION 1891. COMMUNICATION WITH REPRESENTED GOVERNMENT OFFICIALS

QUESTION PRESENTED

Are communications with represented government officials "authorized by law" for purposes of Rule 4.2?

ANSWER

The answer to the question presented is yes, as long as the communication is made for the purposes of addressing a policy issue, and the government official being addressed has the ability or authority to take or recommend government action, or otherwise effectuate government policy on the issue. A lawyer engaging in such a communication is not required to give the government official's lawyer notice of the intended communication.

This analysis will apply only to a narrow subset of government officials, those within the "control group" or "alter ego" of the government entity that were otherwise subject to the no-contact rule. A lawyer's communication with a low-ranking employee of a represented organization does not violate Rule 4.2 since that employee is not "represented by counsel." Therefore, it would be unnecessary to apply the government contact exception in that situation.

Rule 4.2 of the Virginia Rules of Professional Conduct states that:

[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Also pertinent to the discussion is Comment [7] to Rule 4.2 which discusses a lawyer's communications with employees or agents of a represented organization:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An

> officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

This opinion discusses when a lawyer may permissibly communicate with a "control group" agent or employee of a represented governmental entity because such communication is "authorized by law" for purposes of Rule 4.2.

PRIOR OPINIONS

In Legal Ethics Opinion 1537 (1993) the committee addressed a situation in which an attorney represented parents of a child under disability in a dispute with the child's school and school board over an individualized education program (IEP). Following a request for a due process hearing, the parents' attorney wanted to talk to the teachers and school professionals who have conducted evaluations as well as with the members of the team that develops the IEP. The parents' attorney asked the committee to opine whether he could talk to persons such as teachers and evaluators who are employed by the school board, without the presence or prior approval of the lawyer who represents the school board. The committee applied the "control group" test to communications with constituents of a represented organization now found in Comment [7] to Rule 4.2:

> The committee has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's "control group" and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. *See, e.g.*, LE Op. 347, LE Op. 530, LE Op. 795, LE Op. 801, LE Op. 905; *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

Applying the "control group" test, the committee concluded:

> Thus, in the facts you present, the committee believes that it would not be improper or violative of DR:7-103(A)(1) for the lawyer representing the child and parents to directly contact school board employees who are not in a position to bind the school board to a course of action. The committee is of the opinion that the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist. Opinion 332 (9/88), Ethics Committee of the Kentucky Bar Ass'n, ABA/BNA Law. Man. on Prof. Conduct 901:3905.

However, the committee also added some discussion, in what might perhaps be described as *dicta*:

> With respect to actions involving governmental agencies, the committee has previously opined that the disciplinary rule proscribing communications with adverse parties is not applicable in a case where persons are petitioning a legislative body [LE Op. 529]; and that, where an attorney is involved in litigation against a county board of supervisors, it would not be improper for the attorney to contact other county employees if they are fact witnesses not charged with the responsibility of executing board policy [LE Op. 777]. Furthermore, the committee has also opined that, where information is generally available to the public under the Freedom of Information Act, the status of litigant or litigant's counsel does not disenfranchise one from obtaining such information. *See* LE Op. 1504. *Frey v. Department of Health and Human Services*, 106 F.R.D. 32 (E.D. N.Y 1985).

Significantly, the parents' attorney in LEO 1537 did not seek to have *ex parte* interviews with "control group" employees of the school board, but only the child's teachers and evaluators. But in LEO 529 (1983), which the committee cited in LEO 1537, the committee concluded that:

> Even if an attorney knows that the County Attorney is the legal counsel to the Board of Supervisors, it is not improper for the attorney to contact directly a member of a County Board of Supervisors. DR:7-104 is applicable in an

> antagonistic or adversarial context and is not applicable in a case where persons are petitioning a legislative body.

Thus, LEO 529 appears to authorize direct communications with a "control group" employee of a local government in the context of a citizen's right to petition a legislative body without the consent of counsel for the local governmental organization. However, in LEO 1537, the committee cited LEO 777, which reached an opposite position:

> It is unethical for an attorney involved in litigation against a county board of supervisors to directly contact an individual member of that board on matters relating to the litigation. It would not be unethical for said attorney to contact other county employees if such persons are fact witnesses not charged with the responsibility of executing board policy. [DR:7-103(A)(1); LE Op. 347, LE Op. 459 and LE Op. 530; *See Upjohn Corporation v. United States*, 449 U.S. 383, 101 S. Ct. 667 (1981)]

The committee believes that the question is not whether the government official with whom the attorney wishes to communicate falls within the governmental body's "control group." Rather, the question is whether such a communication is "authorized by law" under Rule 4.2. If the lawyer or her client has a constitutional right to petition government or a statutory right under the Freedom of Information Act, or other law to communicate with a government official, about matters which are the subject of the representation, the communication may be "authorized by law" regardless of whether the contacted government official is in the organization's "control group." If the government official with whom the lawyer wishes to communicate is not within the organization's "control group," it is unnecessary to consider whether the communication is "authorized by law." Because the prior LEOs offer little guidance as to when contact with employees of a represented governmental organization is "authorized by law," the Committee turns to other authorities to address this issue.

ACCESS TO GOVERNMENT OFFICIALS

While clearly there is a "government contacts" exception to Rule 4.2, the contours and boundaries of that exception are not so clear. Comment [5] to ABA Model Rule 4.2 states "[c]ommunications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the

government." Virginia's comments do not include this language but prior legal ethics opinions do recognize some sort of exception for *ex parte* contacts with government employees. Unfortunately, in most jurisdictions including Virginia, the precise reach and limits of the "authorized by law" language in Rule 4.2 is not well-defined.

Leading ethics authorities cite the First Amendment's petition for redress of grievances clause (the "Petition Clause") as the foundation for any government contacts exception to the no-contact rule. Hazard & Hodes § 38.8, at 38-16; Charles W. Wolfram, Modern Legal Ethics § 11.6.2, 614 n. 58 (1986); *see* U.S. Const., amend. 1 ("Congress shall make no law respecting … the right of the people peaceably … to petition the Government for a redress of grievances."). In a representative democracy government, "effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental officials acting on their behalf." *Protect Our Mountain Env't, Inc. v. Dist. Court of Cnty. of Jefferson*, 677 P.2d 1361, 1364–65 (Colo. 1984).

As one commentator explains, the "no-contact rule" seems at odds with a citizen's constitutional right to access her government officials:

> Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the governmental party's lawyer.

Wolfram, *supra* at 614–15; *see also* Utah Ethics Op. 115R, at *2 (1994) (explaining that "it is more important to minimize the difficulties and obstacles that face private parties dealing with the government and its officials than it is to provide government agencies and officials with an insulating layer of attorneys").

ABA Formal Op. 97-408 attempts to define the scope of permissible *ex parte* communications with represented government officials as an exercise of the citizen's constitutional right to petition the government. In that opinion the ABA Standing Committee on Ethics and Professionalism stated:

> Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a

> citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel.

According to the ABA opinion, permissible *ex parte* communication with a represented government official must satisfy three conditions. First, the sole purpose of the communication must be to address a policy issue. Second, the government official whom the lawyer seeks to contact must have the authority to take or recommend action in the matter. Third, the lawyer representing the private party must give the government's lawyer reasonable advance notice of her intent to communicate with such officials. This committee agrees that the first two conditions appropriately balance the interests protected by Rule 4.2 with the interest that all constituents have in access to government and the ability to petition the government for the redress of grievance. However, the requirement of advance notice of the communication is not grounded in the text or comments of Rule 4.2 and therefore the committee does not interpret the rule to require advance notice to the government lawyer of otherwise-permissible communications to government officials.

THE PURPOSE OF THE COMMUNICATION MUST BE TO ADDRESS A POLICY ISSUE

As to the first requirement, courts and state ethics committees have routinely permitted lawyers to inquire with government officials about the rationales behind their policy positions, or to lobby government officials for the passage of a law, statute, or regulation favorable to their clients. The communication may be proper even if the policy or issue relates to the subject of a

claim or controversy in which the client and government are represented by counsel. *See, e.g.*, *United States ex rel. Lockyer v. Haw. Pac. Health*, 490 F. Supp.2d 1062, 1089 (D. Haw. 2007) (holding that defendants' counsel's engagement in *ex parte* email conversations with employees at the Centers for Medicare and Medicaid Services, a represented party, about general policies behind the "incident to" rules under Medicare Part B, as opposed to specific facts concerning the litigation, fell within the government contacts exception to Rule 4.2); *MacArthur v. San Juan Cnty.*, 2001 BL 14076, No. 2:00-cv-00584-BSJ (D. Utah March 6, 2001) (entering a protective order precluding counsel from contacting a county commissioner on an *ex parte* basis regarding anything other than policy matters); Ohio Supreme Court Ethics Op. 92-7, at *3–6 (1992) (concluding that communications by lawyers at public board or commission meetings on behalf of an individual or group of citizens fall within the "authorized by law" exception, but advising the attorney to first identify herself when the communication involves a disputed matter before a represented government party).

For example, the State Bar of South Dakota Ethics Committee held that a lawyer representing the board of a municipality may lobby the city council, mayor, and other city entities and officials to pass an ordinance modifying the board's power and authority without the city attorney's permission pursuant to Rule 4.2. South Dakota Ethics Op. 98-9 (1998). The committee reasoned that efforts to obtain a legislative change in favor of a client do not violate Rule 4.2 because such efforts relate "solely to government officials acting on a legislative question rather than in an adjudicative or negotiation capacity." *Id.* at 1.

In North Carolina, some lawyers successfully obtained a sign variance for their clients from a town board of adjustment and the town appealed. The North Carolina State Bar advised the lawyers that they could write the elected members of the town council to request that they place the desirability of the pending appeal on the agenda for the next town council public meeting. North Carolina Ethics Op. 202, at *1–2 (1995).

Likewise, in *Am. Canoe Ass'n, Inc. v. City of St. Albans*, 18 F. Supp.2d 620 (S.D. W. Va. 1998), defense counsel moved to prohibit the plaintiff's counsel from discussing settlement with members of the city governing body. Denying the motion and citing favorably to ABA Formal Op. 97-408, the court reasoned that "[g]overnment remains the servant of the people even when citizens are litigating against it. Thus, when citizens deal with government agencies, several sorts of direct contact are 'authorized by law' and permissible." *Id.* at 621. Similarly, Alabama Ethics

Op. 2003-03 (2003) advises that a lawyer hired to defend the State Board of Education in a lawsuit filed by a County Board of Education may directly communicate with the members of the County Board to discuss settlement of the pending lawsuit without obtaining the consent or approval of the Board's attorney.

On the other hand, some authorities have enforced the "no-contact rule" where a lawyer has contacted government officials whose statements, acts or omissions may bind their governmental employer, for the purpose of developing evidence for use in litigation, or gaining useful admissions against interest. *United States v. Sierra Pac. Indus.*, 759 F. Supp.2d 1215, 1217 (E.D. Cal. 2011).

The bottom line is that a lawyer communicating with a represented government official must be communicating solely about some policy issue, even if the resolution of that policy issue directly affects or includes the settlement of the lawyer's client's matter. On the other hand, a lawyer may not communicate with a represented government official for the purposes of gathering evidence unless the lawyer has the consent of the government lawyer or the communication is otherwise authorized by law, such as formal discovery procedures that might allow direct contact with a represented person. The fact that a communication begins with an appropriate and authorized purpose does not authorize further communication that is not permitted by Rule 4.2. A lawyer who engages in a communication about policy issues must terminate or redirect the communication if the communication crosses the line into improper evidence gathering.

THE GOVERNMENT OFFICIAL'S LEVEL OF AUTHORITY

Even if the purpose of an intended *ex parte* communication with a government official is to address a policy issue, ABA Formal Ethics Op. 97-408 requires that the communication be made with government officials having authority to take or recommend action in the matter. That is, the official must have the power to redress the client's grievances.

To appreciate the full context of ABA Formal Op. 97-408's level of authority requirement for the government contacts exception, it is helpful to consider Rule 4.2's application to organizations generally. Counsel for an organization, be it a corporation or government agency, cannot unilaterally claim that she represents all employees on current or future matters as a strategic device. North Carolina Ethics Op. 2005-5, at *2 (2006). For

organizations, such as government agencies, the "no-contact" rule only applies to a few categories of employees considered the lawyer's clients because of their authority in the organization or their involvement or participation in the particular matter. *Id.*

Significantly, Rule 4.2 only applies to persons who may be regarded as the "alter ego" of the organization or who fall within the organization's "control group"—any employee who because of their status or position has the authority to bind the organization. *See* Comment [7] to Rule 4.2. Therefore, the level of authority requirement potentially affects only a narrow subset of government officials that were otherwise subject to the no-contact rule. A lawyer's communication with a low-ranking employee of a represented organization would not violate Rule 4.2 since that employee is not "represented by counsel." Therefore, it would be unnecessary to apply the government contact exception in that situation.

To satisfy the level of authority requirement, the government official must have the authority to decide the matter or policy question addressed in the communication, or to grant the remedy being sought by the contact. In other words, the government official must have the authority to take or recommend action on the policy matter at issue, or the ability to effectuate government policy on the matter. This inquiry is obviously fact-intensive. The safest course of action, especially when the communication is not directed at an elected or other high-level official within the government agency, is to conduct the necessary due diligence to confirm the identity of the individual who possesses the requisite level of authority to decide the matter at issue.

ADVANCE NOTICE OF THE PROPOSED COMMUNICATION

Finally, ABA Formal Ethics Op. 97-408 requires the lawyer representing a private party to provide the government's lawyer reasonable advance notice of her intent to communicate with such officials.

