THE MOST COMMON LAWSUITS AGAINST SCHOOL BOARDS AND HOW TO DEFEND AGAINST THEM

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I. INTRODUCTION

Public school boards face legal challenges in a wide variety of areas. From student lawsuits claiming violations of constitutional rights, to teachers suing for employment discrimination, to building contractors challenging bid processes, a school board must be prepared to address legal challenges on many different fronts. The purpose of this presentation is to provide an overview of the most common lawsuits against school boards and some ways for school boards to defend against these lawsuits.

II. THE MOST COMMON LAWSUITS AGAINST SCHOOL BOARDS

A. Appeals of School Board Decisions

1. Va. Code Ann. § 22.1-87

Virginia law provides a statutory mechanism to appeal virtually any final decision of a school board. The statute, Va. Code Ann. § 22.1-87, provides that any parent, custodian or

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legal guardian of a public school student may petition a state circuit court to review a school board's decision. Importantly, the appeal must be made within thirty (30) days of the school board's action. Upon appeal, the court reviews the minutes of the school board meeting, any transcript prepared, and "any other evidence found relevant to the issues on appeal by the court." At least one court has ruled that an appeal under Va. Code Ann. § 22.1-87 does not allow the plaintiff to conduct discovery, including the taking of depositions. *See Lowry by Lowry v. Sch. Bd. of City of Chesapeake*, Chancery No. L00-602 (Chesapeake Cir. Ct. Feb. 20, 2002). This ruling has a significant impact in limiting the scope of these appeals and their disruption to school boards.

2. <u>The Arbitrary and Capricious Standard</u>

Va. Code Ann. § 22.1-87 provides that a court must sustain a school board's decision unless the board: (1) exceeded its authority; (2) acted arbitrarily or capriciously; or (3) abused its discretion. One court described this standard as follows:

> The Court does not, and by statute cannot, review the merits of the decision of the School Board's decision. The Court cannot substitute its own view of the merits of the decision in question, it can only review the decision to see if there was a rational and factual basis for the decision to be made. *See County Sch. Bd. of Spotsylvania County v. McConnell*, 215 Va. 603, 212 S.E.2d 264 (1975). Even if the Court disagrees with the decision reached by the School Board, it cannot overturn the board's decision if the board gave fair consideration and debate to the issue. *See Fishel v. Frederick County Sch. Bd.*, 11 Va. Cir. 283 (1988).

See M.M. v. Chesapeake City Sch. Bd., 52 Va. Cir. 356 (Chesapeake Cir. Ct. 2000) (upholding student expulsion for making bomb threat).

B. Student Discipline

1. Expulsion or Long-Term Suspension

One common challenge deals with the amount of due process required for expulsion or long-term suspension. In *Wood v. Henry County Pub. Sch.*, 255 Va. 85, 495 S.E.2d 255 (1998), the Supreme Court of Virginia held that minimum constitutional procedures demand that a student facing long-term suspension (10 or more days) or expulsion must be: (1) notified of what the student is accused of doing, and (2) given an opportunity to be heard regarding the accusation. This procedure is codified at Va. Code Ann. 22.1-277. In *Wood*, a school system suspended a tenth-grade student for bringing a pocketknife on a school field trip. After multiple hearings, the school then expelled the student pursuant to a section of the local school code that prohibited students from possessing knives at school-sponsored events. On appeal, the Court held that the school system did not violate the student's due process rights because he received proper notification and a hearing. This decision followed the ruling by the United States Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975).

2. Zero-Tolerance Policies

Several courts, including the Fourth Circuit Court of Appeals and a Virginia Circuit Court, have recently upheld mandatory expulsion policies as being within a school board's authority. *Ratner v. Loudoun County Public Schs.*, No. 00-2157, 2001 WL 855606 (4th Cir. July 30, 2001); *M.M. v. Chesapeake Pub. Schs.*, 52 Va. Cir. 356 (Chesapeake Cir. Ct. 2000). In these cases, courts defer to policies that promote the safety and welfare of the school community and are unwilling to disturb the discretion that school boards have to implement "zero-tolerance" policies that are designed for protection of these interests, especially where

the offense threatens the safety of students and the school board considers all of the circumstances surrounding the offense.

