NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX CITY OF FAIRFAX

January 28, 2021
(Correction of Clerical Errors in January 21, 2021 Letter Opinion)

BY E-MAIL TO ALL COUNSEL OF RECORD:

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Re: [redacted] *et al. vs. The Fairfax County School Board, et. al.,* Case No. CL 2020-17283

Dear Counsel,

The pending matters in this lawsuit include a demurrer taken under advisement, a scheduled preliminary injunction hearing, and an emergency motion for a protective order and to quash the witness subpoena for two members of the Fairfax County School Board to testify at the hearing for the preliminary injunction.

In balancing the Court's interest in developing a fuller record against the costs of further delay, the Court concludes that it should release this decision addressing standing and other issues, although the decision leaves open legal issues still to be addressed. This partial decision should, at least, guide the parties as to what further action may be needed to reach a final hearing, if needed.

OPINION LETTER

Procedural Background

On November 4, 2020, 34 plaintiffs, comprised of 17 students who, as minors, sued through a parent as "a next friend," and the same 17 parents appearing in their own right, filed a Complaint[1] against the Fairfax County School Board ("School Board") and its Superintendent. Counts I, II and III of the Complaint challenged the decision and actions of the School Board and the Superintendent of the Fairfax County Public Schools ("Superintendent")[2] to eliminate a standardized testing requirement as a factor to be relied upon for admission to the Thomas Jefferson High School for Science and Technology ("TJ"). The Complaint characterizes TJ as a Governor's School for gifted students.

Count IV of the Complaint, titled as a Preliminary Injunction, seeks a preliminary and permanent injunction in the form of a mandatory, as opposed to a preventive, injunction. The injunction seeks to require the resumption of testing. The preliminary injunction hearing to address that claim is presently set for January 26, 2021.

Defendants filed a demurrer to the Complaint and a hearing was set for January 11, 2021. A demurrer is a defensive pleading in response to a lawsuit that argues that even if all the facts alleged are deemed true, the Complaint does not state a cause of action.

On January 8, 2021, the Friday before Monday's January 11, 2021 hearing, the plaintiffs filed an emergency motion for leave to file a First Amended Complaint. The purpose of the amendment was to add to this lawsuit the challenge of another School Board decision that had occurred after the filing of the initial complaint.

Count I of the First Amended Complaint repeated the challenge to the School Board's decision to remove testing as a prerequisite for admission to TJ.

Count II of the First Amended Complaint alleged that on December 17, 2020, the School Board developed a "Hybrid Quota System" to select students for admission from the top 1.5% of students at each participating school and to resort to a lottery for filling in the remaining slots. Plaintiffs complain the new admission procedures unfairly limit the opportunity for students who attend a specialty school for gifted students and impermissibly excludes students attending private school from being included among the eligible students under the first tier of admissions.

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[1] Pursuant to Rule 3:2, the Complaint should be titled as a Petition because it relies on the statutory right to petition for judicial review of actions taken by the School Board under Va. Code § 22.1-87 and seeks injunctive relief, which has generally been accepted as a remedy available under petitions for injunctive relief. *See* Va. Sup. Ct. R. 3:2. The difference in the title of the action is ultimately a matter of form over substance and this decision does not turn on the title of the pleading.

[2] The plaintiffs explained that the third count was brought against the Superintendent because the record was initially unclear as to whether the Superintendent acted independently from the School Board.

The defendants have not responded to the First Amended Complaint and, consequently, the characterizations adopted by the plaintiffs of a Hybrid Quota System are accepted only for the purpose of a demurrer.

Defendants objected to the Court addressing the emergency motion for leave to amend at Monday's hearing but tacitly conceded that the issue of standing and demurrer as to the original complaint could also be applied to the First Amended Complaint. Upon objection properly raised, the Court limited argument on the demurrer to the "no-testing" decision.

After the hearing ended on January 11, 2021, the Court took the matter under advisement. Later that same day, the undersigned judge was assigned to preside over the entire case, to include the hearing on the emergency motion for leave to amend set on January 15, 2021 and the January 26, 2021 evidentiary hearing for the preliminary injunction. That gave the Court an opportunity to ask additional questions of the parties before deciding whether to grant the plaintiffs leave to file an amended complaint.

On Friday, January 15, 2021, the Court granted Plaintiffs' emergency motion for leave to file the First Amended Complaint, which then placed the parties in the awkward procedural posture of having two complaints before the Court.

For judicial economy, the Court now applies the arguments presented under the demurrer to both the original complaint and the First Amended Complaint. Thereafter, it is the First Amended Complaint that is the operative pleading. This decision does not address Count II of the First Amended Complaint and does not foreclose the defendants from filing a demurrer in response to Count II. This decision does not address the constitutional claims asserted under the First Amended Complaint.

Material Facts Taken in Light Most Favorable to the First Amended Complaint

The question presented, made apparent from the parties' competing pleadings, is whether TJ, as a Governor's School, is a program solely for gifted students. If the answer is that TJ is a program solely for gifted students, the question becomes whether a school board can change the procedure for admission that is inconsistent with the screening, referral, identification, and service regulations promulgated by the Virginia Department of Education ("VDOE") that apply to gifted students.

