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PRESIDENT'S MESSAGE
By ANDREW "ANDY" H. Herrick

Happy New Year! As the incoming LGA President and on behalf of the Board of Directors, it is my distinct privilege to welcome you to a new LGA year. As one of the LGA's biggest fans, it is an unbelievable honor for me to serve as the LGA President this year.

I have had the good fortune to work in offices whose lead attorneys have recognized the LGA's value and consistently supported participation in the LGA, even (and especially) by less senior attorneys. From the time I joined the James City County Attorney's Office in 1998, I have attended 51 of the 52 statewide conferences, not to mention many regional seminars and Board meetings. Like several of my predecessors, I am a confirmed LGA conference junkie. LGA conferences have always been among my favorite fringe benefits.

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Through the years, I have watched the LGA both grow and improve. Of course, the LGA's continuing success depends on a strong partnership of dedicated volunteer attorneys and incredibly helpful staff. For those already active in the LGA, thank you for your service. For those not yet active, please consider where you might join in the fun. The LGA offers a variety of committees and practice groups, regardless of your practice area or experience. There is a place for everyone in the LGA.

Again, thank you for your continued support of the LGA. We have a great team. I am looking forward to a great year.

2024 FALL CONFERENCE—LAST CHANCE TO REGISTER!

Don't miss your chance to join us October 3–5 at the Hilton Norfolk The Main for the 2024 Fall Conference! The last day to register is **September 26**. As always, there will be informative programming, an opening night party (at Nauticus), an awards lunch banquet, Friday afternoon activities, and more! Go to the Fall Conference page to register online and get more information. **If you need to cancel your registration or hotel room**, please contact Christy Jenkins (christy.jenkins@easterassociates.com). We maintain a waiting list of folks who would be grateful for your hotel room if you can no longer attend.

It's never too late to be a conference sponsor! The LGA's partner program has Silver, Bronze, and Supporter levels to fit any budget. You can view the details on our website here. Organizations that commit to supporting both the Fall and Spring conferences (to be held in Charlottesville in April 2025) will receive added benefits:

- For $2,500 twice ($5,000 annually) one comped full registration.
- For $5,000 twice ($10,000 annually), one additional comped full registration.

Contact Christy Jenkins (christy.jenkins@easterassociates.com) and join our early supporters: Davenport & Company LLC, DiCello Levitt, Guynn Waddell PC, Hefty Wiley & Gore PC, Pandak & Taves PLLC, Pender & Coward, and VACo Group Self Insurance Risk Pool. Thank you for supporting LGA educational programming!

MEMBER NEWS

WELCOME to the following new members of the LGA!

Conklin Ryan Howard (choward1@pwcgov.org), Prince William County Attorney's Office

Stephanie B. Lauterbach-Diaz (sdiaz@wilsav.com), Willcox Savage

Bryan S. Peeples (bpeeples@pendercoward.com), Pender & Coward

Kaitlyn D. Peters (kpeters@staffordcountyva.gov), Stafford County Attorney's Office

Raymond Starks-Taylor (taylor@brigliahundley.com), Briglia Hundley

Michael Duffey Valentine (mvalentine@pwcgov.org), Prince William County Attorney's Office

Matthew "Matt" Woodward (mwoodward@haneyphinyo.com), Haney Phinyowattanachip

CONGRATULATIONS to the following members who have been promoted or taken a new position:

Kevin Cosgrove (kcosgrove@wilsav.com) is now with Willcox Savage.

Kyle D. Eldridge (keldridge@sandsanderson.com) is now with Sands Anderson.

Steven Rosenberg (steven.l.rosenberg@gmail.com) has retired as Albemarle County Attorney (press release here), and LGA President Andy Herrick (aherrick@albemarle.org) has been appointed Interim Albemarle County Attorney (press release here).

LGA Secretary Courtney Sydnor (courtney.sydnor@hampton.gov) has been appointed Hampton City Attorney (press release here).

ALSO . . . rumor has it that a number of LGA members have been included in the most recent edition of ***The Best Lawyers in America***® for their expertise in municipal law. We are planning on recognizing these LGA member honorees in next month's issue, so if you are aware of an LGA member who made the list, please email David Wagoner (Editor) at dwagoner@nlrg.com.

VIRGINIA COURT OF APPEALS

CONFIDENTIALITY OF CHILD ABUSE INVESTIGATIVE RECORDS • BAD FAITH DISCLOSURE EXCEPTION • MANDATORY REPORTER • CODE § 63.2-1514(D) • STATUTORY INTERPRETATION

Norfolk Dep't of Hum. Servs. v. Goldberg, No. 1382-23-1, 2024 Va. App. LEXIS 474 (Aug. 20, 2024) (Lorish, J.).

HOLDING: The bad faith disclosure exception to the confidentiality generally afforded to child abuse reports permits the disclosure of a report relayed through a third party.

DISCUSSION: A man accused of sexually abusing his daughter petitioned the Circuit Court of the City of Norfolk to release to him the records of the Norfolk Department of Human Services' (Department's) investigation after the circuit court determined that the accusation was made in bad faith. The man and his wife convincingly showed that the wife's mother maliciously concocted the false allegations, but instead of reporting them directly to the Department, she provided this disinformation to a mandatory reporter, who in turn relayed it to the Department. Reports of child abuse generally are kept confidential, but a narrow exception exists in order to enable a civil remedy for the victim of a bad faith actor. The circuit court determined that the man satisfied the requirements of the bad faith disclosure exception and issued a writ of certiorari directing the Department to provide the documents. The Department opposed the order, arguing that because it received the report by a mandatory reporter in good faith, the exception to confidentiality did not apply. Consequently, the Department appealed.

The court held that the bad faith disclosure exception applied in this instance. The statute at issue reads, in pertinent part:

> Any person who is the subject of an unfounded report or complaint made pursuant to this chapter who believes that such report or complaint was made in bad faith or with malicious intent may petition the circuit court . . . for the release to such person of the records of the investigation.

