NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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COUNTY OF FAIRFAX CITY OF FAIRFAX

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February 15, 2018

Mr. H. Jay Spiegel
H. Jay Spiegel & Associates
P.O. Box 11
Mount Vernon, Virginia 22121

Mr. John F. Cafferky
Blankingship & Keith, P.C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030

Re: *Ronald L. Martinson, et al. v. Sandra S. Evans, et al.*, CL-2017-12308

Dear Mr. Cafferky and Mr. Spiegel:

This matter comes before the Court on Defendants' Demurrer, filed November 3, 2017, to Plaintiffs' First Amended Complaint. The Court heard argument on December 1, 2017 and then took the matter under advisement. For the reasons that follow, the demurrer is sustained without leave to amend, and the case is dismissed.

BACKGROUND

Plaintiffs Ronald L. Martinson, Laurel Guy, Vincent Nettuno, Conway Zeigler, and M. André Billeaudeaux (collectively, "Plaintiffs") seek injunctive relief prohibiting Defendants Fairfax County School Board (the "Board"), Board member Sandra S. Evans, and Fairfax County Superintendent of Schools, Scott Brabrand (collectively, "Defendants") from taking any action in furtherance of the Board's

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resolution to change the name of J.E.B. Stuart High School.[1] Plaintiffs allege that the Board pursued the name change of J.E.B. Stuart High School despite, what the Plaintiffs claim, is the facial invalidity and arbitrary application of the Regulation.

On December 7, 2015, Defendant school board member Sandra Evans sponsored an amendment to Regulation 8170, a Regulation governing the naming of new schools. The amendment, known as Regulation 8170.7 (the "Regulation"), established a new procedure to rename existing schools. The Board approved the regulation, making it effective on February 5, 2016.

I understand the Regulation's established procedure to be as follows. First, the Board must find that there is a "compelling need" to change the name of the existing school facility. The determination of whether there is a "compelling need" is initiated by the Board, asking the Division Superintendent to begin community engagement.[2] Second, "at least one magisterial School Board member representing students attending that facility and an at-large member during a School Board Forum," must propose consideration of a name change inquiry. Third, the Division Superintendent must engage with the community and conclude that there is sufficient support for a name change. If "sufficient support" is gathered to change the name of the school facility, proposed names for the "most popular" replacement names are solicited.[3] Fourth, a community meeting must be conducted and a "community recommendation" must be obtained.[4] The Division Superintendent thereafter transmits a recommendation, "consisting of one or more of the most popular choices according to community input" to the Board, "for consideration and action" to change the name of the school facility.

On July 27, 2017, Ms. Evans introduced a resolution (the "Evans Resolution") to change the name of a Fairfax County public school known as J.E.B. Stuart High School. Prior to the Evans Resolution being considered, Board member Tamara

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[1] While Plaintiffs seek injunctive relief against Defendants, the First Amended Complaint contains four "counts:" I) Injunction, Facial Invalidity; II) Injunction, Arbitrary Application; III) Injunction, Failure to Follow Requirements; IV) Injunction, Violation of the Fourteenth Amendment of the United States Constitution. When the Court inquired of counsel at oral argument why there were so many counts, the answer was less than convincing. In my opinion, each count is not a separate cause of action, but nothing more than an alleged reason for injunction relief. This distinction will become important, as will be seen.

[2] "Compelling need" is not defined by the terms of the Regulation.

[3] "Sufficient support" is not defined by the terms of the Regulation.

[4] Votes for the new school name are limited to those persons residing in the school's attendance area. Each household is allowed one vote per each proposed name.

Derenak Kaufax introduced a different resolution to take no action on changing the J.E.B. Stuart High School name until it was determined that the legal requirements of the Regulation were satisfied. Ultimately, on July 27, 2017, the Evans Resolution was enacted as an official Board Action, and the Division Superintendent began the name change process.

Plaintiffs commenced this action on September 1, 2017. On September 7, 2017, this Court denied Plaintiffs' Request for an Emergency Hearing on their Motion for a Temporary Injunction. Plaintiffs filed their First Amended Complaint (the "Complaint") on September 28, 2017.[5]

On December 1, 2017, the parties appeared and presented additional evidence upon and argued Defendants' demurrer. The Court then took the matter under advisement.