This is a case of first impression. In cases involving the request for judicial review of school board actions, the issues addressing concepts such as student discipline and placement fall within the exclusive province of the school board's supervision of the schools. Review of school board actions often focus on quasi-adjudicative proceedings. The decision to eliminate standardized testing resembles more so a legislative act. The Court has not found a case where a school board eliminated testing, changed the process of admissions, or imposed other administrative changes affecting the fundamental character of a program, a magnet school, or, in this case, a Governor's School.

TJ is a public high school serving Fairfax County and other school divisions, including the counties of Arlington, Loudoun, and Prince William, and the city of Falls Church. Although the

various school divisions[3] participate in sending students to TJ, the Complaint alleges that it is the School Board that manages and operates TJ.

TJ is an Academic Year Regional Governor's School for science and technology. It currently ranks as the number one public high school in the nation. *See* Best U.S. High Schools. *U.S. News & World Report* (https://www.usnews.com/education/best-high-schools/national-rankings).

Plaintiffs are gifted seventh and eighth grade students and their parents who sued the School Board and Superintendent to reverse the School Board's decision eliminating standardized testing.

Each of the student plaintiffs has been recognized by his or her current school as "gifted." Am. Compl. ¶ 3. They all "wish" to attend TJ for high school and "intend[] to apply." Am. Compl. ¶ 7. The students have a "high likelihood" of being admitted to TJ if the tests were administered, but without the tests they likely will not be admitted. They also assert that without the tests as a path to admissions, there will "inevitably" be a lower quality of education at the school. Am. Compl. ¶ 8.

School Board Regulation 3355.13 and the VDOE classify TJ as an Academic Year Governor's School. The VDOE's Administrative Procedures for the Establishment of Academic Year Governor's School Programs state, "The Academic Year Governor's School Program shall provide educational options . . . for students identified as gifted or eligible to be so designated." It also explains, "The Department of Education sponsors regional Governor's Schools, which serve gifted high school students during the academic year. These schools create special education opportunities for gifted students in science, mathematics, technology, social sciences, the humanities, and the arts." From these quotes, Plaintiffs conclude that, therefore, TJ, as a Governor's School, "must operate as a high school for gifted students." Am. Compl. ¶ 54.

Chapter 40 of the Virginia Administrative Code (Regulations Governing Educational Services for Gifted Students) applies to all local school divisions in the Commonwealth. There appears to be no regulations specifically addressing Governor's Schools and the fair inference is that they fall under the category of a "gifted program." 8 VAC 20-40-20.

Chapter 40 defines who "gifted students" are and how they must be identified through the use of "multiple criteria." Chapter 40 differentiates requirements for children who are "gifted in general intellectual or specific academic aptitude," except they share the common requirement that testing be done to measure the student's academic capability. 8 VAC 20-40-20.

Chapter 40 specifies that "at least three measures" from a list of criteria must be used to determine whether a student is eligible for study as a gifted student. One of the measures in the seven-part list requires an "individually administered or group-administered, nationally norm-referenced aptitude or achievement tests." Chapter 40 then requires that "if a *program* is designed to address general intellectual aptitude [or specific academic aptitude], an individually administered

[3] A school division is not always the same as a school district. Keeping the characterization consistent with Virginia law, this decision will refer to the different jurisdictions as school divisions. The schools in Fairfax City fall under the Fairfax County Public Schools division.

or group-administered, nationally norm-referenced aptitude test *shall* be included as one of the three measures used in the school division's identification procedure." 8 VAC 20-40-40 (emphasis added).

The promulgated regulations have the effect of law.

For purposes of the demurrer, the Court accepts that programs for gifted students must have a means of selecting successful candidates from a large pool of applicants. Reading the promulgated regulations, those means require, among other means, standardized testing.

The previous admission process to TJ included such standardized tests, for which Plaintiffs alleged "many of the Students spent weeks or months in preparation for . . . ." Am. Compl. ¶ 67. Now, instead of a standardized test, there will be an essay test which presumably is not a "nationally norm-reference aptitude or achievement test."

Under Counts I and V of the First Amended Complaint, the plaintiffs seek reinstatement of the test via a preliminary and permanent injunction.

Under Count III of the First Amended Complaint (formerly Count II of the original complaint), the plaintiffs challenged the sudden vote announced at an October 6, 2020 work session at which time the School Board eliminated standardized testing. The October 6, 2020 meeting's published agenda mentioned there would be discussions concerning admissions to TJ. Plaintiffs complain that this was supposedly a work session and "not a regular school board meeting," that the agenda did not advise the public that there would be a vote but just said the topic would be addressed, and that "there was no opportunity for the public to comment." Am. Compl. ¶ 76. Despite those deficiencies, the School Board voted to eliminate testing that day. For purposes of demurrer, the Court assumes as true that the School Board had a practice of differentiating work sessions from regular meetings and that in accordance with their corporate governance, a vote should not have been made at the work session or at least announced as an action to be taken at the meeting.

