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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 160777

ANDREA LAFFERTY, JACK DOE, a minor, by and through JOHN DOE and JANE DOE, his parents and next friends, JOHN DOE, individually, and JANE DOE, individually,

Appellants,

v.

SCHOOL BOARD OF FAIRFAX COUNTY,

***Appellee*.**

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents only two issues: (1) may a student use the Declaratory Judgment Act to challenge a school board's authority to adopt policies that are not alleged to violate any of his rights and that have not been enforced against him individually? and (2) may his parents and a citizen without any children in the school division also seek such a declaratory judgment? The trial court correctly ruled that Plaintiffs could not. Plaintiffs did not seek adjudication of any of their rights. They also did not have a right under Virginia's substantive law to challenge school board decisions by which they were not aggrieved. They could not use the Declaratory Judgment Act to create such a right.

Plaintiffs' attempts to get this Court to decide the merits of their claims violate the Rules of this Court. Plaintiffs argued to the trial court that it should not reach the merits. It did not do so. Under Rule 5:25, they cannot now argue the opposite on appeal. Plaintiffs also did not raise the merits in any of their assignments of error. Rule 5:17 bars them from raising these new arguments now.

By failing to address it in their Brief, Plaintiffs also have abandoned their fifth Assignment of Error, which claimed that the trial court should have allowed them an opportunity to amend. They did not ask the trial

court for leave to amend, and have yet to identify any basis on which they would have amended their Complaint. Because the trial court found it did not have jurisdiction, the case was a nullity. Plaintiffs also have yet to identify any substantive law that gives them a right to challenge school board policies that are not alleged to violate their rights and have not been applied to them individually.

The trial court's dismissal of the Complaint should be affirmed.

NATURE OF THE CASE

Plaintiffs seek to invalidate policies adopted by the Fairfax County School Board that prescribe how students, employees, and applicants will be treated within the school division. They sought declaratory judgments that provisions in the School Board's nondiscrimination policy and student code of conduct exceed its authority. One Plaintiff, Andrea Lafferty, is a taxpayer who lives in Fairfax County and alleges no other relationship with the school system. Jack Doe is a high school student who alleges that he is distressed and concerned about the policies. John and Jane Doe are Jack's parents, and they bring the suit for their child and for themselves. But what legal right of theirs was to be adjudicated? And on what basis do they have an actual case or controversy with the School Board? That is what this appeal is about.

MATERIAL PROCEEDINGS BELOW

On November 6, 2014, the School Board voted to add "sexual orientation" to its written nondiscrimination policy that was first enacted on July 1, 1986. (JA 9 ¶¶ 38-40.)[1] On May 7, 2015, the School Board again voted to amend its nondiscrimination policy by adding "gender identity" to its reach. (JA 13 ¶¶ 4, 57, 64.) At the same meeting, it voted to approve a number of revisions to its Student Rights and Responsibilities booklet. (JA 13 ¶ 65.) Those revisions included adding "sexual orientation," "gender identity," and "gender expression" to the anti-harassment provisions in the student code of conduct. (JA 73, 98.)

On December 21, 2015, Plaintiffs sued in circuit court alleging that the School Board's changes to its nondiscrimination policy and student code of conduct were *ultra vires* and void, and seeking declaratory and injunctive relief. (JA 1-25.)

On January 12, 2016, the School Board filed a demurrer and motion to dismiss for lack of jurisdiction. (JA 103-08.)

On February 19, 2016, the trial court heard oral argument on the motion. It found that it lacked jurisdiction under the declaratory judgment and injunction statutes. (JA 197:15–201:1.) It rejected Plaintiffs' theory of

[1] Citations to the Joint Appendix are indicated as "JA ___."

"taxpayer standing" for Lafferty and Jane and John Doe. (JA 197:21–199:4.) It also found that Jack's subjective concerns and feelings, including distress and anxiety, did not create any justiciable case or controversy:

> I do not find that his disappointment with or anxiety or confusion or distress over the action of the school board constitutes a case or controversy or an adjudication of a right that gives him access to the declaratory judgment powers and the injunctive relief powers that this court possesses. (JA 199:13–18.)

It dismissed the case without leave to amend. (JA 203-04.)

STATEMENT OF FACTS

Because this case was decided on a motion to dismiss and demurrer and on the basis of lack of jurisdiction, there was no factual development below. The School Board agrees with Plaintiffs that the well-pled facts in the Complaint and all reasonable inferences therefrom must be taken as true. But Plaintiffs have distorted and mischaracterized their own pleadings—which they are not allowed to do and which the School Board will address below.

Plaintiffs have misstated the record in two key respects. First, they contend on brief that "Jack Doe is a student in FCPS *who suffers* injury and *discipline* by the Board's unlawful act." (Brief of Appellants ("Br.") at 2 (emphasis added).) But Paragraphs 16 and 17 of the Complaint, which

Plaintiffs cite as purported support for this claim, did not allege that Jack had suffered or was suffering any discipline. (JA 4 ¶¶ 16-17.) Instead, those paragraphs alleged only that John and Jane Doe were proceeding pseudonymously "because of the sensitive matter of the proceeding and the likelihood of repercussions to [their] son as a continuing student resulting from his family's challenge of the Board's actions." (*See id.*) The Complaint's only allusion to discipline was the allegation that Jack Doe was concerned and distressed about the speculative *possibility* of discipline under the student code of conduct. (*See* JA 14 ¶¶ 70, 72.)

Second, Plaintiffs also claim in their Brief—without any citation to the record—that "Jack Doe … is now forced to share private restrooms for boys with girls…." (Br. at 5.) But the Complaint did not make any such allegation. (*See* JA 1-25.) Instead, it alleged only Jack was concerned about what the decision to add "gender identity" to the nondiscrimination policy and student code of conduct "will mean" with respect to "restrooms, locker rooms and other intimate spaces." (JA 14 ¶ 71.)

