COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

March 4, 2015

The Honorable Adam P. Ebbin
Member, Senate of Virginia
Post Office Box 26415
Alexandria, Virginia 22313

Dear Senator Ebbin:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a 2002 Opinion of this Office,[1] concluding that a school board does not have the legal authority to amend its nondiscrimination policy to prohibit sexual-orientation and gender-identity discrimination, is valid in light of Article VIII, § 7 of the Constitution of Virginia, this Office's 2006 Opinion concerning concealed weapons on college campuses,[2] and the Fourth Circuit's recent decision in *Bostic v. Schaefer*.[3] Your question implicates nondiscrimination policies with respect to both students and school employees.

Applicable Law and Discussion

School boards are "public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication."[4] Virginia follows the Dillon Rule of strict construction, which "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."[5] A corollary to the Dillon Rule applies these constraints to local school boards.[6] Because the General Assembly has never specifically authorized school boards to prohibit discrimination on the basis of sexual orientation or gender identity, school boards only have the authority to do so if that authority is fairly or necessarily implied from an express grant of power.

The Constitution of Virginia confers expansive power on local school boards. Article VIII, § 7 of the Constitution of Virginia provides that "the supervision of schools in each school division shall be

---

[1] 2002 Op. Va. Att'y Gen. 105.

[2] 2006 Op. Va. Att'y Gen. 116.

[3] Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert denied*, Nos. 14-153, 14-225, 14-251, 2014 U.S. LEXIS 6053, 6316, 6504 (U.S. Oct. 6, 2014).

[4] Kellam v. Sch. Bd., 202 Va. 252, 254 (1961).

[5] Bd. of Zoning Appeals v. Bd. of Supvrs., 276 Va. 550, 553-54 (2008).

[6] Payne v. Fairfax Cnty. Sch. Bd., No. 140145 (Va. Oct. 31, 2014); *Bd. of Zoning Appeals*, 276 Va. at 553-54.

vested in a school board."[7] The Supreme Court of Virginia has made clear that the express supervisory power contained in Article VIII, § 7 necessarily includes a broad range of implied powers. For example, the Supreme Court has found that school boards' supervisory power necessarily includes derivative powers to regulate "the safety and welfare of students,"[8] "to supervise personnel,"[9] and to apply "local policies, rules, and regulations adopted for the day-to-day management of a teaching staff."[10] No other local or state entity may encroach on the far-reaching scope of school boards' supervisory authority.[11]

Regulating how a school system, students, and employees interact with and treat one another is a fundamental component of supervising a school system. A policy that allows some students or some employees to be treated differently from others necessarily implicates the welfare of students and supervision of personnel. These are areas that the Constitution of Virginia unquestionably empowers school boards to regulate.[12] Thus, the authority to prohibit discrimination, including discrimination based on sexual orientation or gender identity, is a power fairly or necessarily implied from the constitutional duty to supervise the schools.

A 2002 Opinion of this Office concluded that school boards do not have the authority to prohibit discrimination because the General Assembly has not enacted legislation that would make explicit school boards' authority to do so.[13] That Opinion, however, did not examine the powers of local school boards under Article VIII, § 7 of the Constitution of Virginia, the corresponding broad grant of statutory authority in § 22.1-28 of the *Code of Virginia*, other enumerated powers set forth in Title 22.1, or those that may be fairly implied from them.[14] The Opinion also mistakenly analogized a school board's broad supervisory authority to a county's specific grant of authority under § 15.2-853 of the *Code of Virginia*.[15]

In addition to the authority granted by the Constitution, school boards enjoy broad statutory powers. There is a broad grant of authority corresponding to the constitutional grant.[16] The General Assembly has further authorized school boards to "adopt bylaws and regulations . . . for the management of its official business and for the supervision of schools."[17] The General Assembly also has found that

---

[7] VA. CONST. art. VIII, § 7.

[8] Commonwealth v. Doe, 278 Va. 223, 230 (2009).

[9] Riddick v. Sch. Bd., 238 F.3d 518, 523 (4th Cir. 2000) (citing Sch. Bd. v. Parham, 218 Va. 950, 956 (1978)).

[10] *Parham*, 218 Va. at 957.

[11] *Doe*, 278 Va. at 230; Russell Cnty. Sch. Bd. v. Anderson, 238 Va. 372, 383 (1989); Howard v. Cnty. Sch. Bd., 203 Va. 55, 58-59 (1961); Cnty. Sch. Bd. v. Farrar, 199 Va. 427, 433 (1957); Bd. of Supvrs. v. Chesterfield Cnty. Sch. Bd., 182 Va. 266, 270 (1944).

[12] *Doe*, 278 Va. at 230; *Parham*, 218 Va. at 957-58; Bradley v. Sch. Bd., 462 F.2d 1058, 1067 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).

[13] *See* 2002 Op. Va. Att'y Gen. 105.

[14] No legislation is necessary to effectuate a school board's authority to do what the Constitution of Virginia already authorizes it to do. *Cf.* Purdham v. Fairfax Cnty. Sch. Bd., Civ. Action No.1:09-CV-50, 2009 WL 4730713, at *4 (E.D. Va. Dec. 9, 2009) ("The power to operate, maintain and supervise public schools in Virginia is, and always has been, within the exclusive jurisdiction of the local school boards.") (quoting *Bradley*, 462 F.2d at 1067)), *aff'd*, 637 F.3d 421 (4th Cir. 2011); *Russell Cnty. Sch. Bd.*, 238 Va. at 383 (finding that a statutorily created panel cannot infringe on a school board's constitutional power to supervise its schools by discharging unsatisfactory employees).