Regarding the Superintendent who is named as a Defendant under Count IV (formerly Count III of the original complaint), the First Amended Complaint notes that on October 7, 2020, he announced that he was going to implement the School Board's decision. Plaintiffs claim that "the *purpose* and effect of the [decision] . . . are to alter fundamentally the character of [TJ] by eliminating its role and purpose as a high school for gifted students." Am. Compl. ¶ 74. Plaintiffs contend that the Superintendent "acted unlawfully when he implemented the [decision]." Am. Compl. ¶ 113. Plaintiffs claim the decision was "arbitrary and capricious" and an "abuse of discretion," and effectively "violate[s] Virginia law." Am. Compl. ¶ 92.

Defendants filed a demurrer asserting that Plaintiffs lacked standing under Va. Code § 22.1-87 because of the absence of an immediate injury, such as the denial of admission. The demurrer further argued there has been no violation of Virginia law because it has not been pled that standardized testing is ever required, that TJ serves only gifted students, that the work session procedure was inconsistent with the Virginia Freedom of Information Act ("FOIA"), and that the Superintendent is not a proper defendant to this action.

Standard of Demurrer and Judicial Review

The purpose of a demurrer is to test the legal sufficiency of a pleading. *See Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 226 (2001). A demurrer must be sustained if a complaint fails to state a cause of action upon which relief can be granted. *See Dunn, McCormack & MacPherson v. Connolly,* 281 Va. 553, 557 (2011). At the demurrer stage, the trial court does not decide the merits of the allegations, but only whether the facts and all fair inferences taken in the light most favorable to the Complaint state a cause of action. *See Squire v. Va. Hous. Dev. Auth.,* 287 Va. 507, 514 (2014).

While a demurrer accepts the truth of all properly pled material facts, the Court is not bound by the conclusions of law asserted in a complaint. *See generally Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127 (2003); *see also Arlington Yellow Cab Co. v. Transportation, Inc.,* 270 Va. 313, 318 (1966). Although all fair inferences will be made in the light most favorable to the complaint, inferences that are unreasonable or at best, speculative, are not required to be made. *See Sweely Holdings, LLC v. SunTrust Bank,* 296 Va. 367, 371 (2018).

A school board's decisions and actions are subject to judicial review under Va. Code § 22.1-87 only when the school board "exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." Va. Code § 22.1-87.

An abuse of discretion occurs when the decisionmaker fails to exercise "sound, reasonable, and legal decision-making." *Black's Law Dictionary* (10th ed. 2014); *see also Fairfax Cnty. Sch. Bd. v. S.C.,* 297 Va. 363, 375 (2019) (noting that 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'"); *Sch. Bd. v. Wescott*, 254 Va. 218, 224 (1997) (quoting *Black's Law Dictionary* 105 (6th ed. 1990)). It occurs even when the School Board acts under an honest but mistaken belief as to the law.

Judicial review is conducted under an appellate standard and confers a measure of deference to the decisions and actions undertaken by the elected members of a school board. *See generally George Mason Univ. v. Malik,* 296 Va. 289 (2018) (concerning eligibility and admissibility under a separate statute containing the equivalent deference standard accorded under § 22.1-87).

Standing of Students and Parents Challenging Decision to Eliminate Testing

As a preliminary argument, Defendants assert that Plaintiffs lack standing because their injuries are speculative.[4] Va. Code § 22.1-87 provides that:

> 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

[4] A challenge to standing is typically presented under a motion to dismiss. In certain circumstances, the facts alleged may also reflect the lack of standing and can therefore be addressed under demurrer. *See generally Deerfield v. Cty. of Hampton,* 283 Va. 759 (2012) (deciding whether a party has standing to bring a declaratory judgment action under a demurrer is appropriate and on appeal, decided *de novo*.)

> 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 and capriciously, or abused its discretion.

Reading the plain meaning of the statute, the person who can claim standing to bring a petition under Va. Code § 22.1-87 is:

(1) any parent, custodian, or legal guardian;
(2) of a pupil attending the public schools; and
(3) [of a pupil . . .] who is aggrieved.

The parents of the pupils in public schools therefore have standing under the statute if the pupil is aggrieved. The students themselves do not because they are not a "parent, custodian or legal guardian." It is only when they have an independent cause of action that they can bring a claim against the School Board or the Superintendent, by a next friend designation. The petition for judicial review, authorized under § 22.1-87, is, by its plain terms, limited to their parents.

The parents of aggrieved pupils attending private school do not have standing to seek judicial review under the statute and must proceed on separate grounds.

To establish standing under the statute, the plaintiffs must not only fall within the named class of persons granted standing, but they must have a special or pecuniary interest in the pending action. *See Goldman v. Landsidle,* 262 Va. 364, 371 (2001). Not every parent with an aggrieved child in a public school can petition for relief under § 22.1-87. An action under Va. Code § 22.1-87 requires a petitioner to suffer an "actual or potential injury in fact based on present rather than future or speculative facts." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 361 (2017).

> The term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack . . . The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." . . . Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some *anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated.* The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Bd. of Supervisors of Fairfax Cnty. v. Bd. of Zoning Appeals, 268 Va. 441 (2004) (quoting *Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals*, 231 Va. 415 (1986)).

