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JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

K.C., a minor, by and through her parent and  
next friend, HANNING CHEN, et al., )  
)  
)

Plaintiffs, )  
)  
)

v. )  
)  
)

Case No. 2020-17283

THE FAIRFAX COUNTY SCHOOL  
BOARD, et al., )  
)  
)

Defendants. )

BRIEF IN SUPPORT OF DEFENDANTS' DEMURRER

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December 11, 2020

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## INTRODUCTION

Plaintiffs—a group of seventh and eighth grade students in Fairfax County and their parents—seek judicial review under Code § 22.1-87 of the Fairfax County School Board's decision to eliminate standardized testing as part of the admissions process for Thomas Jefferson High School for Science and Technology ("TJ"). Their Complaint should be dismissed on multiple grounds.

First, Plaintiffs' claims are not justiciable. Their alleged injuries are based entirely on "future or speculative facts" that are insufficient "to establish an actual controversy."

*Lafferty v. Sch. Bd. of Fairfax Cty.*, 293 Va. 354, 361–62 (2017) (citation omitted).

Second, the Constitution of Virginia grants the School Board plenary authority over the public schools in Fairfax County unless the General Assembly has enacted a law validly restricting that authority. Relevant here, the General Assembly *has not* required the School Board to use standardized testing in the TJ admissions process. Plaintiffs' contrary argument rests on the erroneous assertion that academic-year Governor's Schools, such as TJ, must serve only students who have been identified as "gifted" by the relevant school division. That is untrue—no statute or regulation supports Plaintiffs' view, and TJ has always been open to students who have not been separately identified as "gifted" under the Virginia Department of Education's regulations. All interested and academically qualified students are welcome to apply to TJ and to attend if admitted.

Third, the School Board properly adopted the TJ admissions-policy changes at a publicly noticed, open meeting. No law disables the School Board from acting on public business at a public "work session." Plaintiffs identify no law or regulation that they believe the School Board violated when it did so here. Plaintiffs' procedural arguments are

thus facially deficient and, in any event, fail on the merits because the School Board complied with all open-meeting requirements under applicable law.

Lastly, the school division Superintendent—Dr. Scott S. Brabrand—is not a proper defendant in an action commenced under Virginia Code § 22.1-87, and Dr. Brabrand is not otherwise a proper party defendant.<sup>1</sup> So the claims against Dr. Brabrand also should be dismissed for these independent reasons.

### **BACKGROUND**

Before turning to the facts of this case, it is helpful to review the limited regulatory framework addressing academic-year Governor's Schools, which are found throughout Virginia.

#### **A. Academic-year Governors' Schools.**

Governor's Schools receive additional state funding, which encourages localities to establish and maintain such regional schools. *E.g.*, 2020 Budget Bill, HB 5005, Item 145 (2020 Spec. Sess. I), <https://budget.lis.virginia.gov/item/2020/2/HB5005/Chapter/1/145/>. Notwithstanding that additional funding source, the General Assembly and the Department of Education have not generally supplanted local control over the operation of such schools. *See* Va. Const. art. VIII, § 7 (“vesting” the “supervision of schools in each school division . . . in a school board”). Indeed, only a handful of Virginia Code provisions even mention academic-year Governor's Schools. *See* Va. Code Ann. § 22.1-26(D). Notable here, nothing in the Code addresses how school boards are supposed to make admissions

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<sup>1</sup> As stated in the School Board's demurrer, Count IV of the Complaint should be dismissed because a preliminary injunction is not a standalone claim for relief. Additionally, the preliminary injunction claim should be dismissed on the merits for the same reasons given below.

decisions for academic-year Governor's Schools. *See generally* Va. Code Ann. § 22.1-26; *see also* HB 5005, Item 145.