Not only was there no allegation that Jack had been disciplined or was being made to share restrooms with girls, but Plaintiffs also acknowledged in the trial court that they *could* not so allege: The School Board contended that there was no justiciable controversy with Jack

because there was no allegation that the code of conduct or nondiscrimination policies had been enforced against him individually. (JA 117, 121.) It also contended that Plaintiffs could not make such an allegation because no facts existed to support it. (JA 15-17.) Plaintiffs did not claim otherwise. (*See* JA 139-56.) Instead, they argued only that Jack's concerns and feelings about the *potential* of discipline was sufficient to create a justiciable controversy. (*Id.*)

Similarly, the School Board argued that Jack's concerns about having to share restrooms and locker rooms were too speculative because he "may never find himself in a restroom or locker room 'with someone who appears to be a girl.'" (JA 121.) Again, Plaintiffs did not argue otherwise. Instead, they insisted that his concerns and feelings about the mere *prospect* of such events were sufficient. (*See* JA 139-56.)

Plaintiffs' claims in their Brief that Jack "suffers … discipline" and that he is "forced to share private restrooms for boys with girls," therefore, are flatly contradicted by the record.

AUTHORITIES AND ARGUMENT

I. Plaintiffs Did Not Argue The Merits Of Their Claims Below, And They Cannot Do So For The First Time On Appeal.

Despite the procedural posture of this appeal, Plaintiffs begin their legal argument with, and spend 21 pages on arguing the substance of their

claims. (*See* Br. at 9-14, 25-29, and 43-52.) But Rules 5:25 and 5:17 forbid this tactic.

First, Plaintiffs did not ask the trial court to decide the merits of the claims. Indeed, they argued that the trial court *could not* and *should not* decide the merits of their claims on the motion to dismiss and demurrer. (JA 140; JA 197:2-9.) Nor did the trial court do so. (*See* JA 197:15–201:1.)

Because Plaintiffs did not ask the trial court to decide the substantive issues, and the trial court did not do so, this Court cannot decide their substantive claims in the first instance on appeal. Rule 5:25; *see Brandon v. Cox,* 284 Va. 251, 256, 736 S.E.2d 695, 697 (2012) ("Because the purpose of Rule 5:25 is to ensure that the trial court has the opportunity to rule upon an argument, the record must affirmatively demonstrate that the trial court was made aware of the argument."); *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 526, 636 S.E.2d 416, 420 (2006) ("The purpose of Rule 5:25 is to afford the trial court the ability to address an issue. If that opportunity is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal.").

Second, Plaintiffs' substantive arguments are not within the scope of any of their Assignments of Error. Their Brief attempts to shoehorn their

substantive Dillon Rule arguments into their Assignment of Error 2, but that said only: "The Circuit Court erred in concluding that Jack Doe failed to allege an actual controversy sufficient to invoke the Circuit Court's jurisdiction." (Br. at 8.) Nothing about the Dillon Rule or the scope of the School Board's authority was mentioned in their Assignment of Error 2.

Plaintiffs similarly try to squeeze into Assignment of Error 5 their argument that the Court "should engage in plenary review and determine the merits of the pure questions of law presented by petitioner's (sic) claims." (Br. at 43.) But that assignment of error stated only: "The Circuit Court erred in dismissing the Complaint without ever affording Plaintiffs the opportunity to amend." (*Id.* at 9.) That assignment of error bears no relationship to their new argument that urges the Court to reach the merits of their claims.[2]

The merits of Plaintiffs' claims are also not included within Assignments of Error 1, 3, or 4. Nor were their substantive arguments made in their Petition for Appeal to this Court.

Under Rule 5:17 and settled law of this Court, arguments that are not within the scope of any assignment of error cannot be considered. Rule

[2] As explained in Section V below, Plaintiffs' Brief does not present any argument why the trial court allegedly erred in dismissing the Complaint without leave to amend—which was their actual Assignment of Error 5.

5:17(c)(1); *see, e.g.*, *Lawlor v. Commonwealth*, 285 Va. 187, 258, 738 S.E.2d 847, 888 (2013) ("We consider only arguments within the scope of the assignment of error."); *Kirby v. Commonwealth*, 264 Va. 440, 444-45, 570 S.E.2d 832, 834 (2002) (refusing to consider an argument when "counsel did not lay his finger on the error" (internal quotation marks omitted)); *Yeatts v. Murray*, 249 Va. 285, 290, 455 S.E.2d 18, 21-22 (1995) (refusing to consider argument on merits of ineffective assistance of counsel claims because appellant's assignment of error that the habeas court erred in dismissing the petition "without ordering an evidentiary hearing as to his allegations of ineffective assistance of counsel" challenged only the habeas court's alleged procedural error and did not raise a challenge to the substantive ruling on the merits of those claims) (internal quotation omitted).

The Court, therefore, should refuse Plaintiffs' attempts to bait-and-switch their procedural assignments of error with the merits of their substantive claims.

II. Plaintiffs Failed To Establish Jurisdiction Of Jack's Declaratory Judgment Claims (Assignments of Error 1 and 2).[3]

The trial court correctly found that it did not have jurisdiction of Jack's declaratory judgment claims. "Code § 8.01-184 'is the statutory authority for declaratory judgment proceedings in this Commonwealth. From it stem the jurisdiction of the courts of record to entertain applications for declaratory relief and the power to make binding adjudications of the rights of the parties involved.'" *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle Cty. Bd. of Superv's*, 285 Va. 87, 97, 737 S.E.2d 1, 6 (2013) (quoting *City of Fairfax v. Shanklin*, 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964)).