The parents must have an "immediate" interest at stake and interest described as "direct, immediate, pecuniary and substantial," not one that is "remote" or an "anticipated" injury. Virginia appellate decisions have turned to decisions from the United States Supreme Court in deciding the question of whether a party meets the definition of "aggrieved" in seeking judicial review of a decision from government agencies. *See generally Sierra Club v. Morton,* 405 U.S. 727 (1972).

In *Lafferty v. Sch. Bd. of Fairfax Cnty., supra,* the Supreme Court of Virginia addressed standing to sue over a school board's actions.[5] There, a student and his parents sued due to the student's distress "over potential repercussions from the school board's expansion of anti-discrimination and anti-harassment polic[ies]" targeted at protecting transgender students and student who have varied gender identities and sexual orientations. The student claimed being "distressed," "nervous," and "terrified" over potential punishment for accidentally violating the new policies and due to his discomfort with such policies. Defendants filed a motion to dismiss for lack of standing.

The court in *Lafferty* concluded the plaintiffs had no standing for two reasons. First, the Court noted that "[Plaintiff] does not allege any present facts that would place him in violation of the policy, rendering any injury purely speculative." "We are left with [Plaintiff]'s bald assertion of fear of discipline without any alleged predicate facts to form the basis for such a fear." Ultimately, "general distress over a general policy does not alone allege injury sufficient for standing." Second, the Court explained that "while Virginia Code § 22.1-87 authorizes a private right of action for those 'aggrieved' by a decision of the School Board, [a plaintiff who has generalized fears of future conduct] has not yet become aggrieved under the statute."

Here, Plaintiffs allege three reasons why they have standing: (1) the School Board's decision to remove the standardized test make it "substantially less likely" they will be admitted to TJ, (2) the removal of the standardized test will ensure a lower quality of education at TJ, and (3) the right to an admissions process conducted according to law was violated. Am. Compl. ¶ 9.

The first two reasons are insufficient to confer standing.

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[5] The Court understands the plaintiffs' expansive reading of *Lafferty's dicta* regarding an aggrieved student's right to petition for judicial review. Among the reported cases, the decision affirming or reversing a circuit court's review of board action does not require an examination as to whether the proper party is on appeal because in many cases both the parent and the student participated in the appeal. A proper party was before the Court on appeal. Va. Code § 22.1-87 is plain as to who can petition the circuit court – and that is the parent. Students will always have standing to bring claims in their name, by next friend, when their rights are violated under laws separate and apart from Va. Code § 22.1-87. *See generally Sch. Bd. of Cty. of Charlottesville, Va. v. Allen,* 240 F.2d 59 (4th Cir. 1956) (granting an injunction to both parents and students seeking to enjoin school boards and superintendents from enforcing racial segregation). The plaintiffs here have asserted additional constitutional claims of Equal Protection and First Amendment violations under the First Amended Complaint, but that particular argument has not yet been addressed.

Regarding Reason (1), whether the plaintiffs will *likely* have scored highly on the standardized test and have a *"high likelihood"* of being admitted remains too speculative to confer standing. Am. Compl. ¶ 8. The argument that a student may not gain admission to a school expresses an anticipated future injury. There is also no guarantee that attaining the highest score will admit the student.

Reason (2) is likewise insufficient because no manner of acceptable prognostication can predict a lowering of "quality" of education at TJ due to the change in composition of a student body from gifted students who take standardized tests to gifted students who are admitted without taking standardized tests. As the defendants argued, the population of gifted students has already been, for the most part, identified and tested. Adding additional testing for admission to TJ is not a prerequisite to sustain the quality of education. Presumably, it is the teachers, the curriculum, and the facilities that have the greater impact on the "quality" of the education. Linking the quality of education to the composition of the student body threatens the recall of past social injustices.

Reason (3) and the allegation that the decision to eliminate testing violates a regulation of the VDOE and is inconsistent with TJ being a Governor's School do, however, state a cause of action as explained further below under Count I. The families of students who live in the school division and are eligible to seek admission to their local Governor's School have an immediate and substantial interest in ensuring that the admission process complies with promulgated regulations and that the character of the Governor's School is preserved.

Unlike *Lafferty,* the parents of the gifted public school students have sufficiently alleged that they and their child were immediately or imminently affected by the decision to change the admission protocol because the student had invested substantial time and effort in preparing to take the standardized tests. Once the testing had been cancelled, all of those efforts became wasted time. That loss alone would not have conferred standing. Distinguishable from *Lafferty,* where the possibility of violating the newly enacted policies was found to be remote, the plaintiffs who were planning on taking the tests suffered the harm of having their work nullified, and if they are correct, the harm was caused by a violation of promulgated regulations.

The families comprising the plaintiffs in this action are in a position that differs from the general population. They live in the TJ school divisions and have observed a certain level of success that enables them to apply to TJ.

Typically, parents who are disappointed as to a change in the educational policies developed by their school board cannot seek judicial intervention. Their choice usually remains in the marketplace or in the political process. Here, however, judicial review is appropriate if the School Board's decision to eliminate testing conflicts with regulations pertaining to a Governor's School Program and how gifted students are identified and admitted into that program.