[15] 2002 Op. Va. Att'y Gen. 105.

[16] VA. CODE ANN. § 22.1-28 (2011).

[17] Section 22.1-78 (2011).

"quality of education is dependent upon the provision of . . . the appropriate working environment [and] the appropriate learning environment,"[18] and school boards are tasked with promulgating standards of conduct to "provide that public education be conducted in an atmosphere free of disruption and threat to persons or property and *supportive of individual rights*."[19] It is well within the discretion of a school board to determine that prohibiting discrimination on various bases, including on the basis of sexual orientation or gender identity, is necessary to attain those goals.

The 2006 Opinion you reference in your opinion request supports this conclusion. In that Opinion, this Office concluded that the General Assembly's statutory grant of authority to the University of Virginia to regulate the conduct of students and employees gave the University the power to prohibit them from carrying concealed weapons on University grounds.[20] That authority stems not from a specific enabling act of the General Assembly allowing universities to regulate weapons, but rather is an implied power "reasonably necessary to effectuate the powers expressly granted" to the University to "establish rules and regulations for the conduct" of its students and employees.[21] That the General Assembly omitted university campuses from the list of places where a permitted-concealed weapon was barred did not prevent the University of Virginia from determining that the safety of its students and employees warranted prohibiting them from carrying such weapons.[22] I similarly conclude that, like the authority of universities to regulate the conduct of their students and employees, the authority of school boards to protect students and employees from discrimination is a "reasonably necessary" derivative of the supervisory powers conferred upon school boards.[23]

Finally, you ask about the impact of *Bostic v. Schaefer* on school boards' authority to prohibit sexual-orientation and gender-identity discrimination.[24] Under the Fourth Circuit's decision in *Bostic*, same-sex couples must be afforded all the "rights and privileges of marriage" granted to opposite-sex couples.[25] School boards therefore may not discriminate in the provision of benefits to employees who are married according to whether the employee's spouse is of the same or opposite gender. For example, if a school board provides health-insurance benefits to the spouse of an employee, the school board may not treat same-sex spouses differently from opposite-sex spouses.

---

[18] Section 22.1-253.13:1(a) (Supp. 2014).

[19] Section 22.1-253.13:7(c)(3) (Supp. 2014) (emphasis added).

[20] 2006 Op. Va. Att'y Gen. 116.

[21] *Id.* at 118 (citing VA. CODE ANN. § 23-9.2:3(A)(2), (A)(5) (Supp. 2005)); *see also* §§ 22.1-208.01(A) (Supp. 2014) (requiring school boards to establish character education programs that address the inappropriateness of bullying); 22.1-276.01 (Supp. 2014) (defining "bullying"); 22.1-279.6(D) (Supp. 2014) (requiring school boards to include prohibitions against bullying in their codes of student conduct); 22.1-291.4 (Supp. 2014) (requiring school boards to educate their employees about the need to prevent bullying).

[22] 2006 Op. Va. Att'y Gen. 116.

[23] This conclusion is in accord with decisions of the Supreme Court of Virginia and prior opinions of this Office that recognize occasions when a mechanical application of the Dillon Rule is inappropriate. *See, e.g.*, 1994 Op. Va. Att'y Gen. 40 (concluding, despite absence of specific legislation, that localities have power to allow charitable contributions by payroll deduction as part of its general authority as an employer) (citing Scott v. Sylvester, 220 Va. 182 (1979), *cert. denied*, 464 U.S. 961 (1983); Nexsen v. Bd. of Spvrs., 142 Va. 313 (1925); 1982-83 Op. Va. Att'y Gen. 151).

[24] Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.*, Rainey v. Bostic, 135 S. Ct. 286 (2014), Schaefer v. Bostic, 135 S. Ct. 308 (2014), McQuigg v. Bostic, 135 S. Ct. 314 (2014).

[25] Judgment at 2, Bostic v. Rainey, Case No. 2:13-cv-00395-ALWA (E.D. Va. Feb. 24, 2014), ECF No. 139.

Given the broad scope of the supervisory power granted to school boards by the Constitution of Virginia and the explicit statutory grants of authority to school boards, I conclude that school boards have authority to expand their antidiscrimination policies to encompass sexual orientation and gender identity. To the extent that the 2002 opinion previously mentioned is inconsistent with this Opinion, it is overruled.[26]

Conclusion

Accordingly, it is my opinion that, because the power to protect students and employees from discrimination in the public school system is a power fairly implied from the express grant of authority to school boards under Article VIII, § 7 of the Constitution of Virginia and from the specific authority granted to boards by the General Assembly in §§ 22.1-28, 22.1-78 and 22.1-253.13:7(c)(3) of the *Code of Virginia*, the Dillon Rule does not prevent school boards from amending their antidiscrimination policies to prohibit discrimination on the basis of sexual orientation and gender identity. To the extent that the 2002 Opinion of this Office discussed above is inconsistent with this Opinion, it is overruled.

With kindest regards, I am

Very truly yours,

Mark R. Herring

Mark R. Herring
Attorney General

[26] I further note that, in determining that the Fairfax County School Board and Fairfax County have no authority to include sexual orientation in their nondiscrimination policies, the 2002 Opinion states that sexual orientation discrimination "cannot be either 'fairly or necessarily implied' from discrimination based on sex," 2002 Op. Va. Att'y Gen. 105, 106, but this remains an open question under Title IX. *See* U.S. DEP'T OF ED., OFFICE FOR CIVIL RIGHTS, Questions & Answers on Title IX & Sexual Violence 5 (2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; *compare* Riccio v. New Haven Bd. of Educ., 467 F. Supp. 2d 219, 226 (D. Conn. 2006), *with* Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).