However, that does not mean courts have been happy with the results in zero-tolerance cases. As Judge Hamilton noted in *Ratner*, a case involving the suspension of a student who took a knife away from a suicidal friend and hid it in his locker, school boards should take heed of the "well-established precept that judgment is the better part of wisdom" and use common sense in applying zero-tolerance policies.[1]

3. Discipline for Off-Campus Acts

Many parents believe that a school system has no right to discipline a student for actions that occur away from school and will file lawsuits under such circumstances. Several courts have ruled and the Office of the Attorney General has opined that a school board may subject students to punishment for acts committed away from school property and outside of school hours, which are detrimental to the interests of the school or adversely affect school discipline. *See, e.g.,* Op. Va. Att'y Gen., 274-75 (1961).

C. Section 1983 Claims – Free Speech and First Amendment Rights

1. Students' Rights

School Boards routinely face lawsuits under 42 U.S.C. § 1983 for claims arising from constitutional violations. These claims are commonly known as Section 1983 claims, and public bodies often face actions asserting that an individual's First Amendment rights have been violated. Courts have held that students may freely express themselves at school unless their conduct or speech "would materially and substantially interfere with the requirements of

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[1] For a more in-depth discussion of student discipline issues, contact David Anthony for his recent presentation, "Student Discipline: Ten Things You Need to Know," presented at the Governor's Conference on Education on July 23, 2002.

appropriate discipline in the operation of the school." *Broussard v. Sch. Bd. of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (quoting *Tinker v. DesMoines Indep. Sch. Dist.*, 393 U.S. 503 (1969)). In *Broussard*, the court upheld a school's decision to suspend a student for wearing a shirt to school with the inscription, "Drugs Suck." The court found that schools legally could prohibit lewd, indecent or offensive speech.

Under the law, schools may bar expression that directly causes disruption to the academic environment. The more tenuous the link between the expression and the disruption, however, the more likely it is that banning such speech will be found unconstitutional.

2. Parents' Rights

To a more limited extent, parents may freely express themselves at school board meetings, if the school board's policy allows for public comment. *Bach v. Sch. Bd. of City of Va. Beach*, 139 F. Supp.2d 738 (E.D. Va. 2001). If the school board provides an opportunity for public comment, the school board may only place content-neutral restrictions on such comment. For example, the school board may not ban criticism of school officials while allowing praise, as the court in *Bach* struck down such a policy.

3. Teachers' Rights

Teachers have certain rights to free expression under the First Amendment when: (1) the teacher speaks as a citizen about matters of public concern; and (2) the teacher's interest in exercising free speech is not outweighed by the interest of the school in providing quality instruction. *See Newton v. Slye*, 116 F. Supp.2d 677 (W.D. Va. 2000). However, the First Amendment rights of teachers are not absolute, and teachers may not invoke their constitutional rights to take over the school's curriculum. *Id.* In *Newton*, the court found that a school acted within its rights when it refused to allow a teacher to post a list of banned books

on his classroom door. Thus, teachers may not claim First Amendment protection in an attempt to dictate to the school the content of classroom instruction (*e.g.*, what plays they will direct and what books their classes will read). *See also Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (holding that school plays are curriculum-related).

