COMMONWEALTH OF VIRGINIA

BRUCE D. ALBERTSON, JUDGE
CLARK A. RITCHIE, JUDGE
ANDREW S. BAUGHER, JUDGE
ROCKINGHAM COUNTY CIRCUIT COURT
80 COURT SQUARE
HARRISONBURG, VA 22802
(540) 564-3122

TWENTY-SIXTH JUDICIAL CIRCUIT

CIRCUIT COURTS OF
CLARKE, FREDERICK, PAGE,
ROCKINGHAM, SHENANDOAH
AND WARREN COUNTIES
AND CITY OF WINCHESTER

December 2, 2022

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Re: *Deborah Figliola et al., v. The School Board of the City of Harrisonburg, Virginia, et al.*, Case No.: CL22-1304

Dear Counsel:

This matter came before the Court on November 1, 2022, for hearing on Defendants' Demurrer and Plea in Bar to the Complaint and Plaintiffs' Motion for Temporary Injunction. Vincent M. Wagner, Esq., David A. Cortman, Esq., and Daniel P. Rose, Esq., appeared on behalf of Plaintiffs. M. Scott Fisher, Jr., Esq., appeared on behalf of Defendants. Upon consideration of the pleadings and the arguments of counsel, the Demurrer and Plea in Bar are OVERRULED IN PART and SUSTAINED IN PART, and the Motion for Temporary Injunction is DENIED for the following reasons.

I. The Parties[1]

[1] Defendants' Plea in Bar is premised on the allegations in the Complaint. (*See* Plea in Bar ¶¶ 1-8 & Def. Br. in Supp. at 2-12). As required when considering a demurrer and a plea in bar based on the pleadings, the facts recited herein are taken from plaintiffs' complaint and accepted as true, along with all reasonable inferences from those facts, and viewed in the light most favorable to plaintiffs. *Parker v. Carilion Clinic*, 296 Va. 319, 330 (2018).

Defendant, The Harrisonburg City School Board ("School Board"), is a public corporate body that governs the Harrisonburg City Public Schools ("HCPS"). (Compl. ¶ 20). Defendant Michael G. Richards ("Dr. Richards") is the Superintendent of HCPS and, according to Plaintiffs, is ultimately responsible for adopting and implementing the policy and practices challenged in this action. (*Id.* ¶ 27). Plaintiffs filed suit against Dr. Richards solely in his official capacity as Superintendent. (*Id.* ¶ 28).

Each plaintiff is a practicing Christian who bases his or her beliefs on the Bible. (*Id.* ¶ 67). Each plaintiff is an active member of a Christian church and otherwise implements his or her Christian faith in daily life. (*Id.* ¶¶ 68-71). Plaintiffs believe that God created the family and charged parents with the primary responsibility of raising, guiding, and caring for their children; that parents and family play an essential role in maintaining children's physical and mental health and well-being; that God created two sexes, male and female, and that these two sexes are a core part of God's intended design for humanity; and that each person is born with a fixed biological sex that is a gift from God and not subject to change. (*Id.* ¶¶ 73-76).

Plaintiff Deborah Figliola is employed by HCPS as a special-education and English teacher. (*Id.* ¶ 15). Figliola is aware of at least 10 students in her school "who question and struggle with their gender identity," and she has personally worked with three of them. (*Id.* ¶ 39). Figliola believes, pursuant to "her life experiences and religious beliefs," "that she cannot ever push a child towards a gender transition, and that she can never block children struggling with these issues from the benefit of their parents' involvement." (*Id.* ¶ 42).

Plaintiff Kristine Marsh is employed by HCPS as a reading specialist. (*Id.* ¶ 16). Due to her "religious beliefs and conscience," Marsh "cannot encourage children towards a gender transition, nor can she withhold information about children's gender confusion from their parents." (*Id.* ¶ 49).

Plaintiff Laura Nelson is employed by HCPS as an English-as-a-second-language teacher. (*Id.* ¶ 17).[2] Nelson is aware of several children "who struggle with gender-identity issues" at her school, one of whom is in her class. (*Id.* ¶ 54). Due to her "religious and personal beliefs," Nelson "cannot affirm a gender identity inconsistent with a student's biological sex," and cannot "withhold information about students' gender from their parents." (*Id.* ¶ 55).

Nelson and her husband, Plaintiff Timothy Nelson, have three children enrolled in HCPS schools. (*Id.* ¶ 18). The Nelsons allege that HCPS "requires school staff to directly interfere with their ability to parent and to assist their children should one of them struggle with gender identity," which is contrary to the Nelsons' "religious and personal beliefs about raising children." (*Id.* ¶ 60).