Section 8.01-184 authorizes a court to "make 'binding adjudications of right' in cases of 'actual controversy' when there is 'antagonistic assertion and denial of right.'" *Miller v. Highland County*, 274 Va. 355, 369-70, 650 S.E.2d 532, 538 (2007); Va. Code Ann. § 8.01-184 (2016). Because "[t]he purpose of a declaratory judgment proceeding is the adjudication of rights[,] an actual controversy is a prerequisite to a court

[3] The School Board argued that the trial court also did not have jurisdiction of Plaintiffs' claims under the injunction statute, Va. Code Ann. § 8.01-620, and the general statute authorizing circuit courts to decide "cases," Va. Code Ann. § 17.1-513. (*See* JA 105, 122-23, 161.) Plaintiffs do not argue in their Brief that the trial court had jurisdiction under either of those statutes, so they have waived any such argument. Rule 5:25.

having authority." *Charlottesville Area Fitness Club Operators*, 285 Va. at 98, 737 S.E.2d at 6. "If there is no actual controversy between the parties regarding the adjudication of rights, the declaratory judgment is an advisory opinion that the court does not have jurisdiction to render." *Id.*

This Court thus has admonished that "[b]efore a complaint for declaratory judgment can be entertained by the circuit court, it must appear that there is an 'actual controversy' existing between the parties based upon an 'actual antagonistic assertion and denial of right.'" *Id.* (citations omitted). Also, "[t]he controversy must be one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment." *Id.* at 98, 737 S.E.2d at 6-7. The allegations of the complaint must also demonstrate that the plaintiff himself has a "justiciable interest"—*i.e.,* a legally enforceable right that may be evaluated and decided by the court. *Friends of the Rappahannock v. Caroline County Bd. of Superv's*, 286 Va. 38, 46, 743 S.E.2d 132, 136 (2013).

Plaintiffs failed to establish the Court's jurisdiction as to Jack's claims under Va. Code Ann. § 8.01-184, for at least three reasons.

A. Plaintiffs Did Not Seek Adjudication Of Jack's Legal Rights.

First, the Complaint did not seek adjudication of any of Jack's legal rights. Plaintiffs did not frame the "actual controversy" as being between Jack and the School Board, or involving any of his (or any other Plaintiff's) individual rights. Instead, they framed the claims as a broadside assault on the School Board's authority. Count I alleged:

> An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that Defendant's actions expanding non-discrimination protection to sexual orientation, "gender identity" and "gender expression" is *ultra vires* and void *ab initio* while Defendant asserts that it has the authority to expand its non-discrimination policy to include sexual orientation and "gender identity." (JA 17 ¶ 94.)

In Count II, they alleged:

> An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs assert that inserting undefined terms into the student handbook and thereby subjecting students to discipline without proper notice of the conduct for which they can be suspended exceeds Defendant's authority under Virginia law, while Defendant asserts that it can consistent with Virginia law insert the terms "gender identity" and "gender expression" into its student handbook and subject students to discipline. (JA 20 ¶ 112.)

Plaintiffs also did not seek a declaration of any of Jack's rights in the Complaint's prayer for relief. (JA 21-22.) Instead, they sought a

declaration of the School Board's authority vis-à-vis the entire school division. (*Id.*) They also sought to permanently enjoin the School Board from further implementing the student code of conduct and nondiscrimination policy that applied to all students, employees, and applicants. (JA 20-21.)

But, as this Court held in *Shanklin*, a plaintiff's disagreement with a public body's policy or action, without any allegation of injury or threatened injury to any of the plaintiff's legal rights is not an "actual controversy" under the declaratory judgment statutes. 205 Va. at 229, 135 S.E.2d at 775. In that case, a citizen sought a declaratory judgment that certain sections of a city's zoning ordinance were invalid and contrary to Virginia law, insofar as they purported to confer upon the board of zoning appeals authority to issue special use permits for the construction of apartments. *Id.* at 227-28, 135 S.E.2d at 774. "[N]o specific case regarding apartment usage within the [c]ity" was at issue. *Id.* at 230, 135 S.E.2d at 776. The plaintiff claimed "the jurisdiction of the trial court upon his bare position as a taxpayer of the city and his assertion that the zoning ordinance was invalid vis-à-vis the city's claim that it was valid." *Id.* The trial court proceeded to address his claim and ruled that the challenged sections of the ordinance were invalid. *Id.* at 228, 135 S.E.2d at 775.

In reversing the trial court's judgment, this Court ruled that the trial court had erred in taking jurisdiction of the motion for declaratory judgment. *Id.* at 229, 135 S.E.2d at 775. It found that "the plaintiff's case, revealed in its true nature, is but a wholesale, broadside assault upon the city's zoning ordinance, bereft of a single real complaint of injury, or threatened injury." *Id.* at 230, 135 S.E.2d at 776. There was no actual controversy between the plaintiff and the city; instead, the plaintiff "merely sought an advisory opinion, or a decision upon a moot question, or an answer to a speculative inquiry." *Id.* at 231, 135 S.E.2d at 776. The Court stated that "the situation presented here is nothing more than a difference of opinion between a taxpayer and his government. A controversy is not created by taking a position and then challenging the government to dispute it." *Id.* at 231, 135 S.E.2d at 777 (internal quotation omitted).

Because Plaintiffs did not identify any actual controversy between Jack and the School Board, and they did not seek any declaration of Jack's rights, the trial court correctly found that there was no justiciable case or controversy between him and the School Board.

B. Jack's Alleged Distress And Anxiety Did Not Create A Justiciable Controversy.

Second, Plaintiffs' allegations of Jack's anxiety and distress about the nondiscrimination policy and code of conduct did not demonstrate a

justiciable controversy based on present facts. Plaintiffs mischaracterize the trial court as having failed to give their allegations about Jack's feelings "a presumption of truth." (Br. at 30.) The trial court, however, expressly *accepted* those allegations as true; it just found that they did not establish any case or controversy under the declaratory judgment or injunction statutes. (JA 199:13-19; 200:18-201:1.)

Plaintiffs did not allege that Jack was engaging in, sought to engage in, or had a right to engage in sexual orientation or gender identity discrimination or harassment. (*See* JA 14-15 ¶¶ 71-76.) They did not allege that the policies had been applied or were about to be applied to Jack individually. (*Id.*) They did allege that he was distressed, anxious, and concerned, but those feelings alone do not create a justiciable controversy unless they flow from an injury or threatened injury to a legal right.

While Plaintiffs argue that Jack has a "constitutional right to education in the Commonwealth," their Complaint did not allege that Jack was not receiving a public education. Just the opposite, Plaintiffs alleged that he *is* attending a public high school. (JA 4 ¶ 15; 14-15 ¶¶ 71-76.) They also did not seek any declaration of his rights to a public education.