D. Section 1983 Claims – Searches and Seizures in Schools

The United States Supreme Court has ruled that the Fourth Amendment of the United States Constitution applies to searches of students in public schools. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court recognized that students have legitimate privacy interests entitled to Fourth Amendment protection, but also recognized the need to balance the student's legitimate expectations of privacy against the substantial interests of teachers and administrators in maintaining discipline and safety in the classroom and on school grounds. The Court established that the test of the legality of a student search would be the "reasonableness under all the circumstances" of the search. The determination of "reasonableness" involved inquiry into: (a) whether the action was justified at its inception (*i.e.*, when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school); and (b) whether the search was permissible in scope (*i.e.*, when the measures adopted to conduct the search are reasonable related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction). The Supreme Court emphasized that the requirement of reasonable suspicion is not a requirement of absolute

certainty and that teachers and school administrators are permitted to act in accordance with reason and common sense.[2]

Several recent decisions, including decisions from Virginia courts, provide insight into how courts will review the reasonableness standard set forth in *T.L.O.*, as well as under what circumstances individualized suspicion is required.

- *Board of Educ. v. Earls*, 122 S. Ct. 2559 (June 27, 2002) (upholding high school's drug testing program of all students engaged in any extracurricular activities, even without individualized suspicion, as students who participate in extracurricular activities have a diminished expectation of privacy, the school board faced an increase in drug use among students and its policy is a reasonable means of addressing that concern).

- *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding that the random urinalysis testing of high school athletes was reasonable under the circumstances without the necessity of individualized suspicion as children are routinely required to submit to physical examinations, athletes have less privacy expectations than other students, athletes subject themselves to a higher degree of regulation, the policy deterred drug use and the school board had a legitimate fear of physical harm to drug users participating in sports).

- *DesRoches v. Caprio*, 156 F.3d 571 (4th Cir. 1998) (holding that individualized suspicion may not have existed when the backpacks of all of the students in the class were requested to be searched for a pair of stolen shoes; however, after the backpacks of the students who consented were searched and nothing was found, there was individualized suspicion to search the backpack of the one student who objected).

- *Burnham v. West*, 681 F. Supp. 1160 (E.D. Va. 1987) (finding that a search of <u>all</u> middle school students in the school for portable radios, magic markers and marijuana violated the Fourth Amendment because of the absence of individualized suspicion).

- *Smith v. City of Norfolk Sch. Bd.*, Ch. No. C96-2087 (Norfolk Cir. Sept. 1998) (upholding a school board policy whereby all students at randomly selected classrooms, hallways or buses would be scanned for weapons by metal detectors in light of the minimal level of intrusion, the students' lowered expectations of privacy and the significant governmental concern in the welfare and safety of school children.

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[2] The Board of Education has issued a booklet entitled "Guidelines for Student Searches in Public Schools," which was issued pursuant to Va. Code Ann. § 22.1-277.01:2. These guidelines provide helpful tips on the scope and criteria for student searches.

E. **Religion in Schools and Section 1983 Claims for Violations of Freedom of Religious Expression**

School boards have faced a number of issues dealing with the scope and limit of where and how they may allow or refuse to allow religious expression or issues dealing with religion in the public schools.

1. **Moment of Silence**

The Fourth Circuit Court of Appeals recently upheld Virginia's mandatory moment of silence law, Va. Code Ann. § 22.1-203. *Brown v. Gilmore*, 258 F.3d 265 (4th Cir.), *cert. denied,* 122 S. Ct. 465 (2001). The court found the law did not have a purely religious purpose because it allowed non-religious meditation.

2. **Use of School Facilities for Religious Groups**

The United States Supreme Court recently upheld the right of a religious club to use school facilities on the same terms as other outside groups. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). The club's meetings were held after school hours and were open to any student with parental permission to attend. In these cases, the crucial point is that the school cannot appear to be endorsing the club. To the extent that such a club's activities clearly are not sponsored by the school, they should be permitted the same access as non-religious groups.