Va. Code § 63.2-1514(D). Because the statute was ambiguous as to whether "report or complaint" referred only to allegations conveyed directly to the Department or also to those conveyed to the Department by way of an intermediary, the court looked to the General Assembly's intent in order to derive its meaning. Ultimately, it determined that "[t]he General Assembly intended for this provision to provide a means for those who have been victims of malicious or bad faith complaints to file a civil suit against the complainant" in order to remedy "the damage a false report can do to someone wrongfully accused." Thus, it was consistent with the statute's purpose to permit disclosure of the investigative record when the false report was relayed by a mandatory reporter who passed on information received from a third party. Indeed, it would frustrate the statute's purpose to find otherwise. To credit the Department's reading would require inserting words into the statute, making it to refer to "[a]ny person who is the subject of an unfounded report or complaint made *directly to the Department* and pursuant to this chapter."

Therefore, the court affirmed the judgment of the circuit court.

COUNTY ZONING ORDINANCE • SPECIAL USE PERMIT APPLICATION • TOURIST COTTAGES • DENSITY AS A FACTOR • REASONABLENESS OF BOARD'S DENIAL

Axios Partners, LLC v. Northampton Cnty. Bd. of Supervisors, No. 0815-23-1, 2024 Va. App. LEXIS 445 (July 30, 2024) (O'Brien, J.).

HOLDINGS: (1) The ordinance afforded the county board of supervisors' discretion to consider density as a factor in deciding whether to issue the special use permit. (2) The board acted reasonably in denying the permit application. (3) No violation of constitutional rights occurred.

DISCUSSION: A real estate development company (developer) challenged the denial of its application for a special use permit to build tourist cottages on a plot of land in Northampton County. The developer originally submitted its proposal to construct 12 cottages on a 48-acre lot, but reduced this number to six cottages after encountering resistance. The land was situated in a district zoned as Agricultural/Rural Business (A/RB), in which the County's zoning ordinance permitted a maximum density of one "dwelling unit" per 20 acres. Although the ordinance permitted "tourist cottages" as a possible land use in A/RB districts under a special use permit, the County Board of Supervisors (Board) denied the developer's application, finding that the proposed plan exceeded A/RB density restrictions. The circuit court affirmed the Board's decision, prompting this appeal.

The court held first that the Board permissibly considered density as a factor in its decision to deny the developer's application for the special use permit. Parsing the ordinance's definitions, the court determined that a "tourist cottage" is a type of "dwelling unit" that is "intended for short-term vacation rentals," and that dwelling units are designated as "a unit of measurement used as one of the components to calculate density." Northampton County Zoning Ordinance § 154.2.003. An appendix to the ordinance allowed for "up to 12" tourist cottages in land zoned A/RB, but this only set the maximum number provided that the acreage was sufficient; it did not trump the ordinance's density restrictions. Had this been the intent, tourist cottages could have been listed among other categories of specific exemptions. The fact that tourist cottages were "commercial enterprises" did not render them excepted from the density requirements.

The court held second that the record contained ample support for the reasonableness of the Board's decision. County staff members evaluated the application and issued a report recommending denial, finding the proposal deficient in 10 of the 11 criteria used for evaluating special use permits. County staff also found that the proposed use of the land conflicted with the County's comprehensive plan to protect the "right to farm" and to minimize nuisance complaints from rural residents, and that adding numerous short-term rentals to the area was inconsistent with the area's agricultural and residential character. The Planning Commission and the Board conducted the requisite public hearings under the zoning ordinance, and the public comments overwhelmingly opposed the permit.

The court held third that the developer suffered no intrusion upon its constitutional rights. Nothing in the record indicated that the Board's decision was based on a condition that would have required the developer to surrender its right to just compensation for property taken for public use. Nor did the record reflect any violations of due process or equal protection by the Board in rendering its denial decision.

Therefore, the court affirmed the circuit court's order dismissing the developer's appeal with prejudice.

SCHOOL BOARD • FREE AND APPROPRIATE PUBLIC EDUCATION • CHILDREN'S SERVICES ACT • PRIVATE SCHOOL TUITION • DUE PROCESS HEARING • PETITION FOR A WRIT OF MANDAMUS • ADEQUATE REMEDY AT LAW

Halvorsen v. Powhatan Cnty. Sch. Bd., Nos. 0904-23-2 & 1039-23-2, 2024 Va. App. LEXIS 412 (July 23, 2024) (Lorish, J.).

HOLDING: The circuit court properly denied the parents' petition for a writ of mandamus to compel the school board to pay for their child's private school tuition because the parents could have pursued an adequate remedy at law.

DISCUSSION: The parents of an autistic elementary school student sought to enroll their child in a private special education day school, per the proposal of the child's individualized education program (IEP) team, and contended that the Powhatan County School Board should fit the bill. When an IEP team proposes a private school placement, the tuition is paid from funds allocated under the Children's Services Act (CSA). Va. Code § 2.2-5211. To obtain CSA funding, a child's parents must sign a CSA consent form, which permits the community policy and management team to assess the child's eligibility, and authorizes the child's school administrators to release information about the child. Va. Code §§ 2.2-5211.1, 2.2-5212(A). The parents requested the School Board's help in enrolling their child in a particular private school for the 2022-2023 school year, yet they did not respond to the Assistant Superintendent's directive to sign the requisite consent. After CSA denied funding on this basis, the parents provided a consent form that restricted the release of certain information. CSA again denied funding, finding the consent to be insufficient. In an effort to accommodate the parents, CSA presented them with an edited consent form that no longer required consent to the disclosure of certain information, but they again refused to sign because they believed that it remained "too broad."

The parents petitioned for a due process hearing with the Virginia Department of Education (VDOE), arguing that the School Board had failed to timely implement the child's private day school placement, thereby denying him a free and appropriate public education (FAPE). In their view, even without sufficient consent to enable CSA funding, the School Board remained legally responsible for paying for the child's private school assignment. The Hearing Officer determined that the parents had not provided sufficient consent and issued a final decision on September 11, 2022, rejecting their argument.