Requiring a student to be denied admission before seeking judicial review risks foreclosing any review at all. A review that requires a court to conduct a comparative analysis between students who are admitted and those who are denied admission is an impossible task absent objective measures. The elimination of standardized testing removes from the Court's consideration one such objective measure.

The admission of a student is decided under multiple measures and is not decided by any single measure, including the standardized testing. It is inconceivable that a student who was denied admission to TJ could ever present a claim that would survive the deference accorded to School Board actions.

Additionally, the lifespan of a high school career is relatively short and finite in length. Requiring students seeking admission to TJ to await a decision as the case proceeds through the legal system, including trial and appeal, would likely require the student to wait past his or her junior year for the case to be resolved. Moreover, an appropriate remedy is difficult to fashion. Would the Court then require the school to admit the student and displace another or to simply add to the student body regardless of the number of successful appeals?

Stating that the students will have standing to petition once they are denied admission is an expression of an illusory right.

If, in fact, the School Board acted in contravention of applicable regulations, the principle in *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265 (1978) is applicable, and that principle stands for the proposition that an unlawful admission process can be challenged even if the petitioner cannot prove that he or she would have been admitted but for the unlawful condition.

Count I – the No-Testing Decision

On October 6, 2020, the School Board eliminated certain aptitude and achievement tests (identified as the Quant-Q, ACT Aspire Reading and ACT Aspire Science) from being a prerequisite for admission to TJ. The tests are not declared as the dispositive factor.

The Quant-Q test consists of 28 multiple-choice math problems that requires completion within 50 minutes. The ACT Aspire Reading test consists of 32 questions to be completed within 65 minutes and the ACT Aspire Science test consists of 40 questions to be completed within 60 minutes.

All three tests are standardized tests that meet the definition of an "individually administered or group-administered, nationally norm-reference aptitude or achievement test" as required to be used if a program is designed to address either general intellectual aptitude or specific academic attitude. 8 VAC 20-40-10. Virginia's Administrative Code - Chapter 40 contains a number of regulations directing how educational services for gifted students must be provided. These regulations have the force of law.

Va. Code § 22.1-16 authorizes the Board of Education to promulgate such regulations as necessary to carry out its duties. Va. Code § 22.1-17 states that:

> Not less than sixty days prior to the adoption of any regulation affecting school divisions, the Board of Education and the Department of Education shall prepare a statement as to the administrative impact of such regulation on school divisions and the projected costs of implementation of and compliance with such regulation and shall send a copy thereof to each division superintendent.

The Board of Education has promulgated regulations specifically governing the development of programs for identifying and placing gifted student. Under the regulations, the School Board must adopt "measures" to help identify gifted students, including:

a. Assessment of appropriate student products, performance or portfolio;

b. Record of observation on in-classroom behavior;

c. Appropriate rating scales, checklists, or questionnaires;

d. Individual interview;

e. *Individually administered or group-administered, nationally norm-reference aptitude or achievement tests*;

f. Record of previous accomplishments (such as awards, honors, grades, etc.); or

g. Additional valid and reliable measures or procedures.

8 VAC 20-40-40(D)(3) (emphasis added).

8 VAC 20-40-40(D)(4) provides that "if a program is designed to address general intellectual aptitude, an individually administered or group-administered, *nationally norm-referenced aptitude test shall be included as one of the three measures used* in the school division's identification procedures."

8 VAC 20-40-40(D)(5) provides that "if a program is designed to address specific academic aptitude, an individually administered or group-administered, *nationally norm-referenced aptitude test shall be included as one of the three measures used* in the school division's identification procedures."

Plaintiffs persuasively argue for purposes of the demurrer that by removing the standardized tests, the actions of the School Board violate the regulations because the decision writes out of the regulation that a "nationally norm-referenced aptitude test" be employed to identify students with either gifted general intellectual aptitude or gifted specific academic aptitude for certain programs.

Under Va. Code § 22.1-79(5), a school board shall "[i]nsofar as not inconsistent with state statutes and regulations of the Board of Education, operate and maintain the public schools in the school division and determine the length of the school term, the studies to be pursued, the methods of teaching and the government to be employed in the schools." The School Board, while exercising supervisory control of operations of the schools, must still operate the schools consistent with the regulations of the Board of Education.

This Court recognizes that the Virginia Constitution, Article VIII, Section 7, explicitly states that "the supervision of schools in each school division [rests with] a school board." The term

"supervision" is not, however, defined. It has been interpreted by judicial decisions, and in some areas a school board is given great deference.

The School Board does not however have unfettered discretion. It is the role of the General Assembly to formulate policies that "maintain an efficient, high quality, *statewide* educational system," while the local school boards "have *full responsibility* for the application of statewide and local policies, rules, and regulations adopted for the day-to-day management of public schools." *Dennis v. City. Sch. Bd.,* 582 F. Supp. 536, 543 (W.D. Va. 1984) (emphasis added).

Article VIII, Section 1 of the Virginia Constitution places the authority on the General Assembly to ensure that an educational program of high quality is established and continually maintained.

Virginia Constitution, Article VIII, Section 2 further provides that:

> Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly. The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the costs of such program between the Commonwealth and local units of government comprising such school division. Each unit of local government shall provide its portion of such costs by local taxes or from other available funds.