ISSUES PRESENTED

The issues before the Court are: 1) whether Plaintiffs have alleged sufficient facts to establish a right to bring a judicial action;[6] and 2) whether Plaintiffs have alleged sufficient facts to state a valid cause of action.

ANALYSIS

Although I do not find a succinct statement in the Defendants' demurer to the effect of "the Plaintiffs do not have standing," the issue is fairly raised. In their reply brief the Defendants state:

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[5] On September 29, 2017, the Court entered an Agreed Order resolving Plaintiffs' Motion for Leave to File an Amended Complaint and Defendants' Motion Craving Oyer.

[6] In other words, do the Plaintiffs have standing to bring this action? This analysis goes beyond the traditional demurrer analysis, *viz.*, does the Complaint state a cause of action? I address not only whether the Complaint states a cause of action, but whether the Plaintiffs even have standing to bring this cause of action. They are, to me, different analyses, although it is clear that the failure to allege standing can be the basis for sustaining a demurrer. Certainly, within the context of declaratory judgments, the Supreme Court of Virginia has held that the failure to allege sufficient facts to establish standing can be the subject of a demurrer. *Deerfield v. City of Hampton*, 283 Va. 759 (2012). The same rationale used in *Deerfield* should apply with equal force to a demurrer to an injunction. Irrespective of the type of action, the Plaintiffs must, "allege sufficient facts to constitute a foundation in law for the judgement sought." *Deerfield*, 283 Va. at 764.

> Plaintiffs spend much of their Memorandum in Opposition arguing that they have standing as local taxpayers to challenge the School Board's authority to spend money. Mem. in Opp'n 1-2. This argument entirely misses the point. Regardless of whether taxpayers would have such standing, *they must still have a cause of action, a legal basis for claiming that the School Board has exceed its authority,* to survive demurrer. Reply Br. in Supp. of Dem. 1 (emphasis in original).[7]

Moreover, even if the issue had not been raised, it seems to me that a trial court can raise the issue of standing *sua sponte.* I find support for this conclusion in the law of judicial estoppel. In *Eilber v. Floor Care Specialists, Inc.,* 807 S.E.2d 219 (2017), the Supreme Court of the Virginia upheld the trial court's determination to raise the defense of judicial estoppel. In so doing, the Court noted that affirmative defenses must be specifically pled. "Judicial estoppel is intended first and foremost to 'protect the integrity of the judicial process and to guard it from improper use.'" *Eilber,* 807 S.E.2d at 222. I believe that this rationale applies equally to an issue of standing. If a party does not have standing to bring a suit, then surely the Court has the ability to raise this issue *sua sponte* in order to prevent misuse of the Court.

The pleadings generously use the terms, "right of action" and "cause of action" interchangeably, while at times conflating these concepts. However, the Supreme Court of Virginia has distinguished a "right of action," from a "cause of action." *Kiser v. A.W. Chesterton Co.,* 285 Va. 12, 21 (2013); *Cherrie v. Va. Health Servs.,* 292 Va. 309, 314-17 (2016). "The distinction between a *right* of action and a *cause* of action should not be dismissed as an odd, rhetorical anachronism." *Cherrie,* 292 Va. at 314 (emphasis in original). A "right of action" is a legal remedial right to enforce a "cause of action," which is the "set of operative facts" that cause a plaintiff to assert his claim. *Cherrie,* 292 Va. at 314. In this case, the distinction is brought to light. The Plaintiffs may have alleged a cause of action—a set of operative facts that caused the Plaintiffs to assert their claim—but as will be seen, these Plaintiffs do not have a right of action—the legal remedial right to enforce the cause of action.

A discussion of a "right of action" necessarily implicates a discussion of standing. The Supreme Court of the United States has described the concept of standing as an inquiry into whether the parties have, "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *See Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. 59, 72 (1978) (quoting *Baker* v. *Carr,* 369 U.S. 186, 204 (1962)).

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[7] The correct term should be "right of action" rather than "cause of action."

Within the context of this case and set of facts, there is functionally no difference between a right of action and standing. Indeed, the Supreme Court of Virginia has acknowledged the possible synonymy of a right of action and standing in the context of statutory law. *See Cherrie*, 292 Va. at 315 (determining a private right of action under statutory law is, "sometimes called statutory standing. . .").