On October 31, 2022, the parents filed a petition for a writ of mandamus in the Circuit Court of Powhatan County directed to the School Board, asserting their "clear legal right" to demand that the School Board pay the child's private school tuition. The School Board demurred and moved to dismiss, arguing that the parents did not have a

right to the relief they sought, and that an adequate remedy at law existed through an appeal of the Hearing Officer's decision. The circuit court dismissed the petition, finding that the parents had an adequate remedy at law, and declined to address their "clear legal right" argument. The parents appealed. Citing no authority, they contended that they lacked an adequate remedy at law since a VDOE hearing officer "does not have the power to decide who pays the tuition for private placement but only whether the Child is entitled to private placement," and insisted that a Virginia court of record must decide "who had the responsibility to pay."

The appeals court held that the parents' petition was properly denied. It is well-established that a writ of mandamus will not be issued when there exists an adequate legal remedy. Virginia law provides that if a dispute arises between a parent and school administrators regarding the student's "program placements, individualized education programs, *tuition eligibility* [or] other matters," the parent may seek a due process hearing before the VDOE. Va. Code § 22.1-214(B) (emphasis added). If the hearing officer determines that a school division has failed to provide a disabled child a FAPE, the Board of Education "may withhold all special education moneys from the school division and may use the payments that would have been available to such school division to provide special education, directly or by contract, to eligible children with disabilities." Va. Code § 22.1-214(E).

Here, the parents exercised their right to a due process hearing and argued that the School Board had denied their child a FAPE. The Hearing Officer, however, determined that the parents had caused the problem by refusing to sign the CSA consent forms, despite the School Board's diligent and reasonable efforts. The parents had a legal right to appeal this decision to a federal district court within 90 days, or to the circuit court within 180 days, of the Hearing Officer's decision. Va. Code § 22.1-214(D); 8 Va. Admin. Code § 20-81-210(T)(1). Because this remedy at law existed, the circuit court did not err when it denied the parents' petition for a writ of mandamus.

Therefore, the court affirmed the circuit court's judgment.

VIRGINIA FREEDOM OF INFORMATION ACT • EXEMPTION FROM DISCLOSURE REQUIREMENT • STATUTORY INTERPRETATION • CODE § 2.2-3705.7

Citizens for Fauquier Cnty. v. Town of Warrenton, 81 Va. App. 363, 904 S.E.2d 213 (2024) (Raphael, J.).

HOLDINGS: (1) The use of the word "or" in the statute meant that the Freedom of Information Act exemption could not be claimed for both the correspondence of the mayor and the political subdivision's chief executive officer. (2) The town must choose the official for which the exemption applies. (3) The circuit court abused its discretion in finding the sample of withheld emails to be representative of the whole.

DISCUSSION: An environmental nonprofit group (nonprofit) opposing the proposed construction of a massive Amazon datacenter in the Town of Warrenton challenged the Town's decision to withhold from disclosure roughly 3,100 emails under the Virginia Freedom of Information Act's (FOIA's) exemptions, including that for "correspondence of . . . the mayor or chief executive officer of any political subdivision." Va. Code § 2.2-3705.7(2). The circuit court, unwilling to review every document, asked the Town to provide 10 exemplar emails for each claimed exemption in order to conduct an *in camera* review. It then found the Town's claimed exemptions to be appropriate and issued a letter opinion concluding that the "or" in Code § 2.2-3705.7(2) meant "and"—*i.e.*, the exemption applied to the correspondence of Warrenton's mayor and its Town Manager, who functioned as its Chief Executive Officer (CEO). The nonprofit appealed.

The court held first that the statutory exemption applied to a single official only. The language reflected the fact that Virginia cities and towns usually have mayors, but counties and other political subdivisions do not. The charters for some cities and towns make the mayor the CEO, while other charters, like that of Warrenton, designate the city manager or town manager as the CEO and bestow other "ceremonial" duties upon the mayor. Although the word "or" may sometimes be read as conjunctive, as opposed to disjunctive, "courts will construe 'or' as 'and' . . . only where from the context or other provisions of the statute, or from former laws relating to the same subject . . . , such clearly appears to have been the legislative intent." S*.E. Pub. Serv. Corp. v. Commonwealth*, 165 Va. 116, 122, 181 S.E. 448, 450 (1935). The court unearthed no reason to credit the Town's preferred reading of the statute. Indeed, the nonprofit's position accorded with the conclusion arrived at by the FOIA Advisory Council in a 2002 advisory opinion. *See* Advisory Op. AO-02-02 (Oct. 30, 2002). Furthermore, given the General Assembly's directive that the FOIA should be liberally construed in favor of public access, a narrow construction of the exemption tipped the scale toward rendering the meaning of "or" in the statute as exclusive.

The court held second that the Town must decide whether to apply this exemption to the correspondence of its Mayor or its Town Manager. The 2002 FOIA Advisory Council opinion held that courts must require municipalities with ceremonial mayors to apply the exemption only to the CEO, but this conclusion went too far because it rendered the term "mayor" meaningless when applied to municipalities with a mayor that was not the CEO. Given the fact that materials subject to exemption "may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law," Va. Code § 2.2-3705.7, the court reasoned that "the natural reading gives the custodian the 'discretion' to choose which officer gets the exemption."

The court held third that the circuit court erred in its sampling methodology. "Having determined that in camera review of a representative sample was needed to test the Town's exemption claims for 3,100-plus emails, the trial court needed to do more than let the town attorney pick the representative sample. At a minimum, the court should have required the town attorney to explain how he chose the sample and why the sample was

representative of the whole." Code § 2.2-3713(E) placed the burden on the Town to prove by a preponderance of the evidence that all of the withheld emails were exempt from mandatory disclosure. Thus, the Town could not carry its burden without explaining how it picked the sample or why that sample was representative of the entire set.

