In the

Supreme Court of Virginia

At Richmond

Record No. 081691

COMMONWEALTH OF VIRGINIA, et al.,

Appellants,

– v. –

JOHN DOE,

Appellee.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND STATEMENT OF FACTS 1

STATUTE TO BE CONSTRUED 4

CONSTITUTIONAL PROVISION AT ISSUE 5

ARGUMENT

I. VA. CODE §18.2-370.5 IS CLEAR AND UNAMBIGUOUS. 5

II. THE CONSTITUTIONAL GRANT OF POWER TO A SCHOOL BOARD TO SUPERVISE THE SCHOOL SYSTEM IS NOT ABSOLUTE. 12

A. The General Assembly is the dominant political body in the Commonwealth. 12

B. §18.2-370.5 is an appropriate exercise of the Commonwealth's police power. 13

C. While the General Assembly's police power is plenary, a local school board, and any local governmental body, has only those powers that have been granted to it, either by the Virginia Constitution or by statute. 15

D. Article VIII, §7 of the Constitution of Virginia gives to local school boards the power to "supervise" their schools. . 17

E. The General Assembly's power to interfere in local School Board prerogatives is greatest when it is balancing competing interests. 27

CONCLUSION 38

CERTIFICATE 39

TABLE OF AUTHORITIES

Cases:

Arlington County v. White, 259 Va. 708, 528 S.E.2d 706 (2000) 35-37

Board of Sup'rs of Chesterfield County v. Chesterfield County School Board, 182 Va. 266, 28 S.E.2d 698 (1944) 18

Board of Sup'rs of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975) 16, 17

Board of Supervisors of Loudoun County v. Town of Purcellville, 276 Va. 419, 666 S.E.2d 512 (2008) 16

Board of Zoning Appeals of Fairfax County v. Board of Sup'rs of Fairfax County, 276 Va. 550, 666 S.E.2d 315 (2008) 16, 17

Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972); aff'd on other grounds 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973) 20

Brown v. Lukhard, 229 Va. 316, 330 S.E.2d 84 (1985) 7

City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001(1896) 16

Commonwealth v. County Board of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977) 19, 22

Commonwealth v. Zamani, 256 Va. 391, 507 S.E.2d 608 (1998) . . 8, 9, 11

County School Board v. Farrar, 199 Va. 427, 100 S.E.2d 26 (1957) 18

Dairyland Ins. Co. v. Sylva, 242 Va. 191, 409 S.E.2d 127 (1991) 11

DeFebio v. County School Board of Fairfax County,
199 Va. 511, 512-13, 100 S.E.2d 760 (1957),
appeal dismissed, 357 U.S. 218, 78 S.Ct. 1363,
2 L.Ed.2d 1361 (1958) 12, 19, 32, 33

Dennis v. County School Board of Rappahannock County,
582 F.Supp. 536 (W.D.Va. 1984) 20

Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959) 18

Howard v. County School Bd., 203 Va. 55, 122 S.E.2d 891 (1961) 18

Kellam v. School Bd. of City of Norfolk, 202 Va. 252,
117 S.E.2d 96 (1960) 17

Kirkpatrick v. Board of Sup'rs of Arlington County,
146 Va. 113, 136 S.E. 186 (1927) 13

Lucerne Cream & Butter Co. v. Milk Commission,
182 Va. 490, 29 S.E.2d 397 (1944) 11

R. Cross, Inc. v. City of Newport News, 217 Va. 202,
228 S.E.2d 113 (1976) 9

School Board v. Alexander, 126 Va. 407, 101 S.E. 349 (1919) 11

School Board v. Burley, 225 Va. 376, 302 S.E.2d 53 (1983) 19, 27

School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978) . 18, 19, 22

Turner v. Wexler, 244 Va. 124, 418 S.E.2d 886 (1992) 11

Watkins v. Hall, 161 Va. 924, 172 S.E. 445 (1934) 11

Statutes:

Va. Code Ann. §2.2-3112 28

Va. Code Ann. §2.2-3700 28

Va. Code Ann. §9.1-901 14

Va. Code Ann. §9.1-902(A) 1

Va. Code Ann. §9.1-902 . . . . . 1, 26

Va. Code Ann. §9.1-909 1

Va. Code Ann. §15.2-1100 16

Va. Code Ann. §18.2-119 . . . . . 6, 7

Va. Code Ann. §18.2-308 31

Va. Code Ann. §18.2-370.1 1

Va. Code Ann. §18.2-370.4 31

Va. Code Ann. §18.2-370.5 . . . . . passim

Va. Code Ann. §22.1-79.1 29

Va. Code Ann. §22.1-84 28

Va. Code Ann. §22.1-130.1 30

Va. Code Ann. §22.1-202 30

Va. Code Ann. §22.1-203 31

Va. Code Ann. §22.1-277.07 31

Va. Code Ann. §22.1-279.8 24

Va. Code Ann. §63.1-105 7

Virginia Constitution:

Article VIII, Section 7 . . . . . passim

Attorney General Opinions:

1982-83 Va. Op. Atty. Gen. 417 (Jan. 11, 1983) 21

1984-85 Va. Op. Atty. Gen. 269 (January 11, 1985) 22, 23, 30

1991 Va. Op. Atty. Gen. 1 (Sept. 12, 1991) 21

1999 Op.Atty.Gen. 101 (Jan. 11, 2000) 22

2003 Va. Op. Atty. Gen. 083 (Oct. 15, 2003) 31

2004 Op.Atty.Gen. 074 (Oct. 19, 2004) 21

2004 Op.Atty.Gen. 094 (April 7, 2005) 22

2005 Op.Atty.Gen. 093, 2006 WL 403822 (Feb. 08, 2006) 21

Other Authorities:

WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2005) 24

STATEMENT OF THE CASE AND STATEMENT OF FACTS

In 1999, John Doe had been convicted in Orange Circuit Court of 2 counts of taking indecent liberties with a child while in a custodial or supervisory relationship, in violation of Va. Code Ann. §18.2-370.1, an offense for which registration is required pursuant to Va. Code Ann. §9.1-902(A). At the time of the offenses, a violation of Va. Code Ann. §18.2-370.1 was a "non-violent" offense; by 2007, it had been deemed to be a "sexually violent offense" within the meaning of Va. Code Ann. §9.1-902. Mr. Doe served his jail time, and was released in 2000. He completed his term of supervised probation without incident.