[2] Figliola, Marsh, and Nelson are referred to as the "Teacher Plaintiffs."

Plaintiffs John and Nicolette Stephens have three children enrolled in HCPS schools. (*Id.* ¶ 19).[3] Mr. and Mrs. Stephens "feel strongly" that they cannot "parent their children well … if the school hides information from them or lies to them about their children's identity, mental health, or other struggles," and they "want to be informed so they can continue to do what is best for their children." (*Id.* ¶¶ 65-66).

Teacher Plaintiffs believe that they must refrain from "personally affirming or communicating views about human nature and gender identity" that are contrary to their beliefs. They also believe that "using 'preferred pronouns' that are inconsistent with the child's biological sex is harmful to the child." (*Id.* ¶¶ 77-78). Teacher Plaintiffs will not use a student's preferred pronouns if they do not correspond with the student's biological sex. (*Id.* ¶ 202). Teacher Plaintiffs' religious beliefs "prevent them from lying to or intentionally deceiving the parents of the children they teach," and they will not conceal from parents information regarding a student's use of a name different from their given name or use of pronouns different from their biological sex. (*Id.* ¶¶ 79, 205).

Parent Plaintiffs believe they have a God-given responsibility to provide for and participate in all aspects of their children's upbringing in a way that is consistent with their faith, including educational decision-making. (*Id.* ¶¶ 83, 222). Parent Plaintiffs believe that children "should not be encouraged to undertake 'social transition' or 'medical transition,' because of the complexity of the issues involved and children's inability to thoroughly assess the long-term consequences of such actions." (*Id.* ¶ 88). Parent Plaintiffs believe that God creates individuals as either male or female, and that this is an immutable characteristic their children should not seek to change. (*Id.* ¶ 221). Due to their "religious and philosophical beliefs," Parent Plaintiffs will not "affirm" their children's "discomfort with their biological sex" or a gender "that is inconsistent with their God-given sex," and would instead seek medical and psychotherapeutic help and otherwise encourage their children consistent with their faith. (*Id.* ¶¶ 89-91).

II. HCPS Policy 401

In 2021, the Virginia Department of Education (VDOE) issued "Model Policies for the Treatment of Transgender Students in Public Elementary and Secondary Schools." (Compl. ¶ 93). Following VDOE's direction, on August 17, 2021, HCPS revised its "Equal Educational Opportunities/Nondiscrimination Policy" (Policy 401) to include "gender identity." (*Id.* ¶ 94, Ex. 1 & 2). Staff and students are required to abide by Policy 401. (*Id.* ¶ 97).

Policy 401 provides:

> Educational opportunities shall be available for all students, without regard to sex, sexual orientation, gender, gender identity, race, color, national origin, ethnicity, disability, religion, ancestry, age, marital status, pregnancy, childbirth or related medical conditions, military status, genetic information, or any other

[3] The Nelsons and the Stephenses are referred to as the "Parent Plaintiffs."

> characteristic protected by law. Educational programs shall be designed to meet the varying needs of all students.

(*Id.* at Ex. 1).

The policy establishes a grievance procedure for students who believe they have been the victim of prohibited discrimination. (*Id.*). The policy also requires employees who have knowledge of conduct which may constitute prohibited discrimination to immediately report such conduct to a compliance officer. (*Id.*). The policy prohibits retaliation against students or school personnel who report discrimination or participate in related proceedings. (*Id.*). The policy directs that training to prevent discrimination should be included in employee and student orientations and also as employee in-service training. (*Id.*). Plaintiffs challenge both Policy 401 and HCPS's implementing practices, including training to staff and teachers, and globally characterize Policy 401 and related practices as the "Policy." (*Id.* ¶ 1).

As part of teacher and staff training in August 2021, HCPS presented slides titled "Supporting Our Transgender Students." (*Id.* ¶¶ 128-130, 133-139). In the presentation, HCPS stated that it had established "[n]ew practices regarding use of preferred names and pronouns;" that a "Classroom Practice" to "[i]mmediately [i]mplement" is to "[a]sk preferred names and pronouns;" that a student's preferred name and pronouns should always be used even if different from school documentation; that the student's preferred name should be used at school but not in communication with parents/guardians if they are unaware of the name; and that a student's gender transition should be kept confidential and that it is "not appropriate to take the lead" on sharing information concerning a student's gender or preferred name or to contact parents/guardians for their permission to utilize a preferred name. (*Id.* at Ex. 3).