Therefore, the court reversed the circuit court's decision and remanded the case for the circuit court to reevaluate the Town's exemption claim for all withheld emails. Recognizing the impracticability of individually reviewing every document, the court provided suggestions to ease the burden of in camera review of the voluminous records: (1) require a *Vaughn* index for the emails, containing sufficient information to show the date, the author, the recipient(s), any individuals cc'd or bcc'd, the exemption claimed, and a brief explanation of why the exemption applies; (2) a random sampling of the emails claimed to be exempt from disclosure; or (3) a representative sampling, either selected by agreement of the parties or submitted along with a detailed affidavit explaining how the Town chose the sample.

VIRGINIA-BASED U.S. DISTRICT COURTS

FIRST AMENDMENT • MUNICIPAL LIABILITY • OFFICIAL POLICY OR CUSTOM • MODIFICATION OF INTERLOCUTORY JUDGMENT

Misjuns v. City of Lynchburg, No. 6:21-cv-00025, 2024 U.S. Dist. LEXIS 125936 (W.D. Va. July 17, 2024), *appeal filed*, No. 24-1782 (4th Cir. Aug. 19, 2024) (Ballou, J.).

HOLDING: The First Amendment claims against the city could not proceed.

DISCUSSION: On January 10, 2023, a former Lynchburg Fire Department employee filed an amended complaint in federal district court against the City of Lynchburg and three former City Officials, alleging that they terminated his employment in retaliation for expressing his constitutionally protected freedom of political speech and free exercise of religion. On April 20, 2023, the court dismissed most of the claims therein, including a *Monell* claim against the City. It denied the City's motion to dismiss only as to the First Amendment claims against the City based on the actions taken by the former City Officials in their official capacities. The court, recognizing its error, revisited its holding.

The court held that the First Amendment claims against the City could not proceed because the court had found that the employee had failed to state a cognizable claim for municipal liability against the City. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court ruled that a municipality may be held liable for the

deprivation of constitutional rights under 42 U.S.C. § 1983 only when it has caused that deprivation through an official policy or custom. Thus, the court erred when it permitted the First Amendment claims against the City to proceed after determining that the employee failed to allege that the City acted through an official policy or custom.

Therefore, the court amended its prior order, thereby dismissing all of the employee's claims against the City.

REGIONAL JAIL • CORRECTIONS OFFICERS • PRETRIAL DETAINEE • SUICIDE • 42 U.S.C. § 1983 • DELIBERATE INDIFFERENCE • NEGLIGENCE • WRONGFUL DEATH • SOVEREIGN IMMUNITY • QUALIFIED IMMUNITY

Funkhouser v. Brown, No. 5:22-cv-056, 2024 U.S. Dist. LEXIS 133398 (W.D. Va. July 26, 2024) (Urbanski, J.).

HOLDINGS: (1) The administrator for the estate of the deceased detainee stated a plausible claim of negligence against the jail officers. (2) The intake officer's asserted defenses did not relieve him of potential liability. (3) Additional fact-finding was required to determine whether the post-intake officers were entitled to sovereign immunity. (4) The administrator stated a plausible claim of deliberate indifference against the intake officer. (5) The intake officer was not entitled to qualified immunity.

DISCUSSION: The administrator for the estate of a pretrial detainee (Administrator) who committed suicide while being housed at RSW Regional Jail (RSW) in Warren County brought 42 U.S.C. § 1983 and wrongful death claims against five Corrections Officers employed by RSW and an employee of the Northwestern Community Services Board, seeking $5 million in damages. The pretrial detainee received an initial health screening at RSW on February 14, 2022, at which time she indicated that she suffered from bipolar disorder, had been under the care of a mental health professional, and had attempted suicide by hanging several months earlier. Two days later, she attempted to hang herself in her cell with a bedsheet and was found having a seizure. She was taken to the hospital and returned to RSW that same day, telling jail staff that she wanted to kill herself. Over the course of the next 24 hours, the detainee attempted suicide three more times. RSW then sent her to Western State, a psychiatric hospital in Staunton, where she received treatment for 11 days. On February 28, 2024, Western State discharged her back into the custody of RSW with a 10-day supply of antipsychotic and antidepressant medication and paperwork directing jail staff to engage in frequent checks due to her elevated risk for self-harm.

When the pretrial detainee returned to RSW, the Intake Officer on duty decided to perform a "soft booking," in which he answered the intake questions independently and in advance in order to expedite the process. He filled out a form inaccurately listing the detainee as having no psychiatric issues and not having attempted suicide. Even though

a cell equipped with camera surveillance was available, the Intake Officer assigned the detainee to a single occupancy “non-camera” cell, which had one window that would allow officers to see inside only if they were standing directly outside the door. The Intake Officer did not ensure that the detainee received frequent monitoring.

At 6 p.m. that evening, another Officer took over the intake role. He did not relocate the detainee or otherwise ensure that she was frequently monitored, despite feeling that it was “odd” that she had not been placed on suicide watch. At 10 p.m., a different Officer placed a covering over the cell window, completely obscuring the detainee from view. The next morning, at 6 a.m., yet another Officer relieved the previous jail employee of his intake role. Despite the detainee’s known attempts at self-harm, this Officer did not relocate the detainee or remove the window covering. At 11:13 a.m., a Supervisor observed the window covering and took no action to remedy the lack of monitoring. Less than 20 minutes later, the detainee was found unresponsive and pulseless, with marks around her neck from hanging herself. She was pronounced dead shortly thereafter.

These latter four Corrections Officers (Post-Intake Officers) moved to dismiss Count II of the complaint, which asserted a wrongful death negligence claim. The Intake Officer filed a separate motion to dismiss Count II as well as Count I, in which the Administrator accused him of deliberate indifference to the detainee’s risk of self-harm, in contravention of the Fourteenth Amendment.

