COMMONWEALTH *of* VIRGINIA

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May 10, 2024

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Via Hand Delivery
Hon. Kristen N. Nelson, Clerk
York County Poquoson Circuit Court
P.O. Box 371
300 Ballard Street
Yorktown, VA 23690

RE: **Jane Doe, by Jill Doe v. Virginia Department of Education,**
Case No. CL24003989-00

Dear Ms. Nelson,

This office represents the Virginia Department of Education in the above-styled matter. On behalf of the Virginia Department of Education, I have enclosed for filing a Brief in Support of the Department's Plea in Bar of Sovereign Immunity and Plea in Bar of Statute of Limitations. If you have any questions, please do not hesitate to contact me. I can be reached at TSanford@oag.state.va.us or (804) 692-0551. Thank you for your assistance with this matter.

Sincerely,

T. Sanford

Thomas J. Sanford
Assistant Attorney General

Enclosure
CC: Wyatt Rolla (via email)
Geri Greenspan (via email)
Andrew J. Ewalt (via email)
Meghan E.F. Rissmiller (via email)
Jennifer B. Loeb (via email)
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CIRCUIT COURT
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VIRGINIA

VIRGINIA:

IN THE CIRCUIT COURT FOR YORK COUNTY

JANE DOE, BY JILL DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: CL24-3989**
	)	
VIRGINIA DEPARTMENT OF EDUCATION,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S PLEA IN BAR OF SOVEREIGN IMMUNITY AND PLEA IN BAR OF STATUTE OF LIMITATIONS

Defendant the Virginia Department of Education ("Department"), by counsel, submits this Brief in Support of its Plea in Bar of Sovereign Immunity and Plea in Bar of Statute of Limitations. Plaintiff brought this action pursuant to the Virginia Administrative Process Act ("VAPA") and the Declaratory Judgment Act, seeking to invalidate an administrative guidance document issued by the Department.

Sovereign immunity bars this action. Plaintiff asks this Court to strike down a guidance document setting forth model policies for use by local school boards in adopting their own policies. But the Department is immune from suit except where the General Assembly has expressly waived that immunity. Plaintiff points to VAPA's waiver of sovereign immunity, but that waiver is inapplicable here because Plaintiff has entirely failed to comply with VAPA's requirements for challenging an agency guidance document. Among other things, Plaintiff brought this action months after the statutory limitations period to challenge a guidance document expired. Because Plaintiff has utterly failed to comply with VAPA's mandatory requirements, including its statute of limitations, Plaintiff cannot invoke VAPA's limited waiver of sovereign immunity. The Department's sovereign immunity therefore bars this action. Moreover, Plaintiff's failure to

comply with VAPA's statute of limitations not only forecloses a waiver of sovereign immunity—it provides an independent basis for dismissal.

Plaintiff's reliance on the Declaratory Judgment Act does nothing to save the Complaint because it is well established that the act does not itself waive sovereign immunity and cannot be used as an end-run around VAPA's procedural requirements or its statute of limitations. This Court should dismiss the Complaint with prejudice.

BACKGROUND

The Department regularly issues guidance documents for the Commonwealth's public schools.[1] A "[g]uidance document" is "any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations." Code § 2.2-4101. The Department has issued numerous guidance documents on topics ranging from the proper means of conducting educational assessments,[2] to the collection of recyclable materials in public schools. See Code § 10.1-1425.9. In some instances, these guidance documents take the form of or include "model policies" for local school boards to use in adopting their own policies. See, *e.g.*, Code § 22.1-16.8 (directing the Department to issue model policies regarding sexually explicit content).[3]

In 2020, the General Assembly directed the Department to "develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students."

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[1] See Department of Education, *Guidance Documents in Effect as of May 10, 2024*, https://tinyurl.com/3nz775h9 (collecting over one hundred guidance documents issued by the Department).

[2] See Department of Education, *Guidelines for Instruction-Based Assessments* (2004), https://tinyurl.com/msrn75cb.