The committee concludes that the notice requirement of the ABA opinion is not based on the rule or comments, and is not uniformly accepted by state ethics committees or even the drafters of ABA Formal Op. 97-408. *See* Illinois Ethics Op. 13-09, at *4 (2013) (rejecting the notice requirement because "it is strictly a creation of the ABA's Opinion and is not mandated by Rule 4.2"); ABA Formal Ethics Op. 97-408, at 8 n. 12 (observing that several committee members drafting Formal Op. 97-408 believed that advance notice should be permissive, not

mandatory). The conclusion of the committee is that, under the circumstances addressed in this opinion, communications with government officials are "authorized by law" under Rule 4.2, and the plain text of the rule and comments do not require advance notice to the government's lawyer for a lawyer making a communication that is authorized by law; however, the communicating lawyer must disclose her representational role if communicating on behalf of a client on a matter which is the subject of the representation. *See* Rule 4.3 (dealing with unrepresented persons).

While advance notice of the communication is not required, where uncertainty exists as to whether the intended *ex parte* communication falls within the government contacts exception, providing advance notice to opposing counsel may reduce the chances of provoking a court or disciplinary action if the communication is ultimately challenged. *See, e.g., United States ex rel. Lockyer*, 490 F.Supp.2d at 1089 (finding that counsel's communication fell within the Rule 4.2 exception for communications with government officials, but suggesting that the "better practice" would have been for defense counsel to notify opposing counsel prior to initiating those communications).

CONCLUSION

The First Amendment and other law authorizes certain communications with represented government officials that would otherwise be prohibited by Rule 4.2. Accordingly, a lawyer who represents a client in a dispute with a government body may communicate directly with a represented government official if the purpose of the communication is to address a policy issue, and the government official has the authority to recommend or take action in the matter. The lawyer is not required to give notice to the government lawyer before having such a communication.

BISCHOFF MARTINGAYLE

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December 14, 2016

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Virginia Beach School Board

Re: School discipline case issues; Publicity issues/protocols

Dear Chairman Edwards and Members of the Virginia Beach School Board:

For more than ten years, I have been making a good faith effort to bring school discipline procedure problems to the attention of the Virginia Beach School Board so that appropriate reforms and corrections can be put into place. For your convenient reference, I am attaching letters I wrote dated May 10, 2006, October 2, 2013 and November 18, 2015, as well as a reply letter I received dated May 31, 2006 assuring that certain adjustments to policies and procedures would be implemented.

Based upon my ongoing experience handling school discipline cases, it appears that almost nothing has changed, and none of my 2013 or 2015 suggested reforms have been adopted. Serious problems I previously highlighted continue to persist. The result is not only a denial of basic due process, but it also teaches students and parents that there is no "presumption of innocence" in disciplinary proceedings and that a truly fair process isn't considered important.

For example, in my many years of handling school discipline cases, I have seen students punished in the absence of any physical evidence or live testimony, and with an apparent total reliance on hearsay, rumors and innuendo. In fact, I have never seen a hearing officer or panel of the School Board declare that the evidence of "guilt" is

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insufficient, thus requiring outright dismissal of a matter. This stands in stark contrast to my experience in every court in which I have practiced. Judges often declare evidence to be insufficient and dismiss cases (both criminal and civil), yet the VBCPS administration always seems to prevail in disciplinary cases, no matter how weak the evidentiary presentation is. The "playing field" isn't level - - not even close. This must change, and it is your responsibility to make it happen now.

In 2006, my letter described the problem of *ex parte* communications in which quasi-judicial decision-makers consult with administrators outside of the formal hearing process. I was advised by the School Board Chairman in a May 31, 2006 letter (attached) that this problem would be addressed and stopped, but that has not happened. I have long suspected that *ex parte* communications have continued, and I recently had another experience that I feel I must bring to your attention. Specifically, a hearing officer advised near the conclusion of a disciplinary hearing that he intended to speak with the high school principal (who was present) after the conclusion of proceedings, and then would advise as to his decision. I immediately pointed out that *ex parte* discussions are totally inappropriate. A hearing officer sits in a quasi-judicial capacity. Therefore, he or she should never have discussions, conduct investigations and/or receive any other information or evidence outside of the hearing process itself. When I asked that the principal state her position in the presence of my client and his father, she did not speak and the hearing officer reiterated that he intended to talk to her (and perhaps others) later. After the conclusion of the hearing, I advised the attorney representing VBCPS that I felt that the hearing officer's plans were completely inappropriate and that his comments confirmed my suspicion that hearing officers do not seem to understand the prohibition against *ex parte* communications. Later, I received a telephone call from legal counsel for VBCPS advising that it would be communicated to hearing officers that *ex parte* discussions are to be avoided, but I must say that I have no confidence that sufficient safeguards are going to be put into place without your involvement, and even if you give instructions, I have my doubts because of what I was told more than ten years ago. Students and parents are entitled to have disciplinary cases heard by neutral, well-qualified, highly-trained individuals who understand and follow ethical principles and restraints applicable to due process hearings.

The bottom line is this: I am not sure exactly what degree of overhaul is necessary to repair the broken disciplinary hearing system, but it is obvious to me that drastic measures and a new way of thinking are required. "That's the way we've always done it" isn't good enough.

I have also become aware of another problem that requires your attention and correction. I recently assisted a high school coach with discipline that was imposed against

him for a purported (and disputed) rule violation. During the course of my communications back and forth with legal counsel for VBCPS, the coach was contacted by a reporter for The Virginian-Pilot who apparently received disciplinary information from the VBCPS "Director of Communications". When I inquired of VBCPS legal counsel as to the policies and protocols applicable to sharing employment information in response to media inquiries, School Board Policy 4-15 was cited, but because there had not yet been any reporting about the coach, the exact language of the policy would not seem to apply. When I asked whether the VBCPS "standard protocol" for the release of information is in writing anywhere, legal counsel for VBCPS confirmed it is not. Accordingly, I advised that I planned to ask the School Board to develop a clear written policy or protocol governing responses to media inquiries of this nature, and that you include a policy of notifying employees when they are the subject of media inquiries, including sending the subject employees a copy of whatever written inquiries come in and a copy of whatever VBCPS sends out. A copy of my email exchanges (with the coach's name redacted) and Policy 4-15 are attached for your ease of reference. The School Board, VBCPS administrators and all employees should have a clear understanding of how media inquiries and responses are going to be handled, and no employee should ever be blind-sided by a contact from a member of the press or media who has received information from VBCPS. To me, this is not only common sense, but it is also a matter of basic decency.

I sincerely hope that you will give the matters addressed in this letter and my prior correspondence serious focus and attention. I believe that the VBCPS system provides quality education to our students, but when it comes to student disciplinary processes and media responses to inquiries relating to personnel matters, some basic reforms are long overdue. To the extent that any of you would like to discuss these matters further, I urge you to contact me and I will be happy to speak with you. I appreciate your service to our citizens, and hope that this letter will lead to improvements that benefit everyone concerned.

Respectfully yours,

Kevin E. Martingayle

KM/kls
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May 10, 2006

Daniel D. Edwards, Chairman
Virginia Beach School Board
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705 Rock Creek Court
Virginia Beach, VA 23462

Rita Sweet Bellitto, Member
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Virginia Beach, VA 23456

Jane S. Brooks, Member
721 Hilltop Road
Virginia Beach, VA 23454

Emma L. Davis, Member
1125 Michaelwood Drive
Virginia Beach, VA 23452

Edward F. Fissinger, Sr., Member
412 Beckton Place
Virginia Beach, VA 23452

Dan R. Lowe, Member
4617 Red Coat Road
Virginia Beach, VA 23455

Michael W. Stewart, Member
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Virginia Beach, VA 23452

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1709 Ladysmith Mews
Virginia Beach, VA 23455

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Virginia Beach, VA 23455

Dr. Lois S. Williams, Member
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Lyndon Remias, Member-Elect
3225 Nansemond Loop
Virginia Beach, VA 23456

Pat Edmonson, Member-Elect
401-205 Harbour Point
Virginia Beach, VA 23451

Todd C. Davidson, Member-Elect
2424 Savannah Trail
Virginia Beach, VA 23456

Re: Issues Concerning Disciplinary Cases
and Freedom of Information Act Requests

Dear School Board Members and Members-Elect:

As some of you know, I have been involved in a number of School Board discipline cases lately, and there are some procedural and substantive problems which I believe need to be brought to your attention so that you can take appropriate action right away.

The first thing I have noticed is that there is often an unacceptable delay in issuance of the initial decisions. For example, I am aware of recent cases where alcohol, drugs, or items deemed to be weapons were spotted by police officers conducting parking lot sweeps at certain schools. Students were then brought out of class to their cars and asked to open the vehicles and the items were seized. Often, students confessed to owning the objects, although sometimes they did not know that the items were in the cars. They were then put on "suspension pending investigation". In most cases, there was absolutely no need for any additional period of investigation. All of the relevant facts were immediately available and known, and the delay in making a decision for a recommended expulsion simply created further delay in being able to get into the appeal process. Obviously, this meant additional time away from school, which is detrimental to each student's academic progress. In fact, if a student misses a certain number of days, failure is automatic (unless a waiver is granted). Accordingly, I would urge that you direct the principals to make their initial decisions as quickly as possible, particularly where it is clear that they have the evidence available to do so without further delay.

Additionally, there appears to be some confusion over the degree of discretion the principals have in making recommendations. On the one hand, students and parents are directed to www.vbschools.com to look at the Code of Student Conduct and corresponding School Board policies to the extent that they have any questions relating to disciplinary issues. They are also led to believe that principals have wide discretion. However, I am advised that the principals have certain paperwork which looks something like criminal "sentencing guidelines" which, in fact, appear to afford principals very little discretion in many cases. For example, some conduct mandates an automatic recommendation for expulsion. To the extent that any such mandatory (or even advisory) guidelines are given to the principals for use in disciplinary cases, they should also be published to the parents and students. It is unfair and illogical to tell the parents and students to look at www.vbschools.com for all of the answers, and then tell the principals that there is a different or supplemental set of rules in play. Everyone should be "singing from the same sheet of music". Currently, they are not.

The next problem has to do with how recommendations for expulsion are being handled. Both the Code of Student Conduct and the policies issued by this Board are clear, but are not being followed. When expulsion is the recommendation by the principal to the superintendent, a review by the superintendent or his/her designee is to be conducted, which he/she may uphold or modify. If the recommendation is upheld, then a hearing is to be conducted before a "discipline committee of the School Board." Unfortunately, however, it has been my experience that instead of proceeding directly to a committee or panel of the School Board as policy dictates, expulsion recommendations are routinely being scheduled for the intermediate level step of a hearing with a hearing officer. This has been done on several occasions without any notification to the parents or legal counsel that there has been any modification of the principal's recommendation of expulsion. In the cases I have handled, I have been told that if a hearing with a hearing officer is set (instead of a hearing with a School Board committee), then it is "automatic" that the expulsion recommendation is being or has been reduced to a long-term

suspension. However, if such is the case, then the notification to the parents needs to state explicitly that the matter has been reviewed and that the recommended punishment is being reduced. Further, I believe that the School Board should make it clear to administration that it has an interest in reviewing expulsion recommendations, and that any reduction from expulsion should be based on the merits, and not any effort to keep the School Board from reviewing these kinds of cases. The unnecessary step of going to a hearing officer is often a waste of time and resources, and has the effect of keeping the student in a state of "limbo" much longer than necessary. The bottom line is that if something is serious enough to warrant a recommendation of expulsion, the matter belongs in front of a School Board panel, exactly as policy mandates.

Regarding the manner in which hearing officers and School Board panels conduct hearings, I have serious concerns about "*ex parte*" contacts. In every case of student discipline, there are two sides to the dispute. One side is the administration, and on the other side is the student (and parents). The decision-maker, whether a hearing officer or a School Board committee, should be perfectly neutral and should refrain from any *ex parte* contacts with one side or the other. Otherwise, this not only compromises the fairness of the process, but it also violates the "due process" guarantees provided to the parents and students in the Code of Student Conduct and corresponding School Board policies. From what I have seen, it appears to be routine that administrators consult with hearing officers and School Board committee members after hearings are held, without the parents, students and their legal counsel (if any) present. It is critical to remember that hearing officers and School Board committee members are sitting in a quasi-judicial capacity, and therefore should observe the same type of rules relating to *ex parte* contacts as judges do in the courtroom. Specifically, judges do not meet with one side of the dispute before, during or after cases are heard, nor do they allow one side of the dispute to be present in a room while deliberations are underway. From my experience and what I have been told by other attorneys, certain administrators have habitually spoken with the decision-makers during the deliberative process, and notwithstanding complaints about this and reassurances that it would stop, I have no indication that the practice has ended. This needs to be corrected by the School Board immediately. The failure to do so could very well open a Pandora's Box of civil rights litigation caused by denial of Due Process.

Regarding the timing of decisions being announced, when hearing officers or School Board committees are able to announce a decision right away, there is no need to tell the students and parents that a decision will be mailed out in the next several days. Once again, the goals of the disciplinary process include keeping students in school and avoiding absence-related failures, whenever and wherever possible. Therefore, just as in court, if the decision-maker is capable of making a decision "on the spot", the decision should be announced right then and there. Additionally, this has the added benefit of reassuring the parents and students that there are not any after-the-fact, *ex parte* contacts occurring.