HCPS separately provided training on Policy 401 to school counselors. (*Id.* ¶ 131). As part of this training, counselors were instructed to report to administration any teachers who were not using preferred names and pronouns. (*Id.* ¶ 132). HCPS administrators and counselors were required to attend an additional training conducted by a third-party organization titled "Supporting LGBTQ Youth," (*id.* ¶ 141, Ex. 7), and a "Bullying Prevention" presentation was made at a school board work session, (*id.* ¶ 144, Ex. 6). Teachers and staff also received additional training during the school year. (*Id.* ¶¶ 151-154, Ex. 8). These presentations touched on Policy 401, the practices HCPS implemented thereunder, and communications to parents/guardians concerning a student's gender transition and/or preferred names and pronouns, in a manner generally consistent with the initial training provided to teachers and staff in August 2021. (*Id.* ¶¶ 144-150).

HCPS issued a document recommending a "best practice" regarding a student's gender transition. (Compl. Ex. 4). The document provides that "[s]chool counselors should serve as the lead in the intervention process, working collaboratively with administration and, when appropriate, families." (*Id.*). The school counselor informs administration regarding a student's gender transition, sets a meeting with the student, completes the "HCPS Gender Transition Action Plan" with the student, provides resources to the student and family as appropriate, assists in student and staff intervention and education as appropriate, and provides follow-up

interventions and support for the student. (*Id.*). The form to be completed with the student asks, among other things, whether guardian(s) are supportive of the student's gender status and, if not, whether any additional considerations must be accounted for in implementing the student's gender transition plan. (*Id.*). A potential action item listed on the form is whether to "[e]mpower family relationships." (*Id.*).

Teachers are directed to "connect with the student's school counselor" if they are unaware whether the student's parent/guardian is supportive of a name or pronoun change. (Compl. ¶ 125, Ex. 3). Plaintiffs allege that the "school counselor therefore decides whether it is 'appropriate' to involve parents and whether to proceed with a school-sanctioned 'social transition,'" and that each "of these steps are taken without parental notice, consent, or involvement." (*Id.* ¶ 110). Plaintiffs also allege that special-education teachers were instructed not to include information about gender-identity issues on certain paperwork because parents might see it. (*Id.* ¶¶ 154-155). Plaintiffs allege that these practices "were rolled out to school staff and the public and implemented for the 2021-2022 school year." (*Id.* ¶ 96). Teacher Plaintiffs "are currently under the obligation to abide by" and follow these practices. (*Id.* ¶¶ 157-158). However, "[n]one of the Teacher Plaintiffs will use a student's preferred pronouns if they do not correspond with the student's biological sex," and "[n]one of the Teacher Parents" will "keep such information hidden from parents." (*Id.* ¶¶ 202, 205). Plaintiffs allege that HCPS will deem such *non*compliance as a form of discrimination or harassment, with consequences up to and including termination. (*Id.* ¶¶ 186-189, 204, 207).

III. Plaintiffs' Causes of Action

In Count I, Teacher Plaintiffs assert that their right to freedom of speech under the Virginia Constitution, Article I, § 12, is violated by HCPS compelling them to use preferred names and pronouns they do not agree with and prohibiting them from informing parents of the same. (*Id.* ¶¶ 232-254). In Count II, they claim that this also acts to unconstitutionally discriminate against them based on their viewpoint. (*Id.* ¶¶ 255-268). In Count III, Teacher Plaintiffs claim that their right to free exercise of religion under the Virginia Constitution, Article I, § 16, and the Act for Religious Freedom, Va. Code § 57-1, is violated if they are required to personally affirm and communicate HCPS's "preferred message about gender identity, including through the use of preferred pronouns that differ from a student's biological sex," and in concealing such information about pronouns and names from parents. (*Id.* ¶¶ 269-285). In Count IV, Teacher Plaintiffs assert that their statutory right to exercise of religion, Va. Code § 57-2.02, is violated for the same reasons. (*Id.* ¶¶ 286-296).

In Count V, Parent Plaintiffs claim that their due process rights under the Virginia Constitution, Article I, § 11, Virginia Code § 1-240.1, and Virginia common law to make decisions concerning the care, custody, and control of their children is violated by HCPS facilitating, encouraging, or affirming a child's gender transition, including by using a child's preferred name or pronoun which differs from their biological sex, without involving the parents. (*Id.* ¶¶ 297-331). In Count VI, Parent Plaintiffs claim that their right to free exercise of religion under the Virginia Constitution, Article I, § 16, and the Act for Religious Freedom, Va. Code § 57-1, is violated by HCPS interfering with their provision of faith-based advice

and guidance to their children, and by withholding information from parents who hold unsupportive religious beliefs. (*Id.* ¶¶ 332-350). In Count VII, Parent Plaintiffs claim that their statutory right to exercise of religion, Va. Code § 57-2.02, is violated for the same reasons. (*Id.* ¶¶ 351-362).