Plaintiffs' argument gains no force from *Scott v. Commonwealth*, 247 Va. 379, 443 S.E.2d 138 (1994). There, this Court *rejected* claims made by students and school boards that the Commonwealth's system for funding public schools violated the Virginia Constitution because it denied them an educational opportunity substantially equal to that of children who attend public school in wealthier divisions. *Id.* at 386-87, 443 S.E.2d at 142-43. It found that the Constitutional guarantee required no more than an education that met the standards of quality prescribed by the Board of Education. *Id.*

Like the plaintiffs in that case, Jack also did not allege that his public education does not meet the standards of quality prescribed by the Board of Education. Plaintiffs did not, and could not, claim that Jack has a right to attend a public school whose polices he likes or that do not make him feel anxious or distressed. Given the abject lack of any injury or threatened injury to any of Jack's legal rights, he was no different from any of the millions of public school students who may be anxious or distressed about school start times, grading scales, dress codes, or any of the thousands of sometimes controversial policy decisions that local school boards in this Commonwealth make every day.

Contrary to Plaintiffs' argument, there was no justiciable case or controversy even under a liberal administration of the declaratory judgment

statute. By its plain language, § 8.01-184 limits the court's authority to making "binding adjudications of right" in "cases of actual controversy." Va. Code Ann. § 8.01-184 (2016). This plain language cannot be rewritten through "liberal" construction or administration. *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944) ("Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear."); *see Russell Cty. Dep't of Social Servs. v. O'Quinn*, 259 Va. 139, 142, 523 S.E.2d 492, 493 (2000) (refusing to "liberally construe" Declaratory Judgment Act to authorize award of attorney's fees where statute did not expressly grant such authority); *Beck v. Shelton*, 267 Va. 482, 488, 593 S.E.2d 195, 198 (2004) (holding that admonition of "liberal construction" in Virginia Freedom of Information Act was not a legislative invitation to the judiciary to rewrite the provisions of the FOIA).[4]

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[4] Neither of the two cases cited by Plaintiffs support their liberal construction argument. Unlike this case, both involved actual controversies between the parties. In *Fairfax County v. Southland Corp.*, 224 Va. 514, 520, 297 S.E.2d 718, 721 (1982), a landowner challenged a zoning ordinance requiring it to obtain a special exception to construct or operate a free-standing quick-service food store. The landowner claimed both that it had a right to construct and operate such a store, and that the cost and time of the special exception process directly imposed a unique burden upon it, but not upon other landowners. *Id.* at 520, 297 S.E.2d at 721. The

There was no right of Jack's to be adjudicated, and thus no actual controversy between Jack and the School Board. What Plaintiffs sought was, at best, an advisory opinion that the circuit court did not have jurisdiction to render.

C. Plaintiffs Sought To Create A Right Of Review That They Do Not Otherwise Have.

Third, Plaintiffs sought to misuse § 8.01-184 to create a right to review that Jack and they did not otherwise have.

It is settled that the declaratory judgment statutes cannot be used "to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute." *Miller*, 274 Va. at 371-72, 650 S.E.2d at 540. These statutes "do not create or alter any substantive rights, or bring any additional rights into being." *Id.* at 370, 650 S.E.2d at 539. Their purpose "is not to give parties greater rights than those which

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county also admitted that the landowner had tried and was still trying to build and operate such stores within the county. *Id.* Here, Plaintiffs did not claim that Jack has a right to policies that ensure his enjoyment of school; that he has a right to engage in conduct addressed by the policies, namely discrimination or harassment on the basis of sexual orientation or gender identity; or that he is poised to engage in such conduct.

Portsmouth Restaurant Association, Inc. v. Hotel & Restaurant Employees' Alliance, 183 Va. 757, 762-63, 33 S.E.2d 218, 221 (1945), involved two parties to a *contract*, one of whom had been issued an arbitration award against the other. The parties disputed whether the award issued by the tribunal—the "War Labor Board"—was valid and enforceable. *Id.* No such antagonistic assertion and denial of right has transpired in this case.

they previously possessed, but to permit the declaration of those rights before they mature." *Liberty Mut. Ins. Co. v. Bishop,* 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). This Court recently confirmed that it has "long considered the operation of the Declaratory Judgment Act to be only procedural, leaving substantive rights unchanged." *Cherrie v. Virginia Health Servs.*, 787 S.E.2d 855, 859-60, 2016 Va. LEXIS 106, at **11 (July 14, 2016) (internal quotation omitted).

In *Miller*, for example, a neighboring landowner sought a declaratory judgment invalidating a county planning commission's determination that a developer's conditional use permit was in substantial accord with the county's comprehensive plan. *Id.* at 368, 650 S.E.2d at 538. The county board argued that the landowner did not have any statutory right to appeal the commission's finding and could not use the declaratory judgment statutes to create a right of appeal. *Id.* at 368-69, 650 S.E.2d at 538. This Court agreed, holding that the landowner's pleadings "do not assert a valid request for declaratory relief because, among other reasons, [they] do not seek preventive relief but effectively attempt to create a right of appeal that does not exist by statute." *Id.* at 370-71, 650 S.E.2d at 539.

Similarly, in *Charlottesville Area Fitness Club Operators,* fitness club operators sought declaratory judgments invalidating the City of

Charlottesville's lease of public property to a YMCA and a use agreement governing the leased property between the city, Albemarle County, and the YMCA. 285 Va. at 95-97, 737 S.E.2d at 4-6. They alleged that the actions of the city and the county violated Virginia law and exceeded their authority. *Id.* The circuit courts dismissed the petitions on demurrers. *Id.* at 97, 737 S.E.2d at 6.