As for the scheduling of hearings before hearing officers and School Board committees, I have on numerous occasions requested available dates so that I can consult with my clients and witnesses and coordinate calendars. Notwithstanding such requests,

in every instance I can recall, one date was simply announced as the date of the hearing. This is not the way that scheduling should work. Especially in cases where legal counsel is involved, the coordinators for the hearing officers and School Board committees should provide available dates and permit legal counsel and parents/students to select the best date to ensure that everyone relevant is available. Again, the goal is to prevent delay, and those in charge of coordinating the setting of hearings should not be afforded unilateral power or discretion. The scheduling frustration is compounded by the fact that the current mechanism for setting hearings calls for the Office of Student Leadership to be in charge of the process. However, I am also advised that the standing designee of the superintendent is the director of the Office of Student Leadership, and therefore, he is already involved as the representative of administration in the disciplinary process. In fact, this same person reviews cases, makes initial decisions, etc. It is inappropriate to allow the administration's representative to also serve as the gatekeeper of having hearings coordinated and set, just as it would be unfair to let one side of a case in litigation have unilateral control over when a matter is set for trial, who the judge will be, and so forth. The School Board needs to have its own administrative support staff - - completely separate from school administration - - coordinate all disciplinary hearings. Once again, this division of responsibilities prevents inappropriate *ex parte* contacts and reassures participants in the disciplinary process of neutrality and fairness.

An additional concern that I have relates to the inability to get certain types of matters heard by the School Board. I have a disagreement with the City Attorney's office over whether it is legal for the School Board to delegate final and unreviewable decision-making power to school administrators where substantial student rights and opportunities are involved, but notwithstanding, legal or not, it simply makes for bad policy to delegate important final authority to administrators with no opportunity for students and parents to come to the School Board to be heard as a part of the appeal process. One specific instance involved a declaration by a principal that a student is no longer in "good standing" for the purposes of VHSL interscholastic competition eligibility. Under the current set of rules, there is no way to take this matter to a committee of the School Board or to the full School Board. For a student with possible scholarship opportunities, the declaration of a student being not in "good standing" can be devastating and can cost his/her family $100,000 or more. Moreover, VHSL interscholastic competition eligibility relates not only to athletics, but also many academic pursuits such as the "scholastic bowl", debate, drama competitions, etc. So an interscholastic competition eligibility ruling can have direct and long-lasting academic consequences, with no opportunity for a student or parent to be heard by the ultimate authority (i.e., the School Board). This injustice needs to be corrected.

Regarding the school system's legal counsel, this is an area of real confusion and concern. I have seen instances where the same attorney has helped the administration present and argue its disciplinary case against a student at various levels below the School Board, while also advising hearing officers and the Board members (i.e., the decision-makers). This creates an irreconcilable conflict of interest and also looks terrible to the students and parents. In my view, the School Board's legal counsel should always remain

neutral and assist the decision-makers. I do not believe it is appropriate for them to "prosecute" cases, and it should be obvious that they cannot both prosecute and advise the hearing officers or Board members as they decide cases. The Board should clarify with legal counsel what the Board expects in terms of representation/advice, and then make that known to school administration and the public at large. This relationship is simply too important to leave in limbo or allow to remain murky and unclear.

Finally, I have run into frustration getting information pursuant to the Freedom of Information Act. I have had numerous e-mail exchanges where I have requested information that surely exists in written documents, only to be told that I need to ask someone else or to have the request ignored altogether. The following block quote from a FOIA Advisory Council opinion provides a succinct summary of the obligations of the custodians of public records, which includes school administrators and other personnel:

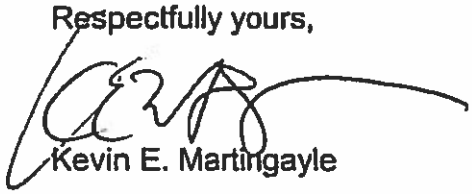
> Subsection A of §§ 2.2-3704 states that [e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying. In making a request for records, subsection B of §§ 2.2-3704 only requires that a request identify the requested records with reasonable specificity. There is no need to make reference to FOIA in order to invoke its provisions, nor is there a requirement that a FOIA request be in writing. Subsection B of §§ 2.2-3704 also states that in responding to a request, the public body must respond within five working days and must either provide the records in their entirety, respond in writing that the records will be withheld in whole or in part and cite the applicable statutory exemption that allows the records to be withheld, or state in writing that it is practically impossible to respond within five working days, which will give the public body seven additional working days to respond. In the facts you present, it appears that the initial verbal request for records that you made on April 22, 2004 constituted a FOIA request, and therefore invoked the requirements of FOIA. The custodian of the records may ask that you put your request in writing, for administrative purposes, but cannot refuse to honor your request because it is a verbal request or require you to put your request in writing.

Virginia Freedom of Information Advisory Council
Commonwealth of Virginia AO-18-04 August 31, 2004

Rather than scurry off to court to complain about the FOIA problems I have encountered, I thought it best to bring this problem to your attention so that you can issue an appropriate directive to solve the problem. I understand that the school administration generally filters FOIA requests through one individual (presumably to ensure compliance with the law), and I have no problem with that, but the burden should not be on me to contact this one point person. Complying with FOIA is as simple as receiving the request, handling it internally as deemed appropriate and advisable, and then providing all of the requested information in a timely manner. Requesters of public information cannot be made to jump through a series of hoops and over a set of hurdles in order to get information that belongs to the public.

In closing, I would like to thank each of you for your time and attention in reviewing this correspondence. I apologize for its length, but I can tell you that I have been hearing a lot of complaints about the disciplinary processes and difficulty getting clear information relating to it and other school matters. Of course, you cannot fix problems of which you are unaware, so my purpose is to bring to you information you need to know, and I promised several past clients that I would bring their concerns to you. To the extent that any of you would like to talk with me in more detail, I would be happy to speak with you and I invite you to call. With kind regards, I am,

Respectfully yours,



Kevin E. Martingayle

KM/kls

VIRGINIA BEACH CITY PUBLIC SCHOOLS

AHEAD OF THE CURVE

May 31, 2006

Kevin E. Martingayle, Esq.
Stallings and Bischoff, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, VA 23451-4160

Re: Issues Concerning Disciplinary Cases and Freedom of Information Act Requests

Dear Mr. Martingayle:

On behalf of the School Board I wish to thank you for your letter of May 10, 2006, concerning the referenced issues. The School Administration has already implemented procedures to attempt to stop ex parte communications regarding disciplinary cases. Additionally, the School Board is examining the other issues you have raised and, where appropriate, we will direct that adjustments to policies and procedures be implemented to further assure that all disciplinary proceedings are conducted fairly. We will also ensure that all FOIA requests continue to be responded to appropriately.

Sincerely,

Daniel D. Edwards
Chairman

BISCHOFF MARTINGAYLE

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Reply to Virginia Beach office
E-Mail: martingayle@bischoffmartingayle.com
Direct Dial (757) 416-6009

October 2, 2013

Daniel D. Edwards, Chairman (dedwscolbd@aol.com)
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Leonard C. Tengco (leonard@leonardtengco.com)
Carolyn D. Weems (carolyn4kids@cox.net)
Virginia Beach School Board

Re: Recent news coverage of school disciplinary cases; suggestions for improvements

Dear Chairman Edwards and Members of the Virginia Beach School Board:

As all of you are undoubtedly aware, the School Board has received some recent media attention calling into question the fairness of certain disciplinary procedures and outcomes. For many years, I have represented students involved in disciplinary cases, and I have seen first-hand some of the problems with the current system. Without focusing on any particular case, and in the interest of improving disciplinary procedures for the benefit of all students and parents, I am writing you this letter to share three particular suggestions for your consideration.

1. **To the greatest extent possible, eliminate hearsay from disciplinary proceedings.**

   Hearsay is inherently unreliable and that is why it is generally excluded from court proceedings. Hearsay cannot be questioned or cross-examined, and is often more prejudicial to the student than probative of any material fact. I have been told before that disciplinary cases involve "relaxed standards of evidence", but a disciplinary case should not involve a "relaxed effort to find the truth". Unfortunately, the unrestrained use of hearsay evidence

frequently results in mere suspicion being substituted for meaningful evidence.

Whenever possible, live witnesses should be called to testify. I understand that there may be some restrictions on compelling students to testify, but the option of testifying should be presented to students who are witnesses. The bottom line is that the best available evidence should be presented. In cases where an accused student has consistently denied the wrongful act(s) alleged, live testimony from the accused student should nearly always trump any hearsay accusations. Will this sometimes allow a "guilty" student to escape punishment? Yes. But it is a fundamental notion of justice in the United States that it is better to allow some "guilty" citizens to escape punishment than it is to have even one "innocent" person suffer a wrongful conviction or other penalty. The same principle should hold true in disciplinary cases.

Pursuant to the Virginia Constitution, students and their parents have the constitutional right to a public school education. Before that right may be infringed in any way (including imposition of suspensions or transfers to other schools), the evidence against an accused student should be of the highest possible quality, and the competent evidence must demonstrate that the infraction actually occurred. Currently, the procedures are defective. I have represented students who appeared before hearing officers with live witnesses and who testified clearly and unequivocally that certain alleged misconduct did not occur. Nevertheless, they were found "guilty" based upon short, printed "eye witness accounts" from individuals I was unable to cross-examine. By comparison, that type of evidence would not be sufficient for someone to be convicted of "dog at large" or a mere parking ticket. Accordingly, it should not be deemed sufficient to prove a disciplinary case where a constitutional right is involved. Higher standards must prevail.

2. **No disciplinary or academic history should be presented to a hearing officer or the School Board when "guilt or innocence" is being considered.**

Currently, hearing officers and the School Board are presented with a package of information at the very beginning of a disciplinary case, and the packet includes not only information about the alleged misconduct, but also disciplinary and academic history. This is inappropriate because it carries a substantial risk that it will create prejudice against the subject student. By way of comparison, in court proceedings, a record of past traffic or criminal

convictions is never presented to a judge unless and until a defendant is found guilty of the allegation that brings the defendant before the court. Why? Because the negative history is more prejudicial to the defendant than probative of the issue of guilt or innocence on the current charge. The same analysis should apply to school disciplinary cases. There is a substantial risk that a student with a history of discipline will be labeled a "bad kid" and strongly suspected of being "guilty" solely because of past problems. That is obviously and fundamentally unfair.

The solution to this problem is to bifurcate the proceedings and separate the packet of materials. No hearing officer and no member of the School Board should ever look at the disciplinary history unless and until it is first determined that the student actually committed the alleged offense. In my view, the accused student's grades and teacher feedback should be handled the same way as the disciplinary record. That type of information is relevant only to punishment, and not "guilt or innocence".

A disciplinary hearing should involve a simple two step process. First, determine whether the alleged offense actually occurred. If so, proceed with an analysis of the school record, including past discipline, grades and teacher feedback. If the student is "exonerated", there is no need to review anything else.

3. **Expedite all suspensions and expulsions.**

Currently, there is often too much of a delay in proceeding with a hearing and obtaining a decision. Many students already struggle to keep up with their academics. If any suspension or expulsion is put into place before a hearing is conducted, a hearing needs to proceed forthwith, unless the delay is requested by the accused student for purposes of preparation for the proceeding. When possible, hearing officers and the School Board should deliberate immediately while the student and parent(s) are waiting, and then announce the decision. I know that there is an effort to have these matters scheduled, heard and resolved promptly, but further improvements are needed. Again, a constitutional right is involved, and any infringement on that right should include the best system of "due process" and "equal protection" that you are able to provide.

In conclusion, I would like to express to you that I appreciate the valuable service that each of you provides to the City of Virginia Beach and its residents. I am aware that nearly all of the current procedures have been in effect for a long time, and probably pre-date the beginning of your service as a member of the School Board. However, I do not

believe that we should ignore any longer some of the deficiencies that exist in the current procedures. "That's the way we have always done it" is never a justification for continuing with flawed policies. The three reforms I have suggested in this letter should be easy to implement and will advance the goals of fairness, accuracy and protection of constitutional rights.

If any of you have any questions or would like to discuss this further, please feel free to contact me. Because I do not currently represent any student with a pending disciplinary case, you may be assured that this letter is not written in an effort to gain an advantage in any particular case. I am writing this letter solely in an effort to bring about positive change.

Once again, thank you for your service. With kind regards, I am,

Respectfully yours,

KM/kls

Kevin E. Martingayle

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Reply to Virginia Beach office
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November 18, 2015

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Carolyn D. Weems (Carolyn.Weems@vbcpsboard.com)
Virginia Beach School Board

Re: School discipline case issues

Dear Chairman Edwards and Members of the Virginia Beach School Board:

On October 2, 2013 - - more than two years ago - - I sent the attached letter to all of the members of the Virginia Beach School Board. The purpose of the letter was to identify areas of concern in school discipline matters and suggest simple, reasonable solutions. Unfortunately, I do not believe that any of the suggestions have been implemented, so I am re-sending this letter to all of the current members of the School Board because it is my understanding that there is a "School Discipline Task Force" that is studying areas of concern and, presumably, will present a list of suggested changes. While any such recommendations are being studied, I respectfully suggest that you should also reconsider my October 2, 2013 letter.

As you think about ways to improve school discipline processes, I believe that you should also take a look at the qualifications of school discipline hearing officers and the training that they receive. In a recent case, a hearing officer heard a matter in which the evidence showed that a 9th grade student unknowingly consumed a sports drink that had been spiked with alcohol by a fellow student, causing the child to become became severely intoxicated and hospitalized. The hearing officer found that the student told the truth in the

hearing when he explained that he did not realize what he was drinking. However, instead of recognizing that this child was a crime victim and did not deserve any form of discipline, the hearing officer concluded that he must attend the "Substance Abuse Intervention Program" at Renaissance Academy for two weeks (or enter an equivalent program) before being returned to his regular high school. While I believe that the hearing officer meant well, this is the kind of legally unsupportable decision that I have seen made many times over the years that I have represented students. All too often, there appears to be a presumption of guilt, not innocence. This is a serious problem. The simple fact is that we require far greater training of judges before they are allowed to decide even the smallest of cases (e.g. littering, parking tickets, violation of City ordinances relating to noise or length of grass, etc.), and yet we allow under-qualified and undertrained hearing officers to decide matters that can impact a child's permanent academic record, which, in turn, can impact many future opportunities. Students and their families deserve better.