The General Assembly's funding decisions can affect policy. Va. Code § 22.1-89 requires that "[e]ach school board shall manage and control the funds made available to the school board for public schools and may incur costs and expenses. If funds are appropriated to the school board by major classification as provided in § 22.1-94, no funds shall be expended by the school board except in accordance with such classifications without the consent of the governing body appropriating the funds."

8 VAC 20-40-70 requires the same, stating that "funds designated by the Virginia General Assembly for the education of gifted students shall be used by school divisions in accordance with the provisions of the appropriation act."

Va. Code § 22.1-118 ensures that the fiscal agent to receive and disperse funds for joint schools, including an academic year Governor's School, can be selected by agreement and approval of the respective local governing bodies.

The various duties and designation of funding are relevant facts because Plaintiffs have shown that the General Assembly set aside funds specifically earmarked for Governor's Schools. The defendants argue that such facts are irrelevant because no statute or regulation requires that a Governor's School be designated solely for gifted students or that the School Board must observe certain standards for admissions of a gifted student. The fact that the General Assembly placed Governor's Schools under a separate category belies that contention.

That argument triggers a critical fact at issue in this case, and that is whether a Governor's School is a school developed solely for gifted students. Taking the evidence in the light most favorable to the plaintiffs, a Governor's School does not appear to be a regular school. A Governor's School appears to be specially created programs only for gifted students.

It is undisputed that TJ is a Regional Governor's School. The defendants deny any legal obligation arising from its status as a Regional Governor's School, to keep it as such, and Defendants go so far as to say that there is no law that requires the school to admit only gifted students.

Virginia's Governor's Schools are, by definition, programs developed solely for gifted students. The VDOE website characterizes such schools as "Governor's School Programs."[6] They are not just schools but are actually programs, and some of the programs run a full academic year.

Merriam-Webster's dictionary defines a school as an "organization that provides instruction." *School*, Merriam-Webster (www.merriam-webster.com/dictionary/school). The plain meaning of "school" brings up visions of brick buildings and athletic fields where teaching occurs.

The definition of a "program" refers to a "curriculum," which are a set of courses offered by an educational institution. *See Program*, Merriam-Webster (https://www.merriam-webster.com/dictionary/program).

A program does not generate visions of school buildings. Governor's Schools started out as summer programs for gifted students and remains programs for gifted students today, although some such as TJ are housed in their own facility and are year-round programs proving full-fledged college preparatory education. Despite the added advantage of being self-contained, TJ is still a program.

The Governor's School Programs were established by Governor Linwood Holton in 1973 for 400 gifted students from across the Commonwealth. It remains a program for gifted students and in this light brings up the often used and commonly applied phrase "*expressio unius est exclusio alterius.*" Setting aside the standard the Court must apply in a demurrer, it is beyond cavil that a program designed for gifted students is a program designed *solely* for gifted students. Exceptions for admission to such programs do not change its character.

There are 19 Academic-Year Governor's Schools in Virginia, established by the VDOE and the General Assembly. There are other Governor's Schools that are not Academic-Year programs. TJ, as a Governor's School, is a program solely for gifted students with a focus on Science and Technology.

No controlling legal principle stands for the proposition that a program for gifted students must be expressly designated by statute or regulation as a gifted program before it can be recognized

[6] In addition to the arguments presented by the plaintiffs, the Court took judicial notice of the Governor's School Program as described by the VDOE. This notice is for the purposes of deciding the demurrer and will not constitute findings of facts for later hearings. Defendants are entitled, upon timely motion made, to be heard as to the propriety of the court taking judicial notice of the VDOE website.

as a program solely for gifted students. It would be ironic if every Governor's School Program throughout the Commonwealth is a program solely for gifted students except for TJ, the currently number one rated high school in the nation.

Another question presented is whether a single school board, even one charged with operating a Regional Governor's School, can on its own initiative fundamentally alter the admission requirements of the school, and in so doing change its standing as a Regional Governor's School.

The VDOE website states:

> The Governor's School programs are administered by the Virginia Department of Education, Office of Secondary Instructional Services, in cooperation with local school divisions, colleges and universities. A local director at each Governor's School site has direct responsibility for the logistics of the programs. Academic-Year Governor Schools have directors and regional governing boards that provide policy and administration of the schools.
>
> The Virginia Department of Education, regional governing boards, local superintendents, site or program directors, school board, and advisory committees establish policies for the Governor's Schools. These policies are described in an administrative procedures documents for each school. All Governor's Schools annually submit a current administrative procedure.

The VDOE website appears to take the position that policies affecting Governor's School Programs are to be decided by more than a single school board. If the VDOE website is incorrect and it is within the discretion of the School Board to decide admissions policies and adopt one that eliminates standardized testing, then the hard-fought efforts of the plaintiffs to seek judicial review will not lead to the relief they seek. An education policy that eliminates standardized testing is a legislative policy decision immune from judicial review.