This Court *sua sponte* found that the circuit courts had lacked jurisdiction of the declaratory judgment petitions. *Id*. at 100, 737 S.E.2d at 7. It noted that the statutes under which the city and county had entered into their agreements did not authorize third-party challenges to those agreements. *Id.* at 100-06, 737 S.E.2d at 8-11. The fitness clubs were improperly attempting to use the declaratory judgment statutes to create greater rights than they otherwise possessed, and to challenge the localities' actions in a manner not authorized by statute. *Id.* It also pointed out that the beneficiaries of the lease agreements that the plaintiffs sought to invalidate were not parties to the proceedings, and thus the court did not have the authority to provide any conclusive relief. *Id.*

Most recently, in *Cherrie*, two decedents' estates sought to use the Declaratory Judgment Act to enforce a Board of Health regulation requiring nursing homes to provide their policies and procedures to residents and

their representatives. 787 S.E.2d at 859-60, 2016 Va. LEXIS 106, at **9-11. The statutes under which the regulation was implemented did not authorize a private cause of action to enforce the regulation outside the administrative process. *Id.* at 858-59, 2016 Va. LEXIS 106, at **7-8. This Court was thoroughly unconvinced by the estates' argument that because they had a right to the documents under the regulation, they could also obtain a declaration and enforcement of that right under the Declaratory Judgment Act:

> This simple syllogism … proves too much. If it were true, the Declaratory Judgment Act would operate as a roving statutory private right of action for anyone claiming to be injured by someone else's violation of any statute. The very concept of statutory standing, under this view, would no longer exist. Indeed, any aggrieved claimant, by virtue of claiming that his grievance involves a statutory violation, would have standing to assert a private right of action in court -- not because the allegedly violated statute grants the right, but because the Declaratory Judgment Act grants the right for all statutes.
>
> This understanding of the Declaratory Judgment Act is wholly out of sync with the traditional view of the Act's purpose and function. *Id.* at 859, 2016 Va. LEXIS 106, at **9.

This Court held that the estates "cannot use the Declaratory Judgment Act as a platform for asserting non-existent private rights of action to enforce

an administrative regulation promulgated by the Board of Health." *Id.* at 860, 2016 Va. LEXIS, at **10.

1. The General Assembly Has Not Given Students And Parents A Right To Challenge School Board Policies That They Oppose.

The Court's reasoning in each of these cases applies with equal force here. The Constitution and Code of Virginia vest the supervision of schools in each school division in the local school board. Va. Const., art. VIII, § 7; Va. Code Ann. § 22.1-28 (2016). The General Assembly has also authorized school boards to adopt policies, regulations, and student codes of conduct for their respective school divisions. In Va. Code Ann. § 22.1-78, the General Assembly authorized school boards to:

> adopt bylaws and regulations, not inconsistent with state statutes and regulations of the Board of Education, for its own government, for the management of its official business and for the supervision of schools, including but not limited to the proper discipline of students, including their conduct going to and returning from school.

In Va. Code Ann. § 22.1-279.6, the General Assembly authorized the Board of Education to establish guidelines and model policies for student codes of conduct, and directed local school boards to adopt and revise "regulations on codes of student conduct that are consistent with, *but may*

be more stringent than, *the guidelines of the Board*." Va. Code Ann. § 22.1-279.6(A) & (B) (2016) (emphasis added).[5]

Neither of these statutes, however, gives students (or their parents or interested citizen activists) a right to challenge or seek judicial review of, any policy, regulation, or code of conduct that they oppose. Plaintiffs' claims thus were an improper attempt to use the declaratory judgment statute to create rights of action that Jack and they do not otherwise have.

2. The Court Should Decline To Create A Right To Challenge Any School Board Policy That A Student, Parent, Or Taxpayer Opposes.

The Court should also decline to depart from its settled precedent here. Allowing students (or parents or taxpayers) to use the declaratory judgment statute to challenge any school board policy that offends them would disturb the careful balance that the General Assembly struck in Va. Code Ann. § 22.1-87.

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[5] Plaintiffs incorrectly claimed in Counts I and II (and repeat in their Brief) that the School Board's non-discrimination policies and student code of conduct derive from Va. Code Ann. § 15.2-965. But that statute on its face does not apply to school boards. Section 15.2-965 authorizes a "locality" to enact "an ordinance." Va. Code Ann. § 15.2-965(A) (2016). A "locality" is defined in Title 15.2 as meaning "a county, city, or town as the context may require." Va. Code Ann. § 15.2-102 (2016). The School Board is not a locality, and its non-discrimination policies and student code of conduct are not an "ordinance."

That statute allows "any parent, custodian, or legal guardian of a pupil attending the public schools in a school division *who is aggrieved by an action of the school board*" to bring a petition for judicial review in circuit court within 30 days of the action. Va. Code Ann. § 22.1-87 (2016) (emphasis added). The General Assembly's deliberate use of the term "aggrieved" is significant.

The term "'aggrieved' has a "settled meaning" in Virginia. *Va. Beach Beautif. Comm'n v. Bd. of Zoning Apps.*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986). "The word 'aggrieved' in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." *Id.* at 419-20, 344 S.E.2d at 902-03 (emphasis added) (citation omitted). A student who is not burdened to "any greater extent than" any other student who finds himself "in disagreement with" a school board action is not thereby "aggrieved." *Va. Emp. Comm'n v. City of Va. Beach*, 222 Va. 728, 733, 284 S.E.2d 595, 598 (1981). He "may be disturbed, or even 'affronted,' and … may disagree strongly" with a school board decision but he "does not thereby become an aggrieved person." *Id.*

Section 22.1-87 also ensures that a court will not sit as a "super-school board" to review the wisdom of a school board's decision. The statute directs that "[t]he action of the school board *shall be sustained unless the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion*." Va. Code Ann. § 22.1-87 (2016) (emphasis added).

This is consistent with the "well-established" "standard of review which a trial court must apply in considering a challenge to a school board's exercise of the supervisory authority granted it by Article VIII, Section 7 of the Virginia Constitution." *Sch. Bd. of the City of Norfolk v. Wescott*, 254 Va. 218, 222, 492 S.E.2d 146, 148 (1997). Under that standard of review "a school board's decision 'will not be disturbed by the courts unless the board acted in bad faith, arbitrarily, capriciously, or in abuse of its discretion, or there is no substantial evidence to sustain its action.'" *Bristol Va. Sch. Bd. v. Quarles*, 235 Va. 108, 119, 366 S.E.2d 82, 89 (1988) (quoting *Spotsylvania County Sch. Bd. v. McConnell*, 215 Va. 603, 607, 212 S.E.2d 264, 267 (1975)).

