

TWENTY-FOURTH JUDICIAL CIRCUIT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA
CITY OF LYNCHBURG AND COUNTIES OF
AMHERST, BEDFORD, CAMPBELL AND NELSON

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Via e-mail and U.S. Mail

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Re: The Christian Action Network, et al. v. Virginia Dept. of Education, et al. and The Consolidated Case No. CL21000282-00

Dear Counsel:

These matters are before the Court on appellees' motions to dismiss and the appellants' motion for intermediate relief. A hearing on these motions was held on July 21, 2021, after which the Court took the matters under advisement. Since then, the Court has reviewed and considered the pleadings, briefs of the parties and amici curiae, and arguments of counsel. For the reasons stated below, the Court concludes that the appellants lack standing to maintain the actions and, therefore, grants the appellees' motions to dismiss.

Background

A recently enacted section of the Code of Virginia directs the Virginia Department of Education ("VDOE") to "develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with evidence-based best practices" Va. Code § 22.1-23.3(A). It further directs Virginia's local school boards to adopt policies "consistent with" these model policies. Va. Code § 22.1-23.3(B).

As directed by the Code of Virginia, VDOE developed model policies, which were then published in the Virginia Register of Regulations. After the 30-day public comment period expired, VDOE delayed implementation of the model policies for 30 days. Having received more than 9,000 comments, including comments from the appellants that the model policies are contrary to various state and federal laws, VDOE responded to all the comments with the following message:

Thank you again for your participation in the Virginia Regulatory Town Hall Comment Forum. We appreciate the feedback you provided in response to the Model Policies for the Treatment of Transgender Students in Virginia's Public Schools. Due to the volume of comments received during the 30-day public comment period from January 4, 2021 to February 4, 2021, the implementation date of this guidance document was delayed 30 days to allow Virginia Department of Education (VDOE) staff to thoroughly review and consider comments for any necessary changes. Based on public comment, changes have been made to streamline language or clarify existing recommendations. This document was developed to assist local school boards in creating policies regarding the fair treatment and privacy of transgender students in an effort to promote a positive school climate where all students feel safe and supported. The final version has been uploaded and will be disseminated to local school divisions in the coming days. The effective date of this document is March 6, 2021. Again, the VDOE appreciates your participation in the public comment process.

On March 6, 2021, VDOE adopted final "Model Policies for the Treatment of Transgender Students in Virginia's Public Schools." The document adopted by VDOE contains model policies, along with guidance commentary that provides, among other things:

School divisions are encouraged to develop comprehensive policies, regulations, guidance and implementation plans to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged, and achieve academic success. This process should be informed by the needs of students, and the strongest policies are developed when they include student participation. While the terminology transgender is used throughout this document, it should be interpreted to include gender-expansive, nonbinary, and gender nonconforming individuals who do not identify on the cisgender binary.

To comply with HB 145 (2020) and SB 161 (2020), local school boards shall adopt policies consistent with model policies contained in this document no later than the 2021-2022 school year. They may adopt more

comprehensive policies than these model policies relating to the treatment of transgender students. The goal is to develop policies that are informed by the law and ensure that all students, including transgender students, have safe, supportive, and inclusive school environments. Local school boards should consult with their school board attorney in the development of policies and regulations relating to the treatment of transgender students.

The purpose of this document is to present model policies for use during the local school board's policy development process. Given the broad range of topics to be addressed by local school boards relating to the treatment of transgender students, it is likely that multiple policies will be needed in different categories rather than a single policy. Existing policies and regulations may also need to be expanded or clarified to be more gender-inclusive or to emphasize specific protections for transgender, nonbinary, and gender-expansive students. This document provides information, best practices, guidance, procedures, and standards for each topic, and model policies are highlighted and distinctive from the discussions. Local school boards may adopt example language in the model policies or use it as a guide to draft policies that meet the unique needs of their school division.

The Christian Action Network and two families whose children attend public schools in the City of Lynchburg filed this action challenging the adoption of the model policies by VDOE, which was later consolidated with another action initially filed in the Circuit Court for the City of Richmond by the Family Foundation, Founding Freedoms Law Center, and a family whose children attend public schools in Hanover County. They contend that the model policies constitute a regulation rather than a guidance document, and that VDOE failed to comply with the Administrative Process Act's requirements for the adoption of a regulation. See Va. Code § 2.2-4000 et seq. Alternatively, they argue that, even if the model policies constitute a guidance document, VDOE did not adequately respond to their comments as required by the Administrative Process Act. In addition to the alleged procedural flaws, the appellants allege various statutory violations, such as VDOE's alleged failure to comply with the statute prescribing the creation of the model policies as well as other statutory violations relating to parental rights and name changes. The appellants also assert constitutional concerns relating to free speech and the free exercise of religion.

Discussion

The Court first addresses the appellees' argument that the appellants lack standing to challenge the model policies. "Standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." Andrews v. Am. Health & Life Ins. Co., 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988). Standing considers the "ability of a party to seek redress through the courts in the first place by demonstrating sufficient connection to, and

actual or potential harm from, the law or action challenged.” Biddison v. Virginia Marine Res. Comm'n, 54 Va. App. 521, 527, 680 S.E.2d 343, 346 (2009).