Here, Plaintiffs in their individual capacities are identified as taxpayers and seek to bring this action relying on taxpayer standing. Plaintiffs' counsel, however, has also indicated that at least one Plaintiff may be implicated under Virginia Code §22.1-87. Plaintiffs' pleadings and argument then, establish two possible theories of standing—statutory standing and taxpayer standing. The Court will address standing both pursuant to Virginia Code § 22.1-87 and citizen-taxpayer status.

Virginia Constitution, Article III, Section 7 mandates that, "[t]he supervision of schools in each school division shall be vested in a school board." Va. Const. Art. III, § 7. The school board's supervisory authority may not, however, be exercised without restraint or escape judicial review. The General Assembly has allowed aggrieved parties to seek judicial review of school board actions pursuant to Title 22.1-87. An express statutory right of judicial enforcement is exclusive unless Title 22.1-87 says otherwise. *See Cherrie*, 292 Va. at 316. A fundamental principle of statutory construction is that, "where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *School Bd. of Norfolk v. Giannoutsos*, 238 Va. 144, 147 (1989). Indeed, "we do not infer a private right of action when the General Assembly expressly provides a different method of judicial enforcement." *Cherrie*, 292 Va. at 316. Title 22.1 is no exception to this longstanding legal principle. To hold that aggrieved individuals can seek relief outside of Title 22.1 would create an unprecedented scope of judicial authority and violate Article III's mandate.[8]

[8] I acknowledge the seeming conflict between my holding and *Flory v. Smith*, 145 Va. 164 (1926). In *Flory*, petitioners appealed from a decree entered enjoining a school principal from prohibiting students from leaving school grounds during lunch hours. *Id.* at 166. Importantly, petitioners brought suit pursuant to the regulation and not any statutory or constitutional provision. The Supreme Court of Virginia held that the school board's regulation prohibiting students from leaving campus during lunch hours was neither unreasonable nor invalid. *Id.* at 170. However, the Supreme Court of Virginia decided *Flory* in 1926, prior to the enactment of Title 22.1. The General Assembly has since made clear its intent to provide an exclusive means to review school board actions.

This Court has not found, nor have the parties suggested, the presence of statutory language authorizing private parties to bring suit in circuit court against the school board outside Title 22.1. As such, Plaintiffs must allege sufficient facts to assert legal standing pursuant to Title 22.1.

Section 87 of Title 22.1 states, "[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 court having jurisdiction in the school division to review the action of the school board..." Va. Code. Ann. § 22.1-87.

The first requirement under § 22.1-87 is that the party bringing the suit be a, "parent, custodian, or legal guardian of a pupil attending the public schools in a school division." *Id.* The Complaint states that Plaintiff Billeaudauex's son is a student at J.E.B High School. The Complaint does not state that any of the other Plaintiffs are a, "parent, custodian, or legal guardian of a pupil attending the public schools in a school division." *Id.* Apparently, then, only one Plaintiff has satisfied the requirement of being the parent, custodian or legal guardian of an aggrieved student.

However, the second requirement under § 22.1-87 is that a petition for judicial review must be filed within thirty days of the Board's action. In other words, the General Assembly created a thirty-day statute of limitations for the limited class of plaintiffs to bring an action under §22.1-87. While this limited period may seem harsh or unduly restrictive, it is within the authority of the General Assembly to create such a truncated time period. It is not within the authority of this Court to change the time period or to create exceptions. Undoubtedly, the General Assembly determined that schools function most efficiently when perceived wrongs are promptly brought to the attention of the school boards. Likewise, the General Assembly determined that the class of plaintiffs would be exclusive—parent, custodian or legal guardian of a pupil. This makes sense. If the class of plaintiffs was not so limited, then the field of plaintiffs would be wide open to anyone who disagreed with what the school board had done, even if that person was not a parent, custodian or legal guardian.[9] Simply put, the Plaintiffs filed too late to pursue the one remedy they possibly had available.

[9] For example, a person who is not a parent, custodian, or legal guardian could sue the school board for choosing a certain textbook or a certain course of instruction. The General Assembly thought it best to avoid this situation.