IV. Defendants' Demurrer & Plea in Bar

Defendants demur on the grounds that Plaintiffs lack standing because they have not alleged an actual injury (all counts); that the School Board is sovereignly immune from Plaintiffs' claims (all counts); that an independent claim does not lie against Dr. Richards (all counts); that Article I, §§ 11, 12, and 16 of the Constitution of Virginia are not self-executing and do not create private rights of action (Counts I, II, III, V, VI); that Virginia Code § 1-240.1 does not create a private right of action and a substantive due process or common law "parental rights" claim does not exist (Count V); that Virginia Code § 57-1 does not create a private cause of action (Counts III & VI); that the policy and practices at issue are permitted by Virginia Code § 57-2.02(E) (Counts IV & VII); and that Plaintiffs have failed to allege sufficient facts to support their claims (all counts).

Defendants also filed a Plea in Bar. The plea asserts that the School Board is sovereignly immune, that no claim lies against Dr. Richards, and that Plaintiffs lack standing for the reasons set forth in the Demurrer.

V. Analysis of Defendants' Demurrer & Plea in Bar

"The purpose of a demurrer is to test the legal sufficiency of a pleading." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 131 (2003). A demurrer is sustained "if the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action." *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 226 (2001).

"A demurrer admits the truth of all properly pleaded material facts. All reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading. However, a demurrer does not admit the correctness of the conclusions of law found in the challenged pleading." *Fuste*, 265 Va. at 131-32 (citation omitted). The court also "may ignore a party's factual allegations" if they are "contradicted by the terms of authentic, unambiguous documents" attached to the complaint. *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382 (1997).

"A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery. The party asserting a plea in bar bears the burden of proof on the issue presented." *Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010). When the parties do not present evidence, only the pleadings are considered, with the facts alleged in the complaint taken as true for purposes of resolving the plea in bar. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 112 (2008).

A. Standing

Courts have the power to issue declaratory judgments "[i]n cases of actual controversy." Va. Code § 8.01-184. "[T]he Declaratory Judgment Act does not give trial courts the authority to render advisory opinions, decide moot questions, or answer inquiries that are merely speculative." *Bd. of Supers. of Loudoun Cnty. v. Town of Purcellville*, 276 Va. 419, 434 (2008). So, although the Declaratory Judgment Act permits the declaration of a party's rights "before they mature," the party must plead sufficient facts supporting a private right of action under substantive law. *Cherrie Va. Health Servs., Inc.,* 292 Va. 309, 317-18 (2016); *see also Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012) ("[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.").

"Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts." *Id.* at 314. With respect to statutory claims, "the plaintiff must possess the 'legal right' to bring the action, which depends on the provisions of the relevant statute." *Id.* at 315 (quoting *Goldman v. Landsidle*, 262 Va. 364, 371 (2001)). A statutory right of action "exists when a statute expressly authorizes it." *Id.* "When a statute is silent, however, [courts] have no authority to infer a statutory private right of action without demonstrable evidence that the statutory scheme necessarily implies it." *Id.*

Here, Teacher Plaintiffs sufficiently allege the existence of an actual controversy within the framework of the Declaratory Judgment Act. They allege that the School Board has adopted policies and practices which are currently effective and which Plaintiffs cannot and will not follow. Teacher Plaintiffs further allege that they are under a credible threat of discipline for not complying with these policies and practices, in violation of their constitutional and statutory rights. A declaratory judgment is an appropriate vehicle for resolving their claims. As discussed below, however, Parent Plaintiffs have not sufficiently alleged the existence of a present controversy ripe for adjudication under the Declaratory Judgment Act.[4]

B. Sovereign Immunity

As "a general rule, the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 102 (2008). "The Commonwealth and its agencies are immune from liability in the absence of an express constitutional or statutory waiver of sovereign immunity." *Id.*

1. Article I, §§ 11, 12, & 16 of the Virginia Constitution

[4] Although Defendants argue that Virginia Code § 22.1-87 provides the sole right of action for a party aggrieved by a school board decision, it "may not be the exclusive manner of challenging a school board decision." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 362 (2017). Indeed, the Supreme Court of Virginia has held: "In cases of actual controversy, a declaratory judgment action could challenge a school board policy when there is an 'antagonistic assertion and denial of right'—whether that right be derived from statutes, common law, or constitutional law." *Id.*

"[S]overeign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia...." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011) (citing *Gray*, 276 Va. at 104-07). "If a constitutional provision is self-executing, no further legislation is required to make it operative" and the provision "is enforceable in a common law action." *Gray*, 276 Va. at 103, 106.