[3] See Department of Education, *Model Policies Concerning Instructional Materials with Sexually Explicit Content* (Aug. 4, 2022), https://tinyurl.com/2rv46rz6.

Code § 22.1-23.3(A); see also Compl. ¶ 19 (describing this section of the Code as "establish[ing] a framework for the [Department] to provide guidance to school districts."). The General Assembly further provided that "[e]ach school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education." Code § 22.1-23.3(B).

The Department issued an inaugural set of model policies in 2021 ("2021 Model Policies"). See Compl. Ex. 1. Notably, the 2021 Model Policies disregarded parents' fundamental constitutional right to direct the upbringing and education of their children by, among other things, directing schools to conceal a child's professed change in gender identity from the child's parents. See Compl. Ex. 1, 2021 Model Policies at 12; Code § 1-240.1 ("A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that this right is "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Williams v. Williams*, 256 Va. 19, 21–22 (1998). Similarly, the 2021 Model Policies failed to recognize teachers' constitutional rights to the free exercise of religion and free speech, which prevent schools from "compell[ing] [teachers] to use government-approved pronouns." *Vlaming v. West Point Sch. Bd.*, 895 S.E.2d 705, 723–24, 737 (Va. 2023); Compl. Ex. 1, 2021 Model Policies at 12–13. Recognizing substantial legal and policy defects in the 2021 Model Policies, the Department withdrew that guidance document. In place of the 2021 Model Policies, the Department adopted—utilizing the full administrative process for guidance documents—new policies that went into effect on July 18, 2023 ("2023 Model Policies"). Compl. ¶¶ 32–33, 38–39 & Ex. 3. The 2023 Model Policies are a guidance document. *Id.* ¶ 1 & Ex. 3 at 2.

Plaintiff attends a public high school in York County. Compl. ¶ 4. After the issuance of the 2023 Model Policies, the York County School Board on August 24, 2023, adopted a policy prohibiting schools from "compel[ling] school personnel" to address students "in any manner that would violate their constitutionally protected rights." *Id.* ¶ 69. After that policy change, Plaintiff requested that school personnel refer to Plaintiff using a first name different from the legal name contained in Plaintiff's official records. *Id.* ¶¶ 69–72. One teacher addressed Plaintiff by Plaintiff's last name rather than using a first name for Plaintiff, *id.* ¶ 68, citing the teacher's constitutional right, *id.* ¶ 83. The principal allegedly informed Plaintiff's mother that the teacher was acting in compliance with York County school policies, but also agreed to transfer Plaintiff to a different class. *Id.* ¶¶ 87–88, 91. Plaintiff is concerned that a substitute teacher could possibly address Plaintiff by Plaintiff's legal first name as Plaintiff does "not know . . . whether any changes in Plaintiff's official records" have been made, *id.* ¶¶ 75–76, or that "future teachers and substitute teachers could" decline to use Plaintiff's preferred name, *id.* ¶ 92.

On February 15, 2024—nearly seven months after the 2023 Model Policies' effective date—Plaintiff filed a "Verified Complaint" against the Department seeking to vacate the 2023 Model Policies for exceeding the Department's "statutory authority." Compl. ¶ 98.[4] The Complaint asks this Court to strike down the 2023 Model Policies and prohibit their use across the entire Commonwealth. See, *e.g.*, Compl. ¶¶ 1, 3, 99–112 & Prayer for Relief. The gravamen of the legal challenge is Plaintiff's claim that the "2023 Model Policies do not comply with the

[4] In VAPA actions the initial filing with the circuit court is a "Petition for Appeal," which follows the filing of a "Notice of Appeal" with the relevant agency, brought by a petitioner against a respondent. Rule 2A:4. Contrary to VAPA's requirements, see Part I.A, *infra*, the initial pleading in this matter is instead styled as a "Verified Complaint" and refers to Doe as "Plaintiff" and the Department as "Defendant." This terminology is erroneous, but to avoid confusion, the Department adopts the Plaintiff's usage.

authorizing statute" for three reasons. *Id.* ¶¶ 45, 98, 101. First, Plaintiff argues that the 2023 Model Policies do not reflect evidence-based best practices. *Id.* ¶¶ 45–57. Second, Plaintiff argues that the "2023 Model Policies exceed the scope of the authorizing statute." *Id.* ¶¶ 58–60. Third, Plaintiff claims the 2023 Model Policies "fail to adequately guide schools" regarding non-discrimination laws. *Id.* ¶¶ 45, 61–66.