Defendants' reliance on *Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526 (2005) is misplaced and does not change this decision to overrule the demurrer on Count I – challenging the elimination of testing. Distinguishable from *Davenport,* where there were no applicable provision of the Virginia Occupational Safety and Health Act or state administrative regulation, the Board of Education's regulations governing the education of gifted students make this case different. Va. Code § 22.1-78 provides that:

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

With TJ being a Governor's School Program, the elimination of the standardized tests, and the failure to replace those tests with other equivalent testing, allows a cause of action for invoking judicial review. Such actions may, in addition to violating promulgated regulations, violate the

prohibition expressed under § 22.1-78 against adopting policies in contravention of promulgated regulations, including the misuse of funds earmarked for a Governor's School.

This decision should not be interpreted as a finding or legal conclusion that standardized testing is either appropriate or necessary to admit gifted students to a Governor's School Program. The Court recognizes there is an ongoing debate about the legitimacy of standardized testing. Ultimately, the decision of whether to use standardized testing rests solely with the other branch of government responsible for developing the education policies of the Commonwealth's schools.

Until the VDOE modifies its regulations, standardized testing is a measure of whether a student should be admitted to a program for gifted students.

Count II – December 17, 2020 Development of the Hybrid Quota System

This decision does not address Count II, given that the defendants have not replied to the First Amended Complaint. It is the Court that applied overlapping legal principles to advance the demurrer. To clarify the procedural awkwardness of the filing of a First Amended Complaint before the Court has an opportunity to publish this decision, the plaintiffs should file a Second Amended Complaint before defendants have to respond to Count II.

Count III - The Unexpected Vote at a Work Session

Regarding Count III (formerly Count II of the original complaint), Plaintiffs have not pled sufficient facts to allege that the decision to remove the standardized test during a work session violates FOIA, and if Count III is intended to be a FOIA claim then the demurrer should be sustained.

The Virginia FOIA only requires that such meetings be public, must have a published agenda, and must have minutes recorded. *See* Va. Code § 2.2-3701. Plaintiffs have not alleged in their Complaint that these three requirements were not satisfied. With each of these requirements being performed, it does not generally matter that the vote occurred during a work session. All that is required for a vote is that it be held in an open meeting and it not be secret. Plaintiffs here confirm that the meeting was open and that a vote was take – therefore, the vote appears to be valid. *See* Va. Code § 2.2-3707.

Further, Plaintiffs allege that there was no opportunity for public comment, but the School Board is not an "agency" for purposes of the Virginia Administrative Procedure Act, so the Act and its public comment requirements do not apply here. *See* Va. Code § 2.2-4001. The only legal requirements for public comment, which is under Va. Code § 22.1-79, do not apply here, as inviting public comment is required only when (1) schools are being consolidated, (2) certain public-school services are being contracted to a private entity, and (3) school boundaries are being redrawn.

In Plaintiffs' Opposition to the Demurrer, they asserted a new allegation – that minutes were not recorded, which is required under Virginia FOIA. While there are remedies available if FOIA is violated, there is no requirement for a re-vote or nullification of the vote that occurred if the issue can be remedied, such as by publishing minutes from the meeting that were previously not published. *See Hill v. Fairfax Cnty. Sch. Bd.*, 83 Va. Cir. 172 (2011) (Fairfax, Alden, J.) ("the Court concludes

that the failures by the Board were not substantial."). Defendants represent the minutes have been published. On the other hand, the failure of the School Board to follow its own procedures or observed common corporate governance may be grounds for finding that it acted arbitrarily and capriciously.

Plaintiffs complain that the notice for the October 6, 2020 meeting was misleading, stating, "Today's presentation will provide an update to the September 15, 2020, work session on the effort of continuous improvement on the Admissions Process for TJHSST. The presentation will provide information regarding the current admissions process and proposed changes for future admissions processes." School Board Agenda (October 6, 2020).

Count III therefore survives, not so much as a cause of action under FOIA but as an additional basis upon which to seek judicial review. Although some minutes have been prepared since the original complaint was filed, an arbitrary and capricious decision can still be inferred from an action taken in a void action or an action that fails to follow proper corporate governance and transparent notices. The plaintiffs are granted leave to amend Count III to assert it more specifically as a basis to support a petition under Va. Code § 22.1-87. Alternatively, they are granted leave to file an amended complaint that satisfied the particularity required of a FOIA claim.

Count IV - Complaint against the Superintendent

Under Count IV of the First Amended Complaint (formerly Count III of the original complaint), Plaintiffs allege that the Superintendent acted unlawfully when he implemented the School Board's vote. The Superintendent acts in accordance with Va. Code § 22.1-70, which defines "[p]owers and duties of superintendent generally. A division superintendent shall perform such other duties as may be prescribed by law, by the school board and by the State Board." Acting as an agent for the School Board, the Superintendent performs his job requirement when announcing his move to implement the Board's decision following its vote to eliminate standardized testing.

Although pleadings in the alternate are permitted under Va. Code § 8.01-281, Plaintiffs did not allege that in the alternative the Superintendent acted unilaterally or contrary to the decision of the School Board. The facts as alleged and re-alleged established that the School Board voted to remove the standardized test and, if so, the Superintendent was acting within his authority to eliminate standardized testing. Without other facts sufficiently pled to show how the Superintendent acted unlawfully except by implementing the policies of the School Board, the demurrer must be sustained.