In short, it is incumbent upon the School Board to take control of this situation, improve disciplinary processes, and make sure that hearing officers possess all of the qualifications and training necessary to render the most accurate decisions possible. Access to a public school education is a right enshrined in the Constitution of Virginia. As such, it deserves the best protection possible, including in disciplinary processes.

Should any of you have any questions or concerns whatsoever, please do not hesitate to contact me. I appreciate your consideration of this correspondence and your continued efforts on behalf of our public school system. With kind regards, I am,

Respectfully yours,

Kevin E. Martingayle

KM/kls
Attachment

Kevin Martingayle

From: Kevin Martingayle
Sent: Friday, December 02, 2016 2:31 PM
To: 'Kamala H. Lannetti'
Cc: Dannielle C. Hall-McIvor
Subject: RE: [redacted]

Well that should most certainly be changed, and quite aside from this particular case, I plan to ask the School Board to do two things:

1) Develop a clear written policy or protocol governing responses to media inquiries of this nature; and
2) Include a policy of notifying employees when they are the subject of media inquiries, including sending the subject employees a copy of whatever written inquiries come in and a copy of whatever VBCPS sends out.

Employees shouldn't be blind-sided like Coach [redacted] was in this instance. If you are asked for your thoughts, I hope you will concur.

Have a nice weekend.

Kevin E. Martingayle, Esquire
Bischoff Martingayle, P.C.
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Virginia Beach, Virginia 23451
www.bischoffmartingayle.com
www.va-appeals.com
Direct Dial: (757) 416-6009
Direct Facsimile: (757) 428-6982
Eastern Shore Local Phone: (757) 787-7788

From: Kamala H. Lannetti [mailto:KLannett@vbgov.com]
Sent: Friday, December 02, 2016 2:26 PM
To: Kevin Martingayle
Cc: Dannielle C. Hall-McIvor
Subject: RE: [redacted]

It is not in writing. There is no written policy or regulation concerning notification of when there is a media inquiry.

Kami

Kamala H. Lannetti
Deputy City Attorney
Virginia Beach City Attorney's Office
2512 George Mason Drive
Municipal Center, Building 6
Virginia Beach, Virginia 23456
(757) 263-1215
(757)263-1843 facsimile
klannett@vbgov.com

From: Kevin Martingayle [mailto:martingayle@bischoffmartingayle.com]
Sent: Friday, December 02, 2016 2:25 PM
To: Kamala H. Lannetti
Cc: Dannielle C. Hall-McIvor
Subject: RE: [redacted]

Is the "School Division's standard protocol" in writing anywhere? It is not mentioned in the policy.
Is there any protocol regarding alerting personnel when they are the subject of a media inquiry, or does VBCPS just send out information and let personnel learn about it when reporters contact them?

Kevin E. Martingayle, Esquire
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Eastern Shore Local Phone: (757) 787-7788

From: Kamala H. Lannetti [mailto:KLannett@vbgov.com]
Sent: Friday, December 02, 2016 2:08 PM
To: Kevin Martingayle
Cc: Dannielle C. Hall-McIvor
Subject: FW: [redacted]

Kevin,

Attached is the only written communication about [redacted] WTKR called and the same information was provided.

It is the School Division's standard protocol to release information concerning an employee's employment status (hired, retired, promoted, resigned, suspension, dismissal, leave). Information concerning the reasons for the status may be released as required by law or in accordance with School Board Policy 4-15. http://www.vbschools.com/policies/4-15_p.asp.

Kami

Kamala H. Lannetti
Deputy City Attorney
Virginia Beach City Attorney's Office
2512 George Mason Drive
Municipal Center, Building 6
Virginia Beach, Virginia 23456
(757) 263-1215
(757)263-1843 facsimile
klannett@vbgov.com

From: Lauren W. Nolasco [mailto:Lauren.Nolasco@vbschools.com]
Sent: Friday, December 02, 2016 1:57 PM
To: Kamala H. Lannetti
Subject: FW: [redacted]

Here you go.

Lauren Nolasco, APR
Director of Communications
Virginia Beach City Public Schools
Direct Line: 757-263-1234
Find and follow us on Facebook, Twitter and Instagram.

Put Students First. Seek Growth. Be Open to Change. Do Great Work Together. Value Differences.

From: Lauren W. Nolasco
Sent: Thursday, December 01, 2016 3:55 PM
To: 'Jami Frankenberry' <jami.frankenberry@pilotonline.com>
Subject: RE: [redacted]

No problem.

Lauren Nolasco, APR
Director of Communications
Virginia Beach City Public Schools
Direct Line: 757-263-1234
Find and follow us on Facebook, Twitter and Instagram.

Put Students First. Seek Growth. Be Open to Change. Do Great Work Together. Value Differences.

From: Jami Frankenberry [mailto:jami.frankenberry@pilotonline.com]
Sent: Thursday, December 01, 2016 3:55 PM
To: Lauren W. Nolasco <Lauren.Nolasco@vbschools.com>
Subject: Re: [redacted]

Thank you, Lauren. I appreciate it.

On Thu, Dec 1, 2016 at 2:55 PM, Lauren W. Nolasco <Lauren.Nolasco@vbschools.com> wrote:

> Hi Jami –
>
> I can confirm that on Nov. 14 [redacted] was suspended as the [redacted] coach. This suspension will run through Dec. 11.

Thanks,

Lauren

Lauren Nolasco, APR
Director of Communications
Virginia Beach City Public Schools
Direct Line: 757-263-1234
Find and follow us on Facebook, Twitter and Instagram.

Put Students First. Seek Growth. Be Open to Change. Do Great Work Together. Value Differences.

From: Jami Frankenberry [mailto:jami.frankenberry@pilotonline.com]
Sent: Thursday, December 01, 2016 12:50 PM
To: Lauren W. Nolasco <Lauren.Nolasco@vbschools.com>
Subject: [redacted]

Hi Lauren:

Hope you are well. Can you give me any information on [redacted] suspension? I'm told it is for at least a month.

Thanks,

Jami

--

Jami Frankenberry

Assistant Sports Editor

The Virginian-Pilot and 757teamz.com

(757) 446-2376

Twitter @JamiVP

--
Jami Frankenberry
Assistant Sports Editor
The Virginian-Pilot and 757teamz.com
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Policies and Regulations

School Board of the City of Virginia Beach
Policy 4-15

PERSONNEL

Personnel Records

A. Confidentiality of Files

The School Board will generally protect the confidentiality of personnel files, personnel references, academic credits and other similar documents, but reserves the right to release such information in accordance with law and written School Board policy or regulation.

In the event that an employee or former employee engages in conduct which becomes the subject of public concern as reported in the news media, or such person otherwise discloses matters related to his/her employment to the news media, the School Board authorizes the Superintendent or designee to disclose accurate and relevant information regarding such person's actions and employment.

B. Definition of Personnel Files

"Personnel file" means, for the purposes of this Policy, any and all memoranda, entries or other documents included in the employee's file as maintained in the central school administration office or in any file on the employee maintained within a school in which the employee serves. The term "official personnel file" shall only pertain to that personnel file maintained by the Department of Human Resources.

C. Contents of Files

1. The official personnel file of an active employee should include the following

   - Original application or resume resulting in employment;
   - Employment Agreements;
   - Evaluations, Observations, and Assessments including rebuttal information submitted by the employee;
   - Correspondence to include letters of reprimand/commendation, transfer/promotion requests, academic leave & military leave orders;
   - Performance Improvement Plans;
   - Contract information;
   - Change of name or address;
   - Certification/licensure information;
   - DMV transcripts;
   - Salary supplement or stipend information;
   - Handbook and policy acknowledgements;
   - Sick leave bank membership

   Except for the documents identified above, only material deemed relevant to the employment status shall be added to the official personnel file.

2. The following are not part of the official personnel file, but will be maintained in separate, confidential files:

- Immigration (I-9) forms;
- Documents in the grievance process;
- Discrimination, EEOC, and employee relations investigation case files;
- Records of arrests, convictions, background investigations, or security clearance information;
- Recruitment and selection records;
- Letters of recommendation for employment and/or references on applicants;
- Medical records, including ADA accommodation requests and Short-term and Long-term disability claims;
- Drug and Alcohol test results;
- Information regarding Workers' Compensation claims and Accident Investigations;
- Copies of state and federal withholding forms (housed in the Payroll Office);
- Benefits enrollment forms (housed in the Consolidated Benefits Office);
- Exit interviews;
- Unemployment Compensation material.

D. Access to File

1. Access by the Employee

An employee may review the contents of his/her personnel file during regular office hours and at the convenience of the employee charged with the safe-keeping of the records or may review by mail if the person makes a written request with proper identification that the School Division has reasonable assurance to be accurate. A reasonable charge may be imposed if copies must be made and/or delivered to the requestor. Employees reviewing the files in person may be accompanied by a person of his/her choosing. If the employee gives notice that he/she wishes to challenge, correct or explain information in his/her personnel records, the School Division will investigate the concern and document the current status of the information. If the information is found to be incomplete, inaccurate, not pertinent, not timely, or not necessary to be retained, it will be corrected or purged from the records. The School Division retains the authority to determine what information is necessary and pertinent to be included in personnel files subject to the employee's right to appeal that decision in accordance with this Policy. The employee may not use this procedure to appeal: test scores; decisions to hire; promote; demote; non-renew; dismiss; or otherwise discipline an employee; evaluations or observations where discretion was fairly exercised by the person conducting such evaluations or observations, wages or benefits, work assignments, or other matters subject to grievance procedures. The School Division reserves the right to maintain records removed from personnel files in confidential files for the purpose of demonstrating compliance with this Policy or applicable law or regulation. If material is removed from a personnel file, the School Division will furnish past recipients of information from these records with notification that the items has been purged or corrected. The School Division will make reasonable efforts to confirm that such notification was received. If the School Division's investigation of the employee's complaint, does not resolve the dispute, the employee's may file a statement of not more than 200 words setting forth his/her position. Such statement will be attached to the disputed record and will be provided to any past recipients of the disputed record. Review and challenge of personnel files will be done in accordance with applicable law or regulation as amended.

2. Access by Other Persons

a. Access with permission of the Employee

Upon written permission by the employee, other persons shall be permitted to review the employee's personnel file. A new authorization shall be required for each review.

b. Access Without Consent of the Employee

The following persons may review an employee's personnel file without the consent of the employee:

1) Administrators and supervisors who have line responsibility over the employee.

2) Members of the School Board when the School Board is in session and review is necessary for a matter pending before the School Board.

3) A person with a court order, valid subpoena; or

4) Other persons authorized by federal or state law or regulation.

E. Disclosure of Employment-Related Information to Specific Current or Specific Prospective Employers

In response to an inquiry made by a specific current or specific prospective employer, the Superintendent or his designee may provide accurate information concerning the professional conduct, job performance, and/or reasons for separation or discipline of a current or former employee. At the Superintendent's or his designee's discretion, the information will be released in accordance with regulations developed by the Superintendent and may be limited to: 1) whether the employee is eligible for rehire; 2) whether the employee was terminated, resigned, or retired; or 3) whether the employee left for personal reasons. A current or former employee's entire personnel record may be released to a specific current or specific prospective employer upon receipt from the employee of a signed Release of Information form.

Legal Reference:

Code of Virginia §2.2-3700 *et seq.*, as amended. The Virginia Freedom of Information Act.

Code of Virginia §2.2-3800 *et seq.*, as amended. The Government Data Collection and Dissemination Practices Act.

Code of Virginia, § 8.01-46.1 as amended. Disclosure of employment-related information; presumptions; causes of action; definitions.

Editor's Note

For Disclosure of personal information upon resignation, see Policy 4-16.

Adopted by School Board: July 13, 1993 (Effective August 14, 1993)
Amended by School Board: April 17, 2001
Amended by School Board: August 2, 2016

A GUIDE TO STUDENT DISCIPLINE

Dannielle Hall-McIvor
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A. Overview

Under federal and state law, school divisions may adopt reasonable rules and regulations to control student conduct. These rules are necessary to ensure order and safety and to set the parameters of conduct. A school board may adopt and enforce reasonable rules of student conduct consistent with constitutional, statutory, and regulatory provisions.

B. Due Process

1. The Fourteenth Amendment to the United States Constitution provides "[n]o State shall… deprive any person of life, liberty, or property, without due process of law." This provision applies to school divisions.

2. Due process is required before the deprivation of life, liberty, or property.

3. Education is not a fundamental right under the U.S. Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). But a student does have a property interest in education by state law.

    - Substantive due process

        - Prevent arbitrary and abusive government power
        - Reasonably related to legitimate state interest
        - The school board's interest in student discipline matters is to maintain order in the school and protect students
        - The school must show its rules are reasonably related to these purposes to pass the substantive due process test

    - Procedural due process

        - In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held for the first time that a student's entitlement to a public education is a property interest protected by the Fourteenth Amendment's Due Process Clause. The Supreme Court applied the concepts of procedural due process to student disciplinary measures.

        - Before taking away a student's liberty interest or property interest through suspension or expulsion, the school's procedures must include:

            - Oral or written notice of the charges
            - An opportunity to explain, deny, or admit the charges, or evidence
            - A decision based on the evidence presented

C. Types of Discipline—Definitions

1. "*Alternative education program*" includes night school, adult education, or any other education program designed to offer instruction to students for whom the regular program of instruction may be inappropriate. Va. Code Ann. § 22.1-276.0.