Constitutional provisions can be self-executing in four ways. First, a "constitutional provision is self-executing when it expressly so declares." *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681 (1985). Second, constitutional provisions "in bills of rights and those merely declaratory of common law are usually considered self-executing." *Id.* Third, provisions of "a negative character are generally, if not universally, construed to be self-executing." *Id.* at 681-82. Fourth, a "constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced." *Id.* at 682.

For example, Article I, § 14 of the Virginia Constitution states: "That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." In holding this provision self-executing, the Supreme Court of Virginia reasoned:

> Article I, § 14 is within the Bill of Rights of the Constitution of Virginia. Further, the second portion of Article I, § 14 is stated in the negative, prohibiting any government 'separate from, or independent of, the government of Virginia.' This prohibition does not require further legislation to make it operative. Therefore, under the test articulated in *Gray*, we hold that Article I, § 14 is self-executing and therefore [the defendant university] does not have sovereign immunity as to claims arising under that provision.

DiGiacinto, 281 Va. at 138.

i. <u>Article I, § 11 – Due Process</u>

Article I, § 11 of the Virginia Constitution provides:

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

The Court will assume *without* deciding that Article I, § 11 is self-executing and provides Parent Plaintiffs a private right of action, because Parent Plaintiffs' claims are factually deficient and dismissed on other grounds. "The doctrine of judicial restraint dictates

that [courts] decide cases on the best and narrowest grounds available. A fundamental and longstanding precept of this doctrine is that unnecessary adjudication of a constitutional issue should be avoided." *Commonwealth v. Swann*, 290 Va. 194, 196 (2015).

ii. Article I, § 12 – Freedom of Speech

Article I, § 12 of the Virginia Constitution provides:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

In *DiGiacinto*, the constitutional provision at issue was held self-executing because it was within the Bill of Rights and stated in the negative, prohibiting certain action. Likewise, Article I, § 12 is self-executing: "It is part of Virginia's Bill of Rights, and it specifically prohibits abridgement of the freedom of speech and petition." *Draego v. City of Charlottesville*, 2016 WL 6834025, at *22 (W.D. Va. Nov. 18, 2016); *see also Loudoun Cnty. Sch. Bd. v. Cross*, 2021 WL 9276274, *6 (Va. Aug. 30, 2021) (applying Va. Const. art. I, § 12 to a teacher's comments opposing a school board policy).

iii. Article I, § 16 – Free Exercise of Religion

Article I, § 16 of the Virginia Constitution provides, in relevant part:

> [A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience.... No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities.

The Court does not reach the issue whether this provision is self-executing. Virginia Code § 57-2.02 provides statutory protection for the free exercise of religion. The statute defines "free exercise of religion" to include "the exercise of religion under Article I, Section 16 of the Constitution of Virginia." Va. Code § 57-2.02(A). The statute also tracks the language of Virginia case law and its test for a free exercise claim. *See Horen v. Commonwealth*, 23 Va. App. 735, 742 (1997) (holding Va. Const. art. I, § 16 "prohibit[s] state imposition of substantial burdens on the exercise of religion unless the state advances a compelling government interest which is furthered in the least restrictive manner"). Since the statute provides a remedy, the Court will not unnecessarily adjudicate the constitutional issue. *Swann*, 290 Va. at 196.

2. Virginia Code §§ 1-240.1 & 57-1

These statutes do not create a private right of action. Virginia Code § 1-240.1 states: "A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." Va. Code § 1-240.1. The statute is prefaced by another statute in the same chapter, which provides: "The rules and definitions set forth in this chapter shall be used in the construction of the Code and the acts of the General Assembly." Va. Code § 1-202. The statute espouses a general principle used in construing other statutes and acts. It does not contain a statutory enforcement provision and does not provide a private right of action. *See Cherrie*, 292 Va. at 315-16 (stating when a statute is silent as to whether a right of action exists, one cannot be inferred "without demonstrable evidence that the statutory scheme necessarily implies it").