Section 22.1-87 also is consistent with this Court's long history of protecting the Constitutional supervisory authority of school boards from interference by other branches or institutions of government. *E.g.,*

Commonwealth v. Doe, 278 Va. 223, 230, 682 S.E.2d 906, 909 (2009) (rejecting interpretation of statute that would have allowed court to decide whether a registered sex offender school must be allowed onto school property, because decisions regarding the safety and welfare of students "are manifestly a part of the supervisory authority granted the school boards under Article VIII"); *Sch. Bd. of City of Richmond v. Parham*, 218 Va. 950, 958, 243 S.E.2d 468, 472 (1978) (striking down binding arbitration provision in Board of Education's mandatory grievance procedure because "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"); *Bd. of Superv'rs of Chesterfield County v. County Sch. Bd.*, 182 Va. 266, 280-81, 28 S.E.2d 698, 705 (1944) (holding that county school board has "exclusive right" to determine how to spend funds appropriated by county board of supervisors for schools).

As Plaintiffs' Brief concedes, they did not bring their claims under § 22.1-87. (Br. at 19.) The School Board also asserted below that none of them met the settled definition of "aggrieved" under § 22.1-87. (JA 106, 123-125.) So they did not have any right of action under that statute either.

Plaintiffs likewise did not claim that they were "aggrieved" by the School Board's decisions, as that term is defined under Virginia law. (*See* JA 134-159.) Nor do they so argue now. (*See* Br. at 14-24.) Instead, Plaintiffs continue to insist that § 22.1-87 is "not exclusive."[6] (*Id.* at 14-24.)

But that argument only begs the question. "In Virginia, 'substantive law' determines whether a private claimant has a right to bring a judicial action. Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts." *Cherrie*, 787 S.E.2d at 857, 2016 Va. LEXIS 106, at **3-4 (citing *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 21, 736 S.E.2d 910, 915 (2013)).

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[6] Plaintiffs continue to misunderstand the School Board's point regarding the "exclusivity" of § 22.1-87. Section 22.1-87 is "exclusive" in the sense that it is the only statute that provides a general right of judicial review of any school board decision by which a student is "aggrieved."

The School Board does not, and did not, contend that it can only ever be sued under § 22.1-87. As it noted below, there a variety of federal and state laws that provide a statutory means to vindicate individual rights conferred in those laws or elsewhere. *See, e.g.,* 42 U.S.C. § 1983; 20 U.S.C. § 1415(i) (providing that "any party aggrieved" by the findings or decision in an IDEA administrative proceeding "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section…"); Va. Code Ann. § 22.1-214(D) (providing that "[a]ny party aggrieved" by the decision of the hearing officer in may "bring a civil action in the circuit court for the jurisdiction in which the school division is located"). Plaintiffs, however, did not sue under any such statute.

It was incumbent upon Plaintiffs, therefore, to identify *some* law that gave them a right of action against the School Board. They did not do so.

Plaintiffs' insistence that the Dillon Rule applies to school boards misses the point. Plaintiffs have not identified any statutory or common law that gives Jack (or any other Plaintiff) the legal right to challenge school board policies on the theory that they violate the Dillon Rule. *See id.* at 857, 2016 Va. LEXIS at *5-*6 (plaintiffs' arguments that nursing homes will not comply with regulation was their "cause of action" but it "did not answer the threshold question of whether 'substantive law' gives them the legal 'right' to seek judicial enforcement of their claimed cause of action"). The Declaratory Judgment Act does not authorize Plaintiffs to act as private attorneys general, challenging any school board decision or governmental action they view to be violative of the Dillon Rule.

Moreover, because § 22.1-87 only gives a right of action to those students who are "aggrieved" by a school board decision—which Plaintiffs conceded they were not—this was not a situation in which "a claimant has a private right of action under a statute, but the underlying facts have not ripened into a fully enforceable cause of action." *Id.* at 859, 2016 Va. LEXIS at **10.

Plaintiffs failed to identify any substantive Virginia law that gives Jack or any other Plaintiff a right of action in this case. The Court should decline to create such a right by judicial decree.

III. Jack Doe's Parents Were Not The Real Plaintiffs In His Claims "By and Through" His "Next Friends" (Assignment of Error 3).

Plaintiffs' Assignment of Error 3 inaccurately asserts that the trial court concluded that "John Doe and Jane Doe failed to allege an actual controversy as parents and next friends of Jack Doe."

The trial court was never asked to, and did not, hold that John and Jane Doe could not sue as Jack's parents and next friends. So this new argument cannot be raised here. Rule 5:25.

Moreover, as Jack's next friends and parents, John and Jane Doe can only bring *Jack*'s claims. Under Va. Code Ann. § 8.01-8, "any minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend." As this Court has held, the minor is the real party in interest in claims brought through his or her next friend. *Herndon v. St. Mary's Hosp., Inc.*, 266 Va. 472, 476, 587 S.E.2d 567, 570 (2003). Indeed, a suit in the name of the minor *must* be brought "by his next friend." *Id.* If instead, "the action is brought in the name of the next friend on 'behalf of the infant' it cannot be maintained. No party, infant or adult, may sue by deputy." *Id.* (internal quotation and citation omitted).

Section 8.01-08 allowed John and Jane Doe to bring Jack's claims. It did not confer them with a right to sue on their own behalves, much less give them a personal right to challenge the School Board's nondiscrimination policy and student code of conduct. The trial court found that there was no case or controversy between Jack and the School Board. So there was necessarily no controversy between the School Board and the Does as Jack's next friends and parents.

IV. Lafferty And The Does Do Not Have "Taxpayer Standing" (Assignment of Error 4).

Plaintiffs also failed to establish any actual controversy between the School Board and Lafferty, who does not have children in the school division, or between the School Board and Jack's parents individually. Lafferty and the Does could not challenge the School Board's nondiscrimination policy and student code of conduct simply by virtue of their status as "taxpayers."