The Department of Education has likewise applied a light touch in addressing academic-year Governor's Schools. *See* Va. Code Ann. § 22.1-26(A) (authorizing the Department to promulgate regulations related to "joint schools," which include academic-year Governor's Schools); *accord* 8 VAC 20-281-10 (defining "joint school" as including a "regional academic year Governor's school"). The handful of Department regulations are focused on organizational issues such as the "membership of the joint board" that "manage[s] and control[s]" a joint school; rules for how the joint board should be organized; the Superintendent's authority; and baseline rules about the budget and expenditures. 8 VAC 20-281-20.<sup>2</sup>

Nothing in the Department's regulations addresses admissions or any other operational or curricular component of academic-year Governor's Schools. In fact, the Department expressly authorizes joint boards to take various actions, including "manag[ing], operat[ing], and conduct[ing] joint schools and programs." *Id.*

**B. TJ exists to educate students with an interest and knowledge in science, technology, and the humanities without reference to whether such students are identified as "gifted."**

The School Board established TJ in 1985 "to improve education in science, mathematics, and technology."<sup>3</sup> From the beginning, TJ was intended to be "a high school for science and technology where students with exceptional quantitative skills and interest

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<sup>2</sup> TJ was founded before the enactment of the joint-board statute and accompanying regulations. TJ thus is governed by the Fairfax County School Board, rather than a regional joint board.

<sup>3</sup> About TJHSST, <https://tjhsst.fcps.edu/about>.

in science, technology, engineering, or mathematics, can pursue higher levels of academic achievement in those subjects in preparation for the pursuit of a science, technology, engineering, or mathematics focused profession." Exhibit 1, FCSB Policy 3355.4(I) (last revised Sept. 12, 2013).<sup>4</sup> TJ continues to serve that purpose today.

Notwithstanding TJ's establishment as a magnet school, the School Board has never required interested students to have been identified as "gifted" to apply to and attend TJ. See, e.g., Compl. ¶ 78 (quoting a School Board member as stating "[t]he purposes of [TJ] is not, as far as I understand, is *not for gifted students* but is for students with an aptitude for STEM, and science"). Instead, the School Board solicits applications from all interested students that "have demonstrated exceptional achievement, aptitude, commitment, intellectual curiosity, passion, and creativity in science, technology, engineering, and mathematics." FCSB Policy 3355.4(III).

**C. The School Board decides to eliminate standardized testing as part of the TJ admissions process, and Plaintiffs file suit.**

On October 6, 2020, the School Board decided to modify the TJ admissions process to eliminate the use of standardized testing. Compl. ¶ 71. Plaintiffs did not like that decision. They want the School Board to continue to use standardized tests because, in each plaintiff's view, "[i]f admissions to [TJ] are based on the applicant's status as a gifted student, as measured by the tests required by applicable state regulations, there is a high probability that [plaintiff] would be admitted." *Id.* ¶¶ 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46.

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<sup>4</sup> Available at <https://tinyurl.com/yyyxwzdn>. The Court must take judicial notice of this official School Board policy under Virginia Rule of Evidence 2:202(a).



In challenging the School Board's decision, Plaintiffs rely on regulations governing educational services for "gifted" students, 8 VAC 20-40 et seq. Compl. ¶¶ 51-64.

According to Plaintiffs, the Board is required to use standardized testing in the TJ admissions process because academic-year Governor's Schools like TJ "must operate as a high school for *gifted* students." Compl. ¶ 53; *accord id.* ¶ 52 (quoting Va. Dep't of Educ., Administrative Procedures for Establishment of Academic Year Governor's Schools). In Plaintiffs' view, academic-year Governor's Schools are part of a school division's "gifted education services," 8 VAC 20-40-10. Compl. ¶ 57.

As a result, they argue that the School Board must comply with the requirements in 8 VAC 20-40-20 and 8 VAC 20-40-40 when "identifying" students eligible to participate in a "gifted program," including attending TJ. Compl. ¶¶ 58-59. Plaintiffs assert that, under 8 VAC 20-40-40, eligible "gifted" students must be identified using, in part, a "nationally norm-referenced aptitude or achievement test." Compl. ¶ 59; *accord id.* ¶¶ 62, 64.

Additionally, Plaintiffs allege that the School Board acted unlawfully by changing the TJ admissions process during a work session without taking public comment. *See* Compl. ¶¶ 67-76. Plaintiffs cite no statutes or regulations that were supposedly violated.

### **STANDARD OF REVIEW**

"Settled criteria govern[] a trial court's consideration of a demurrer." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997). "A demurrer admits the truth of all properly pleaded material facts." *Id.* In addition, the court accepts as true "unstated inferences to the extent that they are *reasonable*," but not inferences that are "*unreasonable*." *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 371 (2018). The Court also does not accept as true the pleader's "conclusions of law," even if such conclusions are "camouflaged as factual allegations or inferences." *Id.* (citation omitted).

