CIVIL RIGHTS AND GOVERNMENTAL IMMUNITY: RECENT DEVELOPMENTS IN VIRGINIA EDUCATION LAW

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INTRODUCTION

This article discusses some of the more significant developments in Virginia education law in recent years. It briefly describes the governing structure of K-12 public education in the Commonwealth, in which ultimate authority vested in the General Assembly.[1] Virginia's courts have provided needed clarity on circumstances in which the common-law doctrine of governmental immunity will prevent individuals from seeking money damages against school boards or school officials, and those in which immunity presents no obstacle to suits for damages.[2]

Consistent with nationwide ideological conflicts, Virginia's regulatory bodies and courts have confronted controversies around student, teacher, and parental rights, and have worked to respect these various rights without unduly impeding the educational mission of the Commonwealth's public education system.[3] These controversies have forced courts to address the scope of teachers' free exercise and speech rights;[4] parental rights, both over curricula[5] and over their children's in-school experience, including how schools will treat their gender-nonconforming children, and whether their right to information about their child overrides the child's request for confidentiality;[6] the rights of school districts to convey civic values of antiracism, nondiscrimination and inclusion;[7] and students' rights.[8]

I. OVERVIEW: GOVERNING STRUCTURE

This Section briefly describes the governance and financing structure of the K-12 public education system in the Commonwealth. Part A addresses the important, albeit limited, role played by the federal government. Part B turns to the governing structure

1. *See infra* Section I.B.
2. *See infra* Part VI.
3. *See, e.g.*, Mary Ziegler, Maxine Eichner, & Naomi Cahn, *Retrenchment by Division: The New Politics of Parental Rights*, 123 MICH. L. REV. 669, 672–73, 702, 715 (2025) (discussing the recent wave of disputes over race, gender identity, curriculum, and parental rights in public schools).
4. *See infra* Sections III.A–B.
5. *See infra* Section IV.A.
6. See *infra* Part V.
7. *See infra* Part IV.
8. *See infra* Sections IV.C–D, Part V.

established by Virginia constitutional and statutory law. Article VIII of the Constitution of Virginia provides for a system of free public schools and establishes a multi-tier hierarchy over education policy.[9] The General Assembly, State Department of Education, and state and local education boards have enacted wide-ranging legislation, regulations, and policies effectuating and expanding on the state Constitutional mandates.[10]

A. *Federal Role*

The United States Constitution delegates no direct authority over education to the federal government—indeed, makes no mention of education at all. Primary responsibility for public schooling thus rests with the states and their localities, which exercise direct control over school administration, curriculum, and instruction.[11] State laws governing education receive the highest degree of deference (rational basis review) in the courts.[12]

The federal government shapes K-12 public education mainly through conditional funding and civil rights enforcement.[13] Congress created the U.S. Department of Education in 1979 to consolidate and coordinate federal education programs, monitor compliance, and enforce civil rights laws.[14] The Department is statutorily prohibited, however, from directing curricula or school administration.[15]

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9. VA. CONST. art. VIII, §§ 1, 5.

10. *See infra* notes 11, 13, 19, 26–39.

11. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 39 (1973) [hereinafter *Rodriguez*] (holding that education is not a fundamental right under the United States Constitution and that the Tenth Amendment reserves to the states and localities primary responsibility for public schooling).

12. *Rodriguez*, 411 U.S. at 44.

13. Congress codified the constitutional structure of U.S. public education in the Department of Education Organization Act, which stated that "[t]he establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States." 20 U.S.C. § 3403(a).

14. 20 U.S.C. §§ 3401, 3402.

15. *Id.* § 1232a ("No . . . program shall be construed to authorize any department . . . to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials").

Through the United States Constitution's Spending Clause, Congress conditions federal education funding on compliance with certain statutory requirements.[16] For example, federal civil rights statutes condition federal funding on an agreement by the recipient not to discriminate on the grounds of race, color, or national origin (Title VI) or sex (Title IX), in what amounts to a contract of sorts between the government and the recipient of funds.[17] Other civil rights statutes condition federal funding on nondiscrimination against otherwise qualified individuals with disabilities (Section 504 of the Rehabilitation Act of 1973) and require states to provide every eligible child with a disability a free appropriate public education through an individualized education program (the Individuals with Disabilities Education Act).[18] States and school districts that accept federal education funds voluntarily agree to comply with the conditions attached to those funds, and the federal government may withhold or terminate funding for noncompliance.[19]

Approximately 11.5% of total public K-12 education funding in Virginia comes from federal sources.[20] The most significant federal education funding statute is the Every Student Succeeds Act (ESSA), the most recent reauthorization of the Elementary and

16. Through its spending power, and subject to certain conditions, Congress may attach conditions to the receipt of federal funds, even to advance objectives outside its enumerated powers. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (holding that Congress had authority under the Spending Clause to withhold federal funds from states who did not conform their legal drinking age to federal policy).

17. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

18. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400.

19. *See, e.g.*, Every Student Succeeds Act, 20 U.S.C. § 6311(a)(7) ("If a State fails to meet any of the requirements of this section, the Secretary [of the U.S. Department of Education] may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.").

20. *What Percentage of Public School Funding in Virginia Comes from the Federal Government?*, USAFACTS (Apr. 24, 2026), usafacts.org/answers/what-percentage-of-public-school-funding-comes-from-the-federal-government/state/virginia/ [https://perma.cc/4U4R-KNAN] (citing National Center for Education Statistics (NCES)). NCES draws data from the Common Core of Data, the Department of Education's primary database on K-12 U.S. education. *Common Core of Data: America's Public Schools*, NAT'L CTR. EDUC. STATS., https://nces.ed.gov/ccd/ [https://perma.cc/V8XG-AJ8J]. State and local governments provide the largest share of K-12 funding, primarily through property and local taxes. *See Public School Revenue Sources,* NAT'L CTR. EDUC. STATS., https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue [https://perma.cc/B252-AAV3]. The Commonwealth contributes roughly 30%. *K-12 Education*, VA. HOUSE APPROPRIATIONS COMM., https://hac.virginia.gov/subtopics/k-12/k-12-education/ [https://perma.cc/6MJ7-3JPT].

Secondary Education Act of 1965.[21] ESSA aims to close educational achievement gaps and to ensure that all children receive a fair, equitable, and high-quality education.[22] The largest share of ESSA funds go to schools serving high concentrations of low-income students.[23]

In exchange for federal funding, states must submit to the Department of Education comprehensive plans that include adopting challenging academic standards, conducting annual statewide assessments of student achievement, and implementing statewide accountability systems designed to identify and support low-performing schools.[24] ESSA gives states flexibility in designing accountability systems and interventions for struggling schools.[25] At the same time, it largely limits the federal government's role to providing oversight, compliance monitoring, and support.[26]

B. *State Sources and Structure*

The Constitution of Virginia requires the General Assembly to provide for a statewide system of free public schools, and it gives that body ultimate authority over the school system.[27] The Constitution also creates the Virginia Board of Education ("State Board"), likewise subject to the General Assembly's authority, charged with effectuating educational policy and exercising general oversight over the entire public school system.[28] The State Board has

21. 20 U.S.C. § 6301.

22. *Id.*

23. REBECCA R. SKINNER & ISOBEL SORENSON, CONG. RSCH. SERV., R48607, FY2023 STATE GRANTS UNDER TITLE I-A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (ESEA) (2025).

24. § 6311.

25. § 6311(d)(1)(B) (directing local educational agencies, when a school has been identified as needing support and improvement, to "locally develop and implement a comprehensive support and improvement plan for the school to improve student outcomes" and providing broad criteria for such a plan, such as "includes evidence-based interventions" and "is based on a school-level needs assessment").

26. § 6311(d)(1), (e)(1) (directing states and local educational agencies to develop and implement comprehensive support and improvement plans for underperforming schools but prohibiting the Department of Education to take additional actions such as adding new requirements or criteria, prescribe specific academic assessments, specific school support and improvement strategies, etc.).

27. VA. CONST. art. VIII, §§ 1, 5.

28. *Id.* at § 4. The Board comprises nine members appointed by the Governor, subject to confirmation by the General Assembly. *Id.* The General Assembly has provided that "[t]he general supervision of the public school system shall be vested in the Board of Education." VA. CODE ANN. § 22.1-8 (2025).

authority to promulgate regulations necessary to carry out its responsibilities.[29] A Superintendent of Public Instruction serves as both the chief executive officer of the public school system and secretary of the State Board.[30] The Virginia Department of Education ("VDOE") is the administrative agency whose staff implements the State Board's operational mandates, manages school funding, and performs the day-to-day administrative functions necessary to effectuate State Board policy.[31] The Superintendent of Public Instruction also acts as the executive officer of the VDOE, overseeing its administrative operations.[32]

The State Board's duties include establishing standards of quality and accreditation, licensing teachers and other school personnel, approving curricula and instructional materials, and supervising special education.[33] Its duties also include dividing the Commonwealth into school divisions; these in turn fall under the supervisory authority of elected local division school boards ("school boards").[34] School boards directly supervise the schools in each local division, consistent with State Board regulations and standards of quality.[35] Each school board appoints a division superintendent from a list of individuals certified by the State Board.[36]

The Constitution of Virginia directs the State Board to establish statewide "standards of quality" ("SOQ").[37] The SOQ set out the standards and requirements that establish the quality of education

29. VA. CODE ANN. § 22.1-16 (2025).

30. 8 VA. ADMIN. CODE § 20-510-10 (2025). The Constitution requires the Superintendent to be an experienced educator appointed by the Governor, subject to confirmation by the General Assembly. VA. CONST. art. VIII, § 6. It delegates to the General Assembly the task of prescribing the authority and responsibilities of the Superintendent. *Id. See also* VA. CODE ANN. § 22.1-23 (2025).

31. 8 VA. ADMIN. CODE § 20 (Cum. Supp. 2025) (Agency Summary).

32. *Id.* at § 20-510-10 (2025).

33. VA. CONST. art. VIII, §§ 2, 5.

34. *Id.* §§ 5, 7.

35. *Id.* § 7; VA. CODE ANN. §§ 22.1-28, 22.1-79 (2025 & Cum. Supp. 2026) ("Each school board shall . . . [consistent] with state statutes and regulations of the Board, 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."); *see* Sch. Bd. of City of Richmond v. Parham, 218 Va. 950, 952, 243 S.E.2d 468, 469 (1978).