The common law right of taxpayers "to challenge the legality of expenditures by local governments," *Goldman v. Landsidle*, 262 Va. 364, 372, 552 S.E.2d 67, 71 (2001), does not apply here. Taxpayer standing "is premised on the peculiar relationship of the taxpayer to the local government that makes the taxpayer's interest in the application of municipal revenues 'direct and immediate,'" thereby giving taxpayers a

personal stake in the outcome of the controversy. *Id.* (finding no taxpayer standing to seek mandamus against Comptroller of Commonwealth); *cf. Gordon v. Bd. of Superv'rs*, 207 Va. 827, 830-31, 153 S.E.2d 270, 273 (1967) (finding taxpayer plaintiffs had standing to challenge legality of loan from county to airport authority).

Taxpayer standing applies when a citizen (1) challenges an allegedly illegal expenditure or tax burden by a local government; and (2) brings suit on behalf and for the benefit of all other taxpayers who would be forced to share the allegedly illegal burden. *Charlottesville Area Fitness Club Operators*, 285 Va. at 101-02, 737 S.E.2d at 8-9 (plaintiff taxpayer's claim did "not constitute an action by a taxpayer on behalf of itself and others similarly situated to restrain an unlawful tax or illegal debt").

But this case did not involve a tax or expenditure of public funds. Instead, Plaintiffs challenged policies governing how the School Board, its employees, and students, will treat others within the school division. Plaintiffs also did not bring this action for the benefit of all other taxpayers. Indeed, Plaintiffs' claims, if successful, would not have benefitted any taxpayer who supported the changes to the nondiscrimination policy and student code of conduct.

Plaintiffs also have yet to cite a single case in which a Virginia court has considered a "taxpayer" challenge to a school board policy. They mischaracterize even the *non-school board* cases that they cite. (*See* Br. at 37-39). The issue of taxpayer standing was not raised in *Arlington County v. White,* 259 Va. 708, 528 S.E.2d 706 (2000). And that case *was* a challenge to an allegedly illegal expenditure of public funds: the county's decision to extend benefits under its self-funded health plan to its employees' unmarried domestic partners. *Id.* at 710, 528 S.E.2d at 707.

Plaintiffs also misplace reliance on *Concerned Taxpayers of Brunswick County v. County of Brunswick*, 249 Va. 320, 331, 455 S.E.2d 712, 718 (1995). That case found that the plaintiffs *lacked standing* to challenge Brunswick County's contract with a third party under the Procurement Act. *Id.* There is no suggestion in the case that taxpayers have standing whenever they allege a Dillon Rule violation, as Plaintiffs claim (*see* Br. at 38).

Plaintiffs also mischaracterize the two, non-precedential cases they cite. In fact, both of these cases support the School Board's position. The circuit court in *Bono Film & Video, Inc. v. Arlington County Human Rights Commission*, 72 Va. Cir. 256, 259-60 (Arlington County 2006), found that the plaintiffs *lacked standing* to challenge as *ultra vires* under the Dillon

Rule a county ordinance authorizing its Human Rights Commission to investigate complaints of discrimination based upon sexual orientation. It reasoned that the "Commission . . . [had] taken no enforcement action against either Plaintiff and therefore, no actual case or controversy exists between the parties." *Id.*

Likewise, the circuit court in *Karunakarum v. Town of Herndon*, 70 Va. Cir. 208, 211 (Fairfax County 2006), *sustained a demurrer without leave to amend* to the taxpayer plaintiffs' Dillon Rule challenge to the town's actions in creating and funding a "day laborer site" with public monies. It found taxpayer standing for their *non-Dillon Rule* claims alleging that the expenditures violated federal, state, and local law. *Id.* at 210-11.[7]

Plaintiffs' radical theory of "taxpayer standing," therefore, finds no support in Virginia law. It also has no limiting principle: by their theory, every policy decision a school board makes can be challenged in the circuit courts by any "taxpayer" who disagrees with it.

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[7] Plaintiffs' insistence that "local school boards are subject to the Dillon Rule" takes them nowhere. (Br. at 12.) None of the cases they cite were brought by plaintiffs who claimed "taxpayer standing." *See Payne v. Fairfax County Sch. Bd.*, 288 Va. 432, 438, 764 S.E.2d 40, 44 (2014) (employee of school board challenging personnel regulations); *Sch. Bd. of Amherst County v. Burley*, 225 Va. 376, 376 302 S.E.2d 53, 54 (1983) (parties to contract with school board seeking specific performance); *Kellam v. Sch. Bd. of City of Norfolk*, 202 Va. 252, 253, 117 S.E.2d 96, 97 (1960) (lessee alleging tort claims arising out of injury on school premises).

Such a dramatic expansion of the circuit courts' jurisdiction would improperly divest school boards of their Constitutional authority to supervise the schools within their divisions. *See, e.g., Doe*, 278 Va. at 230, 682 S.E.2d at 909 (unconstitutional to allow circuit courts to impose the presence of a registered sex offender on school grounds instead of allowing school boards to exercise their authority to make such decisions about safety and welfare of students); *Parham*, 218 Va. at 957-58, 243 S.E.2d at 472-73 (unconstitutional to subject local school boards to binding arbitration in disputes between local school boards and nonsupervisory employees); *Howard v. County Sch. Bd.*, 203 Va. 55, 59-60, 122 S.E.2d 891, 895 (1961) (unconstitutional to divest school board of authority to decide when school property could be put up for sale); *Harrison v. Day*, 200 Va. 439, 452, 106 S.E.2d 636, 646 (1959) (unconstitutional to attempt, by statute, to divest local school board of authority to run schools).

Lafferty and the Does' status as taxpayers was insufficient to create any justiciable case or controversy between them and the School Board.

V. Plaintiffs Have Abandoned Their Fifth Assignment Of Error, Which Was Without Merit In Any Event.

Plaintiffs' Assignment of Error 5 fails for multiple reasons.

First, their Brief does not present any argument as to how the trial court erred in dismissing their Complaint without giving them an opportunity

to amend. So this Assignment of Error must be deemed abandoned. Rule 5:27(d); *see e.g., Teleguz v. Commonwealth,* 273 Va. 458, 471, 643 S.E.2d 708, 717 (2007).