3. **School Prayer**

The United States Supreme Court, however, has ruled that student-led prayer at high school football games is unconstitutional. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). In this case, the court found the circumstances to suggest that the school endorsed the prayer. This opinion suggests that a general student-led prayer at graduation would likely be held unconstitutional. However, prayer in the context of a particular student's address where

the student has been chosen to speak on purely secular criteria would arguably be constitutional, and at least one appellate court has so held. *See Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir.) *cert. denied*, 122 S. Ct. 664 (2001) (upholding student's right to choose to pray during speech where the student was selected to speak by the student body based on purely secular criteria). The rationale essentially is that in a situation where the student is chosen to speak based on purely secular standards, *e.g.*, grade performance, and not because of any spiritual or religious persuasion, the risk of perceived endorsement likely evaporates.

4. Prayer at School Board Meetings

The United States Supreme Court has not addressed the issue of prayer at the beginning of school board meetings. The Sixth Circuit Court of Appeals has ruled that such prayers are unconstitutional. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). However, the Virginia Attorney General's office has offered an opinion that such prayers are constitutional because: (1) the prayers take place in an adult setting; (2) the invocation is directed toward school board members; and (3) the function of the meeting is a meeting of adults with official policy-making and deliberative duties.

F. Labor and Employment

School boards, like any other employer, consistently face lawsuits concerning or by employees under a wide variety of theories. The most common examples of these lawsuits include:

1. Grievances: In general, teachers with contract disputes must follow the grievance procedures set forth by statute and/or the school board's policy manual. *See Sch. Bd. of City of Norfolk v. Giannoutsos*, 238 Va. 144, 380 S.E.2d 647 (1989); *Williams v.*

Northampton County Sch. Bd., No. 00CL120 (Accomack County Jan. 11, 2002); Va. Code Ann. § 22.1-304-06. It is important that school boards strictly comply with the grievance requirements. In a recent decision, the Fourth Circuit Court of Appeals ruled that a terminated teacher was entitled to damages for lost wages and emotional distress. *See Bird v. Bland County Sch. Bd.*, 205 F.3d 1332, 2000 U.S. App. LEXIS 553 (4th Cir. 2000).

2. Title VII of the Civil Rights Act of 1964: Prohibits discrimination due to race, color, religion, sex, national origin or pregnancy. Title VII also prohibits sexual harassment and has a significant administrative scheme with strict time constraints.

3. Age Discrimination in Employment Act of 1967: Prohibits age discrimination against any employee aged 40 or older.

6. Americans With Disabilities Act of 1990: Protects qualified individuals with a disability. A "disability" is defined as a mental or physical impairment which substantially limits one or more major life activities.

7. Family and Medical Leave Act of 1993: Provides protective leave to eligible employees (1) because of the birth or adoption of a child; (2) if the employee is needed to care for his son, daughter, spouse or parent who has a serious health condition; or (3) if a serious health condition makes the employee incapable of performing the function of his or her position.

8. Section 1981 Claims: Prohibits racial discrimination related to all aspects of the employment relationship (*e.g.*, promotions, transfers, terminations).

9. Uniform Services Employment and Re-Employment Rights Act of 1994 ("USERRA"): Prohibits the termination, refusal to promote or denial of any other

"incident or advantage of employment" because of an employee's obligations as a member of the military services.

G. FERPA

The Family Educational Rights and Privacy Act ("FERPA") protects against the disclosure of the educational records of students which contain "personally identifiable information" about the student and also provides rights of access and amendment of such records to parents. *See* 20 U.S.C. § 1232g.[3] Schools may not disclose educational records to third-parties without the parents' consent (or the student's consent if he or she is 18 or older). Should the school violate FERPA's requirements, parents or students 18 years of age or older may bring their complaints before the Family Policy Compliance Office ("FPCO"), a branch of the Department of Education. Some examples of FERPA issues which may fact school board include:

- FERPA is not violated by allowing students to grade each other's papers as this practice does not improperly disclose educational records to third parties. *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002)
- Individuals, such as parents, may not file lawsuits against schools for FERPA violations as they are limited to filing complaints with the Department of Education which, in turn, can withhold federal funds from a district that fails to correct a FERPA violation. *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268 (2002).
- A student identification number standing alone has been held to be personally identifiable information. *See Letter re: San Elizario Sch. Dist.* (FPCO Aug. 6, 2001).
- A school may turn over educational records subject to a subpoena or lawful court order provided that the school makes a reasonable attempt to notify the parents of the order before compliance. *See Letter re: Dunkirk City Sch. Dist.* (FPCO Aug. 8, 2001).