36. VA. CODE ANN. §§ 22.1-58, -60 (2025). Butler v. Fairfax Cnty. Sch. Bd., 291 Va. 32, 40, 780 S.E.2d 277, 282 (2015) (The Supreme Court of Virginia has affirmed that the State Board and Local Boards are both "subject to regulation by the General Assembly pursuant to Article VIII, § 1.")

37. VA. CONST. art. VIII, § 2.

in the public schools.[38] The Board has accordingly established standards governing the following: (1) instructional programs, personnel, accreditations and assessments, student achievement and graduation requirements; (2) quality of classroom instruction and leadership; (3) planning and public involvement; (4) school board policies; (5) compliance; and (6) "exemplar" school recognition.[39]

II. EDUCATION IN VIRGINIA: FUNDAMENTAL RIGHT, NOT PRIVATE PROPERTY

In *Chollet v. Braband*, the Fourth Circuit held that there is a right to a public education under Virginia law that gives rise to a protectable "property interest," but that right does not constitute "private property" under the United States Constitution's Takings Clause.[40] The Takings Clause entitles property-rights-holders to compensation for the "taking" by the government of private property.[41]

A group of parents of children with special needs ("plaintiffs") sued Dr. Scott Brabrand, former Superintendent of Fairfax County Public Schools ("FCPS"), alleging that FCPS's switch to virtual learning during the COVID-19 pandemic was inconsistent with their children's needs and caused them to fall behind academically.[42] The plaintiffs claimed that the use of remote instruction amounted to an uncompensated "taking" of their children's protected property interest in education, in violation of the United States Constitution's Takings Clause.[43] Plaintiffs sought compensation, based on the Clause's provision that "private property [shall not] be taken for public use, without just compensation."[44]

38. 8 VA. ADMIN. CODE § 20 (Cum. Supp. 2025).

39. VA. CODE ANN. § 22.1-253.13:1 (Cum. Supp. 2026). The "Exemplar School Recognition Program" charges the State Board with recognizing and rewarding schools and school divisions that exceed the Board's requirements, show improvement on academic and quality indicators, or implement innovative practices in alignment with the Commonwealth's public education goals. *Id.* § 22.1-253.13:9 (2025).

40. 137 F.4th 241, 246 (4th Cir. 2025).

41. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). The clause's terms apply only to the federal government, but the Supreme Court has held that the clause applies to the states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234–35 (1897).

42. *Chollet*, 137 F.4th at 244.

43. U.S. CONST. amend. V; *Chollet*, 137 F.4th at 244.

44. U.S. CONST. amend. V; *Chollet*, 137 F.4th at 245.

The Fourth Circuit addressed whether there was a right to education under the state constitution, and if so, whether that right constituted "property" protected from uncompensated taking by the federal constitution's Takings Clause.[45]

The Supreme Court of the United States has held that there is no federally-protected fundamental right to education under the United States Constitution.[46] In *Chollet,* however, the Fourth Circuit observed that Virginia statutory and constitutional law do recognize a state-protected right to public education, and that the Supreme Court of Virginia has interpreted the state constitution to protect education as a fundamental right.[47]

When government (state or federal) creates a right to a public benefit, including public education, the Supreme Court of the United States has held that individuals' legitimate entitlement to that benefit is a property interest under the Due Process Clause.[48] In *Chollet,* Plaintiffs claimed that their legitimate entitlement to public education created a vested property right, the deprivation of which—through the switch to exclusively online learning during the COVID-19 pandemic—entitled them to compensation under the Takings Clause.[49]

Only one other circuit, the Ninth, had addressed definitively whether a right to public education qualified as a vested private property right for purposes of the Takings Clause; that court held that it did not.[50]

The Fourth Circuit followed suit. It explained that the concept of "property interests" under the Due Process Clause differs from "private property" under the Takings Clause.[51] The Due Process

45. *Chollet*, 137 F.4th at 247.

46. *Rodriguez*, 411 U.S. at 35. While the Supreme Court of the United States has found that the Fourteenth Amendment and provisions of the Bill of Rights implicitly protect certain unenumerated fundamental rights, it has held that these do not include an implied fundamental right to education. *Id.* at 18, 35.

47. *Chollet*, 137 F.4th at 245 (citing VA. CONST. art. VIII, § 1; VA. CODE ANN. §§ 22.1-214(A), 22.1-215 (2025); Scott v. Commonwealth, 247 Va. 379, 386, 443 S.E.2d 138, 142 (1994)).

48. Goss v. Lopez, 419 U.S. 565, 573–74 (1975). The Constitution does not create property interests. Instead, independent sources—such as state law—create and define the dimensions of such interests. Individuals claiming protected interests must demonstrate more than a need, desire, or expectation of a benefit; they must "have a legitimate claim of entitlement to it." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

49. *Chollet*, 137 F.4th at 246.

50. Zeyen v. Bonneville Joint Dist., 114 F.4th 1129, 1145 (9th Cir. 2024).

51. *Chollet*, 137 F.4th at 246.

Clause provides procedural protections (adequate procedures) before the government may deprive individuals of protected property interests.[52] The Takings Clause provides a substantive remedy (just compensation) only when "private property" is taken by the government for public use.[53]

The concept of "property interest" is also broader than the concept of "private property," which is defined in accordance with "traditional rules of property law."[54] Thus, while government benefits or entitlements often create property interests protected by the Due Process Clause, federal courts have held they are not typically considered vested private property under the Takings Clause.[55]

The *Chollet* court thus found that, while the entitlement to public education is a property interest, it lacks the characteristics typical of private property, such as "full rights of 'possession, control and disposition' . . . 'free use, enjoyment and disposal' . . . and the 'right to exclude others.'"[56]

Lastly, the court noted that property that is not certain but instead subject to change or completely controlled by the government lacks the character of private property.[57] It then observed that the Virginia General Assembly, State Board, and local boards retained broad authority to establish and alter aspects of public education in Virginia.[58] The government's broad discretionary power to regulate and alter every aspect of the public education system rendered public education "'. . . fundamentally incompatible with private ownership'" and established that ". . . public education is not 'handed to students and parents for their use, enjoyment, disposal, or control as private property.'"[59] The court thus rejected plaintiffs' claims for compensation, concluding that "the right to public

52. U.S. CONST. amend. V; *Chollet*, 137 F.4th at 245.

53. U.S. CONST. amend. V; *Chollet*, 137 F.4th at 245.

54. *Chollet*, 137 F.4th at 246–47.

55. *Id.* (citing Bowen v. Gilliard, 483 U.S. 587, 604–05 (1987)) (holding that government benefits program consisted of protected property interest for purposes of the Due Process Clause but not vested property for purposes of the Takings Clause).

56. *Id.* at 247.

57. *Id.* at 247 (citing South Carolina State Educ. Assistance Auth. v. Cavazos, 897 F.2d 1272, 1276–77 (4th Cir. 1990)).

58. *Id.* at 247 (citing VA. CONST. art. VIII; Scott v. Commonwealth, 247 Va. 379, 386, 443 S.E.2d 138, 141–43 (1994)).

59. *Id.* at 246–47 (quoting Zeyen v. Bonneville Joint Dist., 114 F.4th 1129, 1140, 1143–44 (9th Cir. 2024) (holding that the existence of a property interest in public education is "not sufficient to establish that the right . . . warrants protection under the Takings Clause.").

education in Virginia is not 'private property' for Takings Clause purposes under any available theory."[60]

III. TEACHERS' SPEECH, RELIGIOUS EXERCISE, AND DUE PROCESS RIGHTS

The Supreme Court of Virginia issued a significant opinion addressing speech, free exercise, and due process claims brought by Peter Vlaming, a high school French teacher terminated for refusing to refer to a transgender student using their preferred pronouns.[61] Instead, citing his conscience and religious beliefs, Vlaming used the student's preferred name only and avoided using third person pronouns (e.g., he/she or him/her) altogether to refer to any students during class.[62] The School Board fired Vlaming for violating its policies prohibiting discrimination and harassment based on gender identity.[63] Vlaming sued, claiming his firing was unlawful and alleging state constitutional, statutory, and contract claims.[64]

The Supreme Court of Virginia held that Vlaming had stated legally viable claims, which the circuit court had improperly dismissed. In doing so, the court affirmed that the Constitution of Virginia provides more robust protection for religious exercise than does the United States Constitution, and it provides free speech and procedural due process protections coextensive with the United States Constitution.[65]

A. *Free Exercise Protection under the Constitution of Virginia*

Vlaming's free-exercise claim relied exclusively on the protections afforded by the Constitution of Virginia. The Virginia Supreme Court began its analysis of the scope of Vlaming's free-exercise rights by acknowledging the particularly robust history of free-exercise protections in the Commonwealth, noting that the "constitutional guarantees of religious freedom have no deeper roots than

60. *Chollet*, 137 F.4th at 246–47.

61. Vlaming v. W. Point Sch. Bd., 302 Va. 504, 521, 895 S.E.2d 705, 712–13 (2023).

62. *Id.* at 523, 895 S.E.2d at 713–14.

63. *Id.* at 521, 525, 895 S.E.2d at 712–13, 715.

64. *Id.*

65. *Id.* at 521–22, 528–29, 623, 895 S.E.2d at 712, 716–17, 771. Vlaming voluntarily dismissed the procedural challenges asserted in his breach-of-contract claim, which the circuit court had allowed to proceed. *Id.* at 526, 895 S.E.2d at 715.

in Virginia, where they originated, and nowhere have they been more scrupulously observed."[66]

The court noted the significant textual differences between the state and federal constitutional provisions protecting religious liberty, contrasting the exhaustive language of Virginia's Article I, section 16 (238 words) with the single clause addressing religious liberty in the United States Constitution's First Amendment (16 words).[67] It reasoned that the "stark contrast" between the two clauses supports an interpretive approach where the construction of the First Amendment might "inform but . . . not necessarily govern the construction" of Article I, section 16.[68]

The court discussed the standard established by the U.S. Supreme Court to assess the constitutionality of governmental interference with individuals' religious exercise under the First Amendment.[69] In *Smith,* the U.S. Supreme Court held that the First Amendment tolerates even substantial interference with religious rights, so long as the government action was neutral and generally applicable.[70] The *Vlaming* court, however, rejected the dissent's and School Board's argument that *Smith* governed free-exercise claims under the Constitution of Virginia, stating plainly that "the federal *Smith* doctrine is not and never has been the law in Virginia."[71]

For affirmative guidance on interpreting section 16, which has remained unchanged since the 1776 Constitution of Virginia, the court turned to the history of its adoption.[72] In selecting an interpretive methodology, the court declared that "[w]hen a constitutional provision has remained unchanged throughout Virginia constitutional history, we apply the original meaning of the provision when first adopted."[73] After discussing the 1776 Constitutional Convention debate, the majority concluded that the language of

66. *Id.* at 528, 895 S.E.2d at 716; VA. CONST. art. I, § 16 (All persons "are equally entitled to the free exercise of religion, according to the dictates of conscience.").