The court held first that the Administrator stated a plausible claim of negligence against the Post-Intake Officers. She alleged that they had a legal duty to monitor detainees in order to ensure their safety and access to necessary care. She asserted that they breached this duty by “continuing to house [the detainee] in a cell that did not allow for proper monitoring given her known history of attempts to self-harm, known mental health diagnoses, recent return from a commitment at Western State relative to her attempted self-harm, and instructions from Western State that she be frequently monitored and checked on to reduce her high-risk of self-harm” and “by placing a window obstruction over the only window in [her] cell.” Finally, she pleaded that the harm which occurred as a result of these acts and omissions—the detainee’s death—was reasonably foreseeable “in light of specific instructions from Western State regarding her need for supervision, [and] that eliminating the ability to directly observe [the detainee] without moving the window covering would greatly increase the likelihood that she would attempt self-harm and greatly decrease the likelihood that a timely response would occur.”

The court held second that the Intake Officer’s defenses did not relieve him of potential liability. The Intake Officer argued that the Post-Intake Officers’ subsequent negligent acts were a superseding cause of the detainee’s death. The court disagreed, stressing that the Intake Officer’s mishandling of the intake process was central to the wrongful death claim. The Intake Officer also contended that the illegal act doctrine barred

the Administrator's recovery for damages because the detainee committed the crime of suicide. Under Virginia law, one element of this crime is that the person must be of "sound mind." The complaint, however, contained sufficient factual allegations to show that the detainee was not of "sound mind" when she took her life.

The court held third that additional development of the factual record was needed to determine whether the Post-Intake Officers were entitled to sovereign immunity. Federal and state courts in Virginia are split on the question of whether a regional jail such as RSW is entitled to the protection afforded by the sovereign immunity doctrine. Ultimately, the court concluded that RSW was a municipal corporation under Virginia law and was therefore entitled to sovereign immunity. The next question—whether this immunity extended to RSW's Corrections Officers—necessitated determining whether their alleged acts of negligence involved judgment and discretion. The Post-Intake Officers argued that they were sovereignly immune to suit because their purported negligence at issue—improperly monitoring and housing the detainee—involved judgment and discretion. The Administrator countered with the assertion that additional discovery was required on the issue of whether the Post-Intake Officers were required to exercise judgment and discretion in complying with RSW internal policies and state regulations regarding the supervision of inmates. Although the existence of regulations and guidelines alone would not answer this question, the court was persuaded that more discovery was necessary before ruling on this issue at this stage in the proceedings.

The court held fourth that the Administrator stated a plausible Fourteenth Amendment violation of deliberate indifference against the Intake Officer. The Intake Officer argued that the Administrator failed to satisfy the knowledge element of this claim. But the complaint clearly alleged that, in his role as Intake Officer, the defendant's responsibilities included "flagging potential risk factors, noting medical and mental health conditions, assigning proper housing and monitoring, and otherwise ensuring that [the detainee] was safely housed in the facility." In the judgment of the court, "it was [the Intake Officer]'s job to learn about an inmate's medical and mental health status upon their arrival to RSW, and to house them accordingly. In light of that, and given the many indicators of her mental distress . . . [he] knew or should have known about [the detainee]'s mental health condition and that his failure to ensure that she was adequately monitored 'posed an unjustifiable high risk of harm' given her condition."

The court held fifth that the Intake Officer was not entitled to qualified immunity. A reasonable prison official in his position would have understood that he had a duty, which was clearly established at the time, to protect detainees under his charge from self-injury when they have a serious medical condition and have been determined to be at an elevated risk for committing suicide.

Therefore, the court denied the Corrections Officers' motions to dismiss.

SCHOOL BOARD • SPECIAL EDUCATION ADVOCATE • DUE PROCESS HEARINGS • *RES JUDICATA* • 8 VA. ADMIN. CODE § 20-81-150 • FEDERAL PLEADING STANDARD • REQUEST FOR PREFILING INJUNCTION • ATTORNEYS' FEES

Powhatan Cnty. Sch. Bd. v. Halvorsen, No. 3:24cv216, 2024 U.S. Dist. LEXIS 146101 (E.D. Va. Aug. 15, 2024) (Payne, J.).

HOLDINGS: (1) The claim that the hearing officer erred was unsupported by factual allegations. (2) The school board sufficiently presented its request for a prefiling injunction, and (3) stated a plausible claim for attorneys' fees.

DISCUSSION: The Powhatan County School Board initiated this action in the Circuit Court of Powhatan County against the parents of an autistic child who had been asserting that the School Board was legally responsible for paying their child's private school tuition, in accordance with the Individuals with Disabilities Education Act. The parents, represented by their non-attorney Special Education Advocate (Advocate), initiated a due process hearing pursuant to 8 Va. Admin. Code § 20-81-210(A). The Hearing Officer found in favor of the School Board on the basis that the parents had not provided clear consent to the child's individual education program amendment which transferred him from public school to a private special education school. Rather than appeal this decision, the parents, represented by the Advocate, proceeded to file nine more due process hearing requests based on the same operative body of facts. The parents did not prevail in any of these hearings, many of which contained issues that were barred by *res judicata*. The eighth due process hearing included one curious holding. The Hearing Officer resolved all 20 issues in favor of the School Board. However, it was unknown from the record whether the School Board was, in fact, complying with 8 Va. Admin. Code § 20-81-150, which lists what a school division must do on a disabled child's behalf in the case of parental placement in a private school. For this reason, the Hearing Officer ordered the School Board to comply with these requirements, while, at the same time, finding that this particular issue was barred by *res judicata*.

The School Board sought: (1) relief from the Hearing Officer's order (Count I); (2) a preliminary injunction pausing a pending due process hearing request (Count II); (3) a prefiling injunction prohibiting the parents and the Advocate from bringing future due process hearing requests based on the same set of facts without leave of the court (Count III); and (4) an award of attorneys' fees for defending the frivolous due process hearings (Count IV). The School Board voluntarily dismissed Count II because the pending hearing was resolved soon after the complaint was filed. The parents removed the case to federal district court and filed a motion to dismiss all remaining claims.

The court held first that Count I was not adequately pleaded under the *Iqbal/ Twombly* standard. The School Board did not present factual allegations by which the court could measure the claim's plausibility. Instead, it merely made a claim based on a legal conclusion that the Hearing Officer made errors, without explaining those errors in sufficient detail.