2. *"Exclusion"* means a Virginia school board's denial of school admission to a student who has been expelled or has been placed on a long-term suspension of more than 30 calendar days by another school board or a private school, either in Virginia or another state, or for whom admission has been withdrawn by a private school in Virginia or another state. Va. Code Ann. § 22.1-276.01.

3. *"Expulsion"* means any disciplinary action imposed by a school board or a school board committee (at least three members), as provided in school board policy, whereby a student may not attend school within the school division and is ineligible for readmission for 365 calendar days after the expulsion. Va. Code Ann. § 22.1-276.01.

4. "*Long-term suspension*" means any disciplinary action whereby a student is not permitted to attend school for 11 to 45 school days. Va. Code Ann. § 22.1-276.01.

5. "*Short-term suspension*" means any disciplinary action whereby a student is not permitted to attend school for a period not to exceed 10 school days. Va. Code Ann. § 22.1-276.01.

D. Types of Discipline—Actions

The form of discipline imposed depends on the infraction, the disciplinary record of the student, and other circumstances. Potential discipline measures span the continuum from a simple verbal reprimand to expulsion.

1. Short-Term Suspension (less than 10 school days)

   · Under *Goss*, the Supreme Court decided that for an out-of-school suspension of less than ten days, sufficient due process is afforded if the hearing is conducted spontaneously and informally. The student must receive oral or written notice of the charges, an opportunity to explain, deny, or admit the charges, or evidence, and a determination based on the presented evidence.

   · In Virginia, a student may be suspended by a principal, assistant principal, or teacher after receiving oral or written notice of the charges, and, if the student denies the charges, an explanation of the facts known to school staff and an opportunity to present the student's version of events. Va. Code Ann. § 22.1-277.04.

   · In addition, the student's parent or guardian must receive notice of the length of the suspension, information about community-based educational programs, alternative education programs, and the student's return to school when the term of the suspension expires. Virginia Code Ann. § 22.1-277.04

2. Long-Term Suspension (more than 10 days)

- A student may be suspended from school for 11 to 45 school days. Va. Code Ann § 22.1-277.05.

- Written notice to the student and the student's parent or guardian is required. The written notice must inform the student and the student's parent or guardian of the proposed disciplinary action, articulate the basis of the proposed disciplinary action, and advise the student, and parent of the right to a hearing before a school board, school board committee, or the superintendent, or designee as set out in school board policies and regulations. Virginia Code § 22.1-277.05.

- If school board regulations provide for a hearing by the superintendent or designee, the regulations must also provide for a hearing by a school board committee (at least three members). Va. Code § 22.1-277.05.

3. Expulsion

    - In Virginia, a student may be expelled after giving the student and the student's parent written notice of the proposed disciplinary action, the basis of the proposed disciplinary action, and the right to a hearing before a school board committee (at least three members). Va. Code § 22.1-277.06.

    - If the school board committee's determination is not unanimous, the student, or the student's parent or guardian may appeal the committee's decision to the full school board. Va. Code § 22.1-277.06.

4. Alternative educational placement

    - A school board may adopt regulations authorizing the superintendent or designee to require students attend an alternative educational placement consistent with the due process requirements for suspensions. Va. Code Ann. § 22.1-277.2:1.

    - In Virginia Beach City Public Schools, an expulsion recommendation can be reduced to a recommendation for placement at an alternative education program to permit the student to receive continued educational opportunities in a more restrictive environment.

VIRGINIA BEACH CITY PUBLIC SCHOOLS
STUDENT DISCIPLINE PROCEDURES

Dannielle Hall-McIvor
Associate City Attorney
Virginia Beach City Attorney's Office

Definitions

- **Short term suspension** – 10 days or less
- **Long term suspension**- 10 days or more
- **Expulsion**- ineligible for readmission for 365 days
- **Exclusion** – refusing admission for student expelled or long term suspended from another school division or public school
- **Alternative education**- instructional programming when regular program is inappropriate

Due process in student discipline

- *Goss v. Lopez*- United States Supreme Court determined that students have a property interest in public education after 10 days out of school and certain due process is required
  - Notice of reason for disciplinary action
  - If denies, then explanation of evidence
  - Opportunity for student to provide information

  Not required- confrontation of witnesses, attorneys, rules of evidence

VBCPS Disciplinary Levels

- 1 Verbal warning/reprimand
- 2 Conference with student/parent
- 3 Intervention- referral, behavior contract
- 4 In School Suspension 1- 4 days/CHOICES
- 5 Out of School Suspension 1-5 days
- 6 Out of School Suspension 6-10 days
- 7* Long term suspension- out of school up to 365 days
- 8* Expulsion- out of school permanently but can petition to reenter after 365 days- no automatic right to renter. Still subject to compulsory attendance

Code of Student Conduct

- Students receive copy of Code of Student Conduct
  - Parents must receive a copy and sign beginning of school year
  - Students discuss in class, in student handbooks, assemblies
  - Available on School Board website
- Staff uses Disciplinary Guidelines
  - More extensive explanation of offenses
  - Each Rule has many offenses
  - Discipline may be different based on grade level

Short Term Suspensions

- 10 school days or less
- 1- 5 days - Principal can impose
- 5-10 days - Principal must get approval from Office of Student Leadership

Long term suspension

- 10 school days to 365 days after suspension begins
- Hearing with an Office of Student Leadership Hearing Officer by the tenth day out of school
- Appeal must be noted within 5 days
- School Board Discipline Committee hearing generally within two weeks to 30 days
  - Full School Board Hearing only if the Discipline Committee is not unanimous

Office of Student Leadership
Hearing Officer stage

- 1,000-2,000 hearings per year
  - On average only 60-80 are appealed
- Student Discipline package must be presented at least one day before hearing
- Hearings take place at Laskin Road Annex
  - Approximately 30 minutes
  - Principal or Assistant Principal present case
  - Focus on student's academic needs
  - Student will be offered some form of return to an academic placement*
  - Student's educational placement becomes where the Hearing Officer assigns the student. Failure to attend = truancy

Expulsion

- Actual expulsions are rare- less than 10 per year
- Expulsion recommendations are common, but are generally reduced by Office of Student Leadership
  - If the case is sent to a Hearing Officer, it has already been reduced to long term suspension
- Expulsions can only be heard by a School Board Student Discipline Committee
  - Generally- guns, serious drug offenses, very violent acts or threats

Mandatory Expulsion Recommendations

- Arson or attempted arson;
- Assault and Battery of an employee or student;
- Possession, use or sale of a firearm, pneumatic weapon, or dangerous weapon;
- Use, possession, being under the influence of, selling, bringing, giving, distributing or passing to another individual or possessing with intent to sell, give, or distribute alcohol, marijuana, controlled substances or imitation controlled substances;
- Extortion, attempted extortion, robbery, and/or larceny, burglary, motor theft;
- Sex offenses, obscene phone calls, sexual assault, sexual battery, and inappropriate sexual behavior;
- Hazing; Initiation of another student through abuse and humiliation so as to cause bodily injury;
- Kidnapping or other serious criminal violations.
- Possession, use, distribution, sale, lighting or discharge of explosive devices, except poppers;
- Homicide;
- And other good and just cause as determined by the Superintendent

Expulsion factors to consider

- the nature and seriousness of the violation;
- the degree of danger to the school community;
- the student's disciplinary history, including the seriousness and number of previous infractions;
- the appropriateness and availability of an alternative education placement or program;
- the student's age and grade level;
- the results of any mental health, substance abuse, or special education assessments;
- the student's attendance and academic records; and
- such other matters as he deems appropriate.

School Board Discipline Committees

- Three School Board Discipline Committees
- Each Committee has three School Board Members and a School Counselor (nonvoting member)
- Committees have two set days a month for hearings
  - Generally –
    - Discipline Committee #1 Two Monday Afternoons 3-6 pm
    - Discipline Committee #2 Two Tuesday Mornings 8:30- 11 am
    - Discipline Committee #3 Two Wednesday Afternoons 3-6 pm

Discipline Placement Options

- **Renaissance Academy**
  - Disciplinary, 4 x 4 program
  - Tidewater Regional Alternative Education Program
    - Limited space, not special education
- **Home based** – disciplinary reasons (2-5 hrs. per week)
- **Home bound** – medical reasons (2-5 hrs. per week)
- **Suspend without services**
- **Expulsion** – student still subject to compulsory attendance – must hold reentry hearing w/in 365 days
- **Return to home school or place at another school**

School Board Hearing

- School Board retains the right to uphold, increase, reduce, alter, overturn the recommended discipline
- School Board hearings are recorded and made part of the student's education records- can be subpoenaed or turned over to student
- Subject to FOIA Open Meetings laws

Special Education/Section 504

- **Discipline for more than 10 days of school**
  - Must receive education services after 10 days
- **Manifestation Determination Review (MDR)**
  - If the student's actions are a result of disability and the student's IEP or Section 504 Plan has not been implemented, no discipline
  - Must hold MDR before student discipline hearing
  - Expedited procedures to accomplish this
- **Placement**
  - IEP Team must approve final placement
  - Most special education services can be provided in alternative education settings

Frequent Issues

- The Principals, Hearing Officers, School Board Members and School Board Attorneys are not authorized to do plea agreements
- **Students must attend hearings**. Hearings will proceed without students if they do not appear
- **Can we set times for hearings?** Generally no. There are set days and times for hearings
- Students can only continue their home school work/assignments through the Hearing Officer level. Once the Hearing Officer makes a new educational assignment, the student must attend there and the home school must discontinue providing work and access to class materials

Frequent issues, cont'd

- **What if student objects to new educational placement and does not attend?** Student will be subject to truancy rules and will not be allowed to credit for missed days or work. This may cause student to fail class and need to repeat the year.
- **Can the discipline record be expunged?** No. The discipline record can only be corrected for incorrect or misleading information per FERPA regulations.
- **Can we call witnesses and cross examine School Division witnesses?** You can bring your own witnesses. The School Division will generally only have an administrator present the cases and cross examination is not allowed. Subpoenas are not authorized.

VIRGINIA BEACH CITY PUBLIC SCHOOLS

Code of Student Conduct

A Partnership in Responsibility

Administrators, Parents, School Board, Students, Superintendent, Teachers

Dear Parents and Guardians:

Welcome to the 2020-21 school year! As I write this, we are still navigating some uncertainty as to how exactly the educational environment will look. Regardless of that picture, I assure you that your child will be provided with new experiences, a devoted group of educators and an exciting, challenging academic program.

So that our schools and classrooms are places where all children can be successful, we must ensure they are safe and orderly. And in the era of COVID-19, the "classroom" can mean school buildings or family kitchens and living rooms. Combine that with social media and other technologies, schools can be affected far beyond physical buildings, and well before or after school hours. Consequently, everyone - from our administrators and teachers to our students and families - must partner together in this effort.

That is why I encourage you and your child to read carefully through this *Code of Student Conduct* document, which serves as a necessary resource for our families. The *Code of Student Conduct* outlines our School Board policies and expectations for student conduct - whether that be in the classroom, via a lesson conducted virtually, on the bus or at any school-related activities. It is important to understand that anyone who causes a disruption to our school day as described in this document, whether they are physically in a school building or not, will face disciplinary action as outlined in our code.

Cell phones are part of everyday life, and while they are currently allowed in our classrooms, we need to ensure they are not a distraction from learning. Please be aware that allowable use of cell phones is up to individual schools and sometimes teachers within those schools, and that the administration at each school will determine which, if any, locations other than the classroom setting that cell phones can be used during the instructional day.

We also encourage you to talk with your child about what it means to be a responsible digital citizen. Students need to understand that social media posts have the potential to exist forever, regardless of whether they are deleted or not, and that their impact can be life-altering. For example, colleges and employers now routinely conduct social media searches on applicants, and inappropriate use of social media can even cost students their scholarships to college. Also, relative to the *Code of Student Conduct*, please help your child understand that threats shared on social media are taken seriously, and could end in a range of disciplinary actions, including expulsion from school, as well as potential legal action.

I thank you in advance for your willingness to work with us in creating the best and most productive school environment possible, regardless of where the learning may happen. Please consider reading and discussing this *Code of Student Conduct* as a family and following these behavioral guidelines. Afterward, please sign, date, and return the Parent Acknowledgement Form to your child's school by September 18, 2020.

In addition, please note that the *Code of Student Conduct* is always available on ***vbschools.com***, under the "Students" tab on the homepage.

On behalf of our School Board, our principals, teachers, food service staff, bus drivers, and everyone here at VBSchools, we thank you for your support and extend our best wishes for a school year that is safe and productive for your family.

Aaron C. Spence, Ed.D.
Superintendent

CODE OF STUDENT CONDUCT OVERVIEW

Virginia Beach City Public Schools is committed to creating safe, supportive learning environments for all students. As a part of that commitment, the *Code of Student Conduct* is provided in order to outline major categories of behavior and state disciplinary actions that may occur as a result of student misconduct. In addition, a multi-tiered system of supports is utilized districtwide with a focus on teaching expectations for behavior, reinforcing positive behavior and addressing inappropriate behavior with interventions and disciplinary consequences. When enforcing the *Code of Student Conduct*, students and their property (including privately owned electronic devices) may be searched and/or an impairment assessment completed if there is reasonable suspicion that a law or school rule has been or is about to be broken. School staff may question or interview minor students regarding violations of the *Code of Student Conduct* and criminal matters without the consent or presence of parents or legal guardians. Metal detectors and other types of surveillance equipment will be used in the schools and at school activities for both random searches and where reasonable suspicion to search is present. Police dogs will be used on school property to detect the presences of weapons, drugs, and/or other contraband. Depending on the infraction, appropriate legal charges can be pressed against a student. Section 16.1-269.1 of the Code of Virginia permits juveniles, 14 years of age or older at the time of an alleged offense, to be prosecuted as adults for specific crimes under certain circumstances.