67. *Vlaming*, 302 Va. at 527–29, 895 S.E.2d at 716–17.

68. *Id.* at 529–30, 895 S.E.2d. at 717.

69. *Id.* at 530, 895 S.E.2d at 717.

70. *See* Emp. Div., Dep't Hum. Res. of Or. v. Smith, 494 U.S. 872, 879–80 (1990) (holding that the First Amendment does not mandate religious exemptions from neutral and generally applicable laws).

71. *Vlaming*, 302 Va. at 531–32, 532 n.6, 542, 895 S.E.2d at 718, 718 n.6, 724.

72. *Id.* at 532, 895 S.E.2d. at 718–19.

73. *Id.* at 532, 895 S.E.2d. at 719 (citing Howell v. McAuliffe, 292 Va. 320, 345–47, 788 S.E.2d 706, 720–22 (2016)).

Thomas Jefferson's Act for Religious Freedom (originally enacted in 1786 and currently codified in the Code of Virginia), which authorizes interference with religious liberties only to prevent "overt acts against peace and good order," best reflected the provision's original meaning.[74]

Consistent with this construction, and providing significantly more protection to individuals' rights to be free from state government's interference with religious exercise, the court adopted strict scrutiny to evaluate government interference with religion.[75] Under that standard, courts uphold such interference only when narrowly tailored to achieve a compelling state interest.[76]

The court then explained that, if an individual's religious beliefs prompt acts that threaten "public peace, safety, or order," then the government's compelling interest in protecting the public justifies interference, but only the least restrictive means necessary to achieve that interest.[77] Conversely, religious speech (or, as in Vlaming's case, religiously-grounded refusal to speak) that is merely "objectionable" or "hurtful" does not constitute acts threatening public safety, peace, or order.[78]

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74. *Id.* at 535–37, 895 S.E.2d at 720–21 (quoting VA. CODE ANN. § 57-1 (2022)). During the Constitutional Convention debate, George Mason argued for broad governmental authority to limit religious liberty and would have empowered government to do so whenever religious practice would "disturb the peace, the happiness, or safety of society." George Mason, Committee Draft of the Virginia Declaration of Rights and edited by the Virginia Convention, *in* THE PAPERS OF GEORGE MASON (Robert A. Rutland ed., 1970), https://www.consource.org/document/committee-draft-of-the-virginia-declaration-of-rights-and-edited-by-the-virginia-convention-1776-5-27/ [https://perma.cc/6VLF-35RF]. James Madison argued for more limited governmental authority and would have authorized government to interfere with religious practice only in situations where "the preservation of equal liberty, and the existence of the State are manifestly endangered." James Madison, Madison's Amendments to the Declaration of Rights, *in* 1 THE PAPERS OF JAMES MADISON DIGITAL EDITION 174, 174–75 (J. C. A. Stagg ed., 2010). Thomas Jefferson's Act struck a middle ground between Mason and Madison. *Vlaming*, 302 Va. at 535, 895 S.E.2d at 720.

75. *Vlaming*, 302 Va. at 538, 895 S.E.2d at 722.

76. *Id.* Justice Powell, who concurred in part with the majority opinion, disagreed with the majority's conclusion that government must accommodate religious liberties that do not constitute "acts against peace and good order." *Id.* at 584, 895 S.E.2d at 749 (Powell, J., concurring in part). Justice Powell observed that the conclusion narrows the state's acceptable compelling interests to only those that preserve peace and order and objected that "adopting the language of a limiting principle, which was purposefully stated in a statute rather than the Constitution, and declaring it to be a constitutional standard . . . is not supported by the language of our Constitution nor by historical analysis." *Id.* at 584–85, 895 S.E.2d at 749 (Powell, J., concurring in part).

77. *Id.* at 538–39, 895 S.E.2d at 722 (majority opinion).

78. *Id.* at 541, 895 S.E.2d at 724.

Thus "[a]bsent a truly compelling reason for doing so," the government may not "coerce its citizens into pledging verbal allegiance to ideological views that violate their sincerely held religious beliefs."[79] Because the School District had sought to compel Vlaming to speak despite his religious objection, the court concluded that he had stated a legally viable free-exercise claim under section 16.[80]

B. *Free Exercise Protection under the Virginia Religious Freedom Restoration Act*

The Supreme Court of Virginia found that Vlaming had also asserted a legally viable prima facie claim that the government's actions violated the Virginia Religious Freedom Restoration Act ("VRFRA"), which requires the government to show by clear and convincing evidence that its interference with religious liberty satisfies strict scrutiny.[81] The School Board argued that its actions fell within a category of VRFRA exemptions allowing government to interfere with religious liberty in order to "maintain[] health, safety, security or discipline."[82] The court rejected the School Board's argument, reasoning that, construed so broadly, the exemption "would apply to nearly all government actions" and eviscerate the statute.[83]

C. *Protection Against Government-Compelled Speech*

The Supreme Court of Virginia expanded the rights of teachers to refrain from complying with school district policies requiring teachers convey messages with which they disagree.

Vlaming argued that the School Board violated his right to "nonspeech," or to be free from government-compelled speech, when it insisted he use the preferred pronouns of a gender-nonconforming student.[84] The School Board rejected Vlaming's proposal that he simply use the student's preferred name and avoid altogether using third-person pronouns to refer to the student.[85] The court noted

79. *Id.*
80. *Id.*
81. *Vlaming*, 302 Va. at 560–61, 895 S.E.2d at 734–35; VA. CODE ANN. § 57-2.02 (2022).
82. *Vlaming*, 302 Va. at 561, 895 S.E.2d at 735–36 (quoting § 57-2.02(E)).
83. *Id.* at 562, 895 S.E.2d at 736.
84. *Id.* at 541, 565, 895 S.E.2d at 724, 738.
85. *Id.* at 565, 895 S.E.2d at 738.

that speech protections under the Constitution of Virginia are "co-extensive" with—though in some cases may be stronger than—those under the First Amendment of the federal Constitution.[86]

The court explained that the Constitution of Virginia protects both the right to speak and the right to refrain from speaking and held that the School Board's pronoun mandate constituted compelled speech.[87] The court noted that forcing speech "is more pernicious than silencing dissent because the former seeks to monopolize the marketplace of ideas by making everyone in the market say the same thing about the same idea."[88] For that reason, "the government has a[n] [even] higher burden to justify compell[ing] speech than when . . . censor[ing] protected speech."[89]

The School Board claimed a broad entitlement to compel the speech of teacher-employees, arguing that "Vlaming's speech in the hallways and classrooms . . . was pursuant to his official duties as a public school teacher and therefore is not protected speech."[90]

The court, however, declined to extend the School Board's rights to include dictating all speech in which teachers engage while on school grounds or carrying out their duties.[91] Instead, the court distinguished between speech necessary to implement curricular objectives, such as teaching required curricular materials—which the School District could indeed compel—and speech not directly related to curricula.[92] "The core of the teacher's job is to speak in the classroom on the *subjects* she is expected to teach," the court explained, "[b]ut none of them can be compelled into the service of controversial 'religious, political, [or] ideological causes.'"[93] In other

86. *Id.* at 564, 895 S.E.2d at 737. At the same time, the court noted that "the architecture of judicial power implicit in American federalism gives the United States Supreme Court the last word on the meaning of the First Amendment and gives the Supreme Court of Virginia the last word on the meaning of the Constitution of Virginia." It further stated that they "are not outsourcing to the federal courts [their] decision-making power over the Constitution of Virginia." *Id.*

87. *Id.* at 565, 895 S.E.2d at 738 (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943).

88. *Vlaming*, 302 Va. at 566, 895 S.E.2d at 738.

89. *Id.* at 567, 895 S.E.2d at 739.

90. *Id.* at 570, 895 S.E.2d at 740 (quoting Brief of Appellee at 9, Vlaming v. W. Point Sch. Bd., 302 Va. 504, 895 S.E.2d 705 (2023) (No. 211061)).

91. *Id.* at 570–72, 895 S.E.2d at 741.

92. *Id.* at 567–68, 895 S.E.2d at 739.

93. *Id.* (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

words, teachers do not lose all individual speech protections because of their employment.[94]

The court then found that the use of mandated pronouns was unrelated to Vlaming's duties to teach French.[95] It characterized gender identity as a "sensitive political topic[]" and said that speech on such topics merited "special protection."[96] To consider the use of pronouns part of teachers' official on-the-job duties would entitle the School Board to require teachers to say virtually anything while on school grounds.[97] Such an interpretation of the official duties would sweep so broadly as to virtually exclude from constitutional protection any speech rights.[98] It thus found that Vlaming had alleged a viable compelled speech claim.[99]

D. *Teachers' Procedural Due-Process Rights*

Vlaming also alleged that his firing violated the procedural due process guarantees of the Constitution of Virginia.[100] Neither of the two written policies that formed the basis of the School Board's decision required teachers to use third-person pronouns when referring to transgender students, in addition to the students' preferred names.[101] Instead, while the School Board's policies prohibited discrimination and harassment based on gender identity, they were silent with respect to the use of pronouns.[102] Vlaming thus arguably received inadequate notice of what conduct was prohibited.

The court held that individuals' procedural due process rights under the Constitution of Virginia are "at least as strong" as those protected by the United States Constitution.[103] To decide whether Vlaming stated an adequate due process claim, the court explained that "[t]he relevant question . . . is whether the School Board's

94. *Id.* at 572–73, 895 S.E.2d at 742.

95. *Id.* at 568, 895 S.E.2d at 739. Whereas Vlaming could be compelled to teach French, the court reasoned that "[t]he coerced masculine pronouns had nothing to do with any curricular topic related to the French language." *Id.*

96. *Id.* at 569, 895 S.E.2d at 740.

97. *Id.* at 570, 895 S.E.2d at 741.

98. *Id.* at 570–71, 895 S.E.2d at 741.

99. *Id.* at 574, 895 S.E.2d at 743.

100. *Id.* at 574–75, 895 S.E.2d at 743 (citing VA. CONST. art. I, § 11, which states that "no person shall be deprived of his life, liberty, or property without due process of law.").