In June, 2006, Mr. Doe obtained an order from the Orange Circuit Court, pursuant to Va. Code Ann. §9.1-909, that his duty to reregister every 90 days with the Sex Offender and Crimes Against Minors Registry was terminated, and the Order directed that the State Police remove Registry information on Petitioner from the Internet system. Mr. Doe had been examined by three competent evaluators of sex offenders, appointed by the Circuit Court, and was found to exhibit zero (0) risk factors of re-offending. The Circuit Court found by clear and convincing evidence that he does not suffer from any mental abnormality or personality disorder that

makes him a menace to the health and safety of others or significantly impairs his ability to control his sexual behavior. On July 1, 2006, however, new legislation took effect that put him back on the Internet Registry system.

§18.2-370.5 was adopted with an effective date of July 1, 2007, prohibiting Mr. Doe from going onto school property without a court order.

In August, 2007, shortly after the effective date of the newly enacted Va. Code Ann. §18.2-370.5, John Doe brought a petition in the Circuit Court for the City of Charlottesville, asking, pursuant to §18.2-370.5(B), that he be permitted to go onto the property of the Charlottesville City Schools for certain limited purposes related to the education of his step-son.

A hearing was held in the Circuit Court for the City of Charlottesville, at which the Honorable Edward L. Hogshire entered an order permitting Mr. Doe to go onto school property for the following purposes and the following conditions:

> ... it is hereby ORDERED that [John Doe] be permitted to come onto the grounds of any public school in Charlottesville at which his step-son N. K. is a student, as may be necessary to pick up or drop off his step-son, to participate in teacher conferences or to meet with faculty or staff, to be a spectator at any school

> performance at which his step-son is a participant, and for any other purpose for which the school administration may specifically consent to or request his presence. This Order shall be subject to the following conditions:
>
> 1. If [Mr. Doe] comes onto school property to pick up or drop off his step-son, he shall not get out of the motor vehicle except to report to the front office or unless asked to do so by the school administration.
>
> 2. If [Mr. Doe] wishes to come onto school property for some other reason (teacher-parent conferences, student performances, etc.), he shall only do so under the following conditions: that he notify the principal of the school at least 48 hours in advance of his desire to come onto school property; that the school principal shall have the discretion to refuse permission if there is some particular reason why his presence on school property would be inappropriate or a danger to others, which permission shall not be unreasonably withheld; that he come only for the specific activity, and that he leave school property promptly after the conclusion of the activity; and that he abide by all other terms and conditions of the school administration.
> (J.A. 4)

The School Board did not object to any particular term of the Order, but objected to any such order on the ground that the Order would violate Article VIII, §7 of the Constitution of Virginia.

STATUTE TO BE CONSTRUED

Va. Code Ann. §18.2-370.5 provides as follows:

§ 18.2-370.5. Sex offenses prohibiting entry onto school property; penalty.

A. Every adult who is convicted of a sexually violent offense, as defined in § 9.1-902, shall be prohibited from entering and being present, during school hours and during school-related and school-sponsored activities, upon any property he knows or has reason to know is a public or private elementary or secondary school or child day center property, unless (I) he is a lawfully registered and qualified voter, and is coming upon such property solely for purposes of casting his vote; (ii) he is a student enrolled at the school; or (iii) he has obtained a court order allowing him to enter and be present upon such property, and is in compliance with terms and conditions of the order. A violation of this section is punishable as a Class 6 felony.

B. Every adult who is prohibited from entering upon school or child day center property pursuant to subsection A may after notice to the attorney for the Commonwealth and either (I) the proprietor of the child day center, (ii) the superintendent of public instruction of the school division in which the school is located, or (iii) the chief administrator of the school if such school is not a public school, petition the juvenile and domestic relations district court or the circuit court in the county or city where the school or child day center is located for permission to enter such property. For good cause shown, the court may issue an order permitting the petitioner to enter and be present on such property, subject to whatever restrictions of area, reasons for being present, or time limits the court deems appropriate.

CONSTITUTIONAL PROVISION AT ISSUE

Article VIII, Section 7 of the Virginia Constitution provides as follows:

Section 7. School boards.

> The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

ARGUMENT

I

VA. CODE §18.2-370.5 IS CLEAR AND UNAMBIGUOUS.

A necessary implication of Appellants' argument in this case is the somewhat-buried suggestion that Va. Code Ann. §18.2-370.5 is ambiguous. (The argument is never made expressly, though at pages 19-21 of their Opening Brief, they discuss two different constructions of the statute, as though they are each equally permissible.) In fact, §18.2-370.5 is quite clear, particularly in its application to this case. Here, Mr. Doe was clearly one of those subject to the strictures of §18.2-370.5(A), in that he was prohibited by state law from going on to the property of any school, unless permitted by subsequent court order. §18.2-370.5(B) is also quite clear; this prohibition will

continue unless and until a court of competent jurisdiction enters an order "permitting the petitioner to enter and be present on such property, subject to whatever restrictions of area, reasons for being present, or time limits the court deems appropriate."