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Plaintiffs take issue with two separate "actions" of the Board— the enactment of the Regulation and the adoption of the Evans Resolution. The Regulation was enacted on February 5, 2016. The Evans Resolution was approved on July 27, 2017. Plaintiffs commenced this action on September 1, 2017, more than thirty days after both February 5, 2016, and July 27, 2017.[10] Plaintiffs have not alleged standing pursuant to any other section of Title 22.1. For these reasons, I find that Plaintiffs do not have legal standing under Title 22.1 to pursue this action.

Even if Title 22.1 was not the exclusive means for this Court to review the Board's actions, Plaintiffs have attempted but failed to assert taxpayer standing.

Virginia Courts follow long-established precedent concerning taxpayer standing in a suit against the Commonwealth or its local governmental bodies. In *Goldman v. Landsidle*, 262 Va. 364 (2001), the Supreme Court of Virginia considered whether taxpayer standing was sufficient when no individual injury was alleged separate from the public at large. The Court held:

> In the absence of a statutory right, a citizen or taxpayer does not have standing to seek mandamus relief against the Commonwealth unless he can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is *separate and distinct* from the interest of the public at large.

Id. at 373 (emphasis added). The Court recognized that a, "taxpayer may challenge the legality of certain actions of a local government and its expenditures, because the interest of a citizen in matters of local government is direct and immediate, rather than remote and minute. *Id.* (citations omitted).

Again, in *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354 (2017), the Supreme Court of Virginia considered whether a student's parents and a resident of Fairfax county, in their individual capacity, had taxpayer standing to challenge a school board regulation. The Court stated that the plaintiffs, "in their individual capacity . . . have not pled any unique injury or potential injury that would provide a basis for standing. They merely stated that they are parents of a child in the school district." *Id.* at 364. In other words, this "direct and immediate" interest in local government actions is more than a difference of opinion. Certainly, taxpayer standing should not open the floodgates to challenge any local government action. *Id.*

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[10] After the Court took this matter under advisement, the parties submitted correspondence regarding another possible "action" taken by the Board on October 26, 2017. This alleged fact is not part of the record before the Court and is not relevant for purposes of this litigation.

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The Plaintiffs in the instant case failed to allege any personal injury or potential harm. While Plaintiffs assert that their taxpayer funds will be used to rename the J.E.B. High School, "they have not demonstrated that they have a direct interest in the proceedings different from that of the public at large." *Goldman*, 262 Va. at 374. They have done nothing more than attempt to sue because they disagree with the expenditure of funds.

Additionally, Plaintiffs take issue with the reasonableness of the regulation, the way in which it was enacted and its alleged vagueness. Again, none of these claims unveil any unique injury or potential harm that provides a basis for standing. The pleadings make clear that Plaintiffs, in their individual capacity, assert only, "difference of opinion between a taxpayer and his government." *City of Fairfax v. Shanklin*, 205 Va. 227, 231 (1964).

Even though I have found that the Plaintiffs do not have standing to bring this action, using an overabundance of caution I will address the demurrer in the traditional way, *viz.*, whether the Complaint state a cause of action. A demurrer tests the legal sufficiency of a pleading. When viewed in the light most favorable to the plaintiff, the demurrer is sustained only if it fails to state a valid cause of action. Va. Code Ann. § 8.01-273; *see Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303 (2005). For the purposes of demurrer, the Court must consider the facts alleged and any reasonable inferences that can be drawn from those facts to be true. *McDermott v. Reynolds*, 260 Va. 98, 100 (2000). The Court is limited to review of the Complaint and any attachments thereto. *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 212 (2010). Those attachments can include those added by a motion to crave oyer. *Ward's Equip. v. New Holland,* 254 Va. 379, 382 (1997).

A demurrer "does not test matters of proof and, unlike a motion for summary judgement, does not involve evaluating and deciding the merits of a claim; it tests only the sufficiency of factual allegations to determine whether the pleading states a cause of action." *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 227-28 (2001) (citations omitted). When the issue of standing is raised on demurrer, "a plaintiff has no legal standing to proceed in the case if its factual allegations fail to show that it actually has a 'substantial legal right' to assert." *Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012) (citations omitted).