Parental Responsibility and Involvement: Each parent of a student enrolled in a public school in Virginia Beach has a duty to assist the school in enforcing the standards of student conduct and attendance in order that education may be conducted in an atmosphere which is free of disruption and threat to persons or property. Parents are to be supportive of individual rights, and to pay all fees and charges levied against their children by the Virginia Beach City Public Schools, including costs associated with damage to or loss of books and other school property. [Section 22.1-279.3 of the Code of Virginia]

Faculty/Staff Responsibilities: Teachers handle the major portion of student discipline through their system of classroom management. However, teachers will refer a student for misconduct when the situation warrants. In Virginia Beach, each public school has in place a referral system for student discipline. The administrator is responsible for addressing the student's behavior after the teacher referral. The Office of Student Leadership provides administrative support for presentation of discipline cases to hearings before discipline hearing officers, School Board discipline committees, and appeals to the School Board.

School Board Policies and Regulations can be accessed via our website at ***vbschools.com*** and in each school library.

DISCIPLINARY ACTION LEVELS

The following summarizes the levels of disciplinary action which shall be enforced by school personnel with students who are in violation of school rules, *Code of Student Conduct*, *School Board Bylaws*, *Policies*, *Division Regulations*, the *Discipline Guidelines*, and/or local, state, or federal laws.

LEVEL 1 - Verbal Warning/Reprimand
The teacher/staff member will tell/remind the student not to engage in inappropriate behavior or give the student a reminder of the rule.

LEVEL 2 - Conference
Staff members may conduct a conference with the student, parent, or both.

LEVEL 3 - Intervention
Staff members may use one of the following interventions: ***Referral*** to school counselor, psychologist, social worker, or other; ***Time-out***, the temporary removal of a student from class; ***Detention***, detaining a student for disciplinary reasons before or after school hours; ***Student Response Team***, a meeting of school personnel and others to consider the behavior of the student and make recommendations for improvement; ***Behavioral Contract***, a written agreement between the student/parent/guardian and school listing requirements for improvement; ***Restriction***, the temporary denial of the student's right to participate in designated activities; ***Confiscation***, temporary possession of personal property; ***Saturday School***, Session, not to exceed three hours, served on Saturday morning with permission of the parent/guardian; ***Afternoon/Evening School***, Session, not to exceed three hours, served after school or in the evening with the permission of the parent/guardian; ***Probation***, a written agreement with the student for a defined period of good behavior in lieu of suspension; ***Mediation***, a restorative process for resolving conflicts. Mediation provides an opportunity for willing participants to problem-solve and take responsibility for their actions in a collaborative effort. This process follows a structured protocol and is facilitated by a trained mediator; ***Written Communication***, a letter, progress report, or other communication, sent to the parent/guardian; ***Bus Discipline***, temporary removal or loss of bus privileges; and ***Community Service***, an approved duty or activity meant to make restitution for actions and/or benefit both the student's personal growth and the school community.

LEVEL 4 - Suspension (In-School up to 3 Days) (Choices Program - Secondary) [School Board Regulation 5-21.2]
A student may be given in-school suspension (ISS) for up to three days. In ISS, a student is assigned to a classroom for the day and given work to do by qualified school personnel serving as the school's ISS coordinator. Students are then given an excused absence for all classes missed while in ISS. Refusal to attend ISS will result in out-of-school suspension (OSS) until the ISS is served.

The principal, parent/guardian, hearing officer, or School Board Discipline Committee may initiate the placement to the Choices Program as an alternative to suspension. The principal/assistant principal meets with the parent/guardian and the student to review the requirements of the Choices program to determine the acceptance of the responsibilities of this placement.

LEVEL 5 - Suspension (Out-of-School 1-5 Days) (Choices Program - Secondary) [School Board Regulation 5-21.1, B]
The principal, assistant principal, acting principal, or his/her designee may suspend a student from school for a period up to five days for engaging in prohibited conduct as outlined in the *Code of Student Conduct*. The parent/guardian shall be required to confer with the principal or his/her designee prior to the student's reinstatement. Any student who is under out-of-school suspension (OSS) and is also enrolled in a work cooperative program and/or extracurricular activities shall be restricted from employment and/or excluded as a participant or spectator from extracurricular activities until reinstated in his/her school. A student who is under the penalty of OSS will be provided class work and homework material, if requested by the parent and/or student, so the student may remain current with school instruction as long as enrolled in school.

LEVEL 6 - Suspension (Out-of-School 6-10 Days) (Referral to Office of Student Leadership) [School Board Regulation 5-21.1, B]
The principal, assistant principal, acting principal, or his/her designee may suspend a student from school for six to ten days with the approval of the Director of the Office of Student Leadership for engaging in prohibited conduct as outlined in the *Code of Student Conduct*.

The parent/guardian shall be required to confer with the principal or his/her designee prior to the student's reinstatement.

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DISCIPLINARY ACTION LEVELS *continued*

Any student who is under OSS and also enrolled in a work cooperative program and/or extra-curricular activities shall be restricted from employment and/or excluded as a participant or spectator from extracurricular activities until reinstated in his/her school. A student who is under the penalty of OSS will be provided class work and homework material, if requested by the parent and/or student, so the student may remain current with school instruction as long as enrolled in school.

The principal may suspend the student and refer the student to the Office of Student Leadership for a Corrective Action Plan (CAP). The student and parent will meet with the Coordinator of Student Conduct/Services. The parent must contact the Office of Student Leadership to set up an appointment.

LEVEL 7 - Suspension (Out-of-School Over 10 Days) [School Board Regulation 5-21.1, D]
A student can be suspended for more than ten days following a hearing before a hearing officer designated by the superintendent or designee. For certain offenses or habitual offenses, a student may be suspended for the remainder of the semester, the rest of the school year, or for a calendar year. It may be determined that transfer to another school serves the best interest of the student and the school.

In the case of a recommendation for long-term suspension, the Director of the Office of Student Leadership shall arrange a time and place for the hearing before the hearing officer and notify the parent/guardian and the principal.

The student will remain on out-of-school suspension pending the hearing and written decision of the hearing officer. The student is restricted from entering upon school property and is excluded as a participant or spectator from extracurricular activities. The student will be provided class work and homework material, if requested by the parent and/or student, so the student may remain current with school instruction as long as enrolled in school.

LEVEL 8 - Expulsion [School Board Regulation 5-21.1, D]
A student can be expelled only by action of the school board or a discipline committee of the school board based upon recommendation of the principal and the superintendent or his/her designee. Expulsion from school excludes the student from regular school attendance until readmission by the School Board or a discipline committee of the School Board.

In the case of a recommendation for expulsion by the principal, the Director of the Office of Student Leadership shall review the recommendation, which he/she may uphold or modify. If the Director of the Office of Student Leadership upholds the recommendation of expulsion, he/she shall notify the student and his/her parent/guardian of the time and place of a hearing before a discipline committee of the school board. A hearing shall be held before the discipline committee within ten school days of the date of notice from the principal or acting principal. If the decision of the three-member committee to uphold the expulsion is unanimous, there is no right of appeal of this decision. If, however, the decision of the committee is not unanimous, the student and his/her parent(s)/guardian(s) may appeal the decision to the full School Board.

The student will remain on out-of-school suspension pending the hearing and written decision of the hearing officer or discipline committee of the school board. The student is restricted from entering upon school property and is excluded as a participant or spectator from extracurricular activities. The student will be provided class work and homework material, if requested by the parent and/or student, so the student may remain current with school instruction as long as enrolled in school.

DUE PROCESS
[School Board Policy 5-36, B.]

With the requirements of fair and equitable treatment of all students and within the guidelines of the federal judiciary, the following shall constitute the minimum due process procedures to be followed in the detention, suspension, and expulsion of students:

1. The student shall be given written notice of the charges against him/her.
2. If he/she denies the charges, he/she must be given an explanation of the facts as known to school personnel and an opportunity to present his/her version of what occurred.
3. The student shall be informed of the conditions of the disciplinary action.
4. In the case of a suspension of more than 10 days or the case of an expulsion:
   a. The officer, committee, or school board which hears the case must be impartial; and
   b. The disciplinary decision must be based on evidence presented at the hearing in the presence of both parties. If the student and parent(s)/legal guardian(s) fail to appear, the hearing may be held in their absence.
   c. A parent/guardian will be notified about the existence of community-based educational, training, and interventional programs. The cost for participation in those programs not offered by the school division is borne by the parent/guardian of the student.
5. The parent or guardian of a student or the student, if eighteen years or older, may appeal the decision as provided in School Board Policy 5-21 or 5-6 as appropriate.

If the principal or his/her designee determines that the student's presence at school creates a continuing danger to persons or property or an ongoing threat of disruption, the student may be removed from school immediately.

PROHIBITED CONDUCT

Students are subject to the *Code of Student Conduct* while on school property, while engaged in or attending a school activity, or while going to or returning home from school including while at bus stops and while riding the bus. Students may also be disciplined for acts committed away from school property and outside school hours if the conduct is detrimental to the interest of the school or adversely affects the educational environment.
[S. B. Policy 5-1, S. B. Policy 5-21, A., and S. B. Policy 5-35, A.]

Students may be suspended or expelled from attendance at school for sufficient cause. Prohibited conduct is any behavior incompatible with the school environment and good citizenship and includes, but is not limited to, the following:

1. **Attendance:** Tardiness, truancy, excessive absences, skipping, being in an unauthorized area and leaving the classroom, building, or assigned area without permission. [S. B. Policy 5-11 and 5-17/S. B. Reg. 5-11.1 and 5-17.1/Rule 1]
2. **Food/Beverages:** A student will not eat in nor carry food to unauthorized areas of school. [School Handbook/Rule 2]
3. **Cheating/Plagiarism/Misrepresentation:** Students are expected to perform honestly through the production of their own work and refrain from verbal or written falsification. [S. B. Reg. 5-34.2/Rule 3]