The Complaint raises these arguments in two counts. Count I seeks this Court's review of "an agency action" under VAPA. Compl. ¶¶ 99–109 (citing Code §§ 2.2-4027 and -4029 of VAPA); see also *id.* ¶ 3 (requesting that the Court "set aside the 2023 Model Policies under the Virginia Administrative Process Act"). This count seeks to vacate and "set aside" the 2023 Model Policies and restore the "2021 Model Policies," requiring school boards to comply with that rescinded guidance document. *Id.* ¶¶ 99–109. Count II seeks the same relief under the Declaratory Judgment Act. *Id.* ¶¶ 110–12 & Prayer for Relief ¶ B.

LEGAL STANDARD

Plea in Bar Standard. "A plea in bar asserts a single issue," including sovereign immunity or the expiration of the statute of limitations, "which, if proved, creates a bar to a plaintiff's recovery." *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019). "The party asserting the plea in bar bears the burden of proof" and may meet that burden by "relying on the pleadings." *Id.*

Administrative Appeal Standard. "On appeal of agency action under the VAPA, the party complaining bears the burden of demonstrating an error subject to review. The circuit court's role in such an appeal is equivalent to an appellate court's role in an appeal from a trial court ruling." *Virginia Bd. of Med. v. Hagmann*, 67 Va. App. 488, 499 (2017) (cleaned up); Code § 2.2-4027.

SUMMARY OF ARGUMENT

This Court should dispose of this suit at the outset because it is barred by sovereign immunity. See, *e.g.*, *Commonwealth v. White*, 293 Va. 411, 419 (2017) ("The doctrine of judicial restraint dictates that [courts] decide cases on the best and narrowest grounds available.") (cleaned up). As an agency of the Commonwealth, the Department's sovereign immunity shields it from suit absent its consent. To overcome this immunity, Plaintiff must identify an express waiver of that immunity. Plaintiff has not and cannot do so. Although VAPA provides a limited and conditional waiver of sovereign immunity, a VAPA petitioner must comply with VAPA's conditions to qualify for that waiver. Plaintiff here has not even attempted to meet those conditions; among other issues, the action is untimely and does not comply with VAPA's procedural requirements. The Department's sovereign immunity therefore bars this suit, and this Court lacks jurisdiction over Plaintiff's claims.

Moreover, Plaintiff's challenge to the 2023 Model Policies is also time-barred. Under VAPA, challenges to guidance documents must be brought within thirty days of the effective date of the guidance document. Plaintiff waited nearly seven months. Plaintiff's suit is therefore time-barred.[5]

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[5] In response to the Complaint, the Department filed (1) a Plea in Bar of Sovereign Immunity, (2) a Plea in Bar of Statute of Limitations, (3) a Motion to Dismiss, and (4) a Demurrer. Courts "first consider the [] claim of sovereign immunity because it is jurisdictional" and renders the Commonwealth and its agencies entirely immune to suits. *Seabolt v. County of Albemarle*, 283 Va. 717, 719 (2012); *cf.* Code § 8.01-670.2(A). The Department has therefore first noticed its Plea in Bar of Sovereign Immunity in this matter for hearing on July 15, 2024. As the substance of the Plea in Bar of Statute of Limitations overlaps substantially with the Plea in Bar of Sovereign Immunity, the Department also noticed that plea for hearing at the same time. This brief, therefore, addresses those two pleas, while the Department reserves argument, if necessary, on the Motion to Dismiss and Demurrer for a subsequent hearing and briefing.