Appellants assert that §18.2-370.5 must be read such that it would have no effect on the School Board's pre-existing power to ban a person from school property and to charge that person with the misdemeanor of trespass in violation of §18.2-119. First, they argue that if one adopts the construction that Judge Hogshire adopted, there is a conflict between §18.2-370.5 and the School's power to prosecute a trespasser under §18.2-119. Then they assert that this conflict means that §18.2-370.5 is ambiguous, meaning that this Court must interpret the statute.

Appellants have the analysis backwards. The first step in the analysis is to look at the language of §18.2-370.5. The language is clear and unambiguous; it provides quite simply that a Circuit Court may enter an order fixing the circumstances under which a sex offender may come onto school property. We believe that that ends the inquiry; there is no ambiguity to construe away.

However, the Appellants' contention, at base, is that there is something

ambiguous about §18.2-370.5. They don't say what they think the ambiguity is; it seems that they think that the statute is ambiguous because it does not discuss the trespass statute (§18.2-119), or because it leads to a result that they find to be unconstitutional. Of course, if §18.2-370.5 had discussed §18.2-119 sloppily, that could certainly be an ambiguity that requires court construction. But that is not the case here.

Ambiguity vel non is to be found on the four corners of the statute. Ambiguity is not to be found by looking at extrinsic facts. In Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985), the Department of Welfare contended that Va. Code Ann. §63.1-105, read together with pertinent portions of the Appropriations Act, was ambiguous. This Court noted that "the Department does not contend that § 63.1-105, standing alone, is ambiguous. It argues, however, that the pertinent portions of the Appropriations Act affecting the provisions of the statute are unclear and ambiguous." The Court rejected the argument:

> Language is ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously. Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp., 229 Va. 132, ---, 327 S.E.2d 98, 101 (1985). An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. Ayres v. Harleysville Mut. Casualty Co., 172 Va. 383, 393, 2 S.E.2d 303, 307 (1939). If language is clear and unambiguous, there is no

> need for construction by the court; the plain meaning and intent of the enactment will be given it. School Board of Chesterfield County v. School Board of the City of Richmond, 219 Va. 244, 250, 247 S.E.2d 380, 384 (1978). When an enactment is clear and unequivocal, general rules for construction of statutes of doubtful meaning do not apply. Id. at 250-51, 247 S.E.2d at 384. Therefore, when the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted because we take the words as written to determine their meaning. City of Portsmouth v. City of Chesapeake, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964). And, when an enactment is unambiguous, extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists. See Cohan v. Thurston, 223 Va. 523, 525, 292 S.E.2d 45, 46 (1982).

Here, Appellants ask the Court to look past the clear and unequivocal language of §18.2-370.5 to what was NOT said, in search of confusion that might then be construed away. That is not consistent with this Court's rules of statutory construction. The Appellants' argument is, in essence, "Surely the General Assembly didn't mean that. Yes, it is clear and unambiguous, but they couldn't have meant to do that."

Of course, if the Court accepts at least part of the Appellants' argument, and finds that there is some conflict or ambiguity between §18.2-370.5 and §18.2-119, there are other rules of construction that come into play.

Statutes that seem to conflict must be construed so that each can have meaning. See Commonwealth v. Zamani, 256 Va. 391, 507 S.E.2d 608

(1998). In Zamani, the Court construed two statutes that seemed to be applicable to the process by which misdemeanor appeals are transferred to the Circuit Court, and found that the plain language of the statutes made sense, and rejected the Commonwealth's attempt to argue that "what the legislature must have intended" was a scheme that would have led to the conclusion that two statutes were in conflict. In other words, the only way to find an ambiguity was to look beyond the clear words to attempt to discern a broader structure to the statutory scheme that required construction. The Court affirmed the Court of Appeals in concluding that the two statutes were reconcilable by looking no further than their plain language. See also R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976)(a court cannot look beyond clear statutory language to other statutes that might arguably raise some ambiguity to find an excuse to construe the clear statutory language).

In this case, the trespass statute has an independent application for everyone not subject to the strictures of §18.2-370.5. For someone who has been ordered to stay away from school property because, for example, he or she has committed a crime on school property, the trespass statute still applies with full force. §18.2-370.5 applies to only a narrow class of people

– sex offenders. The statute not only prohibits sex offenders from going onto school property but also establishes a practice that vests in the Circuit Court the power to decide, on a case-by-case basis, with full consideration of the characteristics of the individual sex offender, whether there are circumstances under which he can come on to school property consistent with the health, safety and welfare of the community that are at the heart of every application of the police power. The statute asks judges to do what judges do – after notice to the school system, and after giving them an opportunity to participate, to make an individualized determination. Following the analysis of Zamani, Judge Hogshire's reading of the statute gives each meaning, by looking at their plain language.

Let's consider the alternative formulation. Appellants' interpretation that §18.2-370.5 leaves untouched the School Board's authority to prosecute for trespass means that the purpose of the statute is effectively gutted. Under Appellants' interpretation, the only thing that a sex offender does by going through the process established in §18.2-370.5(B) is to make sure that if he goes onto school property, he gets convicted only of a misdemeanor instead of a felony. That is an absurd result. Courts should avoid statutory interpretations that lead to absurd results.

Even if the Court felt that the plain meaning of §18.2-370.5 was as argued by Appellants, the manifest absurdity that would result means that the "courts cannot [adopt] a construction which amounts to holding the legislature did not mean what it has actually expressed." Watkins v. Hall, 161 Va. 924, 930, 172 S.E. 445, 447 (1934) (quoting Floyd v. Harding, 69 Va. (28 Gratt.) 401, 405 (1877)).