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4. **Inappropriate Property:** The unauthorized possession or use of any type of personal property, which disrupts the educational process, is prohibited. Specifically prohibited are electronic devices when they are not authorized or being used for academic purposes (including cell phones), lighters, and other items deemed inappropriate. For specific information related to cell phones see S. B. Policy 3-65 and the *Student/Parent Guidelines for use of a Privately Owned Electronic Device* (accessible on ***vbschools.com***). [Rule 4]
5. **Student Dress:** All students are expected to wear dress appropriate to the occasion; extreme or ostentatious apparel or appearance is to be avoided. Any article of clothing or accessory which advertises alcohol, or an illegal substance, depicts lewd graphics, displays offensive or obscene language, or is gang-related is forbidden. Dress standards shall be set by principals. Students and parents are to be advised of these standards, by letter, or other appropriate means, prior to the opening of school. Decisions regarding the appropriateness of clothing, footwear and accessories will be made by the principal or a designee. Items initially deemed inappropriate may be brought to the student's or the parent's attention for corrective action. Subsequent violations of the dress code will subject the student to suspension from school. The principal or his/her designee reserves the right to take appropriate disciplinary action with regard to any first time offense. Disciplinary action will be taken against any student taking part in gang-related activities that are disruptive to the school environment, which include the display of any apparel, jewelry, accessory, or tattoo, by virtue of its color, arrangement, trademark, or any other attribute, denotes membership in a gang that advocates illegal or disruptive behavior. [S. B. Policy 5-41/Rule 5]
6. **Disruption:** Any disruption, which interrupts or interferes with teaching or orderly conduct of school activities, is prohibited. Conduct, which by its nature is so extreme or offensive that it negatively impacts the school or places the student at risk either physically or educationally, will also constitute disruption. [S. B. Policy 5-2 and 5-38/Rule 6]
7. **Disrespectful Behavior:** A student will behave in a respectful manner toward teachers/staff and other students. Examples of disrespectful behavior are: walking away, talking back, refusing to identify self properly, rude behavior, spitting, and challenging authority. [S. B. Reg. 5-36.3/Rule 7]
8. **Insubordination:** A student will obey the directions of any staff member. Examples of insubordination are: failure to comply with direction or instruction of a staff member, refusal to work in class, refusal of detention, refusal to participate during in-school alternatives, and refusal to report to in-school suspension. [S. B. Policy 5-2, 5-21 and 5-38/Rule 8]
9. **Profanity/Obscenity:** Use of language, gestures or conduct that is vulgar, profane, obscene, abusive, demeaning, or disruptive to teaching or learning is prohibited. Possession of offensive materials such as nude photographs or pornographic videos as well as clothing or adornments that convey violent or sexually suggestive messages or offensive statements toward others is prohibited. [S. B. Reg. 5-36.3, C., and 5-36.9/Rule 9]
10. **Trespassing:** Students, patrons, and school personnel are expected to have appropriate authorization to be on school board property (to include vehicles, buildings and grounds). [S. B. Reg. 5-36.5 and 5-37.1/Rule 10]
11. **Unauthorized Use of Computer Technology:** Any student who fails to comply with the terms of this policy or the regulation developed by the superintendent may lose system privileges, and students may be disciplined in accordance with the *Code of Student Conduct* or other school board policies and division regulations governing student discipline. Students may also be the subject of appropriate legal action for violation of this policy or regulation. See Acceptable Use Policy (Computer Systems) on page 5. [S. B. Reg. 5-36.9, 6-62.1 and 6-64.1/ S. B. Policy 6-62 and 6-64/Rule 11]
12. **Gambling:** A student will not play games of skill or chance for money or property or be present at the scene of gambling. [S. B. Reg. 5-37.1/Rule 13]
13. **Fighting/Aggression:** Students and school personnel are entitled to a school environment free from threat and the physical aggression of others. The following acts are prohibited: two or more parties striking each other for the purpose of causing bodily harm, threatening, posturing to fight, incitement/instigation, physical abuse, gang activity, bullying and cyberbullying. Recording fights and spitting on another individual are considered incitement. A student who is assaulted and retaliates by hitting, kicking, or any other physical means, may be disciplined for fighting. Students who haze or otherwise mistreat another student so as to cause bodily injury shall be immediately suspended from school. [S. B. Reg. 5-36.1, 5-36.3 and 5-37.1/Rule 14]
14. **Improper Vehicle Use:** Elementary and middle school students may not drive any motorized vehicle to or from school. Subject to availability of parking spaces, high school students who meet and follow parking and vehicle use regulations prescribed by their school may drive to school. Failure to adhere to such regulations could result in forfeiture of the parking privilege. In the case of a parking violation, a vehicle could be towed away at the operator's expense. [S. B. Policy 7-57 and 7-61/Rule 15]
15. **Defacing/Destroying School or Private Property:** A student will not willfully or maliciously deface, damage, or destroy property belonging to another, including school property at any time and private property while the student is under the school's jurisdiction. A student or parent/ guardian will be held financially responsible, as allowed by Virginia law, for willful or malicious destruction of school property. Examples are as follows: writing on walls, mirrors, or desks; damaging another's clothing or property; and graffiti. [S. B. Policy 5-42/S.B. Reg. 5-42.1/Rule 16]
16. **Theft/Attempted Theft:** A student shall not intentionally take or attempt to take the property of another without consent. A student will not possess or attempt to possess stolen property. [S. B. Reg. 5-37.1 and 5-42.1/Rule 17]
17. **Tobacco, Tobacco Products and Nicotine Vapor or Alternative Nicotine Products:** The law requires all school buildings to be smoke free. Students are prohibited from possessing, selling or trading or offering to do so, smoking and/or using tobacco products or nicotine vapor or alternative nicotine vapor products as defined in Virginia Code §18.2-371.2 at all times while on School Board owned property, in School Board owned vehicles, in any vehicle parked on School Board property, at bus stops, at on or off site school-sponsored or school-related activities, or while going to or coming home from school. [S. B. Reg. 5-45.1/Rule 18]
18. **Alcohol, Drugs, Drug Paraphernalia or Imitations:** Students will not use, give to another, possess, or be under the influence of alcohol, marijuana, drug paraphernalia, controlled substances, or imitation controlled substances on School Board property, at school-sponsored activities, or while going to or coming from school. [S. B. Reg. 5-36.1 and 5-45.1/Rule 19]
19. **Medication:** Students are not to be in possession of medication (prescribed or over-the-counter) at any time. All medications must be taken by the parent and/or guardian to the clinic and will be administered by a parent/ guardian or designated adult per guidelines and in accordance with School Board policy. Additional information is available in the clinic regarding procedures for allowing students to carry and self-administer the following: a.) inhaled medication for asthma, b.) diabetes syringes, glucose meter and insulin, and c.) epinephrine auto-injector pen for life-threatening allergies. Medications needed during field trips are likewise handled through the school clinic and require written consent from the parent and/ or guardian in order to be administered by a designated adult while on a field trip. [S. B. Regs. 5-45.1, C and S. B. Policy 5-57/Rule 20]
20. **Arson/Attempted Arson:** To unlawfully and intentionally damage, or attempt to damage, any school or personal property by fire or incendiary device. Firecracerks, fireworks, and trash can fires would be included in this category if they were contributing factors to a damaging fire. [S. B. Reg. 5-36.1/Rule 21]
21. **Extortion/Attempted Extortion/Robbery and/or Larceny:** A student will not take, attempt to take, or threaten to take another person's property by force, violence, threats, or intimidation. This includes obtaining money, property, or other objects of value, either tangible or intangible. [S. B. Reg. 5-36.1/Rule 22]
22. **Mace/Mace-like Devices:** A student shall not supply, handle, use, transmit, or possess pepper gas/spray, mace, or similar substances on School Board property, on the way to or from school, or at school-sponsored activities. [S. B. Reg. 5-36.7/Rule 23]
23. **Firearms/Pneumatic Weapons/Look-alike Weapons:** Possession of an instrument or device that resembles or looks like a pistol, revolver, or any type of weapon capable of propelling a missile is prohibited. These may include, but are not limited to, a cap pistol, water pistol, or any look-alike gun. The principal may determine if a look-alike is considered a weapon. [S. B. Reg. 5-36.4 and 5-37.1/Rule 24]

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PROHIBITED CONDUCT *continued*

24. **Weapons/Explosives/Fireworks:** A student will not distribute, handle, use, transmit, or possess a weapon or any object that is designed or used to inflict bodily injury or place a person in fear of bodily injury or any object which can reasonably be considered a weapon. Students shall not possess, distribute, discharge, or participate in the discharge of fireworks or similar items. Examples of weapons and fireworks and other substances are as follows: bomb, knife/razor blade/box cutter, ammunition, metal knuckles, fireworks, small explosives such as firecrackers, caps, poppers, and stink bombs, the use of any object or substance that will potentially cause harm, irritation, or bodily injury to students or any other person. When a laser pen is used to threaten, intimidate, or injure, it is considered a weapon. [S. B. Reg. 5-36.1 and 5-36.4/Rule 25]
25. **Sexual Offenses:** A student will not engage in sexual or immoral behavior such as offensive touching, sexual harassment, indecent exposure, amorous behavior, obscene phone calls, inappropriate sexual behavior, or acts of sexual assault or battery. If a student believes he/she is a victim of sexual harassment, he/she may file a complaint with the school principal and/or the Title IX Coordinator in accordance with School Board Regulation 5-44.1. The contact information for the Title IX Coordinator is listed in the Non-Discrimination Policy at the end of the *Code of Student Conduct*. [S. B. Reg. 5-44.1/Rule 26]
26. **Serious Violations:** A student will not participate in any criminal acts in violation of local, state, or federal laws. A student will not engage in conduct that is dangerous to the health or safety of self, students or others. [S. B. Reg. 5-37.1/Rule 27]
27. **False Fire Alarms/Bomb Threats/911 Calls/Threats Against Persons/ Hoaxes:** Activating a fire alarm without cause, making a bomb threat, false threats, oral threats, written threats, and hoaxes (imitation infectious, biological, toxic, or radioactive substances) against students, division personnel or School Board property, communicating a threat in writing or electronically (including forwarding a text message containing a threat) or encouraging or soliciting any person to commit such a threat are prohibited. [S. B. Policy 5-43/S. B. Reg. 5-36.2 and 5-37.1/Rule 28]
28. **Unlawful Assembly:** A student will neither participate in nor instigate a public disturbance where students and/or staff are assembled involving violence, confusion, or disorder on school grounds. [S. B. Policy 5-36/S. B. Reg. 5-36.1, 5-40.1 and 5-40.2/Rule 29]
29. **Harassment or discrimination based on race, color, sex, disability, national origin, ethnicity, religion or sexual orientation:** A student will not harass or discriminate against another person based upon that person's race, color, sex, disability, national origin, ethnicity, religion or sexual orientation. If a student believes he/she has been discriminated against as listed, he/she may file a complaint with the principal or the Director of the Office of Student Leadership. Disability-based harassment or discrimination complaints may be made with the principal and/or Division Section 504 Coordinator, whose contact information is listed in the Non-Discrimination Policy at the end of the *Code of Student Conduct*. [S. B. Policy 5-7/Rule 31]

For a full explanation of these offenses, please consult the cited policies and regulations, and the rules referenced in the Discipline Guidelines.

MANDATORY EXPULSION

Any student committing any of the following offenses while on school property or at school-sponsored or related activities, shall, except for a first-time simple drug or alcohol possession or drug paraphernalia possession offense at the discretion of the principal as provided in S. B. Reg. 5-45.1 (I)(A), be automatically recommended by the principal to the superintendent for expulsion of at least one calendar year and, when appropriate, referred for criminal prosecution. Students may also be disciplined for acts committed away from school property and outside school hours if the conduct is detrimental to the interest of the school or adversely affects the educational environment.

1. Arson or attempted arson
2. Assault and battery on an employee or student
3. Possession, use or sale of a firearm, pneumatic weapon or dangerous weapon
4. Use, possession, being under the influence of, selling, bringing, giving, distributing or passing to another individual or possessing with intent to sell, give, or distribute alcohol, marijuana, controlled substances or imitation controlled substances, and inhalants
5. Extortion, attempted extortion, robbery, burglary, motor vehicle theft, and/or larceny
6. Sex Offenses: sexual battery, inappropriate sexual behavior, obscene phone calls, and sexual assault
7. Hazing: initiation of another student into a club, group, or any other organization through abuse and humiliation so as to cause bodily injury
8. Kidnapping or other serious criminal violations
9. Possession, use, distribution, sale, lighting or discharge of explosive devices
10. Homicide
11. Malicious wounding of an employee or student
12. And other good and just causes as determined by the superintendent

AFTER-SCHOOL ACTIVITIES

1. Students are subject to conditions of the *Code of Student Conduct* while attending and participating in after-school student activities and athletic events as provided in S.B. Policy 5-1. Regulations outlined in the *Code of Student Conduct* apply at all after-school activities (such as athletic events, club meetings, dances, etc.) and the like.
2. Students are not allowed to loiter in concession areas.
3. Students must be seated during athletic activities (when seating is available).
4. Students are expected to leave school grounds at the conclusion of the activity.
5. Students waiting for a ride should meet their ride at the school's designated student drop-off/pick-up location.
6. Metal detectors are utilized at after-school activities and special events in order to ensure the safety of students and spectators.
7. Parental involvement is encouraged at all school-related activities.
8. If parents are not attending a school-sponsored event, a plan should be made to pick up their child at the conclusion of the event.

If the principal or his/her designee determines that the student's presence at any after-school activity creates a continuing danger to persons or property or creates an ongoing threat of disruption, the student may be removed from the activity immediately.

BRING YOUR OWN DEVICE (BYOD)

Students are allowed to use privately owned electronic devices to access the VBCPS wireless network. This wireless access provided to the devices is designed to enhance the students' educational experience and outcomes. Connecting to the VBCPS Wi-Fi network with personal devices is a privilege, not a right. Permission to bring and use privately owned devices is contingent upon adherence to VBCPS guidelines. If a privately owned device is used by a student to disrupt the educational environment, in the sole opinion of VBCPS, that student's privileges may be limited or revoked. The school division reserves the right to examine the privately owned electronic device and search its contents if there is reason to believe that school division policies or local, state and/or federal laws have been violated. Devices are brought to school at the students' and parents' own risk. In the event that a privately owned device is lost, stolen or damaged, VBCPS is not responsible for any financial or data loss. Students and parents should read the *Student/Parent Guidelines for use of a Privately Owned Electronic Device* thoroughly. The guidelines and answers to frequently asked questions can be found on the division's website at ***vbschools.com***.

ACCEPTABLE USE POLICY (COMPUTER SYSTEMS)

The School Board provides computer systems to promote educational excellence, resource sharing, innovative instruction and communication, and to prepare students to live and work in the 21st century. Computer systems include, but are not limited to, all computers, electronic tablets, electronic readers, servers, network devices, telecommunication devices, multifunction devices, printers, scanners, peripheral equipment, local and wide area networks, Internet access, software, apps, application systems, web resources, data and digital content. Misuse of computer systems may result in disciplinary action including long-term suspension and/or expulsion. Computer systems shall not be used to conduct illegal activities or to send, receive, view, or download illegal materials. Any authorized or unauthorized use in school or out of school of computer software, computer networks, telecommunications, information technology, and related technologies; or involvement in willful acts that cause physical, financial, or other harm in any manner, is prohibited and may result in a recommendation for expulsion. Any authorized or unauthorized use in school or out of school of computer software, computer networks, telecommunications, information technology, and related technologies, which disrupts or interferes with the education of students in any manner is prohibited and may result in a recommendation for expulsion. Any student who fails to comply with the terms of the Acceptable Use Policy (6-64) or the regulations developed by the superintendent may lose system privileges, and students may be disciplined in accordance with the *Code of Student Conduct* or other School Board policies and division regulations governing student discipline. Students may also be the subject of appropriate legal action for violation of these policies or regulations. [School Board Policies 6-62 and 6-64] [School Board Regulations 6-62.1 and 6-64.1]

BULLYING AND CYBERBULLYING

Virginia Beach City Public Schools is committed to providing an educational atmosphere free from harassment, intimidation, or bullying. Students who threaten to cause harm or harass others will be referred to the principal or assistant principal for appropriate disciplinary action, which may include suspension and/or recommendation for long-term suspension or expulsion. (This includes actions in school, on school property, at a bus stop, on a school bus, at any school activity and/or actions that cause a disruption to the educational process at school.)

Virginia Code §22.1-276.01 defines bullying 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 cyberbullying. Bullying does not include ordinary teasing, horseplay, argument, or peer conflict." Cyberbullying is using information and communication technologies, such as cell phone text messages and pictures, internet email, social networking websites, defamatory personal websites, and defamatory online personal polling websites to support deliberate, hostile behavior intended to harm others.

Should a student or parent/guardian be aware of any act of bullying or cyberbullying committed by another student, he or she should immediately report this incident to the administration. Strong partnerships and communication between students, parents/guardians and schools is crucial in identifying and addressing instances of bullying, preventing future incidents and providing support for victims of bullying.

Understanding how emotionally painful bullying and cyberbullying can be to a child, Virginia Beach City Public Schools' staff remain committed to preventing this type of harmful activity during the school day and at school-related activities. There are numerous initiatives and programs in place to create a culture that embraces respect for one another.