101. *Id.* at 575, 895 S.E.2d at 743.

102. *Id.* at 577, 895 S.E.2d at 744.

103. *Id.* at 575, 895 S.E.2d at 743.

policies clearly informed teachers that they could be fired for not using third-person pronouns in addition to preferred names when referring to transgender students."[104] It stated that vague laws or policies fail to provide the notice to individuals required by the Due Process Clause. "Vagueness that implicates freedom of expression," moreover, risks chilling protected speech and thus receives especially close scrutiny by courts.[105]

The court rejected the School Board's argument that, because both policies incorporated by reference Title IX standards prohibiting discrimination and harassment on the basis of sex, Vlaming should have known they required him to use pronouns in addition to names when referring to transgender students. Instead, it noted that no court, federal or state, has held that referring to a transgender student by preferred name only and avoiding third-person pronouns violated Title IX; indeed, the only appellate court to address the issue held that doing so did not implicate Title IX.[106]

The court concluded that "at the time that the School Board fired Vlaming, no clearly established law . . . put a teacher on notice that not using third-person pronouns in addition to preferred names constituted an unlawful act of discrimination against transgender students."[107] Thus, it held that Vlaming had stated a legally viable claim under the Due Process Clause of the Constitution of Virginia.[108]

IV. ANTIRACISM CURRICULA: PARENTS' AND STUDENTS' RIGHTS

The Court of Appeals of Virginia established in *Ibanez v. Albemarle County School Board* that provisions of the Constitution of Virginia's Bill of Rights—those guaranteeing due process, equal protection, non-discrimination, and free speech—are self-executing.[109] The opinion resolved a previously unsettled question of Virginia constitutional law. The decision also held that the right to

104. *Id.* at 576, 895 S.E.2d at 744.

105. *Id.*

106. *Id.* (citing Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021) (holding that a professor's decision to refer to a transgender student by name rather than by their preferred pronouns did not implicate Title IX)).

107. *Id.* at 579–80, 895 S.E.2d at 746.

108. *Id.* at 580, 895 S.E.2d at 746.

109. Ibanez v. Albemarle Cnty. Sch. Bd., 80 Va. App. 169, 191, 897 S.E.2d 300, 311 (2024).

parent protected by the Constitution of Virginia is not so broad as to include the right to dictate public school curricula.[110]

In *Ibanez,* a group of parents and their minor children enrolled in county public schools ("plaintiffs") challenged the School Board's adoption of an antiracism policy ("Policy") and sought to enjoin any curriculum implementing it.[111] Plaintiffs alleged that the policy and curriculum discriminated on the bases of race, religion, and viewpoint, that it compelled student speech, and that it interfered with their parental rights.[112] The holding and determination that the constitutional provisions were self-executing were unanimous, and a shifting majority of the Court of Appeals of Virginia agreed that the circuit court had properly dismissed each of the plaintiffs' claims.[113]

In 2019, the School Board adopted a policy whose purpose was "to eliminate all forms of racism" from the school district.[114] It also adopted regulations implementing the policy that addressed communication, staff training, and curriculum and instruction.[115] The regulations required the School Division to "implement an antiracist curriculum and provide educational resources for students at every grade level."[116] The "Policy Enforcement" provisions required implementation, evaluation, and data collection and reporting, but imposed no disciplinary action for noncompliance.[117] The regulations did require the School Board to implement for students "alternative discipline processes, such as restorative justice, to reduce racial disparities in discipline and suspension."[118]

In 2021, the School Division began a pilot program to incorporate the antiracist curriculum at Henley Middle School, permitting students to opt out of participating.[119] While one of the student-plaintiffs "saw some of the curriculum content" before his parents elected to remove him from the program, plaintiffs did not allege

110. *Id.* at 218, 897 S.E.2d at 325.
111. *Id.* at 176, 897 S.E.2d at 303.
112. *Id.* at 177, 188–89, 897 S.E.2d at 303, 310.
113. *Id.* at 177, 897 S.E.2d at 303.
114. *Id.* at 178, 897 S.E.2d at 304.
115. *Id.* at 179, 897 S.E.2d at 304.
116. *Id.*
117. *Id.* at 179–80, 897 S.E.2d at 304–05.
118. *Id.* at 180, 897 S.E.2d at 305.
119. *Id.* at 181, 897 S.E.2d at 305.

that the student suffered any adverse consequence from withdrawing.[120]

Plaintiffs alleged that Albemarle County Public Schools ("ACPS") discriminated against students based on race and religion, deprived students of due process, and violated students' speech rights by compelling speech and engaging in viewpoint discrimination.[121] Parent-plaintiffs alleged that ACPS also violated their parental rights under both the Constitution of Virginia and the Code of Virginia.[122]

A. *Parents' Constitutional and Statutory Right to Direct Children's Education*

Plaintiffs alleged that ACPS violated both Virginia's parental rights statute, which recognizes parents' "fundamental right to make decisions concerning the upbringing, education, and care" of their children, and Virginia's constitutional protection of parents' rights to control the education of their children.[123]

1. Virginia's Parental Rights Statute

Generally, sovereign entities—including school boards and school officials acting in their official capacities—are immune from suit absent their consent.[124] The statute contained no statement waiving immunity or providing for a private cause of action.[125] The court explained that a "'waiver of sovereign immunity will not be implied from general statutory language but must be explicitly and expressly stated in the statute.'"[126] In the absence of such statement, the court refused to imply waiver of immunity and dismissed plaintiffs' statutory claim.[127]

120. *Id.* at 181–82, 897 S.E.2d at 305–06.

121. *Id.* at 187, 897 S.E.2d at 309.

122. *Id.* (citing VA. CONST. art. I, § 11; VA. CODE ANN. § 1-240.1 (2026)) (noting that the relief sought by plaintiffs included declaratory and injunctive relief).

123. *Id.* at 187–89, 192, 897 S.E.2d at 309–10; VA. CODE ANN. § 1-240.1 (2026).

124. *Ibanez*, 80 Va. App. at 189–90, 897 S.E.2d at 311.

125. *Id.* at 192, 897 S.E.2d at 312.

126. *Id.* (quoting All. to Save the Mattaponi v. Commonwealth Dep't of Env't Quality *ex rel.* State Water Control Bd., 270 Va. 423, 455, 621 S.E.2d 78, 96 (2005)).

127. *Id.*

2. Virginia's Constitutional Protection of Parental Rights

Plaintiffs also alleged that the antiracism curriculum violated their right under section 11 of the Constitution of Virginia's Bill of Rights to control the education of their children.[128] Assessing whether sovereign immunity barred their claim, the court noted that the Supreme Court of Virginia has found to be self-executing those constitutional provisions: appearing in the Bill of Rights (Article I of the Constitution of Virginia); prohibiting government action; declaring common law; or stating a rule with sufficient clarity to enable courts to protect the right without additional legislation.[129] Analyzing these factors, and noting that Virginia courts have historically addressed on the merits claims against government defendants based on Article I, section 11, the *Ibanez* court found the constitutional provision to be self-executing.[130]

The court nonetheless found plaintiffs failed to state a claim that the policy unlawfully interfered with their parental rights.[131] It affirmed the Supreme Court of Virginia's current interpretation of section 11 as coextensive with the Supreme Court of the United States' interpretation of the Federal Due Process Clause but emphasized that Virginia courts alone ultimately interpret the State Constitution.[132]

The court noted that the Supreme Court of the United States has not clearly stated what level of scrutiny courts should apply when addressing parental rights under the United States Constitution.[133] An exception, it noted, involved a challenge to state law that allegedly infringed parental rights in tandem with free exercise rights.[134]

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128. *Id.* at 176, 188–89, 897 S.E.2d at 303, 310.

129. *Id.* at 190, 897 S.E.2d at 311 (citing Robb v. Shockoe Slip Found., 228 Va. 678, 681–82, 324 S.E.2d 674, 676 (1985)).

130. *Id.* at 191, 897 S.E.2d at 311–12.

131. *Id.* at 215, 220, 897 S.E.2d at 323–24, 326.

132. *Id.* at 215–16, 897 S.E.2d at 324.

133. *Id.* at 217, 897 S.E.2d at 324 (quoting Hawkins v. Grese, 68 Va. App. 462, 471, 809 S.E.2d 441, 445 (2018)).

134. Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972), *cited in* Hawkins v. Grese, 68 Va. App. 462, 471, 809 S.E.2d 441, 445 (2018), *quoted in* Ibanez v. Albemarle Cty. Sch. Bd., 80 Va. App. 169, 217, 897 S.E.2d 300, 324 (2024). In *Wisconsin v. Yoder*, the Supreme Court subjected to strict scrutiny the state's refusal to grant to Amish plaintiffs a religious exemption from the state's compulsory secondary school attendance requirement, given that the requirement interfered with both First Amendment Free Exercise rights and Fourteenth Amendment parental rights. *See* 406 U.S. at 234–35.

As noted in *Ibanez*, Virginia courts, however, have addressed different components of the right to parent, and have extended them varying levels of constitutional protection.[135] In *Williams v. Williams*, for example, the Supreme Court of Virginia subjected to strict scrutiny a state law entitling non-parents (in this case, the grandparents of a minor child) to visitation.[136] The *Williams* court held that interference with parents' rights in the context of childrearing could only be justified by a compelling interest.[137]

The court in *Ibanez* declined to follow *Williams*'s use of strict scrutiny, noting that *Williams* addressed a component of parental rights—childrearing—different than the education-related rights before it, and that *Williams* "did not discuss parental rights with respect to the education of their children."[138]

Instead, the *Ibanez* court focused its analysis on "the scope of the right to control and direct the education of children."[139] It found the right asserted by the plaintiffs—an entitlement to direct all aspects of their children's education, including control over curricula—to be overbroad.[140] The court held that the scope of "the right Parents assert is broader than the constitutional right contained within the due process clause."[141] Because the claimed right fell outside constitutional protection, it was unnecessary for the court to decide whether strict scrutiny would apply when state action interfered with the protected parental right. The court noted nonetheless that other federal courts of appeal, whether or not characterizing parents' rights over education as "fundamental" or not, had consistently subjected such state action to rational basis review.[142]

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135. *See Ibanez*, 80 Va. App. at 218 n.26, 897 S.E.2d at 324–25 n.26.

136. Williams v. Williams, 256 Va. 19, 20–21, 501 S.E.2d 417, 417–18 (1998).

137. *Id.* at 21, 501 S.E.2d at 418.