There are other principles of statutory interpretation that apply here as well.

When a specific statute (such as §18.2-370.5) arguably conflicts with a statute of general application (such as §18.2-119), the specific statute controls. Lucerne Cream & Butter Co. v. Milk Commission, 182 Va. 490, 29 S.E.2d 397 (1944); School Board v. Alexander, 126 Va. 407, 101 S.E. 349 (1919).

Courts are not to concern themselves with the motives or the wisdom of the legislature. Dairyland Ins. Co. v. Sylva, 242 Va. 191, 409 S.E.2d 127 (1991). A court can look only at what the legislature actually said, not at what the court thinks the legislature should have said. Turner v. Wexler, 244 Va. 124, 418 S.E.2d 886 (1992).

This Court may be persuaded that the General Assembly did not know

what it was doing during the 2007 session. This Court may have its own belief as to the wisdom of §18.2-370.5. But neither is a permissible basis for decision.

We recognize that the Appellants' hint here is an effort to give the Court an "out" – to duck the constitutional issue. We don't believe that the constitutional issue can be so neatly ducked.

II

THE CONSTITUTIONAL GRANT OF POWER TO A SCHOOL BOARD TO SUPERVISE THE SCHOOL SYSTEM IS NOT ABSOLUTE.

A. The General Assembly is the dominant political body in the Commonwealth.

The legislative power of the Commonwealth is vested in the General Assembly. CONSTITUTION OF VIRGINIA, Article IV, §1. This Court has noted that, unlike local governments, which have only such powers as are granted to them by the General Assembly,

> [t]he legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions.

DeFebio v. County School Board of Fairfax County, 199 Va. 511, 512-13, 100

S.E.2d 760 (1957), appeal dismissed, 357 U.S. 218, 78 S.Ct. 1363, 2 L.Ed.2d 1361 (1958).

B. §18.2-370.5 is an appropriate exercise of the Commonwealth's police power.

The police power of the Commonwealth – "the power to legislate in the interest of the public welfare, the public health and the public safety" – "is inherent in the legislature, and it may delegate the full power or any limited part thereof to the cities or counties of the State as it sees fit." Kirkpatrick v. Board of Sup'rs of Arlington County, 146 Va. 113, 126, 136 S.E. 186, 190 (1927). The General Assembly's power in this area is limited only by the U.S. Constitution and such provisions of the Virginia Constitution as may grant power to local governments or to other parts of the state government.

The police power includes the power to define crimes and to provide for their punishment. Although under some circumstances that General Assembly has granted to localities the power to punish certain violations of law, they do so only because the General Assembly has granted them that power. Only the General Assembly punishes felonies. Only the General Assembly provides for terms of probation. Only the General Assembly maintains a Sex Offender Registry. And the General Assembly enacts

legislation on all of these subjects in furtherance of its power to provide for the public health, safety and welfare.

When the General Assembly established the Sex Offender Registry (see Va. Code Ann. §9.1-901 et seq.), it did not do so to establish new educational policy. It created the Sex Offender Registry as the first step of what has turned out to be many steps to regulate the lives of those who have been convicted of sex crimes, pursuant to its police power. When the General Assembly made it a crime to trespass on the real property of another (see Va. Code Ann. §18.2-119), it did so pursuant to its police power. When the General Assembly made it a crime for someone on the Sex Offender Registry to go onto school property (see Va. Code Ann. §18.2-370.5(A)), it did so pursuant to its police power. When the General Assembly established a procedure to permit a sex offender to go onto school property with a court order (Va. Code Ann. §18.2-370.5(B)), it did so pursuant to its police power.

When the General Assembly adopted §18.2-370.5, it was exercising its police power, and it was doing so appropriately in pursuit of the public welfare, public health and public safety.

C. While the General Assembly's police power is plenary, a local school board, and any local governmental body, has only those powers that have been granted to it, either by the Virginia Constitution or by statute.

This principle is tied in with, and is really just another expression of, the relationship between the Commonwealth and local governments as reflected in the so-called Dillon Rule:

> In City of Richmond v. Board of Supervisors, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958), we stated the general "Dillon's rule" as follows:
>
> > It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied. Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001, 57 Am. St. Rep. 822 [1896]; Wallace v. Richmond, 94 Va. 204, 26 S.E. 586, 36 L.R.A. 554 [1897]; Railway Co. v. Dameron, 95 Va. 545, 28 S.E. 951 [1898]; Duncan v. City of Lynchburg, 2 Va. Dec. 700, 34 S.E. 964, 48 L.R.A. 331 [1900].
> >
> > However, we also stated the specific rule to be followed when the question is narrowed to consider the scope of a municipal corporation's extraterritorial powers. "A municipal corporation is a mere local

> agency of the State and has no powers beyond the corporate limits except such as are clearly and unmistakably delegated by the legislature." Id.

Board of Supervisors of Loudoun County v. Town of Purcellville, 276 Va. 419, 436-37, 666 S.E.2d 512, 520-21 (2008). The principle of the Dillon Rule has been followed in Virginia since at least 1896 (see City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001, 1002 (1896)), and although not set forth explicitly in the Virginia Constitution, it undergirds the relationship between the state and local governments so completely that it must be seen as a rule of at least quasi-constitutional force.[1] The principle of the Dillon Rule is now also embodied in the Virginia Uniform Charter Powers Act (Va.Code Ann. § 15.2-1100 et. seq.), but the Dillon Rule controlled the relationship between the state and local governments before that statute was passed.