In addition to being familiar with the school division's policies, please review the following Virginia legal codes with your child:

Virginia Code Ann. §18.2-152.7:1 states, "If any person, with the intent to coerce, intimidate, or harass any person, shall use a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act, he shall be guilty of a Class 1 misdemeanor."

Virginia Code Ann. §18.2-60 states that if a threat is written, signed or unsigned, and contains a threat to kill or to do bodily injury to an individual or member of his/her family, it is a Class 6 felony. (This would include written threats to kill or to do bodily harm that are communicated via electronic communication.)

[S.B. Regulation 5-36/Code of Va. §22.1-276.01] [S.B. Policies 6-62 and 6-64] [S.B. Regulations 6-62.1 and 6-64.1] [Virginia Code Ann. §18.2-152.7:1] [Virginia Code Ann. §18.2-60]

THE CHOICES PROGRAM *(Secondary Schools Only)*

The principal, parent/guardian, hearing officer, Coordinator of Student Conduct/Services or School Board Discipline Committee may initiate a student's placement in the Choices Program as an alternative to suspension.

Choices is an instructional program designed to serve students who consistently demonstrate inappropriate behaviors, excluding truancy, that interfere with learning. Students placed in this program have not successfully implemented the behavioral interventions put in place by the school. The Choices curriculum provides students with information and activities to develop skills necessary to make appropriate choices and understand the impact of anti-social behavior on their lives and the lives of their families and communities.

SUBSTANCE ABUSE INTERVENTION PROGRAM

The Substance Abuse Intervention Program (SAIP) is designed for students in middle and high school. SAIP is a ten-day substance abuse education and prevention program offered by the school division tuition-free. All absences associated with completion of SAIP are excused and should not be counted when determining excessive absences of a student. Transportation to and from the program is provided by the school division.

SAIP may be assigned to a student as a disciplinary consequence for an offense related to the possession, use or distribution of a controlled substance. If a student is assigned to the program as a result of a disciplinary infraction, then the student is considered to be under out-of-school suspension (OSS). The student will be restricted/excluded as a participant in or spectator of any extracurricular activity until reinstated in his/her school.

SAIP may be accessed on a voluntary basis based on parent and/or student requests, in absence of reasonable suspicion or other conduct which alone would subject the student to discipline, due to concern for a substance abuse problem. In these cases, the student's participation is not deemed a disciplinary placement. The student is permitted to remain in school and may participate in activities. Parents/students should contact their school for additional information.

DISCIPLINARY ACTION FOR CONDUCT NOT RELATED TO SCHOOL ACTIVITIES

The School Board 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 or drugs, or intentional injury to another person; (ii) found guilty, adjudicated delinquent, or not innocent of a crime which resulted in or could have resulted in injury to others, or of a crime for which the disposition ordered by a court is required to be disclosed to the superintendent; or (iii) expelled for certain drug offenses, convictions or adjudication of delinquency 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 may be inappropriate. The School Board may impose this requirement regardless of where the crime occurred.
[S. B. Regulation 5-36.1/Code of Va. §22.1-277.2/Rule 30]

SUSPENSION APPEAL PROCEDURES

For your convenience, information on how to contact the Office of Student Leadership is included at the bottom of the following page.

In-school Disciplinary Actions [S. B. Reg. 5-6.1]

Should a parent disagree with an in-school disciplinary action of the school, the parent may appeal the school's decision using the following guidelines.

1. Appeal the school decision to the school principal in writing within three (3) school days of the incident.
2. School principal will meet with a parent/legal guardian and respond in writing within five (5) school days of the receipt of the appeal.
3. The school principal may assign a designee to meet with a parent/legal guardian and to respond in writing within five (5) days of the receipt of the appeal if the principal will be absent pursuant to authorized leave during the entire five (5) day appeal period as set forth in this section.
4. The decision of the school principal shall be final.

OSS Ten Days or Fewer [S. B. Reg. 5-6.1] [S. B. Reg. 5-21.1]

Level I

a. Appeal the school decision to the school principal in writing within three (3) school days of the incident.
b. School principal will meet with a parent/legal guardian and respond in writing within five (5) school days of the receipt of the appeal.
c. The school principal may assign a designee to meet with a parent/legal guardian and to respond in writing within five (5) school days of the receipt of the appeal if the principal will be absent pursuant to authorized leave during the entire five (5) day appeal period as set forth in this section.

Level II

a. Appeal principal's or designee's decision to the Office of Student Leadership in writing within three (3) school days of the receipt of the principal's or designee's decision.
b. The appropriate coordinator in the Office of Student Leadership will investigate the matter and respond in writing within five (5) school days of the receipt of the appeal.

Level III

a. Appeal the coordinator in the Office of Student Leadership's decision to the director of the Office of Student Leadership in writing within three (3) school days of receipt of the coordinator's decision.
b. The director of the Office of Student Leadership acting as the Superintendent's designee will investigate the matter and respond in writing within five (5) school days of the receipt of the appeal.
c. Acting as the Superintendent's designee, the decision of the director of the Office of Student Leadership shall be final.

Long-term Suspensions (more than ten days) [S. B. Policy 5-21/Reg. 5-21.1, 5-21.3]

Following a hearing before a hearing officer, the parent may appeal the decision to a discipline committee of the School Board as follows:

1. Such requests to appeal must be filed in writing by the parent with the director of the Office of Student Leadership, within five (5) school days of receipt of the decision, or the right to appeal is waived. The discipline committee will consider the appeal within thirty (30) calendar days and may confirm, amend, or disapprove the suspension.
2. If the decision of the three-member discipline committee is not unanimous, the parent may appeal the decision to the full School Board. The appeal must be in writing and must be filed by the parent with the director of the Office of Student Leadership within five (5) school days of receipt of the decision or the right to appeal is waived. The School Board will consider the appeal within thirty (30) calendar days.
3. Students remain subject to compulsory attendance laws while on suspension. If the student fails to enroll in an education program offered by VBCPS during the suspension, the student and/or parent/legal guardian are responsible for otherwise complying with the compulsory attendance laws and may be subject to referral to the court system for failure to comply. Students with disabilities should consult the Office of Programs for Exceptional Children or with the division's Section 504 Coordinator, whomever is applicable, for educational service options.

Expulsions [S. B. Policy 5-21/Reg. 5-21.1, 5-21.3]

Following the superintendent's or his/her designee's recommendation for expulsion, a hearing will be held by a discipline committee of the School Board, and the committee may confirm or disapprove the expulsion. If the decision of the three-member discipline committee is not unanimous, the parent may appeal the decision to the full School Board. The appeal must be in writing and must be filed by the parent with the director of the Office of Student Leadership within five (5) school days of receipt of the decision or the right to appeal is waived. The School Board will consider the appeal within thirty (30) calendar days. Students remain subject to compulsory attendance laws while on suspension. If the student fails to enroll in an education program offered by VBCPS during the suspension, the student and/or parent/legal guardian are responsible for otherwise complying with the compulsory attendance laws and may be subject to referral to the court system for failure to comply. Students with disabilities should consult the Office of Programs for Exceptional Children or with the division's Section 504 Coordinator, whomever is applicable, for educational service options. Students who are expelled from VBCPS remain subject to compulsory attendance laws.

Reinstatement

The School Board may require students who have been expelled by the School Board or a discipline committee of the School Board to provide a written request for readmission to school after one calendar year from the date of expulsion. Such a request should be accompanied by evidence that the student has corrected inappropriate behaviors and has established acceptable patterns of conduct.

REGULATIONS FOR PASSENGERS RIDING SCHOOL BUSES

MEETING THE SCHOOL BUS [SCHOOL BOARD POLICY 5-34/ SCHOOL BOARD REGULATION 5-34.1]

- Students are subject to all conditions of the *Code of Student Conduct* while at the bus stop, going to and from the bus stop, or riding the bus.
- Parents or their designee should accompany their children to and from the school bus stop.
- Students must be on time. It is recommended that students be at their stop five minutes before the scheduled arrival time of the bus.
- Students must not stand on the traveled portion of the roadway or on private property while waiting for a bus.
- While waiting at a bus stop, students must respect the property of homeowners in the area.
- Students must not run alongside a moving bus, but must wait until it has stopped, then walk to the front door.

CONDUCT ON THE SCHOOL BUS [SCHOOL BOARD POLICY 5-34/ SCHOOL BOARD REGULATION 5-34.1]

- Students must obey the driver and be courteous to him/her and to fellow students. The driver is in charge of the bus and students and has the authority to assign seats to maintain discipline or promote safety.
- Students must never mar or deface the bus. Willful or careless damage must be paid for by the student performing the act.
- Students must not extend arms, legs, or heads out of the bus.
- Students must not talk to the driver while the bus is in motion except in an emergency.
- Students must not tamper with the emergency door.
- Students must not wave or shout at pedestrians or passengers in other vehicles.
- Students must not throw objects about the bus or from a window.
- Books, book bags, band instruments, or other loose objects must not be placed in the aisle or at the front of the bus on the floor. These items will be permitted aboard ONLY if they can be held in the student's lap and not encumber another student.
- Eating, drinking, or selling any commodity on the bus is prohibited.
- Students must not open windows without permission from the driver.
- Items that are prohibited at school will not be permitted on the bus. This includes but is not limited to: live animals, glass objects, skateboards, scooters, surf/boogie boards, and other items that do not directly support the educational process.
- Portable communication devices, including cell phones, may be displayed, activated or used on the school bus by students while being transported to and/or from school.
- The bus driver has the right to refuse transportation to any student who has an unsafe object (matches, knives, firearms, etc.) in his/her possession.
- Students must provide written request from their parents to go home any other way than their regular route, subject to the approval of their school administrator.
- No change will be made in the location of bus stops or bus routing without the approval of the Office of Transportation Services, (757) 263-1545.
- Students must use the bus to which they are assigned. No change in a bus may be made without the permission of the school principal.

LEAVING THE SCHOOL BUS [SCHOOL BOARD POLICY 5-34/ SCHOOL BOARD REGULATION 5-34.1]

- Students must remain seated until the bus comes to a full stop.
- Students must leave the bus at their regular stops.
- If students must cross a highway, they are to do so at the front of the bus and at a distance of at least ten feet in front of the bus. They must not cross until the driver has signaled that it is safe to do so.
- Riding a school bus is a privilege. Should any child be reported to the school principal, the principal will be responsible for the disciplinary action including loss of the privilege of bus transportation.
- If you need help with problems relative to transportation, please contact the school principal or the Office of Transportation Services, (757) 263-1545.

How to contact the Office of Student Leadership

Virginia Beach City Public Schools
1413 Laskin Road, Virginia Beach, Virginia 23451
Phone: (757) 263-2020 Fax: (757) 263-2022
vbschools.com

The Virginia Beach City Public Schools, in partnership with the entire community, will empower every student to become a life-long learner who is a responsible, productive and engaged citizen within the global community.

Aaron C. Spence, Ed.D., *Superintendent*
2512 George Mason Drive, P. O. Box 6038, Virginia Beach, VA 23456-0038

Visit our website - ***vbschools.com*** -
for a complete listing of School Board Policies and Regulations.

Notice of Non-Discrimination Policy
Virginia Beach City Public Schools does not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation/gender identity, pregnancy, childbirth or related medical condition, disability, marital status, age, genetic information or veteran status in its programs, activities, employment, or enrollment, and provides equal access to the Boy Scouts and other designated youth groups. School Board policies and regulations (including, but not limited to, Policies 2-33, 4-4, 5-7, 5-19, 5-20, 5-44, 6-33, 6-7, 7-48, 7-49, 7-57 and Regulations 4-4.1, 4-4.2, 5-44.1, 7-11.1, 7-17.1 and 7-57.1) provide equal access to courses, programs, enrollment, counseling services, physical education and athletic, vocational education, instructional materials, extracurricular activities and employment.

Title IX Notice: Complaints or concerns regarding discrimination on the basis of sex or sexual harassment should be addressed to the Title IX Coordinator, at the VBCPS Office of Student Leadership, 1413 Laskin Road, Virginia Beach, Virginia 23451, (757)263-2020, *Mary.Dees@vbschools.com* (student complaints) or the VBCPS Department of Human Resources, Office of Employee Relations, 2512 George Mason Drive, Municipal Center, building 6, Virginia Beach, Virginia, 23456 (757) 263-1133, *Edie.Rogan@vbschools.com* (employee complaints). Additional information regarding Virginia Beach City Public Schools' policies regarding discrimination on the basis of sex and sexual harassment, as well as the procedures for filing a formal complaint and related grievance processes, can be found in School Board Policy 5-44 and School Board Regulations 5-44.1 (students), School Board Policy 4-4 and School Board Regulation 4-4.3 (employees), and on the School Division's website. Concerns about the application of Section 504 of the Rehabilitation Act should be addressed to the Section 504 Coordinator/Executive Director of Student Support Services at (757) 263-1980, 2512 George Mason Drive, Virginia Beach, Virginia, 23456 or the Section 504 Coordinator at the student's school. For students who are eligible or suspected of being eligible for special education or related services under IDEA, please contact the Office of Programs for Exceptional Children at (757) 263-2400, Laskin Road Annex, 1413 Laskin Road, Virginia Beach, Virginia, 23451.

Alternative formats of this publication which may include taped, Braille, or large print materials are available upon request for individuals with disabilities. Call or write: Michael B. McGee, Director, Office of Student Leadership, Virginia Beach City Public Schools, 1413 Laskin Road, Virginia Beach, Virginia 23451, Telephone: (757) 263-2020 Fax: (757) 263-2022

VIRGINIA BEACH
CITY PUBLIC SCHOOLS
CHARTING THE COURSE

July 2020