Likewise, Teacher Plaintiffs fail to state a cause of action under Virginia Code § 57-1. This provision recites the 1786 Virginia Act for Religious Freedom and enshrines important principles of religious freedom, but it does not expressly provide a private right of action. *Id.* Rather, Virginia Code § 57-2.02 provides a right of action for religious freedom claims. *See id.* § 57-2.02(A) ("'Exercise of religion' means the exercise of religion under ... the Virginia Act for Religious Freedom (§ 57-1 et seq.)"). Virginia courts will not "infer a private right of action when the General Assembly expressly provides for a different method of judicial enforcement." *Cherrie*, 292 Va. at 316.

3. Claims against Dr. Richards

The Complaint alleges that the "School Board has final policymaking and decisionmaking authority for rules, regulations, and decisions that govern HCPS," including the practices challenged in this action. (Compl. ¶ 22). The official-capacity claims against Dr. Richards fail because they are redundant with Plaintiffs' claims against the School Board. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding an official-capacity suit against a public official is "to be treated as a suit against the [government] entity"). "[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Here, the real party in interest is the School Board, which promulgates school policy and under whose authority Dr. Richards operates, so the individual claims against Dr. Richards are dismissed.

C. Sufficiency of Plaintiffs' Allegations[5]

1. Counts I and II (Teacher Plaintiffs' claims of compelled speech and viewpoint discrimination under Art. I, § 12)

[5] The Court will not address the sufficiency of the allegations under Counts III and VI, because the right of action for a free exercise claim is set forth in Virginia Code § 57-2.02 (Counts IV and VII).

Article I, § 12 of the Virginia Constitution is "co-extensive with the free speech provisions of the federal First Amendment." *Loudoun Cnty. Sch. Bd.*, 2021 WL 9276274, at *6 (quoting *Elliott v. Commonwealth*, 267 Va. 464, 473-74 (2004)). "[F]reedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, __ U.S. __, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Therefore, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). The government also "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citation omitted).

"[S]choolteachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 693 (4th Cir. 2007) (quotation omitted). "Nevertheless, certain limitations are placed on the free speech rights of schoolteachers" as public employees. *Id.* In determining whether their speech is protected, courts consider a two-part inquiry: first, was the speech at issue "that of a private citizen speaking on a matter of public concern;" and second, does "the employee's interest in" constitutionally protected expression "outweigh[] the public employer's interest in what the employer has determined to be the appropriate operation of the workplace." *Id.* (citation omitted); *see also Garcetti v. Ceballos*, 547 U.S. 410, 416 (2006) ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

Concerning the first inquiry, "[c]ourts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums." *Lee*, 484 F.3d at 695 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). "[F]ree speech rights in a school environment are not 'automatically coextensive with the rights of adults in other settings.'" *Id.* (quoting *Hazelwood*, 484 U.S. at 266). For example, if the contested speech is "curricular in nature, it does not constitute speech on a matter of public concern." *Id.* at 697 (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998) (en banc)).[6] On the other hand, a school's interest in limiting a teacher's speech is not great when the speech is "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572-73 (1968).[7]

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[6] Curricular speech constitutes "school-sponsored expression bearing the imprimatur of the school" that is "supervised by faculty members and designed to impart particular knowledge to the students." *Id.* (citing *Hazelwood*, 484 U.S. at 271); *see also Garcetti*, 547 U.S. at 421, 425 (holding statements made pursuant to a public employee's "official duties" are not insulated from employer discipline, but also declining to extend this analysis "to a case involving speech related to scholarship or teaching"); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (concluding that speech which "cannot be fairly considered as relating to any matter of political, social, or other concern to the community" is not a matter of public concern).

[7] Whether *Pickering* applies to compelled speech is undecided. "When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is

For example, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a college professor shared similar religious views of Plaintiffs in this case concerning the use of gender identity-based pronouns. The court held that "the use of gender-specific titles and pronouns has produced a passionate political and social debate," and that "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at 508. Through the professor's refusal to address a transgender student "as a woman, he advanced a viewpoint on gender identity" which "manifested his belief that sex is fixed in each person from the moment of conception" and "was a matter of public concern." *Id.* at 509. The court then applied the second part of the balancing test to determine whether the professor had sufficiently alleged that his employer violated his First Amendment rights by requiring he use a student's preferred name and pronouns even if they differed from the student's sex at birth. *Id.* at 509-12.