> The corollary to Dillon's Rule does not refer to sources from which a municipal corporation derives its power but to the application of the rule to other public bodies such as boards of supervisors and school boards in addition to municipal corporations. See Board of

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[1] This Court noted in Board of Sup'rs of Fairfax County v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 456 (1975), that the Commission on Constitutional Revision had recommended including in the new Constitution a provision to reverse the Dillon Rule as to cities and certain counties; this recommendation was rejected by the General Assembly, and was not included in the 1971 Constitution. "We must conclude, therefore, that, regardless of its fate in other jurisdictions, Dillon's Rule remains in effect in this state."

> Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455-56 (1975) (boards of supervisors); Kellam v. School Board, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960) (school boards).

Board of Zoning Appeals of Fairfax County v. Board of Sup'rs of Fairfax County, 276 Va. 550, 554, 666 S.E.2d 315, 317 (2008).

Local governments, and local school boards, have only those powers conferred by the Commonwealth, either by statute or in the Virginia Constitution.

D. Article VIII, §7 of the Constitution of Virginia gives to local school boards the power to "supervise" their schools.

Article VIII, §7 of the Constitution of Virginia provides that "the supervision of schools in each school division shall be vested in a school board..." There is no indication in the Constitution of what constitutes "supervision." This Court, though, has noted that the School Boards, while being given the authority of "supervision" of the public schools, are still limited in their authority.

> School boards thus established constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.

Kellam v. School Bd. of City of Norfolk, 202 Va. 252, 254, 117 S.E.2d 96 (1960).

The decisions of this Court have not shed much light on the parameters of the power to "supervise" without interference from the General Assembly. This Court has found certain kinds of school division responsibilities to be so fundamental to the operation of the school division that any interference with them constitutes impermissible interference with the School Board's power of "supervision":[2]

- the decision whether to sell school property (see Howard v. County School Bd., 203 Va. 55, 58-59, 122 S.E.2d 891, 895 (1961));
- the decision of how to hire and fire employees (see School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978));
- the decision of how to spend its allotted funds (see Board of Sup'rs of Chesterfield County v. Chesterfield County School Board, 182 Va. 266, 28 S.E.2d 698 (1944));
- the decision of how to spend the proceeds of school construction bonds (see County School Board v. Farrar, 199 Va. 427, 433, 100

[2] Of course, the attempt of the General Assembly in 1956 to defeat school integration by giving the Governor the power to completely take over local school systems was held to be unconstitutional in Harrison v. Day, 200 Va. 439, 452, 106 S.E.2d 636, 646 (1959).

S.E.2d 26, 30 (1957)).

In Parham, the Court wrote that "the function of applying local policies, rules, and regulations, adopted for the management of a teaching staff, is a function essential and indispensable to exercise of the power of supervision vested by § 7 of Article VIII." 218 Va. at 958, 243 S.E.2d at 473. The Court held the binding arbitration provision unconstitutional because such a provision "effectively divests the School Board of a function indispensable to its § 7 power of supervision and transfers to an arbitration panel the authority to make a final and binding decision upon the application of the policy." Id.

On the other hand, this Court has held that the legislature has not given authority to the school boards to take certain actions which the school boards argued were necessarily a part of their "supervisory" authority – see, e.g., Commonwealth v. County Board of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977) (school boards may not enter into collective bargaining agreements); School Board v. Burley, 225 Va. 376, 302 S.E.2d 53 (1983)(school boards may not enter into binding oral contracts for the sale of land, but must adhere to state statutes requiring written contracts); DeFebio, supra. DeFebio involved the validity of an act of the General Assembly placing in the hands of a state pupil placement board the authority to assign

pupils to particular schools. This Court held that such a statute did not run afoul of Section 133 of the Virginia Constitution, the predecessor to Article VIII, Section 7:

> Section 133 of the Virginia Constitution, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised.

Id.

In addition to the decisions of this Court, cited above, the United States District Court for the Western District of Virginia has held that state statutes that mandated certain deadlines for nonrenewal of contracts are permitted under Article VIII, §7 (Dennis v. County School Board of Rappahannock County, 582 F.Supp. 536 (W.D.Va. 1984)). The Fourth Circuit has held that a school board has no power to levy taxes or to appropriate funds. Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972); aff'd on other grounds 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973).

In addition, there are many Attorney General's opinions stating the opinion that certain school board actions are not permitted. Those opinions are perhaps best summarized in an opinion from 1991:

The supervisory power invested in local school boards by Article

> VIII, § 7 has never been interpreted to provide such boards with absolute autonomy concerning the internal affairs of their respective school divisions. To the contrary, the Supreme Court of Virginia has recognized that the supervisory power of school boards is not plenary.

1991 Va. Op. Atty. Gen. 1 (Sept. 12, 1991). These decisions are usually based explicitly on some statement of the Dillon Rule, and rarely specifically cite Article VIII, §7, but the decisions would make no sense if Article VIII, §7 gave absolute power to the local school boards, independent of the General Assembly:

- When a school has barred someone from coming on school property, but that person is a registered voter, that person may come on school property for the purpose of voting; 2005 Op.Atty.Gen. 093, 2006 WL 403822 (Feb. 08, 2006).
- A school board may not enact a stricter nepotism policy than that permitted by state statute; 1991 Op.Atty.Gen. 1 (Sept. 12, 1991).
- The grievance procedures and disciplinary policies set forth in Va. Code Ann. §§22.1-308 through 22.1-315 are applicable to school employees. 1982-83 Va. Op. Atty. Gen. 417 (Jan. 11, 1983).
- A school board may not loan money to the Board of Supervisors; 2004 Op.Atty.Gen. 074 (Oct. 19, 2004).