138. *Ibanez*, 80 Va. App. at 218 n.26, 897 S.E.2d at 325 n.26 (distinguishing Williams v. Williams, 256 Va. 19, 21, 501 S.E.2d 417, 418). In *Williams*, the Virginia Supreme Court agreed with the appellate court's holding that "the right of parents in raising their child is a fundamental right protected by the Fourteenth Amendment . . . [and] that state interference with a fundamental right must be justified by a compelling state interest." 256 Va. at 21–22, 501 S.E.2d at 418.

139. *Ibanez*, 80 Va. App. at 217, 897 S.E.2d at 325.

140. *Id.* at 218, 897 S.E.2d at 325.

141. *Id.*

142. *Id.* at 218 n.27, 897 S.E.2d at 325 n.27 (citing Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 457 (2d Cir. 1996), *cert denied*, 519 U.S. 813 (1996); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381,

Thus, consistent with federal and state precedent, the court in *Ibanez* held that the scope of the right to direct their children's upbringing and education is not so expansive as to include the right to dictate the curricula of public schools or to demand exemptions from content with which they disagree.[143] To the contrary, the court stated, "As every court to consider the issue has held, the right to direct the education of children does not extend to allowing parents to handpick the curriculum within a public school system."[144]

3. Potential Impact of *Mahmoud v. Taylor*

A year after *Ibanez*, the Supreme Court of the United States decided *Mahmoud v. Taylor*, in which it held that parents' right to direct the religious upbringing of their children entitled them to an exemption from lessons that infringed that right.[145]

In *Mahmoud*, parents sought an exemption from LGBTQ+-inclusive lessons based on their fears that such exposure would hinder their ability to instill their religious beliefs in their children.[146] The school district denied the requested exemptions, explaining that accommodating the growing number of opt-out requests would disrupt classes and that permitting some students to leave class while the storybooks were taught would stigmatize and isolate other students.[147] The Court subjected the school district's actions to strict scrutiny, holding that denying the exemption violated the parents' First Amendment rights by requiring that their children receive instruction that threatened to undermine the religious beliefs the parents wished to instill.[148]

At first blush, *Mahmoud* might be read to undermine *Ibanez*. Its impact on Virginia precedent, however, is uncertain. First, the plaintiffs in *Ibanez* asserted parental rights exclusively under the Constitution of Virginia's Due Process Clause (Article I, section 11), rather than under the United States Constitution.[149] The

396 (6th Cir. 2005); Griffin High Sch. v. Illinois High Sch. Ass'n, 822 F.2d 671, 672–73 (7th Cir. 1987); Fields v. Palmdale Sch. Dist., 447 F.3d 1187, 1188 (9th Cir. 2006) (per curiam)).

143. *Id.* at 217–19, 897 S.E.2d at 324–25.

144. *Id.* at 218, 897 S.E.2d at 325.

145. Mahmoud v. Taylor, 606 U.S. 522, 568–69 (2025).

146. *Id.* at 528–30, 540–42.

147. *Id.* at 538.

148. *Id.* at 565, 569.

149. *Ibanez*, 80 Va. App. at 187, 215, 897 S.E.2d at 309, 323–24.

Ibanez court, citing *Vlaming*, explained that Virginia precedents discussing the U.S. Supreme Court's interpretation of the Federal Due Process Clause reflected simply that "as of that point in time—our Supreme Court's own understanding of Article I, § 11 did not extend more broadly than the Supreme Court of the United States' interpretation of the Federal Due Process Clause."[150] However, the *Ibanez* court noted pointedly that Virginia itself has "the last word on the meaning of the Constitution of Virginia."[151] In other words, the Supreme Court of the United States' interpretation of the federal Constitution does not bind Virginia's interpretation of its Constitution.

Second, the legal claims advanced by the parents in each case are distinct. The *Mahmoud* plaintiffs claimed that refusing them an exemption infringed their rights, not merely to direct the education of their children, but to "direct the religious upbringing of their children," as protected by the First and Fourteenth Amendments.[152] And fifty-three years earlier, in the landmark precedent of *Wisconsin v. Yoder*, the Court held that "when the interests of parenthood are combined with a free exercise claim[,]" courts must subject state action interfering with the exercise of that right to heightened scrutiny.[153]

The *Ibanez* plaintiffs, conversely, asserted no First Amendment Free Exercise claim.[154] Instead, among other causes of action under the Constitution of Virginia, they asserted a parental rights claim, and a claim on behalf of the student-plaintiffs that the curriculum discriminated against students on grounds that included religion.[155] This formulation of their claims distinguishes *Ibanez* from *Mahmoud* and *Yoder*, and aligns it with the large number of cases in which parents unsuccessfully sought exemptions from curricular requirements or to otherwise shape or veto curricula.[156]

150. *Id.* at 215–16, 897 S.E.2d at 324 (citing Vlaming v. West Point Sch. Bd., 302 Va. 504, 528–29, 895 S.E.2d 705, 716–17 (2023)).

151. *Id.* at 215, 897 S.E.2d at 324 (quoting Vlaming. West Point Sch. Bd., 302 Va. 504, 528, 895 S.E.2d 705, 716 (2023)).

152. *Mahmoud*, 606 U.S. at 543–45 (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

153. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

154. *Ibanez*, 80 Va. App. at 196 n.10, 897 S.E.2d at 314 n.10.

155. *Id.* at 187, 196 n.10, 897 S.E.2d at 309, 314 n.10.

156. *See, e.g.*, Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998); Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 683 (7th Cir. 1994); Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058, 1060–61, 1070 (6th Cir. 1987).

B. *Antiracism Curriculum and Discrimination on Basis of Race, Religion*

Plaintiffs alleged that the antiracism curriculum perpetuated racial stereotypes, treated students differently by race, and sought to indoctrinate students into a political viewpoint on race.[157] They alleged that the curriculum also discriminated on the basis of religion "by teaching that Christianity is a 'dominant' 'identity' that has oppressed 'subordinate' 'identities' such as Islam, Buddhism, Judaism, other non-Christian religions, and atheism."[158]

Based on the reasoning discussed above, the court found self-executing the constitutional provision prohibiting government from any "discrimination upon the basis of religious conviction, race, color, sex, or national origin."[159]

Because the curriculum had not yet been implemented across the School District, plaintiffs and the court relied on Pilot Program slides that the district had provided teachers as "reflective of the curriculum Students will experience in the future."[160]

The court rejected the plaintiffs' claims as speculative.[161] It noted that nothing in the Policy directed that students be treated differently based on race or religion and instead directed that such disparities be reduced or eliminated.[162] The court noted that acknowledging the existence of racial distinctions did not suggest that differential treatment had occurred or was likely to occur.[163] It noted that facts alleged by plaintiffs, even if true, established only that "ACPS taught that different racial and religious groups have different experiences, not that ACPS has treated anyone differently based on their race or religion."[164] Lastly, the court rejected plaintiffs' claim that the "curriculum itself stereotypes and denigrates students based on their race" and creates a "racially hostile educational environment."[165]

157. *Ibanez*, 80 Va. App. at 182, 897 S.E.2d at 306.
158. *Id.* at 196–97, 897 S.E.2d at 314.
159. *Id.* at 188–89, 897 S.E.2d at 310 (quoting VA. CONST. art. I, § 11).
160. *Id.* at 181–82, 897 S.E.2d at 305–06.
161. *Id.* at 198, 897 S.E.2d at 315.
162. *Id.* at 197–98, 202, 897 S.E.2d at 315, 317.
163. *Id.* at 198, 202, 897 S.E.2d at 315, 317.
164. *Id.* at 202, 897 S.E.2d at 317.
165. *Id.* at 201–02, 897 S.E.2d at 316–17.

C. *Student Rights: Compelled Speech*

Plaintiffs also alleged that ACPS compelled speech and action while also chilling nonconforming speech and action.[166] Plaintiffs argued that ACPS required students to take certain positions and profess beliefs, because the slides stated that "'[b]eing anti-racist is fighting against racism' and requires 'a conscious decision to make . . . equitable choices daily'" else risk unconsciously upholding white supremacy.[167] The slides also invited students to reflect on how they could "'look', 'think', 'sound', and 'act' more anti-racist."[168]

Relying on *Vlaming*, the court stated that speech protections under the Constitution of Virginia were at least as strong as those established by the Supreme Court of the United States' interpretation of the First Amendment.[169]

But unlike the policy in *Vlaming*, which required teachers to refer to students by pronouns that matched their gender identity rather than their sex, the *Ibanez* majority held that the Policy did not compel student speech.[170] Plaintiffs pleaded that the Pilot Program materials stated that "students should 'declare and affirm how they will look, think, sound, and act 'more anti-racist.'"[171] The court reviewed the materials, however, and found they prescribed only "thought-exercises" that classes might engage in and concluded that the allegations demonstrate that the School District "acquainted Students with the principles of anti-racism, not that Defendants compelled Students to declare any belief."[172]

166. *Id.* at 182, 897 S.E.2d at 306.

167. *Id.* at 183, 897 S.E.2d at 306.

168. *Id.*

169. *Id.* at 202–03, 897 S.E.2d at 317.

170. *Id.* at 206–07, 897 S.E.2d at 318–19.

171. *Id.* at 205, 897 S.E.2d at 319.

172. *Id.* at 205, 207, 897 S.E.2d at 319. The court noted its agreement with a Missouri District Court decision that found that curricular "assertions that equity and anti-racism 'generally require advocacy and proactivity, are wholly distinct from [a school district] compelling [students] to express specific views that they find objectionable.'" *Id.* (quoting Henderson v. Sch. Dist. of Springfield R-12, 650 F. Supp. 3d 786, 794 (W.D. Mo. 2023)).