In a petition for review of a school board's decision under Code § 22.1-87, "[t]he action of the school board shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." Va. Code Ann. § 22.1-87 (2016). The "circuit court, sitting in an appellate capacity, does not conduct a plenary de novo review—one which negates the prior proceeding and in which the court reweighs the evidence anew, as a circuit court does on appeal from a general district court." *George Mason Univ. v. Malik*, No. 180005, 2018 WL 5074695, at \*2 (Va. Oct. 18, 2018) (citation and quotation marks omitted). "A well-deserved measure of deference" applies when reviewing a school board's decision under Code § 22.1-87. *Fairfax Cty. Sch. Bd. v. S.C.*, 297 Va. 363, 375 (2019).

### ARGUMENT

#### **I. Plaintiffs' claims are not justiciable.**

To have a justiciable claim, Plaintiffs must show that they suffer an "actual or potential injury in fact based on 'present rather than future or speculative facts.'" *Lafferty*, 293 Va. at 361; *see also* Va. Code Ann. § 22.1-87 (requiring a challenger to be "aggrieved by an action of the school board"). Plaintiffs try to carry their burden by alleging that their children are "substantially less likely" to be admitted under the new admissions policy because it lacks a standardized testing requirement. Compl. ¶¶ 8–9; *accord id.* ¶¶ 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46. They generally allege that they are injured because their children will be impacted by the change to the admissions process. *See id.* ¶ 10.

Those allegations are far too speculative and hypothetical to establish an actual controversy. For starters, none of the Plaintiffs allege that their children have taken the standardized tests and achieved a particular score—instead, they ask this Court to simply

speculate that they would have achieved an exceptional score if they took the test.

Moreover, there is no guarantee that a certain score would have entitled a student to admission at TJ. The superseded TJ admissions policy did not base admissions solely on standardized test scores; it used a holistic approach.

In short, Plaintiffs' allegations are nothing more than expression of "general 'distress'" about school policy changes. *Lafferty*, 293 Va. at 361. Such a claim is not justiciable, and the Complaint should therefore be dismissed for lack of standing.

**II. Plaintiffs fail to state a claim that the School Board exceeded its authority, acted arbitrarily or capriciously, or otherwise abused its discretion by deciding not to use standardized testing as part of the TJ admissions process.**

The Constitution of Virginia explicitly "vest[s]" "[t]he supervision of schools in each school division . . . in a school board." Va. Const. art. VIII, § 7. Interpreting that provision broadly, the Supreme Court of Virginia has made clear that a school board's power over its school division is vast—"[n]o statutory enactment can permissibly take away from a local school board its fundamental power to supervise its school system." *Russell Cty. Sch. Bd. v. Anderson*, 238 Va. 372, 383 (1989). The Supreme Court has consistently interpreted Article VIII, § 7 to prohibit other branches of State government from intruding on a school board's supervisory authority, whether the other branch is the

General Assembly,<sup>5</sup> the State Board of Education,<sup>6</sup> the local governing body,<sup>7</sup> or a circuit court.<sup>8</sup>

Notwithstanding the School Board's plenary control over schools in Fairfax County, Plaintiffs take issue with the Board's decision to eliminate standardized testing as part of the admissions process for TJ. The lynchpin of Plaintiffs' Complaint is that, in their view, Virginia law dictates that TJ is an academic-year Governor's School *solely* for "gifted" students—no one else may attend. Compl. ¶¶ 3–5, 52–53, 61–62, 73, 78–79, 83, 92. Because "gifted" is a legal term of art in this context, Plaintiffs contend that several regulations issued by the Virginia Department of Education involving "gifted" educational services mandate standardized testing in the TJ admissions process. *Id.* ¶¶ 56–60, 83 (discussing 8 VAC 20-40-10; 8 VAC 20-40-20; 8 VAC 20-40-40; and 8 VAC 20-40-70). Not so.

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<sup>5</sup> *E.g.*, *Howard v. Sch. Bd. of Alleghany Cty.*, 203 Va. 55, 58 (1961) (invalidating State statute that required sale of school property if favored by majority of voters in referendum); *Harrison v. Day*, 200 Va. 439, 451–52 (1959) (invalidating law that closed integrated schools and placed them under the Governor's control); *Sch. Bd. of Carroll Cty. v. Shockley*, 160 Va. 405, 413 (1933) (invalidating legislation specifying tax for the creation of a high school in a particular location in the county).