- A school board does not have the authority to charge students or their parents for drug testing. 1999 Op.Atty.Gen. 101 (Jan. 11, 2000).
- A locality may not enact ordinances imposing civil or criminal penalty against a parent for providing false residential information to enroll a child in the local school system and requiring parent to pay tuition or educational costs for such child. 2004 Op.Atty.Gen. 094 (April 7, 2005).
- The General Assembly may enact a statute setting out the earliest day for the opening of a school year. 1984-85 Va. Op. Atty. Gen. 269 (January 11, 1985).

Nowhere are the cases as close as in the opinions concerning whether, and to what extent, the General Assembly can control a School Board's actions in hiring or firing employees. On the one hand, in Parham, the Court held that a local School Board did not have to follow State Board of Education regulations on binding arbitration of employee disputes because those regulations interfered with the local School Board's authority; on the other hand, in Commonwealth v. County Board of Arlington County, the Court held that a local School Board's autonomy did not extend to entering into a

collective bargaining agreement. The Attorney General has opined that, notwithstanding the presumably clear authority of the School Board to hire whom it chooses, the School Board did not have the authority to promulgate a nepotism policy that is broader than the nepotism policy set forth by state law; the Attorney General has also opined that, notwithstanding the presumably clear authority of the School Board to fire whom it chooses, it must comply with the state statutes governing grievances, suspensions and discipline.

The Attorney General opinions often define the test for constitutionality as being "whether a given function is essential and indispensable to local school board supervision," a test that "necessarily requires a case-by-case analysis." 1984-85 Va. Op. Atty. Gen. 269 (January 11, 1985). If a General Assembly enactment represents "an intolerable intrusion into the prerogatives reserved to the local school boards by Art. VIII, § 7", it will be disapproved.

Employee hiring, firing and discipline would seem to be "essential and indispensable to local school board supervision," but some employment measures are thought to violate Article VIII, §7, while others do not. Are collective bargaining and arbitration of employment disputes "intolerable

intrusions" into local prerogatives? If so, then why are state-mandated grievance and termination procedures **not** "intolerable intrusions"?

The Appellants have asserted that the essential power of school boards that is under attack with §18.2-370.5 is the power to control who comes onto school property. (See Opening Brief at 11-13). In support of that notion, they cite Va. Code Ann. §22.1-279.8 (see fn. 5), a statute that imposes on schools the obligation to conduct a school safety audit, and to maintain emergency management plans. It is curious that the Appellants cite that statute in particular, because if there is any statute that interferes with the Appellants' power to "supervise" the school system, it should be this statute.

"Supervision" is defined as the act of overseeing, directing, or managing employees in the performance of work. WEBSTER'S NEW WORLD COLLEGE DICTIONARY (2005). §22.1-279.8 says exactly how the schools shall carry out their supervision function – they must perform a school safety audit, they must make copies available on request, they must develop and review annually plans for crisis management, emergency management and medical emergency response plans. What greater interference could there be with the school board's power to "supervise" than to tell the school boards exactly how they must "supervise" the schools?

Appellants complain about certain conditions in the Circuit Court's order in this case. For example, they complain that the order gives Mr. Doe the right to come onto school property to deliver and pick up his son. App. 4-6.[3] It is important to note that at the Circuit Court hearing, the Appellants did not challenge any detail of the order. In fact, Appellants specifically chose not to negotiate any of the details of the order, in effect waiving their right to object to any specific provision of the order. Appendix at 16. Judge Hogshire, finding from the psychological reports that were introduced in the case that Mr. Doe presented no risk factors to re-offend, concluded that the order was reasonable.

> If there is ever going to be a situation where this is going to be allowed by the court, this would be it. I mean, I don't know what else it could take because we've had this thorough vetting of – of his risk factors, which have all come out that he doesn't present a risk.

Appendix at 20-21.

In fact, before this action was brought, the Charlottesville School System's policy on allowing sex offenders onto school property simply parroted §18.2-370.5. Until June, 2008, the policy stated as follows:

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[3] They don't mention that he cannot get out of his car when he does so, unless it is to go to the School office.

> No adult who has been convicted of a sexually violent offense, as defined in Va. Code § 9.1-902, may enter or be present, during school hours, or at school sponsored events, upon any public school property, unless
>
> • he/she is a lawfully registered and qualified voter, and is coming upon such property solely for purposes of casting his vote;
> • he/she is a student enrolled at the school; or
> • he/she has obtained a court order allowing him to enter and be present upon such property, and is in compliance with the terms and conditions of the order.

http://www.ccs.k12.va.us/uploads%5CBusiness%20Session%20June%2019%202008.pdf (Accessed March 23, 2009). The school's present policy, most recently revised on at a School Board meeting on June 19, 2008, issued on June 22, 2008, a month after the issuance of the order in this case, is substantially similar, and provides as follows:

> 6. Parents of Students. When the school division learns that a parent is a registered sex offender, the parent will be notified in writing that he or she is barred from being present on school property or at school-sponsored events without the express written approval of the student's principal, unless such parent is otherwise prohibited by law or court order from being present on school property. Such approval must be obtained in advance of the proposed visit. When a parent, who is a registered sex offender, is permitted at school or at school functions, he or she will be monitored to ensure that he or she does not come into contact with any children other than his or her own children.

http://www.ccs.k12.va.us/policy/SectionK/KN.pdf and http://www.ccs.k12.va.us/uploads%5CFinal%20Draft%20June%2019,%20

2008%20Minutes.pdf (Accessed March 23, 2009).

E. The General Assembly's power to interfere in local School Board prerogatives is greatest when it is balancing competing interests.