The court held second that the School Board's request for a prefiling injunction survived the motion to dismiss. The School Board alleged that the parents and the Advocate had a history of repetitive litigation in this matter, thereby making "a plausible showing of vexatious, harassing, or duplicative filings." The School Board demonstrated their intent to harass, as the Advocate had previously been found to have publicly proclaimed her objective to harass a school board by filing multiple due process hearing requests as a strategy to help her succeed in similar proceedings. *See Henrico Cnty. Sch. Bd. v. Matthews*, No. 3:18-cv-110, 2019 U.S. Dist. LEXIS 171735 (E.D. Va. Oct. 2, 2019). The School Board had spent over $330,000 defending the due process requests at issue, and no other sanction was reasonably available to prevent this type of burden on the School Board.

The court held third that the School Board was entitled to reasonable attorneys' fees under 20 U.S.C. § 1415(i)(3)(B)(i), having prevailed "on multiple, if not all, of the grievance hearing requests because the Hearing Officer found in its favor on all proposed issues." In addition to the parents' liability, the Advocate could also be liable because, although not an attorney, "she clearly served as an agent and representative of the [parents]."

Therefore, the court granted the parents' motion to dismiss Count I without prejudice, thereby permitting the School Board to file an amended complaint, and denied the motion with respect to Counts III and IV.

SCHOOL BOARD • TRANSGENDER STUDENT • ATHLETICS • TITLE IX • EQUAL PROTECTION • PRELIMINARY INJUNCTION

Doe v. Hanover Cnty. Sch. Bd., No. 3:24cv493, 2024 U.S. Dist. LEXIS 146940 (E.D. Va. Aug. 16, 2024) (Lauck, J.).

HOLDINGS: (1) The transgender student was entitled to a preliminary injunction, thereby allowing her to compete for a spot on her school's girls' tennis team, based on her likelihood of succeeding on the Title IX claim and (2) equal protection challenge.

DISCUSSION: An 11-year-old transgender girl (student) alleged Title IX and equal protection claims against the Hanover County School Board stemming from the Board's enforcement of a policy that denied her request to play on her middle school's girls' tennis team. The student was "assigned the sex of male at birth," but, since age seven, has identified as female. In 2022, she was diagnosed with gender dysphoria and received a histrelin implant, which "suppresses her endogenous hormones and prevents further development of puberty associated with testosterone." She has since remained on puberty blockers.

In August 2023, the student tried out for, and was selected to play on, her middle school's girls' tennis team. Soon thereafter, the School Board discovered that she was born male and, after receiving documentation from the student's parents regarding her gender dysphoria and treatment, voted unanimously against permitting her to participate on the girls' team in order "to ensure fairness in competition for all participants."

In November 2023, the School Board revised its Policy governing extracurricular activities, adopting language based on the Virginia Department of Education's 2023 Model Policies, which stated that for boys' and girls' school sports, "the appropriate participation of students will be determined by biological sex rather than gender or gender identity." Policy Manual § 7-4.1 (2023).

In August 2024, the student's parents renewed their request that the student be permitted to try out for the girls' tennis team. The School Board denied this entreaty by a vote of five to one. In a letter explaining the rationale for the decision, the School Board: (1) affirmed that its Policy conformed to the Model Policies "as required by state law"; (2) cited Virginia Attorney General Jason Miyares's Advisory Opinion stating that the 2023 Model Policies' guidance complied with Title IX, the Equal Protection Clause, and the Virginia Human Rights Act, 2023 Op. Va. Att'y Gen. 42; (3) discussed the relevance of *B.P.J. v. West Virginia State Board of Education*, 98 F.4th 542 (4th Cir. 2024) (in which the Fourth Circuit determined that a West Virginia statute preventing transgender girls from playing on girls' athletic teams violated Title IX as applied to the plaintiff, and finding that summary judgment in favor of the defendants on the equal protection claim was unwarranted), yet noted its hesitance to rely on this holding since the U.S. Supreme Court had yet to rule on the petition for a writ of certiorari that has been filed in this case; and (4) cited other ongoing lawsuits and regulatory actions that have left open the question of whether Title IX requires school divisions to use gender identity, rather than biological sex, to determine eligibility for athletics.

On July 3, 2024, the student filed her complaint, as well as a motion for preliminary injunction. In order to receive the requested injunctive relief, the student bore the burden of demonstrating: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities between the parties tips in her favor; and (4) that granting the relief favors the public interest. These last two factors merge where, as here, the government is a party.

The court held first that preliminary injunctive relief was warranted as to the Title IX claim. The student was likely to succeed on the merits of this claim since she had proven all of the necessary elements. She established that the School Board excluded her from participating in an education program based on her gender identity, which qualifies as discrimination "on the basis of sex" under Title IX. *B.P.J.*, 98 F.4th at 563. It was undisputed that Hanover County Public Schools received federal funding, thereby subjecting their athletic programs to Title IX. The student made a clear showing that she has suffered and will suffer medical, emotional, social, dignitary, and financial harm because of the School Board's discriminatory conduct. Finally, she demonstrated that she has been treated worse than others similarly situated, as the effect of the School Board's Policy was to exclude her from participation in athletics outright.

The court held second that the student was entitled to a preliminary injunction on the alternative ground of her likelihood of succeeding on her Fourteenth Amendment claim for a violation of equal protection. Because the Policy at issue affected transgender

individuals, it was subject to intermediate scrutiny. On its face, the Policy targeted transgender individuals for differential treatment because it considered only biological sex in determining a student's participation in school athletics. Although "competitive fairness constitutes an important governmental interest," the Policy was overbroad because it forbade transgender boys from playing on boys' teams and, at the same time, under-inclusive since it prevented transgender student athletes from being able to compete at all. "[I]f the Board seeks to 'ensure fairness in competition,' it must do so for *all* Hanover County students, not just for Hanover County's cisgender students." Furthermore, the Fourth Circuit has indicated that circulating testosterone level is generally viewed as a more useful indicator of sex-based differences in athletic performance than biological sex. *B.P.J.*, 98 F.4th at 560. Here, the student presented evidence that she has never undergone the Tanner 2 stage of puberty due to her hormonal treatments, strongly suggesting that she lacked the levels of increased circulating testosterone that would tend to give her a competitive advantage over cisgender girls. With regard to the other factors relevant to the preliminary injunction decision, courts presume that irreparable harm occurs when a claim is based on the violation of an individual's constitutional rights, and the only detriment to the School Board if an injunction were to issue was the potential friction with state polices, which was dwarfed by the interests of upholding individuals' constitutional rights.