ARGUMENT

I. The Department's sovereign immunity bars this action

Sovereign immunity bars Plaintiff's claims under both VAPA and the Declaratory Judgment Act. "It is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts, or in any other, without its consent and permission." *Board of Pub. Works of City of Richmond v. Gannt*, 76 Va. 455, 461 (1882). "[B]ecause the Commonwealth can act only through individuals, the doctrine applies not only to the state, but also to certain government officials" and "agencies." *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 102 (2008); see, *e.g.*, *Billups v. Carter*, 268 Va. 701, 707 (2004) ("The Commonwealth and its agencies are immune."). The Department is an agency of the Commonwealth, Compl. ¶ 5, and it thus "enjoys the privileges of sovereign immunity" to the same extent as the Commonwealth itself. *Virginia Bd. of Med.*, 13 Va. App. at 464. This immunity is not merely a defense to civil actions—it deprives a court of jurisdiction over the suit. *Commonwealth v. Luzik*, 259 Va. 198, 206 (2000).

Sovereign immunity "serves a multitude of purposes." *Afzall v. Commonwealth*, 273 Va. 226, 231 (2007). Among other things, it "'protects the state from burdensome interference with the performance of its governmental functions,'" and "provides for 'smooth operation of government.'" *Virginia Bd. of Med.*, 13 Va. App. at 464 (quoting *Hinchey v. Ogden*, 226 Va. 234, 240 (1983) and *Messina v. Burden*, 228 Va. 301, 308 (1984)). In keeping with those purposes, sovereign immunity shields the Department "from suits in equity to restrain governmental action or to compel such action," including "declaratory judgment proceeding[s]." *Afzall*, 273 Va. at 231.

Sovereign immunity bars both of Plaintiff's claims because they expressly seek to "restrain [or compel] governmental action," *Afzall*, 273 Va. at 231, and to interfere with "governmental functions," *Gray*, 276 Va. at 101. Plaintiff seeks to restrain the Department from providing the

guidance in the 2023 Model Policies to local school boards, and also demands that the Department direct local school boards to adopt policies consistent with the withdrawn 2021 Model Policies. The Department's sovereign immunity therefore bars these claims, and this Court lacks jurisdiction to address them, unless Plaintiff can identify an express waiver of that immunity. Plaintiff cannot.

"[O]nly the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity." *Luzik*, 259 Va. at 206. Such waivers "cannot be implied from general statutory language or by implication." *Hinchey*, 226 Va. at 241 (quoting *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 457 (1961)). Rather, "language granting consent to suit must be explicitly and expressly announced." *Id.* Even where the General Assembly has expressly waived sovereign immunity, the terms of that waiver "must be strictly construed." *Halberstam v. Commonwealth*, 251 Va. 248, 250 (1996). Thus, where the Commonwealth "tailor[s] its consent to be sued by prescribing certain modes, terms, and conditions . . . it can be sued only in the manner and upon the terms and conditions prescribed." *Virginia Bd. of Med*, 13 Va. App. at 465; *Halberstam*, 251 Va. at 250–51 ("The Act [waiving sovereign immunity] is a statute in derogation of the common law doctrine of sovereign immunity and, therefore, must be strictly construed. . . . [S]trict compliance with all of its provisions is required."). "Compliance with the conditions and restrictions set forth" in a waiver of sovereign immunity is a "jurisdictional" requirement. *Virginia Bd. of Med*, 13 Va. App. at 465.

The General Assembly has not waived the Department's immunity to this suit. Plaintiff brought Count I of the Complaint under VAPA, which provides for a limited waiver of the Department's sovereign immunity—but with strict conditions, including a time limit and procedural requirements, that Plaintiff entirely fails to meet. Count II of the Complaint is brought under the Declaratory Judgment Act, which the Supreme Court of Virginia has held is not a waiver

of sovereign immunity. Plaintiff's claims are therefore barred by sovereign immunity, and this Court lacks jurisdiction to consider them.