D. *Student Rights: Viewpoint Discrimination*

Plaintiffs alleged that the curriculum penalized speech that was inconsistent with the Policy but allowed speech that was consistent with the Policy.[173]

The court explained that viewpoint discrimination "occurs when speech is restricted because of the speaker's viewpoint on the topic—i.e., but for the perspective of the speaker, the speech would normally be permissible."[174] To state a claim for such discrimination, plaintiffs would thus need to allege regulation of some types of speech but not others, as well as some nonspeculative consequence for failure to comply.[175] Assessing the examples of such alleged regulation presented by plaintiffs, and the absence of disciplinary measures or penalties, the court concluded that the "Pilot Program slides depict thought-exercises and teaching tools; they do not regulate speech based on the speaker's viewpoint."[176]

The court distinguished the facts of *Ibanez* from those of *Vlaming*, where the teacher was fired for refusing to speak in conformity with the School Board's views and also for expressing his views.[177] It also distinguished a recent Fourth Circuit case where the parents of students challenged a school's implementation of an online "Bias Reporting Form" that allowed students to anonymously report incidents of perceived bias, including "'Offensive Language, Teasing or Taunting' . . . 'Exclusion or victim of lack of inclusivity,' 'Gender Identity and Expression,' 'Ability Status,'" etc.[178] The Fourth Circuit held that the plaintiffs' allegations that their children refrained from expressing views on a range of controversial issues because they feared being reported and investigated sufficiently established that the reporting form had a chilling effect on speech, and the plaintiffs thus had standing to challenge the policy as discriminating against certain viewpoints.[179]

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173. *Id.* at 207, 897 S.E.2d at 320.

174. *Id.* at 208, 897 S.E.2d at 320 (quoting Hartman v. Thompson, 931 F.3d 471, 479 (6th Cir. 2019)).

175. *Id.* at 208–10, 897 S.E.2d at 320–21.

176. *Id.* at 209, 897 S.E.2d at 320.

177. *Id.* at 209, 897 S.E.2d at 320–21 (citing Vlaming v. W. Point Sch. Bd., 302 Va. 504, 574 n.37, 895 S.E.2d 705, 743 n.37 (2023)).

178. Menders v. Loudoun Cnty. Sch. Bd., 65 F.4th 157, 161 (4th Cir. 2023).

179. *Id.* at 165–66.

Because the *Ibanez* court held that the Policy did not compel speech or punish speech expressing certain viewpoints, it affirmed the circuit court's dismissal of plaintiffs' claim that the Policy is unconstitutionally vague and gives students insufficient notice as to which words would be considered to violate the Policy, ostensibly subjecting them to potential disciplinary measures.[180]

V. POLICIES ON THE TREATMENT OF TRANSGENDER STUDENTS

Virginia law requires the Department of Education to develop policies on the treatment of transgender students.[181] The law requires the policies to address the identification of students, sex-specific activities and events, use of school facilities, and compliance with privacy and antidiscrimination laws.[182] The policies are to be model policies, rather than self-executing regulations, and school boards must implement their own local policies consistent with the model policies.[183]

Under Governor Glenn Youngkin, the Department enacted the 2023 Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools ("2023 Model Policies").[184] The policies took effect in July 2023, superseding the 2021 Model Policies for the Treatment of Transgender Students in Virginia's Public Schools ("2021 Model Policies").[185]

The 2021 Model Policies adopted as their guiding principle that "all children have a right to learn, free from discrimination and harassment," and encouraged school districts to implement policies that presumptively recognized students' consistently asserted gender identities without requiring "particular substantiating evidence," to use students' chosen name and pronouns, and to

180. *Ibanez*, 80 Va. App. at 213–15, 220–21, 897 S.E.2d at 322–23, 326.

181. VA. CODE ANN. § 22.1-23.3(A) (2025).

182. *Id.* Section 22.1-23.3(A)(8) of the statute excludes interscholastic athletic events governed by athletic organizations from sex-specific school activities and events.

183. *Id.* § 22.1-23.3(B).

184. VA. DEP'T OF EDUC., MODEL POLICIES ON ENSURING PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS 1 (July 18, 2023) [hereinafter 2023 MODEL POLICIES], https://www.doe.virginia.gov/home/showpublisheddocument/46509/638252918535370000 [https://perma.cc/M4LC-E35M].

185. *Id.*; VA. DEP'T OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS (Dec. 31, 2020) [hereinafter 2021 MODEL POLICIES], https://townhall.virginia.gov/l/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs_Proposed%5C201%5CGDoc_DOE_4683_20201208.pdf [https://perma.cc/RR55-85S3].

"minimize social stigmatization . . . and maximize opportunities for social integration."[186] To that end, for example, they extended to transgender students access to restroom facilities corresponding to their gender rather than biological sex and where possible, designated gender-inclusive or single-user restrooms accessible to all students seeking privacy.[187]

The 2021 Model Policies encouraged communication with students' families about the student's gender identity but acknowledged that, for transgender students whose families are not supportive, "[d]isclosing a student's transgender status can pose imminent safety risks, such as losing family support or housing."[188] They thus instructed school staff to discuss with students how they preferred information about their gender identity to be shared in the school community.[189] They stated an expectation that no regulation would require staff to notify parents of a student's request to affirm their gender identity, but that instead schools should address students' preferences "on a case-by-case basis," and "staff should work with students to help them share the information with their family when they are ready to do so."[190]

The 2023 Model Policies evince a wholesale reversal of policy towards transgender students, with a presumption against recognizing transgender or gender-nonconforming identities, deference to parental preference, and emphasis on ensuring that other students are not made uncomfortable by the inclusion of transgender students.[191]

They direct schools to refer to students only using the names in the student's official record and pronouns "appropriate to the sex" in the official record.[192] Schools will refer to a student by a different name and pronoun only if a parent submits a written statement that a different name and pronoun be used.[193] If other members of the school community object to using a student's preferred

186. 2021 MODEL POLICIES at 8, 12. The 2021 Model Policies also established that teachers' refusal to use students' preferred names and pronouns would constitute discrimination. *Id.* at 12.

187. *Id.* at 17.

188. *Id.* at 11–12.

189. *Id.* at 11.

190. *Id.* at 12.

191. 2023 MODEL POLICIES at 3, 14.

192. *Id.* at 14.

193. *Id.*

pronouns, however, the policies instruct school divisions that the First Amendment prohibits the government from requiring adherence to any particular ideological beliefs or ideas contrary to their religious beliefs.[194] And the policies label as "ideological [the] belief that gender is a matter of personal choice or subjective experience, not sex."[195]

Under the 2023 Model Policies, transgender students' access to activities and facilities is "determined by sex rather than gender or gender identity."[196] If law requires otherwise, objecting students must be provided the opportunity to opt out and provided alternate facilities.[197]

Other than effectuating parents' written preference respecting their child's gender identity, the policies impose no specific obligations on schools to integrate transgender students. Instead, the policies assert a broad commitment to nondiscrimination, respecting all students, and preventing and addressing bullying generally.[198] They direct schools to "attempt to accommodate students with distinctive needs, including transgender students."[199] A team of school staff should collaborate with parents to identify "reasonable accommodations or modifications (if any)," taking account of resources, staff, and the "rights and needs of other students."[200]

The 2023 Model Policies replace the 2021 Model Policies' concern for student privacy and safety with an emphasis on keeping parents informed about "all matters that may be reasonably expected to be important to a parent," with no mention of ensuring student safety or privacy concerns.[201] Instead, unless otherwise required by law, school districts may not require personnel to maintain confidential information shared by students.[202]

Following the publication of the 2023 Model Policies, Governor Youngkin asked Virginia Attorney General Jason Miyares whether the 2023 Model Policies comported with Title IX, the Equal Protection Clause of the Fourteenth Amendment, and the Virginia

194. *Id.* at 5, 15.
195. *Id.* at 5.
196. *Id.* at 16.
197. *Id.* at 3.
198. *Id.* at 2, 13.
199. *Id.* at 3.
200. *Id.*
201. *Id.*
202. *See id.* at 15.

Human Rights Act.[203] In a published opinion, Attorney General Miyares responded in the affirmative for all three.[204]

Attorney General Miyares addressed the Policies' requirement that students participate in athletics according to sex rather than gender identity. He argued that the Equal Protection Clause permits different treatment of the sexes (such as excluding males from female sports teams) when the sexes are not similarly situated.[205] Title IX, moreover, imposes no requirement for sex-integrated teams, which Miyares stated would undermine its purpose of correcting the underrepresentation of girls in athletics.[206]

Attorney General Miyares also argued that providing access to activities, events, and facilities solely on the basis of sex, irrespective of gender identity, comports with the Virginia Human Rights Act, which prohibits discrimination on the basis of gender identity.[207] Sex-segregated facilities, he argued, do not "facially discriminate on the basis of transgender status."[208] Rather, students are grouped according to sex, not gender identity, and both groups include transgender students. In other words, if all students are grouped according to sex, and transgender students are members of both groups, they are not being singled out for discriminatory treatment based on their gender identity.[209] Attorney General Miyares also noted the longstanding practice of separating sexes in intimate settings, and argued that students have the expectation of privacy in their "persons," such as "shielding [their] body from view of the opposite sex."[210] This right, according to Attorney

203. 2023 Op. Va. Att'y Gen. 1, 1, https://www.oag.state.va.us/files/Opinions/2023/23-042-Youngkin-issued.pdf [https://perma.cc/5BRZ-9888].

204. *Id.*

205. *Id.* at 4–5.

206. *Id.* at 5; 34 C.F.R. § 106.41(b) (2025) (permitting institutions to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport").

207. 2023 Op. Va. Att'y Gen. at 8; 2023 Model Policies at 16; VA. CODE ANN. § 2.2-3900 (2026).

208. 2023 Op. Va. Att'y Gen. at 8 (quoting Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022)).

209. *Id.* This reasoning is analogous to the Supreme Court's reasoning in Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974), where the Court held that excluding pregnancy from insurance coverage did not constitute sex discrimination, because there were women in both the pregnant and non-pregnant groups of employees.

210. 2023 Op. Va. Att'y Gen. at 8.

General Miyares, is not diminished because another student identifies as transgender.[211]

In a later opinion responding to an inquiry by Delegate Karen Hamilton, Attorney General Miyares addressed the scope of the Fourth Circuit's decision in *Grimm v. Gloucester County School Board*, in which the court held that, as applied to Gavin Grimm, a transgender boy, a school board's policy prohibiting transgender students from using restrooms consistent with their gender identity violated Title IX and the Fourteenth Amendment's Equal Protection Clause.[212]

Attorney General Miyares announced that *Grimm*'s holdings do not apply beyond the specific facts of that case and do not dictate policies on athletics, pronoun usage, parental rights to information, or facilities other than restrooms.[213] Moreover, Attorney General Miyares argued that the U.S. Supreme Court's decision in *United States v. Skrmetti* "undercut much of *Grimm's* reasoning," limiting its application to future cases.[214] In *Skrmetti*, the Court subjected a state law banning puberty blockers and hormone therapy for minors to deferential rational basis review and upheld it as an age-based medical regulation, and not sex discrimination.[215]

VI. SCHOOL BOARD SOVEREIGN IMMUNITY

Virginia's Court of Appeals and Supreme Court have recently clarified the scope of sovereign immunity from suit of school boards, school board employees, and school officials.