<sup>6</sup> *E.g.*, *Sch. Bd. of City of Richmond v. Parham*, 218 Va. 950, 957–58 (1978) (invalidating State Board of Education regulation that compelled school boards to submit to binding arbitration of teacher-employment disputes).

<sup>7</sup> *E.g.*, *Bd. of Superv'rs of Chesterfield Cty. v. Cty. Sch. Bd.*, 182 Va. 266, 275–76 (1944) (holding that board of supervisors could not dictate the salary of the school board's division superintendent).

<sup>8</sup> *E.g.*, *Commonwealth v. Doe*, 278 Va. 223, 230 (2009) (barring a circuit court from compelling a school board to allow a convicted sex offender on school grounds despite the court's having removed the offender's statutory impediment to coming onto school property).

"[S]tate law" does not require TJ "to be operated as a high school for gifted students," *id.* ¶ 83(a), and Plaintiffs cite no legal authority for that audacious claim. First, Plaintiffs identify no statute or regulation that says that. Indeed, the only statute or regulation Plaintiffs arguably could be relying on is the Budget Bill, given their passing reference to "the appropriation of funds" by the General Assembly for Governor's Schools. *See id.* ¶ 83(a). But Item 145 of the 2020 Budget Bill, HB 5005 (2020 Spec. Sess. I), says nothing about operating Governor's Schools solely for "gifted" students. *See generally* HB 5005, Item 145, <https://budget.lis.virginia.gov/item/2020/2/HB5005/Chapter/1/145/>; *accord id.* § 145.C.27 ("Governor's School Payments). In fact, the Budget Bill addresses "Education of the Gifted Payments" separately from "Governor's School Payments" and does not mention this issue at all. *Id.* § 145.C.6. The Budget Bill thus does not support Plaintiffs' claims.

Lacking any statutory or regulatory basis for their claim that TJ and all other academic-year Governor's Schools exist solely to serve "gifted" students, Plaintiffs point to a "guidance document" published by the Virginia Department of Education, "Administrative Procedures for the Establishment of Academic Year Governor's Schools." Compl. ¶ 52.<sup>9</sup> But it is black-letter law that agency "guidance document[s]" are "[n]ot subject to the scrutiny associated with promulgated regulations," and as such are not "a substitute for the statute" and do not carry the force of law. *Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 532–33 (2005) (Kelsey, J.) (quoting *Jackson v. W.*, 14

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<sup>9</sup> The Virginia Department of Education identifies the *Procedures for Initiating Academic Year Governor's Schools* as a "Guidance Document" on Virginia's regulatory Townhall website. *See* <https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=861>. The "Administrative Procedures for the Establishment of Academic Year Governor's Schools" are part of that guidance document. *See* <https://tinyurl.com/y6fwjrsp>.

Va. App. 391, 399 (1992) (stating that guidelines "do not have the force of law")). The guidance document thus provides no basis to deprive the School Board of its plenary, constitutional authority over TJ.<sup>10</sup>

In sum, Plaintiffs' challenge to the School Board's decision to forgo standardized testing should be dismissed because Virginia law does not require all Governor's Schools, or TJ alone, to be operated solely for "gifted" students. To the contrary, the General Assembly has left the School Board free to manage admissions to TJ as the Board believes best, including deciding whether to use a standardized test as part of the admissions process. The School Board therefore did not exceed its authority, act arbitrarily or capriciously, or otherwise abuse its discretion by deciding not to use standardized testing as part of the TJ admissions process for the upcoming school year.

**III. The School Board complied with Virginia law in adopting the TJ admissions policy changes.**

Count 2 of the Complaint should be dismissed because the School Board fully satisfied its procedural obligations before changing the TJ admission policy. Plaintiffs allege that the School Board acted unlawfully by making that change during a "work session." They admit that the topic of TJ admissions was on the agenda but complain that the agenda did not clearly state "that a vote would be taken" and did not provide for "an opportunity for the public to be heard." Compl. ¶¶ 69, 88. But Plaintiffs cite no provision of Virginia law that was violated.

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<sup>10</sup> Additionally, TJ was founded in 1985—*before* the Department's guidance document was issued—and Plaintiffs point to nothing in the School Board's regulations or policies specifying that TJ exists only to serve "gifted" students. No such regulation or policy exists.