A. Plaintiff failed to comply with VAPA's mandatory conditions and thus cannot invoke VAPA's limited and conditional waiver of sovereign immunity

This action falls outside VAPA's limited and conditional waiver of sovereign immunity because Plaintiff failed to comply with VAPA's mandatory conditions, including its 30-day time limit and its procedural requirements.

VAPA governs "an agency's actions" and "judicial review" of those actions, including the issuance of guidance documents. *Virginia Bd. of Med.*, 13 Va. App. at 465; *Washington v. Caroline Cnty. Dep't of Soc. Servs.*, 71 Va. App. 308, 314 (2019) ("In Virginia, [VAPA] governs an agency's actions and judicial review thereof."); Code § 2.2-4002.1. Guidance documents require a "30-day public comment period" prior to the guidance document's effective date. Code § 2.2-4002.1(B). The General Assembly has provided a limited waiver of agency sovereign immunity by permitting a person "aggrieved" by a guidance document to challenge the guidance document after its effective date by following the clearly defined procedures for challenging agency action articulated in Article 5 of VAPA and the Rules of the Supreme Court of Virginia incorporated by Article 5. See Code § 2.2-4002.1(C) ("Any person who remains aggrieved after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ 2.2-4025 et seq.)."); Code § 2.2-4026 (specifying that an aggrieved person may seek "direct review" of the guidance document "by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of Supreme Court of Virginia").

Article 5 of VAPA ("Court Review") provides a standardized mechanism to challenge the legality of agency action. Code §§ 2.2-4025 through -4030. Article 5 is a limited and tailored

waiver of sovereign immunity. *Virginia Bd. of Med.*, 13 Va. App. at 465. This conditional waiver of "the sovereign immunity of agencies . . . is designed to provide for and standardize court review of agency actions." *Id.* But Article 5 of VAPA "waive[s] sovereign immunity only to allow a party to obtain judicial review of" agency action "*in the manner provided in the VAPA*." *Id.* at 466 (emphasis in original); see generally *Halberstam*, 251 Va. at 250–51.

This action does not comply with VAPA's mandatory procedures; therefore, Plaintiff cannot invoke VAPA's limited waiver of sovereign immunity. See, *e.g.*, *Halberstam*, 251 Va. at 250–52 (observing that "strict compliance with all of [a statutory waiver's] provisions is required" and rejecting claim brought pursuant to that waiver when the challenger failed to meet a technical notice requirement); *Washington*, 71 Va. App. at 315 ("Because [the agency] has waived its sovereign immunity to be sued and has tailored its consent to such suits by prescribing that they must be brought in the manner provided in the VAPA, we find that compliance with this requirement as set forth in the Rule is mandatory.").

First, Plaintiff failed to comply with VAPA's time limits. Article 5 permits a challenge to a guidance document only through a "timely" court action, Code § 2.2-4026(A), and Rule 2A:2 establishes how to challenge an agency action in a timely fashion. Code § 2.2-4026(A); *Virginia Bd. of Med.*, 13 Va. App. at 469 (VAPA "requires" that administrative appeals "be filed within the time constraints of Rule 2A:2."). To meet VAPA's timeliness requirement, a challenger must file the notice of appeal of a guidance document within thirty days of that guidance document's effective date. Code §§ 2.2-4002.1, 2.2-4026; Rule 2A:2. Next, a timely challenge under VAPA requires that a "petition for appeal" be filed "with the clerk of the circuit court named in the first notice of appeal" within "30 days after the filing of the notice of appeal." Rule 2A:4. Plaintiff here failed to file either a notice of appeal or a petition for appeal, and therefore has not met these

requirements. And to the extent Plaintiff asks that this "verified complaint" be construed as either a notice of appeal or a petition for appeal, Plaintiff brought this action nearly *seven months* after the effective date of the 2023 Model Policies. See Background, *supra*. This action is therefore ineligible for VAPA's limited and conditional waiver of sovereign immunity, as well as time-barred, see Part II, *infra*.