[3] Virginia law also restricts access to student records to certain statutorily defined persons. *See* Va. Code Ann. § 22.1-287 (listing acceptable persons). Violation of this section by school personnel may be a Class 3 misdemeanor.

- A statistical compilation of disciplinary incidents in a school district, but which did not individually identify any particular student, was not an educational record within FERPA. *See Hardin County Schs. v. Foster*, 40 S.W.3d 865 (Ky. 2001).

H. <u>Virginia Public Procurement Act</u>

School boards, as public bodies, are subject to the requirements of the Virginia Public Procurement Act ("VPPA"). Va. Code Ann. § 2.2-4300, *et seq.* The VPPA aims to ensure fairness in the public procurement process and provides procedures for bidders, offerors, contractors, and the government to protest or litigate procurement decisions. Such persons can protest the award of a contract, the decision to award a contract, or the decision to negotiate a contract on a sole source basis. *See* Va. Code Ann. § 2.2-4360. The protest must be filed within ten days of the public notice of the award or the announcement of the decision to award, whichever comes first. *Id*.

The school board must issue a written response to a protest within ten days that states the reasons for its decision. *Id*. If the protest is denied, the protestor may then appeal to Circuit Court. *Id*. Alternatively, the protestor may file a lawsuit directly with the Circuit Court. *See* Va. Code Ann. § 2.2-4364. Upon the timely filing of a protestor lawsuit, the award of the contract is stayed unless the school board makes a written determination that "proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire." *See* Va. Code Ann. § 2.2-4362.

Circuit Courts review the school board's decision to determine whether it was: (1) "arbitrary and capricious"; or (2) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the invitation to bid.

Some examples of cases dealing with bid protests include:

- A disappointed bidder may not protest the public body's decision that the selected bidder or offeror is not a "responsible" bidder or offeror (*i.e.*, that the bidder has the

"capability, in all respects, to perform fully the contract requirements in the moral and business integrity and reliability that will assure good faith performance" of a contract). *See Banner Detective Agency, Ltd. v. City of Norfolk*, 10 Va. Cir. 53 (Norfolk 1986); *see also* Va. Ann. § 2.2-4301.

- The time requirements of the VPPA are strictly construed and a Circuit court does not have jurisdiction over a case when the party has failed to institute legal action within ten days from the agency's written decision. *See NBS Imaging Sys. v. Va. Dep't of Motor Vehicles*, 46 Va. Cir. 165 (Richmond 1998).
- A protestor may not file his protest before the agency issues its written decision denying this protest. *See Sabre Constr. Co. v. County of Fairfax*, 256 Va. 68, 501 S.E.2d 144 (1998).
- There can be no cause of action for money damages under the VPPA. *Monk v. Va. Dep't of Transp.*, 34 Va. Cir. 374 (Russell Co. 1994).

I. Freedom of Information Act

The Virginia Freedom of Information Act ("FOIA") requires that meetings of school boards be open to the public and further provides public access to official records. Va. Code Ann. § 2.2-3700.

1. Open Meeting Requirement

School board meetings must be open to the public unless they are among those specifically excluded from the open meetings requirement by Va. Code Ann. § 2.2-3711. Committees or subcommittees of school boards are also subject to the open meetings requirement. Many items are exempted under FOIA, including those convened to discuss employment decisions, acquisition of property, and matters involving the scholastic records of a student, such as disciplinary or re-admissions proceedings. To convene a closed meeting, the board must first take a public vote approving a motion that: (1) identifies the subject matter of the meeting; (2) states the purpose of the meeting; and (3) makes specific reference to the statutory exemption relied upon to authorize a closed meeting. Va Code Ann. § 2.2-3712.