Sovereign immunity is a common-law doctrine that insulates governments from liability for harms resulting from the tortious acts of their agents or employees.[216] The doctrine serves multiple purposes, including:

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211. *Id.*

212. 2026 Op. Va. Att'y Gen. 1, 1–2, https://www.oag.state.va.us/files/Opinions/2026/26-002-Hamilton-issued.pdf [https://perma.cc/3XKU-8HJZ].

213. *See id.* at 4–5.

214. *Id.* at 1, 6, 9.

215. United States v. Skrmetti, 605 U.S. 495, 500, 506, 513, 522–23 (2025).

216. *See* Rector & Visitors of the Univ. of Va. v. Carter, 267 Va. 242, 244, 591 S.E.2d 76, 78 (2004). The doctrine originated with the British idea that the king could do no wrong. *See* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 233, 238–39 (2019) (holding that, absent waiver, states have sovereign immunity from private suits in the courts of another state). Immunity from suit extends to all tortious acts (including gross negligence or

> protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.[217]

Sovereign entities like Virginia, the federal government, and their agencies retain their immunity unless they consent to suit via express statutory or constitutional waiver.[218] Whether or not sovereign immunity protects a government defendant in a given case is a question of substantive law.[219] Thus, for federal claims, the Eleventh Amendment of the United States Constitution and federal case law govern the scope and applicability of immunity.[220] For state law claims, state (rather than federal) law governs the applicability of immunity; the Supreme Court of Virginia has developed sovereign-immunity law, modified occasionally by statutes enacted by the General Assembly.[221]

Federal courts' interpretation of sovereign immunity under the United States Constitution and federal laws diverges in meaningful respects from the Supreme Court of Virginia's interpretation of sovereign immunity under the Constitution of Virginia and state

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intentional torts) committed by agents and employees performing governmental functions. *See Carter*, 267 Va. at 244, 591 S.E.2d at 78 ("Absent an express statutory or constitutional provision waiving sovereign immunity, the Commonwealth and its agencies are immune from liability for the tortious acts or omissions of their agents and employees."). The Supreme Court of Virginia has noted that, while controversial, the doctrine of sovereign immunity "is 'alive and well' in Virginia." Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984). The Supreme Court of Virginia has held that the doctrine encompasses school boards. Kellam v. Sch. Bd., 202 Va. 252, 254, 117 S.E.2d 96, 97 (1960).

217. *Messina*, 228 Va. at 308, 321 S.E.2d at 660.

218. *See* United States v. Sherwood, 312 U.S. 584, 586 (1976) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . ."); *Carter*, 267 Va. at 244, 591 S.E.2d at 78.

219. Drasovean v. Walts, 85 Va. App. 293, 311–12, 917 S.E.2d 518, 527 (2025) (Raphael, J., concurring) (citing Fines v. Rappahannock Area Cmty. Serv. Bd., 301 Va. 305, 320, 876 S.E.2d 917, 927 (2022)).

220. *See id.* at 311, 917 S.E.2d at 527. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the Amendment's text directly addresses suits by a citizen of one state against another state, the Supreme Court has held more broadly that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain . . . except as altered by the plan of the Convention or certain constitutional Amendments." Alden v. Maine, 527 U.S. 706, 713 (1999).

221. *Drasovean*, 85 Va. App. at 311–12, 917 S.E.2d at 527 (Raphael, J., concurring).

law.[222] For example, the Supreme Court of the United States has construed the Eleventh Amendment's grant of sovereign immunity to extend to states but not to their political subdivisions (cities, towns, and counties), which the Court refers to generally as "municipalities."[223] Eleventh Amendment precedent also characterizes local school boards as municipalities, and the Supreme Court has not extended immunity to local school boards.[224]

Under Virginia sovereign-immunity law, however, both the Commonwealth itself as well as entities considered "arms of the State" presumptively retain immunity in the absence of waiver.[225] Virginia itself created counties, agencies, and local school boards to operate as political "arms" or "local subdivisions" of the Commonwealth.[226] Because they operate as arms of the state, local school boards are treated like the Commonwealth itself and enjoy absolute sovereign immunity.[227]

Conversely, cities and towns (considered "municipalities" in the Commonwealth) were formed not by the Commonwealth itself, but by the people residing within them.[228] Thus, under Virginia law, they presumptively enjoy less broad immunity than the Commonwealth and entities considered arms of the state.[229] Municipalities enjoy immunity from tort claims only if the actions giving rise to the claim arose from a "governmental" function, rather than a "proprietary" one.[230] The distinction between the two functions is notoriously imprecise. In general, however, "governmental" functions aim to advance the public welfare and typically involve sovereign powers reserved to the state.[231] Examples include officials exercising discretion to enact legislation or make policy decisions.[232]

222. *Id.*

223. *Id.* at 310, 917 S.E.2d at 526; Jinks v. Richland Cnty., 538 U.S. 456, 466 (2003) (repeating the Supreme Court's consistent interpretation of the Eleventh Amendment that "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").

224. *Drasovean*, 85 Va. App. at 310–11, 917 S.E.2d at 526 (Raphael, J., concurring) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977)).

225. *Id.* at 312, 917 S.E.2d at 527.

226. *Id.* at 304–06, 917 S.E.2d at 523–24.

227. *Id.* at 302–03, 917 S.E.2d at 522.

228. *Id.* at 303, 305, 917 S.E.2d at 523–24.

229. *See id.* at 303–04, 917 S.E.2d at 523.

230. *Id.* at 303, 917 S.E.2d at 523.

231. *Id.*

232. *See id.* at 298, 301, 917 S.E.2d at 520, 522 (majority opinion); *see also id.* at 303–04, 917 S.E.2d at 523 (Raphael, J., concurring).

"Proprietary" functions typically involve more businesslike or nondiscretionary activities, often ones that private companies could perform, subject to common-law duties.[233]

In 2025, an en banc panel of the Court of Appeals of Virginia reversed the decision of a three-judge panel that mistakenly applied the federal test for determining sovereign immunity to determine the scope of immunity on state law claims.[234]

A. *Waiver*

In Virginia, the Commonwealth itself presumptively possesses broad absolute common-law tort immunity, but the General Assembly has expressly waived that immunity in limited circumstances.[235]

The Supreme Court of Virginia first held in 1960 that school boards are agencies of the Commonwealth and enjoy the same sovereign immunity as the Commonwealth itself.[236] Thus school boards, having been created by the General Assembly to act as agencies of the State in carrying out the obligations imposed by the Constitution of Virginia (to "provide for a system of free public elementary and secondary schools"), enjoy absolute tort immunity, unlike the narrower immunity that shields municipalities from claims arising from "governmental" functions but not "proprietary" ones.[237] And the Supreme Court of Virginia has consistently upheld the principle that, absent waiver, school boards enjoy absolute immunity from suit.[238]

233. *Id.* at 304, 917 S.E.2d at 523 (Raphael, J., concurring).

234. *Id.* at 296, 298–99, 917 S.E.2d at 519–21 (majority opinion).

235. VA. CODE ANN. § 8.01-195.3 (2024).

236. Kellam v. Sch. Bd., 202 Va. 252, 253–54, 259, 117 S.E.2d 96, 97–98, 99 (1960) (holding school board immune from liability for injuries sustained by plaintiff attending a junior high school concert). *See also* Maddox v. Commonwealth, 267 Va. 657, 665, 594 S.E.2d 567, 571 (2004) ("[A] school board is an agent or instrumentality of the state, not a true municipality, and therefore 'partakes of the state's sovereignty with respect to tort liability.'") (quoting *Kellam*, 202 Va. at 259, 117 S.E.2d at 100).

237. *Drasovean*, 85 Va. App. at 303–07, 917 S.E.2d at 522–25 (Raphael, J., concurring); VA. CONST. art. VII, § 1.

238. Newport News Sch. Bd. v. Z.M., 304 Va. 276, 280, 282, 915 S.E.2d 56, 57, 59 (2025); Linhart v. Lawson, 261 Va. 30, 36, 540 S.E.2d 875, 878 (2001) ("As a general matter, school boards are immune governmental entities.").

1. Statutory Waiver of Sovereign Immunity

Governments may waive sovereign immunity via statutes that explicitly allow a private right of action and where constitutional provisions are "self-executing."[239]

While School Boards presumptively enjoy the benefit of sovereign immunity, the Code of Virginia waives immunity from tort claims up to the applicable insurance limits, when a school board owns, operates, or insures a "vehicle involved in an accident."[240] In *Newport News School Board v. Z.M.*, the parents of an autistic child sought damages after school employees allegedly assaulted the child on the bus.[241] The Supreme Court of Virginia held that the School Board was immune from suit.[242] Noting that "waivers of sovereign immunity are strictly construed," the court reasoned that the statutory waiver was inapplicable—the actions giving rise to the claim had taken place on the bus, but the vehicle had not been involved in an accident.[243]

2. Constitutional Waiver of Immunity

Governments can also waive sovereign immunity where constitutional provisions are "self-executing."[244] Courts have found provisions of the Constitution of Virginia to be self-executing when they expressly state as much, and also when they (1) are included in the Bill of Rights, (2) declare common law, (3) prohibit government action, or (4) without needing additional legislation, provide a rule sufficient to protect or enable individuals to exercise a right.[245]

In *Ibanez*, for example, ACPS claimed immunity from suit.[246] Plaintiffs argued that sovereign immunity had been waived, since

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239. Ibanez v. Albemarle Cnty. Sch. Bd., 80 Va. App. 169, 190, 897 S.E.2d 300, 311 (2024) (citing Gray v. Va. Sec'y of Transp., 276 Va. 93, 102, 662 S.E.2d 66, 71 (2008)).

240. VA. CODE ANN. § 22.1-194 (2025).

241. 304 Va. at 279, 915 S.E.2d at 57.

242. *Id.* at 282–83, 915 S.E.2d at 59.

243. *Id.* at 281–82, 915 S.E.2d at 58 ("[T]he waiver of sovereign immunity does not apply because, in this instance, the bus was not a 'vehicle involved in an accident.'").

244. *Ibanez*, 80 Va. App. at 190, 897 S.E.2d at 311 (quoting *Gray*, 276 Va. at 102, 662 S.E.2d at 71).