Assuming, *arguendo*, that Plaintiffs have standing, the Complaint does not pass the demurrer standard. Indisputably, "an injunction is an extraordinary remedy." *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323, 341-42 (2005) (quoting *Unit Owners Ass'n of BuildAmerica v. Gillman*, 223 Va. 752, 770 (1982)). Under traditional

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equitable principles, a party requesting an injunction must demonstrate that an adequate and complete remedy cannot be obtained in a court of common law. *See, e.g., Wright v. Castles*, 232 Va. 218, 224 (1986).

Although the Supreme Court of Virginia has not definitively set out a standard for awarding injunctive relief, this Court follows the four-part test delineated by the Supreme Court of the United States. In *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), the Supreme Court of the United States established a four part test for determining whether to grant a preliminary injunction: 1) the likelihood of success on the merits; (2) the likelihood of irreparable harm to the plaintiff if relief is denied; (3) the balance of equities tips in the plaintiff's favor; and (4) the injunction is in the public interest. The standard for a permanent injunction would be the same, except that the plaintiff would have to show actual success rather than likelihood of success. *Id.* at 32.

Here, Plaintiffs have failed to state a valid cause of action in any of the four counts. With respect to the injunction, Plaintiffs have not sufficiently alleged the four elements articulated in *Winter. Id.* The Complaint merely states conclusory statements of fact, claiming the Plaintiffs would suffer irreparable harm and fails to provide relevant facts to support that element. Additionally, this Court has acknowledged the possibility of a remedy at law. Plaintiffs had the opportunity to sue pursuant to Virginia Code § 22.1-87 and thereby authorize judicial review of the Board's actions.[11]

As noted earlier, the Complaint alleges four "counts:" I) Injunction, Facial Invalidity; II) Injunction, Arbitrary Application; III) Injunction, Failure to Follow Requirements; IV) Injunction, Violation of the Fourteenth Amendment of the United States Constitution.

I find that none of these counts state a cause of action. Moreover, each count is a mere reiteration of the others.

All counts are merely conclusory allegations. I understand that at demurrer a plaintiff need not "descend into statements giving details of proof in order to withstand demurrer." *Assurance Data v. Malyevac*, 286 Va. 137, 143 (2013). However, I do not read *Assurance Data* for the proposition that the Plaintiff need only recite the elements of a cause of action to survive demurrer. There must be a balance between the extremes and this Complaint does not meet that balance.

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[11] As previously noted, Plaintiffs have missed the window of opportunity to seek relief pursuant to Virginia Code § 22.1-87.

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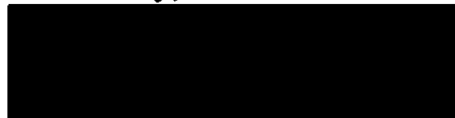
In each Count, Plaintiffs allege, as to the public interest, that "[t]he Public interest is furthered by granting the requested injunctive relief." Compl. ¶¶ *48, 59, 68, 78*. The Complaint does not tell either the Defendants or the Court how the public interest would be furthered if the injunction were granted.

CONCLUSION

In conclusion, Plaintiffs have failed to adequately allege any standing to pursue this action. The Complaint in its repetitive four counts does not state a cause of action. The standing defects cannot be cured by amendment. The demurrer is, therefore, sustained without leave to amend the Complaint. An Order to that effect is attached.

Sincerely,



Robert J. Smith
Fairfax County Circuit Court

Enclosure

OPINION LETTER

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

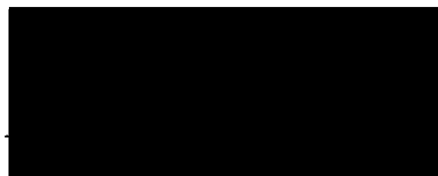
Ronald L. Martinson, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CL-2017-12308**
	)	
Sandra S. Evans, *et al.*	)	
	)	
Defendants.	)	

ORDER

IT APPEARING that this matter was brought before the Court on Defendants' Demurrer to Plaintiffs' First Amended Complaint, it is hereby

ORDERED that the Defendants' Demurrer to Plaintiffs' First Amended Complaint is **SUSTAINED WITHOUT LEAVE TO AMEND.**

ENTERED this 15th day of February, 2018.



The Honorable Robert J. Smith

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.