Therefore, the court granted the student's motion and enjoined the School Board from enforcing § 7-4.1 of the Policy against her with respect to the girls' tennis team for the 2024-2025 school year.

ATTORNEY GENERAL'S OPINIONS

The opinion summarized here is available for downloading, in PDF format, from the Attorney General's website, www.oag.state.va.us/, or by clicking on the hyperlinked opinion number below.

LOCAL TAXATION OF PROPERTY • SOLAR PHOTOVOLTAIC SYSTEMS • GENERATING EQUIPMENT • DISCRETION AFFORDED TO LOCALITIES • CODE §§ 58.1-2606.1, 58.1-3660, & 58.1-3661

Op. No. 23-009, Addressed to the Honorable Robert S. Wertz, Jr., Commissioner of the Revenue, County of Loudoun (Aug. 14, 2024).

The Commissioner of the Revenue for Loudoun County posed five questions related to the local taxation of property associated with solar energy.

(1) Whether Code § 58.1-3660 requires localities to provide a property tax exemption for solar photovoltaic systems, and whether localities may limit the duration of such an exemption.

"Certified pollution control equipment and facilities . . . *shall* be exempt from state and local taxation." Va. Code § 58.1-3660(A) (emphasis added). Nevertheless, "[f]or solar photovoltaic (electric energy) systems, this exemption applies only to" certain enumerated qualifying projects. Va. Code § 58.1-3660(C). For some of these projects, the exemption is partial, limited to a percentage of assessed value that decreases incrementally over time. The word "shall" in subsection (A) indicates that the exemption is mandatory for qualifying solar photovoltaic projects, to the extent specified in subsection (C) of the statute. There is no suggestion that the General Assembly granted localities with the discretion to limit the duration of this exemption.

(2) Whether Code § 58.1-3661 requires localities to provide a property tax exemption for the types of small-scale solar facilities described in subsection (A) of that statute, and whether localities may limit the duration of such an exemption.

"Any solar facility installed pursuant to subsections A or B of § 15.2-2288.7 [(which relate generally to certain solar facilities installed on the roofs of residential dwellings to serve the energy needs of residential or agricultural properties on which they are located)] with a nameplate rated electrical generating capacity measured in direct current kilowatts of not more than 25 kilowatts . . . *shall* be wholly exempt from state and local taxation." Va. Code § 58.1-3661(A) (emphasis added). Again, the directive "shall" means that localities may not disregard the exemption, and the lack of any language authorizing a locality to limit this exemption indicates that localities lack such discretion.

(3) Whether Code § 58.1-2606.1 requires localities to impose a tax and gradually diminishing exemption on the generating equipment of solar photovoltaic projects with five megawatts or less in generating capacity.

"Notwithstanding clause (iv) of subsection C of § 58.1-3660 [(referring to the exemption for solar photovoltaic projects equaling five megawatts or less)], generating equipment of solar photovoltaic projects five megawatts or less *shall* be taxable by a locality." Va. Code § 58.1-2606.1(A) (emphasis added). The statute further states that a locality may determine the rate of taxation, but that such rate may not exceed that locality's applicable real estate tax rate. It then provides that "the exemption shall be as follows: 80 percent of the assessed value in the first five years in service after commencement of commercial operation, 70 percent of the assessed value in the second five years in service, and 60 percent of the assessed value for all remaining years in service." *Id.* Consequently, localities must adopt ordinances setting forth the applicable tax rate, but possess no discretion to tax, or exempt from taxation, this classification of property in any other manner.

(4) Whether the term "generating equipment" in Code § 58.1-2606.1(A) refers only to such equipment owned by public service corporations.

This question arose from the statute's placement within Chapter 26 of Title 58.1, which is entitled "Taxation of Public Service Corporations." It is well established that "[a] provision's placement in a particular [portion of the Code] does not substitute for a statute's operative text." 2021 Op. Va. Att'y Gen. 48, 49 n.4. Thus, notwithstanding the statute's location within this chapter, the language of Code § 58.1-2606.1(A) clearly and unambiguously refers to all generating equipment, regardless of ownership.

(5) Whether Code § 58.1-2606.1(A)'s tax on generating equipment extends to the generating equipment of the types of small-scale solar facilities that are otherwise exempt from taxation under Code § 58.1-3661(A).

Since certain small-scale solar facilities are exempt from taxation under Code § 58.1-3661(A), it follows that the generating equipment of such facilities must also be exempt. The language of Code § 58.1-2606.1 supports this conclusion, as the General Assembly has made clear: "Nothing herein shall be construed to authorize local taxation pursuant to this section . . . of generating or storage equipment of solar photovoltaic projects that serve the electricity needs of that property upon which such solar facilities are located, as is provided in § 15.2-2288.7." Va. Code § 58.1-2606.1(C).

POSITIONS AVAILABLE

(Positions posted in order received, sorted by most recent)

Hanover County

Position:	Senior Assistant County Attorney/Assistant County Attorney II
Deadline:	September 20, 2024
Details:	The Hanover County Attorney's Office seeks qualified applicants for a Senior Assistant County Attorney position; however, the position may be filled as an Assistant County Attorney II position, depending on candidate qualifications and experience. The successful candidate will

assist the County Attorney and Deputy County Attorney in providing a wide range of legal services to the Board of Supervisors, the School Board, constitutional officers, the Pamunkey Regional Library, and County departments, boards, and agencies. Duties include drafting and reviewing contracts, ordinances, resolutions, and other legal documents; litigating cases before administrative agencies and state and federal courts; performing legal research; and providing legal advice. The successful candidate may be responsible for assigning projects and reviewing the work product of legal assistants.