2. **Requests for Public Documents**

Official records are those records prepared, owned, or in the possession of a school board, school employee or school officer during the transaction of public business. Va. Code Ann. § 2.2-3701. To request official records under FOIA, a person must make the request describing the documents with "reasonable specificity" and need not make reference to FOIA in the request. Va. Code Ann. § 2.2-3704. The motivation of the person making the request is immaterial to the school board's duty to comply with it. *Associated Tax Serv. Inc. v. Fitzpatrick*, 236 Va. 181 372 S.E.2d 625 (1988).

A school board has five days to respond to a FOIA request. It can either comply with the request, deny the request, comply in part, or state that it cannot comply within five days (in which case it will receive an extra seven days to respond). To the extent a request is denied, the school board must state in writing the reasons for the denial, with citations to the appropriate Code sections supporting the denial. If the request is for an extraordinary amount of records, the school may ask a court for additional time to comply. Failure to respond at all, however, is considered a violation of FOIA.

Persons whose requests are denied may challenge the denial by filing a motion for injunctive relief in court. Va. Code Ann. § 2.2-3713. A hearing will be held within seven days of the motion. If the denial is found to be in violation of FOIA, the court may award attorneys' fees and costs to the petitioner. However, the court may deny such an award if it finds that it would be unjust. For example, if a school board relied on an opinion of the Attorney General or court decision in denying the request, the statute suggests the court should not award fees and costs. Va. Code Ann. § 2.2-3713(D). In addition, a school official can be fined in his or her individual capacity for a willful and knowing violation of FOIA. Va. Code Ann. § 2.2-

3714. Such a fine cannot exceed $1,000 for a first violation, or $2,500 for subsequent violations.

In a case that helped define the parameters of FOIA in the school context, the Supreme Court of Virginia ruled that a school board did not have to reveal the vote totals of student candidates in a school election. *Wall v. Fairfax County Sch. Bd.*, 252 Va. 156, 475 S.E.2d 803 (1996). The court found that such information was a "scholastic record," and thus exempt from FOIA's disclosure requirements.

In sum, FOIA generally provides for open meetings and public access to official records. The Act, however, is riddled with exceptions, thus school boards should consult with counsel to determine its applicability to a particular situation.

J. <u>Breach of Contract Claims</u>

Like any other business, school boards may be sued for breaching contracts with others. Many claims arise out of contracts involving construction projects, architectural services, food service, textbooks, computers and other vendors. School boards do not enjoy sovereign immunity for intentional breaches of contract.

K. <u>Sexual Abuse of Students</u>

There are at least two areas where the issue of sexual abuse in schools can create legal liability for a school district. In the first instance, schools and school officials may have liability where a teacher sexually abuses a student. In the second, schools and school officials may be liable where they fail to report a suspected sexual relationship between two minor students whose age difference would violate Virginia's statutory rape law.

First, in a recent decision, the Fourth Circuit Court of Appeals held a principal personally liable for the sexual abuse of a student by a teacher. *Baynard v. Malone*, 268 F.3d

228 (4th Cir. 2001), *cert. denied, sub nom Bayard v. Alexandria City Sch. Bd.*, 122 S. Ct. 1357 (2002). The court found the principal had constructive knowledge that the teacher was engaged in conduct that posed an unreasonable risk of injury to students and yet did not take any preventative action. The assistant school superintendent was not held liable because he investigated the issue as soon as he learned of it. The superintendent was not held liable because he appropriately delegated authority to his assistant. The school board also was not held liable because the court did not consider the principal the functional equivalent of the school board. However, in circumstances where the superintendent or other authoritative school official is held responsible, the school board itself could face liability.

Second, a Virginia federal court has ruled that a teacher's duty to report sexual abuse under Va. Code Ann. § 63.1-248.3(a) did not violate the due process clause of the Fourteenth Amendment. *See Ominski v. Tran*, No. 2:96cv724, 1997 U.S. Dist. LEXIS 13177 (E. D. Va. July 21, 1997).