In *Loudoun County School Board v. Cross*, 2021 WL 9276274 (Va. Aug. 30, 2021), a panel of the Supreme Court of Virginia considered a temporary injunction granted, at least in part, under the free speech provision of Article I, § 12 of Virginia's Constitution. The Court held that a teacher has a right to speak on matters of public concern, and a teacher's comments "opposing a policy that might burden his freedoms of expression and religion by requiring him to speak and interact with students in a way that affirms gender transition, a concept he rejects for secular and spiritual reasons," constitute protected speech. *Id.*; *see also Janus*, 138 S. Ct. at 2476 ("[S]exual orientation and gender identity ... are undoubtedly matters of profound value and concern to the public.").

Here, Teacher Plaintiffs specifically allege that the School Board has implemented a policy requiring them to use a student's preferred name and pronouns, and to not disclose that information to parents, in a manner that contradicts their beliefs. These allegations are supported by the documents attached to the Complaint and are sufficient to state a claim of compelled speech or viewpoint discrimination in violation of Article I, § 12. Whether such communications are part of a teacher's official duties, or whether their interest outweighs the School Board's interest in the appropriate operation of the workplace, cannot be decided on demurrer.

2. <u>Count IV (Teacher Plaintiffs' claims of religious discrimination under Virginia Code § 57-2.02)</u>

Virginia Code § 57-2.02(B) provides: "No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest." "'Substantially burden' means to inhibit or curtail religiously motivated practice." *Id.* § 57-2.02(A).

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different." *Janus*, 138 S. Ct. at 2473. In general, however, "when public employees are performing their job duties, their speech may be controlled by their employer." *Id.* at 2474. This is so because "[w]hen an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer." *Id.*

Defendants contend that Teacher Plaintiffs are not prohibited from expressing their faith, but the statute protects more than that. It prohibits the "substantial burden" of religiously motivated practices. The Complaint sets forth sufficient factual allegations that Teacher Plaintiffs are being forced to affirm a message that violates their sincerely held religious beliefs. *See, e.g.*, *Horen*, 23 Va. App. at 745 (finding a substantial burden exists "where governmental action compels a party to affirm a belief they do not hold"). These allegations are sufficient to bring Plaintiffs within the statute.

Defendants' additional argument that they are insulated from a statutory challenge because Teacher Plaintiffs contest a rule of general applicability, or one enacted for health and safety, is unavailing at this stage. *See* Va. Code § 57-2.02(E) ("Nothing in this section shall prevent any governmental institution or facility from maintaining health, safety, security, or discipline."). Virginia Code § 57-2.02(B) does not exempt rules of general applicability from the statute. Instead, it says the government shall not substantially burden a person's free exercise of religion *even if* the burden results from a rule of general applicability. *Id.* Moreover, whether the challenged practices are part of "maintaining health, safety, security, or discipline" cannot be decided on demurrer.

3. Count V (Parent Plaintiffs' claims of due process violations under Article I, § 11) and Count VII (Parent Plaintiffs' claims of religious discrimination under Va. Code § 57-2.02)

Parent Plaintiffs' allegations "fail[] to set forth a controversy that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment." *Lafferty v. Sch. Bd. of Fairfax Cnty.*, 293 Va. 354, 361 (2017). Although concerned about the practices set forth by HCPS for its teachers, Parent Plaintiffs have not sufficiently alleged that they have been or are likely to be affected by these practices.

First, Parent Plaintiffs allege that HCPS employees are "forbidden" from notifying them "if their children were to seek to undergo social transition," (Compl. ¶ 218), but this is not a complete reading of the documents they submitted with the Complaint. Those documents, which are alleged to set forth the implementation of the challenged policy and practices, direct teachers to inform the school counselor of gender identity issues and for the counselor to lead a discussion with parents at the appropriate time. The documents do not support Parent Plaintiffs' allegation that they will *not* be notified if their children seek to undergo a social transition.

Second, the Complaint does not state that any of Parent Plaintiffs' children have been subjected to name or pronoun communications from teachers or staff or that the parents themselves have failed to receive information concerning their own children and such issues. Parent Plaintiffs' allegations are like those in *Lafferty*, where a student and his parents alleged that they were aggrieved by a school board policy that may cause the "sharing of a bathroom or locker room by a transgender student." 293 Va. at 361. The Court held that, although the student was distressed by the policy and concerned he may violate it, there was "no connection

with an articulated injury that [he] is suffering or will suffer based on the present facts as pled." *Id.* Parent Plaintiffs' allegations are similar: they are concerned by the challenged policy and practices but do not allege that their children have been subjected to them. Their current allegations do not show the existence of a present harm that they are suffering or will suffer, and do not permit the inference that *their* rights "will be affected by the outcome of the case," as required for a declaratory judgment. *Deerfield*, 283 Va. at 764.