The appellants argue that the model policies constitute a rule or regulation rather than a guidance document. A “guidance document” is “any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies.” Va. Code § 2.2-4101. A “rule” or “regulation” is “any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.” Va. Code § 2.2-4001.

A guidance document shall be subject to a 30-day public comment period, to include public comment through the Virginia Regulatory Town Hall website, after publication in the Virginia Register of Regulations and prior to its effective date. Va. Code § 2.2-4002.1(B). During the public comment period for guidance documents, “the agency shall respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter.” Va. Code § 2.2-4002.1(C). “Any person who *remains aggrieved* after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ 2.2-4025 et seq.)” Id. (emphasis added).

The requirements for the adoption of a rule or regulation are more extensive than the requirements for guidance documents. Va. Code §§ 2.2-4006–4015. “Any person *affected by* and claiming the unlawfulness of any regulation . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of Supreme Court of Virginia.” Va. Code § 2.2-4026 (emphasis added).

In short, one must be aggrieved by a guidance document to have standing to challenge the guidance document, and one must be affected by a rule or regulation to have standing to challenge the rule or regulation. The appellants do not argue for a distinction between being affected by and being aggrieved, and the terms appear to convey the same or a substantially similar meaning. Thus, whether the model policies are regulations or guidance documents, the appellants must be affected or aggrieved by them to have standing.

The Court finds that the model policies are a guidance document as defined by Va. Code § 2.2-4101. They were developed by VDOE to provide information and guidance of general applicability to the various local school boards to interpret or implement Va. Code § 22.1-23.3. Thus, in order to have standing to challenge the model policies, the appellants must be aggrieved.

The Virginia Supreme Court has explained:

The term “aggrieved” has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an

adverse decision. In order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. Nicholas v. Lawrence, 161 Va. 589, 592, 171 S.E. 673, 674 (1933). The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.” Id. at 593, 171 S.E. at 674. Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.

Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Virginia Beach, 231 Va. 415, 419–20, 344 S.E.2d 899, 902 (1986). The Court of Appeals applied this definition in the context of the Administrative Process Act. Reston Hosp. Ctr., LLC v. Remley, 59 Va. App. 96, 717 S.E.2d 417 (2011).

The appellants claim that, in the phrase “person who remains aggrieved,” the word “remains” modifies “aggrieved” in a way that makes the terms apply to a lack of an adequate response to a comment submitted during the public comment period. The word “remains” means that an aggrieved party was already aggrieved prior to the public comment period. It does not remove the meaning that the interest be substantial, pecuniary, and immediate.

VDOE contends that the appellants are not aggrieved by the model policies, which are directed not at the appellants but at the local school boards, which have flexibility to fashion policies consistent with the model policies. VDOE argues that the appellants can only speculate as to what policies, if any, the various school boards will develop.

In these cases, the appellants do not have standing to challenge the model policies. Their dissatisfaction with VDOE’s response to their comments does not create an immediate, pecuniary, or substantial interest in this litigation, but only a remote or indirect interest. They have not identified or alleged any personal or property right, legal or equitable, they have been denied. They have not identified any burden or obligation imposed upon them different from that suffered by the public generally. Instead, their concerns are indirect, advancing a perceived public right, and anticipating a public injury that may or may not occur. They do not claim that the model policies apply to or have had an effect upon them, nor do they assert that their particular school boards have adopted the model policies or any policies consistent with the model policies.

Instead of being directed to the appellants, the model policies are directed to local school boards, which have their own constitutional authority and responsibility. “The supervision of

schools in each school division shall be vested in a school board.” Va. Const. art. VIII, § 7; Commonwealth v. Doe, 278 Va. 223, 230, 682 S.E.2d 906, 909 (2009) (“[D]ecisions regarding the safety and welfare of students are manifestly a part of the supervisory authority granted the school boards under Article VIII.”).

Because the model policies are directed only to school boards, they cannot affect or aggrieve anyone other than the school boards. The model policies cannot affect or aggrieve someone if the local school board has already adopted similar policies before the development of the model policies. They would not affect or aggrieve someone if the local school board, despite any potential repercussions, declines to act on them. Thus, the model policies do not affect or aggrieve the appellants, and the appellants will remain unaggrieved and unaffected absent actions related to the model policies taken by school boards.

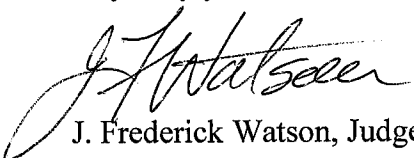
Finally, the Court finds no merit to the appellants alternative assertions that they have taxpayer/citizen or representational standing. The deficiency in the claim of taxpayer standing is that the appellants are not challenging the legality of an expenditure. The deficiency for representational standing is that the organizations have not shown that they have a member with standing.

Having decided that the appellants do not have standing to challenge the model policies, the Court declines to address the appellants’ Motion for Intermediate Relief as it is moot.

Conclusion

For the foregoing reasons, the Court dismisses each of the consolidated cases for lack of standing. The Court directs Ms. Charnes to draft and circulate an order reflecting the Court’s ruling.

Very truly yours,


J. Frederick Watson, Judge

JFW

cc: K. Todd Swisher, Clerk