In trying to parse the cases and Attorney General's opinions on the question of when the General Assembly can interfere with a School Board's operation of its schools, one theme emerges. When the General Assembly is attempting to balance educational interests against other competing interests, its legislative action will be upheld, even if it affects the way in which the School Board "supervises" its school division. But if the General Assembly, or a Board of Supervisors, is just trying to meddle in the School Board's business, that outside interference will be struck down. To look at it from the opposite perspective, if a state statute has a rationale that involves balancing competing interests, some of which may have nothing to do with education, the School Board will have to comply.

The easiest case in this respect is School Board v. Burley, 225 Va. 376, 302 S.E.2d 53 (1983), where this Court held that a school board must comply with state statutes requiring that land sales be done pursuant to a written contract. This decision had nothing to do with educational policy, and everything to do with upholding the salutary purposes of the Statute of Frauds

– particularly where school property is involved.

And there are literally hundreds of statutes that have nothing to do with educational policy that surely apply with equal force to local school boards.

- Va. Code Ann. §2.2-3112 requires any state or local governmental official disqualify himself from participating in a transaction in which he has a financial interest. Surely a school superintendent can be barred from doing business with his own company, Article VIII, §7 notwithstanding.
- The Virginia Freedom of Information Act, Va. Code Ann. §2.2-3700 et seq., by its terms applies to school boards. Surely the school boards must comply, Article VIII, §7 notwithstanding.
- If a school board wishes to buy insurance for its buildings, it may be required to use an insurance company authorized to do business in the Commonwealth. Va. Code Ann. §22.1-84.

Virtually every provision in Title 2.2 dealing with the administration of government, and virtually every provision in Title 22.1 dealing with education and local schools, represents, at some level, a degree of interference with the operation of, or "supervision of", the school division. Some, like those above, are purely administrative, but they nonetheless impose burdens on the school

boards even though there does not appear to be any issue of educational policy. The administrative procedures set forth in the statutes are surely "essential and indispensable" for school board supervision; by that test, they should be deemed to violate Article VIII, §7. On the other hand, maybe they are not "intolerable intrusions," so they should be permitted. If the test is whether the statute sets up an intrusion that is "intolerable," that suggests that the standard will be entirely subjective – not a good basis for a Constitutional decision. (Presumably the Constitutional answer does not depend on the good humor of the school principal in question.)

As any observer of the Virginia political system will recognize, many other provisions in the Virginia Code that affect the schools how they are "administered" or "supervised." These bills have often been the most contentious and bitterly fought bills of the General Assembly session. These bills virtually always involve attempts by the General Assembly to balance educational interests against other rights and interests.

- Va. Code Ann. §22.1-79.1 – half-jokingly referred to as the "King's Dominion Relief Act" – tries to fix the beginning of the school year. The purpose of the bill was to try to keep schools from opening before Labor Day, so that tourism businesses like King's

Dominion could have student labor throughout their busiest season. The Attorney General has given an opinion that this statute does not violate Article VIII, §7. 1984-85 Va. Op. Atty. Gen. 269, 1985 WL 192329 (Jan. 11, 1985).

- Pursuant to Va. Code Ann. §2.2-3804, if a public school gives information to its students about educational or occupational options, military recruiters must have equal access to the students. The Code has another, slightly different formulation as well, making it mandatory to allow access by military recruiters. See Va. Code Ann. §22.1-130.1. These statutes are justified as representing a way to assure that students are adequately informed about all educational or occupational options, but they had their roots in a political decision rather than a specifically educational decision.
- Va. Code Ann. §22.1-202 requires that students recite the Pledge of Allegiance daily. Again, this statute, and the one that follows, represent attempts to find a middle ground in contemporary culture wars, rather than a sense that educational factors require them.

- Va. Code Ann. §22.1-203 requires a daily moment of silence in the classroom, specifically to permit "the free exercise of religion."
- Va. Code Ann. §18.2-308 provides that a student may bring a firearm onto school property, provided that it is unloaded and locked in a trunk. However, Va. Code Ann. §22.1-277.07 provides that a student who does so "shall" be suspended for one year. In 2003, a Attorney General's opinion stated that a school division was not required to suspend a student who brought a gun to school, the seemingly mandatory language of Va. Code Ann. §22.1-277.07 notwithstanding, but that the school division could nonetheless punish a student who brought a firearm onto school property. 2003 Va. Op. Atty. Gen. 083 (Oct. 15, 2003).
- Va. Code Ann. §18.2-370.4 prohibits certain sex offenders from volunteering in a school.
- Va. Code Ann. §18.2-370.5(A) prohibits certain other sex offenders from coming onto school property during school hours and during school activities.
- Va. Code Ann. §18.2-370.5(B) permits the sex offenders referred to in §18.2-370.5(A) to come onto school property with a court

order. (This is the statute involved in this case.)

Let's consider the interest of the school system in each of these bills.

Why is not the decision about the length of the school year, or when the school year shall start, just about the most fundamental decision to "supervise" the schools that a school board might make?

If the school system asserts an unfettered power to secure the schools from dangerous influences by deciding who comes onto its property, why is the General Assembly allowed to tell the schools that they must allow military recruiters on school grounds? And why, under that analysis, can the General Assembly tell local schools that a student should be allowed to have a concealed weapon in the trunk of his car on school grounds? Why should the General Assembly be allowed any voice at all on this? Why is not Article VIII, §7 invoked to tell the General Assembly to stop interfering with the "supervision" of who can bring firearms onto school grounds?

This Court held in DeFebio that the pupil placement board was constitutional because it only delegated the decision about who to educate;

it didn't tell the schools how to educate.[4] Under this logic, presumably the General Assembly can also tell the schools when to educate. At some point in following this line of analysis, the analysis loses its force.