Salary: $83,612–$133,194

Link/Contact: Hanover Senior Assistant County Attorney/Assistant County Attorney II

City of Richmond

Position: Assistant City Attorney Civil Litigation Division

Deadline: Continuous

Details: The City of Richmond seeks an **Assistant City Attorney** to handle civil cases in federal and state trial and appellate courts. The position will undertake other assignments as needed. The successful candidate must be a member of the Virginia State Bar. This position is responsible for protecting the legal interests of the City of Richmond and providing legal services and representation and advice to City officials, employees, and departments. The position is responsible for reviewing legal matters, providing appropriate counsel, and initiating or responding to legal actions. The class works within a general outline of work to be performed and develops work methods and sequences under general supervision.

The successful candidate must have demonstrated the ability to apply legal analysis in the solution of technical, administrative, and legal problems. The successful candidate must also have strong written and verbal skills. Prior trial experience is preferred although not required. The position will undertake other assignments as needed.

Salary: $87,614–$146,317

Link/Contact: Assistant City Attorney Civil Litigation Division

James City County

Position: Attorney I/II

Deadline: Open until filled

Details: James City County's Circuit Court seeks an individual to provide legal research and recommendations to the Judges of the Williamsburg and James City County Circuit Court; provide overall training, direction, and supervision to law clerks; and perform related work as directed by the Judges.

Salary: $84,843–$90,000 or higher DOQ

Link/Contact: Click here for full job description. Accepting applications until position is filled. Cover letters and resumes may also be attached, but a fully completed application is required for your application to be considered.

City of Petersburg

Position: Assistant City Attorney

Deadline: Open until filled

Details: The purpose of this job within the organization is to assist the City Attorney in providing excellent legal representation for the City of Petersburg. In accordance with Section 2-192 of the City Code, this position works under the supervision and serves at the pleasure of the City Attorney. This position is not covered under the City's Grievance Policy.

The essential functions of the Assistant City Attorney include the following:

- Provides support and assistance as instructed by the City Attorney in his efforts to provide legal representation of the City of Petersburg.
- Prepares, researches, and drafts legal documents as assigned including but not limited to deeds, ordinances, resolutions, and contracts.
- Prepares legal memoranda on complex legal issues.
- Provides legal advice in matters as assigned to various City employees and constitutional officers.
- Attends meetings and other functions as assigned by the City Attorney.

- Provides representation to the City on assigned cases in various civil matters including but not limited to Building Code Enforcement; Taxation; Personnel Matters; Land Use; Zoning; FOIA; and other areas.
- Provides representation to the City on assigned cases in various administrative proceedings including but not limited to Employee Grievances, ABC and other State Licensure Proceedings; State Technical Review Board proceedings; EEOC; DEQ; SCC, and other areas.
- Prosecutes cases involving specified misdemeanor offenses and violations of City Code as assigned.

Salary: $63,159–$104,023

Link/Contact: Petersburg Assistant City Attorney

County of Goochland

Position: Deputy County Attorney

Deadline: Open until filled

Details: If you are looking for a leadership opportunity in an up-and-coming, professionally run locality, this is for you! The Goochland County Attorney's office seeks qualified applicants interested in becoming the Deputy County Attorney.

The successful candidate will assist the County Attorney in providing legal representation and counsel to the Board of Supervisors; County administration; constitutional officers; and County departments, boards, and committees. In addition to partnering with the County Attorney on some projects, the Deputy County Attorney will have independent, self-directed work and directly manage client relationships with several departments and the Planning Commission.

The specific job duties will depend upon the successful candidate's experience and interest, but could include land use, real property, procurement, contracts, and Freedom of Information Act matters. The successful candidate will have a broad knowledge of local government law paired with high standards for writing, work ethic, and initiative.

This position has the potential for a hybrid telework schedule of up to two days per week.

Admission to the Virginia Bar is required and candidates with a minimum of five years of experience in local government law are preferred.

Salary: $111,464–$144,904

Link/Contact: Goochland Deputy County Attorney

City of Hopewell

Position: City Attorney

Deadline: Continuous

Details: Under the appointment of City Council, the Hopewell City Attorney performs work of considerable difficulty in protecting the legal interests of the City, and serves as the chief legal advisor to Council and City Manager. As designated by Council, the City Attorney also serves as the chief legal advisor to other departments, boards, commissions, and agencies of the City in all matters affecting the interests of the City. City residency is required within mutually agreed upon terms at time of appointment.

Examples of Duties:

- Provides oral and written legal opinions and advice on complex matters to City Council, City administration, and City departments on a daily basis.
- Attends a variety of meetings—City Council, Boards, Commissions, Committees, Authorities, etc.
- Represents the City in complex legal matters. Prepares and tries cases, including appeals to state and federal courts; processes and litigates claims against the City; and prosecutes suits, actions, and proceedings for and on behalf of the City.
- Prepares, reviews, and/or approves various complex legal documents on behalf of the City—contracts, ordinances, resolutions, bonds, bids, deeds, leases, policies, etc. Provides explanations and answers when necessary.
- Researches, interprets, and applies laws, court decisions, and other legal authority in the preparation of opinions, advice, and briefs.
- Advises on the purchase, sale, exchange, and/or leasing of properties.
- Reviews procurement matters to ensure compliance.

- Prepares and reviews legislation for General Assembly sessions. Presents to the General Assembly as necessary.
- Supervises and reviews codifications of City Code.
- Manages, supervises, and reviews the work of support staff, as well as manages the department budget, support contracts, etc.
- Membership and active engagement in local government organizations and attendance of continuing education seminars specializing in local government.

Salary: $85,000–$150,000

Link/Contact: Hopewell City Attorney

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