Further, the statute under which Plaintiffs seeks to invoke judicial review, Va. Code § 22.1-87, allows a party to file suit only against the School Board, not the Superintendent. The Court will not find that a private right of action is implied when there is express authorization for bringing a claim against one defendant but not the other. *See Fernandez v. Comm'r of Highways,* 298 Va. 616, 618 (2020) (citing *Cherrie v. Va. Health Serv., Inc.* 292 Va. 309, 315 (2016)). In *Cherrie,* the Court held that "[w]hen a statute is silent, however, we have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it." *Cherrie v. Va. Health Serv., Inc.* 292 Va. 309, 315 (2016). Importantly, "[t]he necessity for such an

implication must be palpable. We would never infer a private right of action based solely on a bare allegation of a statutory violation." *Id.*

What the Supreme Court of Virginia rejected in *Cherrie,* and now *Fernandez,* is what Plaintiffs have attempted to do here. Plaintiffs cannot rely otherwise on their cited cases that allow superintendents to be defendants, because those cases are federal, referencing violation of federal or constitutional law, whereas here, the law allegedly violated is Va. Code § 22.1-87. Therefore, the Superintendent is not a proper defendant in this case.

Count V – Preliminary Injunction

Va. Code § 8.01-620 grants the Circuit Court jurisdiction to award injunctions. Set forth under a separate count of the Complaint, it is a remedy in search of a right of action. Plaintiffs have pleaded it as a separate count out of an abundance of caution that the remedy is not lost for it not being sufficiently pled. Insofar as this decision concludes that a cause of action exist under Count I, this Count survives demurrer.

The reach of an injunction extends not only to a named defendant, but to all those in "privity" with the defendant as long as they have notice of the injunction. The Court will assume that the Superintendent will act responsibly and will comply with the enforceable orders of the Court until proven otherwise. It is premature to include him as a party defendant.

Conclusion

For the reasons stated above, the demurrer filed by Defendants is SUSTAINED in part and OVERRULED in part with respect to the original complaint and the First Amended Complaint, deemed filed as of January 15, 2021, as follows:

(1) The aggrieved students who appeared as plaintiffs by their next friend do not have standing to petition for judicial review under Va. Code § 22.1-87.

(2) The parents of pupils in private schools do not have standing to petition for judicial review under Va. Code § 22.1-87.

(3) The demurrer to Count I is OVERRULED, but the time for the School Board to file responsive pleadings to Count I of the First Amended Complaint is suspended until further Order of the Court.

(4) Count II of the First Amended Complaint is not addressed in this decision, and the time for the School Board to file responsive pleadings to Count II is suspended until further Order of the Court. This suspension modifies the Order entered on January 15, 2021.

(5) The demurrer to Count III of the First Amended Complaint (Count II of the original complaint) is SUSTAINED with leave to amend. To the extent the plaintiffs seek to assert a claim under FOIA, the facts as pled are insufficient to

state a FOIA violation and Plaintiffs must amend the Complaint to state facts sufficient for a FOIA violation. Plaintiffs may otherwise amend to rely upon allegations of improper procedures culminating in the vote of "No Testing" as a factor to be considered under the "arbitrary and capricious" standard of Va. Code § 22.1-87. Defendants are entitled to an accurate notice of the claim. The time for the School Board to file responsive pleadings to Count III of the First Amended Complaint is suspended until further Order of the Court.

(6) The demurrer to Count IV (Count III of the original complaint) is SUSTAINED with leave to amend. As stated, the Superintendent, by implementing the policies of the School Board, is not a proper party defendant.

(7) If defendants' demurrer extends to Count V (Count IV of the original complaint), the demurrer is OVERRULED. Although the injunctive relief requested under both complaints is a remedy and not an independent cause of action, pleading injunctive relief under a separate count is not prohibited. The request for injunctive relief survives if there are allegations of sufficient circumstances or a violation of the law to support the claim. Count I, if proven, supports the claim for injunctive relief. The response from the defendants is suspended until further Order of the Court.

The parties will kindly prepare a draft Order reflecting this decision. To resolve the confusing procedural posture caused by the filing of the First Amended Complaint, the plaintiffs should file a Second Amended Complaint that is consistent with the decision stated here. The defendants can then file a demurrer to Count II and file such other pleadings as they should decide.

If a demurrer is filed as to any Count under the Second Amended Complaint, an answer to the remaining Counts does not have to be filed until the Court disposes of all demurrers.

The parties should meet and confer with respect to the timing of the preliminary injunction hearing. Certain material facts remain in dispute and the parties are technically not at issue. The granting of an injunction is an extraordinary remedy. The plaintiffs will not have the benefit of having the allegations considered in the light most favorable to their position at the preliminary injunction hearing. The Court must weigh expert testimony at a preliminary injunction hearing differently considering the opposing party does not have an opportunity to offer an expert in rebuttal. The School Board's actions will be viewed with the deference accorded to an elected political body and as the statute requires.

Sincerely,

[redacted]

John M. Tran
Judge, Fairfax Circuit Court