We suggest that there is a better, more intellectually straightforward approach.

Rather than focusing this decision on the label that we put on the function that the General Assembly is regulating – is this function "indispensable?" "Essential?" – we suggest that the Court should think about making its decisions along lines of institutional competence.

What will be apparent with all of these statutes is that there is a reason other than simply educational policy behind the enactment. In virtually every case, the impetus for the bill did NOT come from educational professionals; in most cases the impetus was political. Those who have read the newspapers during the legislative sessions in the past 20 years will remember

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[4] A cynic might note that DeFebio, like some of the other cases here, dealt with the highly politically charged issue of integrating schools, and it is possible that the logic of some of those opinions may be less favored in the modern, post-Massive Resistance era. The decisions may well suggest proof of the adage that "hard cases make bad law." They may also reflect a recognition by this Court that where the General Assembly weighs competing societal interests, its policy decisions – which may be decisions of broad social policy rather than educational policy – are on sounder footing.

many of the debates that led to these statutes being passed. In each case, the General Assembly made its decision by balancing broader societal interests with educational factors. For example, the torturous debate over the conflicting statutes dealing with guns and schools involved advocates of Second Amendment rights arguing that students who wanted to be free to go hunting after school should be allowed to do so. It is hard to make an argument that the legislative authority for enacting standards of quality is authority for passing such a law.

In the case of §18.2-370.5, the statute was introduced by Delegate Robert B. Bell, in response to a situation in Madison County in December, 2005, where a sex offender played Santa Claus at an elementary school. There was no allegation that the sex offender who played Santa Claus caused any harm to anyone at the school, or that the quality of education was in any way affected. The rationale for the statute, according to Delegate Bell's public comments at the time, was a matter of public safety than educational policy.[5]

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[5] See http://www.charlottesvillenewsplex.tv/schools/headlines/4920166.html , accessed March 22, 2009, or http://morningcoffee.wordpress.com/2006/12/14/virginia-proposal-bars-violent-sex-offenders-from-schools-during-school-hours/ , accessed March 22, 2009.

There is, of course, nothing illegitimate about a public safety rationale for a law that affects schools; the point is that when the General Assembly considers public safety and educational policy, it is doing what legislatures do every day – it is weighing competing demands and balancing competing interests.

The "institutional competence" of the General Assembly is to balance different rights and interests in implementing the police power that it is given under our Constitution.

The General Assembly gave to the courts the power to do what they do – to make individualized determinations about the dangerousness of sex offenders, and to make individualized determinations about the circumstances under which they should be permitted to be near children.

It is instructive to look at another decision of this Court that dealt with a similar kind of balancing – in Arlington County v. White, 259 Va. 708, 528 S.E.2d 706 (2000), this Court held that the local government of Arlington County did not have authority to extend health care benefits to unmarried domestic partners of its employees. When the case was accepted, the question on which review was granted was:

> Does Arlington County have the legal authority to recognize common law marriages or "same-sex

> unions" by conferring certain health insurance benefits upon domestic partners of County employees who are engaged in these relationships?

259 Va. at 716, 528 S.E.2d 710-11. The Court did not address the question, and instead concluded that the County did not interpret "dependent" in a reasonable fashion, thereby violating the Dillon Rule. In deciding the case on that basis, the Court noted that "we need not address the Taxpayers' argument that the County has attempted to legislate in the field of domestic relations." 259 Va. at 713, fn.4, 528 S.E.2d at 708, fn. 4.

The separate opinion by Justice Hassell, joined by Chief Justice Carrico and Justice Compton, noted that the majority opinion did not squarely address the issue on which review was granted. The separate opinion would have based its decision on the responsibility that is uniquely given to the General Assembly, and not to the County, "of recognizing and defining marital relationships." 259 Va. at 721, 528 S.E.2d at 713.

Suppose that a school division attempted to do the same thing that Arlington County did – to extend health care benefits to unmarried domestic partners of the school division employees. Suppose further that a declaratory judgment action was brought, challenging that decision and citing Arlington County v. White. Could the school division defend its actions by saying, "But

this is a decision that we are making pursuant to our authority to supervise the school division?"

It would stand to reason under the caselaw of this Court that if the Arlington County Board of Supervisors had no authority to establish such a health care plan, the Arlington County School Board would not have the authority, either. This is consistent with the decisions of this Court that a "corollary" to Dillon's Rule provides that the constraint on the local authority applies to local decision-making bodies such as School Boards.

Justice Hassell's opinion in Arlington County v. White provides a useful starting point for the analysis required in this case.

Just as the General Assembly is given the responsibility to define marriage and to set the policy of the Commonwealth of matters of domestic relations, so is the General Assembly the only body that has the power to define, or to punish, crimes.

What this case and Justice Hassell's opinion in Arlington County v. White have in common is that in both situations, the fundamental question is whether the local government should be able to substitute its judgment for the judgment of the General Assembly on an issue for which the General Assembly uniquely has responsibility.

When the General Assembly passed §18.2-370.5, it was doing what legislatures do. It was balancing interests in using its police power to promote the general health, safety and welfare.

CONCLUSION

This statute is constitutional, and it was applied constitutionally to Mr. Doe's petition. Judge Hogshire's order was a reasonable order, entered after notice to the School Board, which chose not to participate in negotiating the terms of the order. Judge Hogshire's decision should be affirmed.

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CERTIFICATE

I hereby certify that the requirements of Rule 5:26(D) have been complied with – that fifteen copies of the foregoing Appellee's Brief have been filed with the Clerk via hand delivery and that an electronic copy has been filed via email at scvbriefs@courts.state.va.us.

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This March 23, 2009.

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