Third, the Office of the Attorney General of Virginia has recently opined that a teacher or school administrator has an affirmative duty to report suspected sexual relations between minors where the activity would violate Virginia's statutory rape law. The opinion, issued on December 27, 2001, addressed a hypothetical scenario where an 18-year-old student was engaged in sexual relations with a 13 or 14-year-old student, or two minor students whose age difference would also be in violation of the law were engaged in such relations. The Attorney General determined that in such a circumstance, Va. Code Ann. §§ 63.1-248.2 and 63.1-248.3 (now codified at Va. Code Ann. §§ 63.2-1508 and 63.2-1509) required the teacher or school administrator to report it. Failure to report can subject the violator to a $500 fine for the first offense and $1,000 for subsequent offenses.

L. **Miscellaneous Claims**

As with many private businesses and employers, public school boards face a host of lawsuits in other areas. Some of these may include:

1. Special education (Individuals with Disabilities Act);
2. Challenges to the curriculum (*see Johnson v. Chesapeake City Sch. Bd.*, 52 Va. Cir. 252 (Chesapeake 2002) (denying parents' request for science textbook to be removed from curriculum));
3. Religious exemption from school attendance;
4. Challenges to school board elections;
5. Sexual harassment of students by other students.
6. Defamation;
7. Other Section 1983 claims;
8. Financial mismanagement by school board members;
9. Copyright (and other intellectual property claims);
10. Title IX;
11. Misuses of power;
12. Environmental issues;
13. Antitrust;
14. Educational malpractice;
15. Negligent hiring, supervision and retention of personnel;
16. Premises liability;
17. Students' rights to extracurricular activities;

18 Rights of home schooled students;

19. Assault and battery;

20. Corporal punishment;

21. Virginia's State and Local Government Conflict of Interests Act;

22. Liability for control and use of public funds; and

23. Insurance disputes.

III. SIGNIFICANT DEFENSES TO LAWSUITS AGAINST SCHOOL BOARDS

A. The Arbitrary and Capricious Standard

See discussion on page 2.

B. Sovereign Immunity

1. Generally

As agents of the state, school boards may be entitled to invoke the defense of sovereign immunity. *Mattox v. Campbell County Sch. Bd.*, 37 Va. Cir. 221 (Campbell County 1995). This doctrine provides immunity for tort claims against governmental entities and some employees caused by negligent acts which resulted in personal injury or property damage. *See Kellam v. Sch. Bd. of City of Norfolk*, 202 Va. 252, 257, 117 S.E.2d 96, 99 (1960). The Supreme Court of Virginia has explained the purpose behind sovereign immunity as follows:

> One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse. . . . However, protection of the public purse is but one of several purposes for the rule. . . . [S]overeign immunity is a privilege of sovereignty and . . . without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. . . . [I]f the sovereign could be sued at the instance of every citizen the State could be 'controlled in the use and disposition of the means required for the proper administration of the government.'

Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) (citations omitted).

A plea of sovereign immunity, when accepted by the court, is sufficient for school boards to be completely dismissed from a case. *See Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001). Significantly, a public body does not lose its sovereign immunity protection from liability even when one of its employees commits an intentional tort during the performance of his job. *See Niese v. City of Alexandria*, 264 Va. at 239-40, 564 S.E.2d at 133.