Second, Plaintiffs did not present any argument below as to why an amendment should be allowed. The School Board argued in its motion, its opening brief, and at oral argument that the jurisdictional defects were incurable. (JA 106-07, 123-27, 183-84.) Plaintiffs' brief did not argue otherwise or ask for an amendment. (JA 134-59.) They also did not ask for leave to amend orally. (*See* JA 185:1-197:6.) Their only mention of an amendment was in the form of a clarifying question by Plaintiffs' counsel after the trial court announced that it was dismissing the case without leave to amend:

> MR. SCHMID: Your Honor, is that without leave to amend as to the minor included?
>
> THE COURT: That is correct. Thank you very much. (JA 201:6-9.)

This exchange was plainly insufficient to preserve whatever arguments Plaintiffs may now make as to why amendment should have been allowed. *See* Rule 5:25 (objection must be "stated with reasonable certainty at the time of the ruling").

Third, the trial court's conclusion that it lacked jurisdiction rendered the lawsuit a nullity. *See Shanklin*, 205 Va. at 231, 135 S.E.2d at 231 (ruling that order on motion for declaratory judgment was a nullity where trial court did not have jurisdiction under declaratory judgment statute); *see also Harmon v. Sadjadi,* 273 Va. 184, 198, 639 S.E.2d 294, 301-02 (2007) (holding that action filed by person without standing was nullity and did not toll applicable statute of limitations).

Finally, even if a court may allow amendment of a lawsuit as to which it does not have jurisdiction, amendment of the Complaint here would have been futile. Plaintiffs conceded that the policies at issue had not been applied to them or enforced against Jack, or any other party. (*See* JA 150; JA 191:8-19.) They did not identify any law under which Jack or any other Plaintiff had a right to challenge school policies that were not alleged to violate any of his or their legal rights. Even now, Plaintiffs have not identified on what basis they would have amended their Complaint.

Therefore, even if the trial court was authorized to allow an amendment, it could properly exercise its discretion to disallow Plaintiffs another opportunity to reargue the same issues. *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 403, 337 S.E.2d 744, 749 (1985) (a trial court properly denies leave to amend "when it is apparent that such an

amendment would accomplish nothing more than provide opportunity for reargument of the question already decided").

Plaintiffs mischaracterize the record in suggesting that the trial court considered § 22.1-87 to be "exclusive" and their claims as untimely under the 30-day period provided in that statute. (*See* Br. at 8.)[8] Just the opposite, the trial court found that, notwithstanding that they presently did not have *any* right of action, Jack and his parents would be able to sue under § 22.1-87, if the School Board took action in the future to enforce the policies or code of conduct against him, as they would then be "aggrieved":

> I do not find that his disappointment with or anxiety or confusion or distress over the action of the school board constitutes a case or controversy or an adjudication of a right that gives him access to the declaratory judgment powers and the injunctive relief powers that this court possesses.
>
> Once the school acts, in terms of some sanction on

[8] The School Board argued below that, *if* Plaintiffs could somehow be considered to be "aggrieved" under § 22.1-87, by the decisions to change the nondiscrimination policy and code of conduct, then their challenge was untimely because those decisions were made hundreds of days earlier. (*See* JA 106.) The trial court found, however, that Plaintiffs were not "aggrieved," so the 30-day period under § 22.1-87 did not apply. (*See* JA 198:18-19 ("They do not fall, within the court's view, of what an aggrieved party is as it relates to 22.1-87"); JA 200:11-17 ("[A]t this point, they don't fall within the court's understanding of what an aggrieved person is, by the action of the school board. They are upset with the school board. They have a disappointment with, visceral, I suppose, disappointment with the decision of the school board, but that, unfortunately, does not make them aggrieved under the purposes of that statute.").)

> this young man, if it in fact does act, then that code section kicks in and within a certain period of time, 30 days, this court, through appellate process, has the ability to see whether the school board acted arbitrarily or capriciously or abused its discretion or exceeded its authority, including any sort of Dillon violation in this case. That has not occurred in this case. (JA 199:13 – 200:6.)

In other words, once the Does were "aggrieved" by a school board action, they would have statutory standing—both a right of action *and* a cause of action—under § 22.1-87. *See Cherrie*, 787 S.E.2d at 857, 2016 Va. LEXIS, at **4 ("A 'right of action' is a legally recognized 'remedial right' to 'enforce a cause of action,' which is simply the 'set of operative facts' that causes a claimant to assert his claim."). Of course, if the School Board were to take an action that violated Jack's rights under some other law, he could bring a claim to enforce those rights under that law. The trial court did not foreclose such a possibility.

The trial court also made clear that it did not consider a potential action under § 22.1-87 to be untimely, but rather, *premature* at this point because Plaintiffs did not have standing under that statute:

> I want it clear that the door is not shut in the court's mind to the parents' ability to petition on an appeal once an action is taken in this case. But, at this point, they don't fall within the court's understanding of what an aggrieved person is, by the action of the school board. They are upset with the school board. They have a disappointment with, visceral, I

> suppose, disappointment with the decision of the school board, but that, unfortunately, does not make them aggrieved under the purposes of that statute. So, as I review this case, I am without jurisdiction as it relates to either Ms. Lafferty or the parents of this young man, at this point in time. And I am without jurisdiction as it relates to the young man who is going to school, for the reasons that I have stated. (JA 200:8-201:1.)

There was no legal right of Jack's (or any other Plaintiff's) to be declared, enforced, or adjudicated, so there was no case or controversy to be decided. Dismissal without leave to amend was proper.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs failed to establish jurisdiction of their declaratory judgment claims. The School Board requests the Court to affirm the trial court's dismissal of the Complaint.

Dated: November 18, 2016

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

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CERTIFICATE PURSUANT TO RULE 5:26(h)

As required by Rule 5:26, I hereby certify that foregoing Brief of Appellee contains 39 pages, excluding those parts of the brief that are exempted under Rule 5:26(b), and that the foregoing Brief of Appellee is otherwise in compliance with Rule 5:26.

Dated: November 18, 2016

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CERTIFICATE PURSUANT TO RULE 5:26(e)

As required by Rule 5:26, I hereby certify that on this 18th day of November, 2016, I served a true and correct copy of the foregoing via electronic mail on the following counsel of record for Appellants:

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