245. *Id.* at 190, 897 S.E.2d at 311 (citing Robb v. Shockoe Slip Found., 228 Va. 678, 681–82, 324 S.E.2d 674, 676 (1985)).

246. *Id.* at 187, 897 S.E.2d at 309–10.

their constitutional claims arose under provisions that are "self-executing."[247]

The Court of Appeals found to be self-executing the provisions of the Bill of Rights pursuant to which Plaintiffs asserted violations of due process, racial and religious discrimination, and infringement of their parental rights to direct the education of their children.[248] That provision (the first paragraph of Article I, section 11) states:

> That no person shall be deprived of his life, liberty, or property without due process of law; . . . that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.[249]

The court also found the Bill of Rights provision (Article I, section 12) to be self-executing pursuant to which Plaintiffs asserted violations of their right to free speech, including the freedom against compelled speech and freedom from viewpoint discrimination.[250]

While the court held that the first paragraph of section 11 and section 12 are self-executing, it declined to decide whether the provisions support Plaintiffs' claims for money damages in addition to declaratory and injunctive relief.[251] Instead, because the court found that Plaintiffs' claims, while not barred by sovereign immunity, nonetheless failed for other reasons, it did not reach the question.[252]

B. *Immunity of School Officials and Employees*

Litigants may sue individual government employees in addition to, or in lieu of, suing a government entity like a school board. If the doctrine of sovereign immunity is to fulfill its purpose, the Supreme Court of Virginia has explained, "the reach of the doctrine [cannot] be limited solely to the sovereign but must be extended to

247. *Id.* at 189, 897 S.E.2d at 310–11.
248. *Id.* at 188–89, 191, 897 S.E.2d at 310–11.
249. VA. CONST. art. I, § 11.
250. *Ibanez*, 80 Va. App. at 189, 191, 897 S.E.2d at 310–11.
251. *Id.* at 192, 897 S.E.2d at 312.
252. *Id.* at 190, 192, 897 S.E.2d at 311–12.

'some of the people who help run the government.'"[253] The government acts through individuals, and exposing every government employee to lawsuits risks crippling government operations.[254] Thus individual employees, depending on the nature of the claim and the actions that gave rise to the suit, may also receive the protection of sovereign immunity.[255]

Different immunity rules apply depending on whether employees are sued in their official capacities (in which their employer would be liable under the doctrine of *respondeat superior*) or individual capacities (in which the employees would incur personal liability).[256]

1. Officials and Employees Sued in Their Official Capacities

It is well-settled that "a suit against a government employee in his or her official capacity is functionally a suit against the government entity that the employee works for."[257] In other words, a suit against a government employee in their official capacity is not a suit against the employee as a private citizen but instead a suit against the official's office or the employee as an agent of the state.[258] Thus, the employee enjoys the same scope of immunity as the government entity that employs them. If the government employer lacks immunity, and the employee is found liable for harms resulting from their actions, the government employer is responsible. Because school boards enjoy absolute immunity, so too do employees sue in their capacity as school board employees.

In *Drasovean*, a female student allegedly assaulted by a recently-transferred male student brought a state-law claim against three school employees in their official capacities, asserting they were grossly negligent in approving the transfer of the male

253. Lentz v. Morris, 236 Va. 78, 81, 372 S.E.2d 608, 610 (1988) (quoting Messina v. Burden, 228 Va. 301, 308, 321 S.E.2d 657, 661 (1984)).

254. *Id.* at 81, 372 S.E.2d at 610.

255. *Id.* at 81–82, 372 S.E.2d at 610.

256. Suffolk City Sch. Bd. v. Wahlstrom, 302 Va. 188, 219–221, 886 S.E.2d 244, 262 (2023).

257. Drasovean v. Walts, 85 Va. App. 293, 300, 917 S.E.2d 518, 521 (2025). *See also* Hinchey v. Ogden, 262 Va. 234, 238, 307 S.E.2d 891, 893 (1983) ("Thus, [the government employee], sued in his official status, enjoys whatever immunity the sovereign may be entitled to claim.").

258. *Drasovean*, 85 Va. App. at 353, 917 S.E.2d at 547–48 (Athey, J., dissenting) (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 89 (1989)).

student, who had a history of disruptive and sexually abusive behavior.[259] A divided *en banc* panel of the Court of Appeals of Virginia held that the school officials enjoyed the same (absolute) immunity as the school board itself.[260] The court explained that "[s]ince Drasovean's suit against the [school officials] in their official capacities was functionally a suit against the School Board itself, her gross negligence claim was barred under sovereign immunity."[261]

2. Officials and Employees Sued in Their Individual Capacities

Litigants may also choose to sue government employees in their individual capacities, as private citizens, for acts related to the official's performance of their duties.[262] Whereas the government as a sovereign entity and employees sued in their official capacities enjoy absolute immunity, government employees sued in their individual capacities enjoy qualified, rather than absolute immunity.[263] Instead, depending on employees' functions and the nature of their actions, they may be subject to suit. In general, employees lack immunity protection when they act beyond the scope of their employment or individually, exceed their authority and discretion, or act wantonly or in a grossly negligent manner.[264]

Through the 1970s, the Supreme Court of Virginia held that, despite school board immunity, employees sued in their individual capacities could be held liable for acts of simple or ordinary negligence.[265] In subsequent cases, however, the court modified its

259. *Id.* at 295–297, 917 S.E.2d at 519–20 (majority opinion).

260. *Id.* at 298, 302, 917 S.E.2d at 520–522.

261. *Id.* at 302, 917 S.E.2d at 522.

262. Suffolk City Sch. Bd. v. Wahlstrom, 302 Va. 188, 220–21, 886 S.E.2d 244, 262 (2023) (citing *Ex Parte* Young, 209 U.S. 123, 159–60 (1908)).

263. James v. Jane, 221 Va. 43, 53–55, 282 S.E.2d 864, 869–70 (1980) (discussing nature of employee qualified immunity and holding that state-employed physicians lack immunity, because they do not act at the direction of the state but instead exercise discretion and ultimate authority in treating patients).

264. *Id.* at 53, 282 S.E.2d at 869.

265. *See, e.g.*, Short v. Griffitts, 220 Va. 53, 55, 255 S.E.2d 479, 480–81 (1979) (holding that a high school athletic director, baseball coach, and grounds supervisor sued in their individual capacities did not enjoy school board's immunity but instead could be held responsible for acts of simple or ordinary negligence), *overruled by* Lentz v. Morris, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988); Crabbe v. Cnty. Sch. Bd., 209 Va. 356, 359, 164 S.E.2d 639, 641 (1968) (allowing plaintiff to proceed with a suit alleging that teacher was negligent in permitting use of a defective power tool and failing to properly instruct student in its use), *overruled by Lentz*, 236 Va. at 82, 372 S.E.2d at 610 ("We also expressly overrule *Crabbe* insofar as it addresses the employee's liability in that case.").

approach to provide broader—but not absolute—immunity to employees.[266] If an employee works for an immune governmental entity, the court established the employee too would be eligible for immunity protection, so long as other criteria are met.[267] It set out a four-factor test for courts to use to determine an individual employee's entitlement to immunity. These include:

> (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion.[268]

Thus, the court extended immunity to a physical education instructor charged with negligently supervising a class in which a student was tackled and injured. The court found that the instructor was acting within the scope of his employment, and that the facts did not support either gross negligence or intentional misconduct.[269]

In *Newport News v. Z.M.* (discussed in Part VI(A) above), in which parents of an autistic child sought damages after school employees allegedly assaulted the child on the bus, the court held that the School Board enjoyed absolute immunity from suit.[270] But because the suit accused the school employees *individually* of gross negligence, however, the Court held that sovereign immunity would not insulate them from suit.[271]

CONCLUSION

Many developments in the Commonwealth's education-related law address the same controversies with which the nation as a

266. Messina v. Burden, 228 Va. 301, 305–06, 310–11, 313–14, 321 S.E.2d 657, 659, 662, 664 (1984) (holding the Superintendent of buildings of a Virginia Community College and the Chief of Operations Division of the Department of Public Works in Arlington County entitled to immunity from suits alleging simple negligence in the performance of acts within the scope of defendants' employment).

267. *Id.* at 313, 321 S.E.2d at 664.

268. James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980); *see also Lentz*, 236 Va. at 82, 372 S.E.2d at 610 (citing *Messina*, 228 Va. at 313, 321 S.E.2d at 663).

269. *Lentz*, 236 Va. at 82, 372 S.E.2d at 610 (citing *Messina*, 228 Va. at 313, 321 S.E.2d at 663).

270. 304 Va. 276, 278–79, 915 S.E.2d 56, 57 (2025).

271. *Id.* at 283, 915 S.E.2d at 59 ("Because the plaintiff alleges that these employees were grossly negligent, the action may proceed against the employees, who are not protected by derivative sovereign immunity in that circumstance.").

whole has been preoccupied in recent years—the scope of parents' entitlement to shape their children's curricular experiences to accord with their beliefs, teachers' free exercise and speech rights, student rights, and school districts' obligations to provide more or less inclusive educational environments to their gender-nonconforming students.[272] At the same time, Virginia's courts have carefully guarded their role as the ultimate interpreters of the scope of individual civil rights under the state's constitution and laws, even when invoking the interpretation of analogous rights in case law arising under and interpreting the federal constitution.[273] Thus, Virginia courts have established distinct state law doctrine in core realms, providing more robust sovereign immunity protections to the entities of the state and safeguarding a fundamentally protected right to education itself. Nevertheless, the courts have stopped short of an interpretation so robust as to have the state-protected right comprise a compensable property interest.[274]

272. *See generally* Ziegler, Eichner, & Cahn, *supra* note 3 (discussing controversies involving race, gender identity, curriculum, and parental rights in public schools).

273. *See* Fines v. Rappahannock Area Cmty. Servs. Bd., 301 Va. 305, 318, 876 S.E.2d 917, 926–27 (2022) (noting that state courts are ultimate interpreters of state entities entitlement to sovereign immunity from claims arising under state law, compared to claims arising under federal law and governed by the Eleventh Amendment); Ibanez v. Albemarle Cnty. Sch. Bd., 80 Va. App. 169, 215–16, 897 S.E.2d 300, 324 (2024) (noting that state courts are ultimate interpreters of scope of parental rights under state constitution, while looking to interpretation of analogous rights under federal constitution).

274. *See* Drasovean v. Walts, 85 Va. App. 293, 311, 917 S.E.2d 518, 526 (2025); Chollet v. Braband, 137 F.4th 241, 244 (4th Cir. 2024).