Sovereign immunity may extend to individual employees of a public school board in the form of a qualified immunity depending on: (1) the nature of the function performed by the employee; (2) the extent of the State's interest and involvement in this function; (3) the degree of control and discretion exercised by the State over the employee; and (4) whether the act complained of involved the use of judgment and discretion. *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980). Virginia courts have granted immunity from tort suits to the following individual employees of school systems:

a. School board supervisors. *Mattox v. Campbell County Sch. Bd.*, 37 Va. Cir. 221 (Campbell County 1995).

b. School teachers. *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988); *Summerell v. Woflskill*, 34 Va. Cir. 518 (Southampton County 1994); *Locklear v. Pometto*, 28 Va. Cir. 307 (Fairfax County 1992); *accord Bowers v. Martin*, 116 F.3d 472, 1997 LEXIS 15169 (4th Cir. June 23, 1997).

c. School superintendents and principals. *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982); *Young v. Young*, 22 Va. Cir. 46 (County of Fairfax 1990).

d. Coordinator of school grounds. *Pusey v. Riner*, 26 Va. Cir. 321 (Fairfax County 1992).

2. Examples of Specific Statutes Granting Immunity

The Virginia General Assembly has adopted a number of statutes granting immunity to individuals in certain circumstances. Examples of these statutes include:

a. Va. Code Ann. § 8.01-47: Granting immunity to school officials who report or investigate drug or alcohol activities of students relating to school activities, so long as they act in good faith, with reasonable cause and without malice.

b. Va. Code Ann. § 8.01-220.1:2: Granting immunity to school teachers for good faith acts related to the supervision, care and discipline of students.

c. Va. Code Ann. § 22.1-303.1: Granting immunity to teachers who participate in peer review of another teacher unless they act in bad faith or with malicious intent.

d. Va. Code Ann. § 22.1-289(G): Granting immunity to superintendent and designee for reporting missing children.

e. Va. Code Ann. § 63.1-248.5: Granting immunity to reporters of child abuse and participation in court proceedings so long as they act in good faith.

3. Exceptions to Sovereign Immunity

Sovereign immunity does not limit a school board's liability for intentional torts or breach of contract claims. In addition, by statute, sovereign immunity does not apply to claims arising out of school bus accidents where it is the insured of the vehicle involved in the accident. *See* Va. Code Ann. § 22.1-194. In these cases, plaintiffs may recover up to, but not beyond, the limits of the insurance in effect. *But see Wagoner v. Brown*, 43 Va. Cir. 225 (Henry County Aug. 7, 1997) (since accident in question did not fall within the relevant insurance policy then sovereign immunity is not waived).

C. Qualified Immunity in Section 1983 Cases

The defense of qualified immunity may apply in circumstances where individual school officials have been sued for violations of a constitutional right. This defense is available to individuals as opposed to the school board itself. To invoke the protection of qualified immunity, courts look to whether: (1) the constitutional right allegedly violated was "clearly

established;" and (2) a reasonable official would have understood that the conduct at issue violated the "clearly established" right. *See Mansoor v. County of Albemarle*, 124 F. Supp. 2d 367, 368 (W.D. Va. 2000). In other words, as long as individual school officials acted in a way that was at least arguably correct under the circumstances and did not knowingly violate a constitutional right, they will be protected from civil liability even if in hindsight their actions turn out to be unconstitutional. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

D. Punitive Damages

Public school boards cannot be liable for punitive damages. *See City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981). This doctrine serves to significantly limit a school board's liability in many cases.

E. Contributory Negligence

Contributory negligence is the failure to act as a reasonable person would have acted for his or her own safety under the circumstances. In Virginia, contributory negligence serves as a complete bar to any recovery where the plaintiff's negligence caused the injury, in whole or in part, even where another's negligence contributed to the injury. *See Waters v. Safeway Stores*, 246 Va. 269, 272, 435 S.E.2d 380 (1993).

F. Assumption of the Risk

Assumption of the risk occurs when a plaintiff fully comprehends the nature and extent of a known danger, yet voluntarily exposes himself to such danger. Under these circumstances, the plaintiff has assumed the risk of injury and cannot recover for those injuries. *See Arndt v. Russillo*, 231 Va. 328, 332, 343 S.E.2d 84 (1986).

G. <u>Statute of Limitations</u>

A statute of limitations is a specific time period by which an individual must bring a lawsuit. The precise statute of limitations depends on the particular claim asserted by a plaintiff.

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