VI. Analysis of Plaintiffs' Motion for Temporary Injunction

"A temporary injunction allows a court to preserve the status quo between the parties while litigation is ongoing." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (2019). "[T]he granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). "No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." Va. Code § 8.01-628.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also May*, 297 Va. at 17-18 (plaintiff must show irreparable harm and no adequate remedy at law). "[A]ll four requirements must be satisfied." *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010).[8]

Plaintiffs fail to satisfy the second requirement that they are likely to suffer irreparable harm if an injunction is not entered now. Dr. Richards' sworn declaration states that employees have not been disciplined for failing to follow the practices regarding preferred name and pronoun use. (Richards Decl. ¶¶ 23, 26-27). Dr. Richards also states that HCPS has a policy (Policy 103) that teachers can utilize to raise complaints and address potential conflicts, that this process has been utilized for at least one teacher with success, and that Teacher Plaintiffs have not initiated this process for themselves. (*Id.* ¶¶ 25-27, 28). Although Teacher Plaintiffs present evidence that they are in fear of disciplinary action or other type of enforcement, Dr. Richards' unrebutted testimony indicates that, *at this time*, HPCS is not disciplining teachers for failing to ask students their preferred names and pronouns, for failing to use a student's preferred names and pronouns, or for sharing (or not sharing) such information with parents. Teacher Plaintiffs may also have a reasonable accommodation available if they bring these concerns to HCPS. A possible accommodation is even suggested by Teacher Plaintiffs in their Complaint. (*See* Compl. ¶ 81) ("Teacher Plaintiffs can avoid using requested pronouns when doing so would violate their religious beliefs, while simultaneously not intentionally using other gender-specific pronouns that a student has specifically asked them not to use.").

[8] "Since the Fourth Circuit decided *Real Truth*, most Virginia Circuit courts have evaluated temporary injunctions using the *Real Truth* sequential analysis." *Freemason St. Area Ass'n, Inc. v. City of Norfolk*, 100 Va. Cir. 172, 2018 WL 9392737, at *9 (City of Norfolk 2018). *Real Truth* applies *Winter's* standard for a preliminary injunction, which the parties also applied in their briefs, and requires a showing that plaintiffs are likely to suffer irreparable harm in the absence of an injunction.

To be sure, "a likely constitutional violation" constitutes irreparable harm. *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021). Teacher Plaintiffs have sufficiently *alleged* a constitutional violation for purposes of demurrer, but a temporary injunction developed by an evidentiary record requires more. Indeed, if the implementing guidance for Policy 401 is not being enforced (and Dr. Richards unequivocally and without challenge stated there has been no actual discipline and no threat of potential discipline), then Teacher Plaintiffs are not likely to face adverse action, at least at this time, for following their conscience and refusing HCPS's guidance regarding Policy 401. A temporary injunction is inappropriate under these circumstances. *See May*, 297 Va. at 18 (stating temporary injunctions serve to "preserve the status quo"); *Large v. Clinchfield Coal Co.*, 239 Va. 144, 148 (1990) ("[N]o prohibitory injunction against an anticipated wrong will issue unless there is reasonable cause to believe that the wrong is one that would cause irreparable injury and the wrong is actually threatened or apprehended with reasonable probability."); *see also Ricard v. USD 475 Geary Cnty. Sch. Bd.*, 2022 WL 1471372, at *3 (D. Kan. May 9, 2022) ("In denying preliminary injunctive relief regarding the Preferred Names and Pronouns Policy, the Court specifically relies on statements made by the District that Plaintiff's current practice is not subject to discipline.").

VII. Conclusion

For the reasons set forth above, the Demurrer and Plea in Bar are OVERRULED as to Counts I, II, and IV, and SUSTAINED as to Counts III, V, VI, and VII and to the individual claims against Dr. Richards. The Motion for Temporary Injunction is DENIED. Plaintiffs are granted leave to file an Amended Complaint.

Mr. Wagner will prepare an Order incorporating these rulings and circulate it to Mr. Fisher for endorsement prior to tendering it to the Court. Plaintiffs have 14 days from the entry of the Order to file an Amended Complaint, and Defendants have 14 days from the filing of the Amended Complaint to file responsive pleadings.

Sincerely,

Andrew S. Baugher
Judge

ASB/
C: Court file
David A. Cortman, Esquire (via email only)
Daniel P. Rose, Esquire (via email only)
Ryan Bangert, Esquire (via email only)
Katherine Anderson, Esquire (via email only)
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