Nor could they. The School Board's actions were consistent with the public meeting requirements of the Virginia Freedom of Information Act (FOIA).<sup>11</sup>

Under FOIA, the School Board is a "public body," Va. Code Ann. § 2.2-3701, and its meetings, "including work sessions," *id.*, must "be open" to the public, with certain limited closed-session exceptions, Va. Code Ann. § 2.2-3707(A). The School Board is required to "give notice of the date, time, and location of its meetings" and to "ma[k]e available for public inspection" a "copy of the proposed agenda and all agenda packets." *Id.* § 2.2-3707(C), (F). But nothing in Code § 2.2-3707 (or any other provision of FOIA) precludes the School Board from (1) modifying the agenda, (2) holding a vote during a work session, or (3) approving policy changes without soliciting public comment.

Plaintiffs' allegations conclusively show that the School Board complied with FOIA. The School Board properly noticed the work session and provided a proposed agenda. Compl. ¶ 69. Plaintiffs do not allege that the public was prevented from witnessing that meeting—only that no comment period was held during the meeting. *See id.* ¶¶ 70, 75, 88.

In sum, Plaintiffs admit that the School Board (1) provided the public with notice of the meeting, (2) published an initial agenda explaining what the Board generally intended to address, and (3) allowed the public to hear and observe the Board's discussions. That is all that FOIA required. Thus, the Board did not exceed its authority, act arbitrarily or capriciously, or otherwise abuse its discretion by deciding to modify the TJ admissions policy at its work session.

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<sup>11</sup> The School Board is not an "agency" for purposes of the Virginia Administrative Process Act, *see* Va. Code Ann. § 2.2-4001, so that Act and its various public comment requirements do not apply here. FOIA contains no "public comment" requirement.



Additionally, Plaintiffs have not alleged facts showing that public comment was required by any other law. The General Assembly has specified the matters on which school boards *must* allow public comment before action. Under Code § 22.1-79(8), school boards must allow for “public comment” whenever (1) schools are being consolidated, (2) certain public school services are being contracted out to a private entity, and (3) school boundaries are being redrawn. Changing an admissions policy for an academic-year Governor’s School falls within none of those categories. As a result, the School Board was under no obligation to solicit public comment before eliminating standardized testing as a relevant criterion for admission to TJ.

**IV. Dr. Brabrand is not a proper defendant under Code § 22.1-87 and is not otherwise a proper party defendant.**

Under Code § 22.1-87, “[a]ny parent, custodian, or legal guardian of a pupil attending the public schools in a school division who is aggrieved *by an action of the school board*, may within thirty days after such action, petition the circuit having jurisdiction in the school division *to review the action of the school board*.” (emphases added); accord *Lafferty*, 293 Va. at 362 (“Code § 22.1-87 authorizes a private right of action as a judicial remedy to *school board actions*, allowing parties ‘aggrieved’ by a decision of the Board to challenge the action in circuit court . . .”) (emphasis added). Code § 22.1-87, however, does not provide a private right of action with respect to school superintendents or other school officials who are responsible for implementing school board decisions. See *Cherrie v. Va. Health Servs.*, 292 Va. 309, 315 (2016) (“When a statute is silent . . . [the courts] have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it.”).



Because Plaintiffs have no private right of action against Dr. Brabrand under Code § 22.1-87, and because Plaintiffs' case is entirely about the School Board's action in eliminating the testing requirement for admission to TJ, Dr. Brabrand should be dismissed from the case. Count III, which purports to be against Dr. Brabrand alone, should likewise be dismissed with prejudice.

CONCLUSION

The Court should sustain the School Board's demurrer and dismiss all Counts of the Complaint with prejudice.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL  
BOARD; DR. SCOTT S. BRABRAND,  
SUPERINTENDENT, FAIRFAX  
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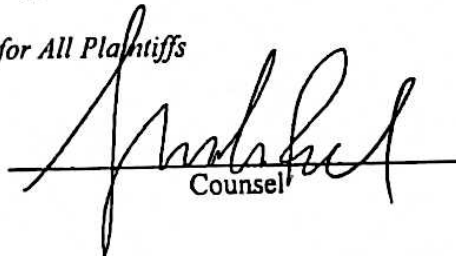
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**CERTIFICATE OF SERVICE**

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