Second, Plaintiff also failed to comply with VAPA's procedural requirements to file the mandatory notice of appeal and petition for appeal. A challenge to an administrative action cannot begin with a complaint; instead, VAPA requires a petitioner to file "a notice of appeal" with "the agency secretary" to initiate a challenge. Rule 2A:2(a). A valid notice of appeal must "identify" the agency action appealed from, the identities of the appellants, and the circuit court to which the appeal is taken. Rule 2A:2(b). And the Rules make clear that "sending a notice of appeal to an agency's counsel will not satisfy the requirement that a notice of appeal be filed with the agency secretary." *Id.* Here, Plaintiff failed to file *any* notice of appeal with the Department secretary, much less a notice that included the information required by Rule 2A:2. Plaintiff similarly failed to file a petition for appeal. To pursue an administrative appeal under VAPA, Plaintiff must file and serve a "Petition for Appeal" that complies with the requirements of Rule 2A:4 "[w]ithin 30 days after the filing of the notice of appeal." Rule 2A:4. This includes serving a copy of the petition on the agency secretary. Rule 2A:4. Plaintiff did not file a petition for appeal at all, much less one that satisfies the requirements of Rule 2A:4. These defects preclude Plaintiff from invoking VAPA's limited waiver of sovereign immunity.[6]

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[6] To the extent Plaintiff seeks to remedy the lack of either a Notice of Appeal or a Petition for Appeal by recasting the Complaint as either of those required filings, that effort would be unavailing. On its face the Complaint is neither, but it certainly is not both. Simply put, "one filing cannot satisfy both requirements." *Infinitee Day Sch., LLC v. Virginia Dep't of Educ.*, 111 Va. Cir. 407, 413 (Norfolk City Cir. Ct. 2023). "The Supreme Court of Virginia enacted two distinct rules:

Finally, Plaintiff fails to comply with VAPA's requirements for "standardize[d] court review of agency actions" provided for by the General Assembly. *Virginia Bd. of Med.*, 13 Va. App. at 465. VAPA administrative appeals are adjudicated based on an administrative record submitted by the agency, not civil discovery. See Rule 2A:5 (clarifying that Part Four of the Rules, which governs discovery, does "not apply to appeals under this part" and prohibiting depositions); see also Rule 2A:3 (providing for an administrative record prepared by the agency secretary). But rather than seeking certification of an administrative record by filing a notice of appeal, see Rules 2A:2(a); 2A:3(b)–(c), Plaintiff attached cherry-picked regulatory documents as exhibits to the Complaint, see, *e.g.*, Compl. Exs. 4–6 (attaching certain comments submitted during the regulatory process). And, contrary to Rule 2A:5, Plaintiff seeks to engage in discovery in this matter. See Plaintiff's Proposed Protective Order ¶ 4 (permitting the parties "to notice depositions and depose witnesses and conduct other discovery using" pseudonyms).

Relatedly, Plaintiff's counsel appears to be seeking two bites at the same apple in challenging the 2023 Model Policies. On the same day Plaintiff's counsel filed this suit, they filed a separate complaint in Hanover County Circuit Court on behalf of a separate student raising the same claims against the Department and challenging the same 2023 Model Policies. See *Loe v. Virginia Department of Education*, Case No. 24-577 (Hanover Cnty. Cir. Ct.). This procedure violates VAPA's provision requiring consolidation of challenges to agency action in a single circuit court. Rule 2A:3(b) (providing that in the event of multiple appeals of the same agency action, the cases will be "transferred to and heard by the court having jurisdiction that is named in

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Rule 2A:2 regarding notices of appeal to be filed with the administrative agency, and Rule 2A:4 regarding petitions for appeal to be filed with the circuit court. Therefore, one filing cannot serve as both a party's notice of appeal and its petition for appeal." *Id.*

the notice of appeal that is the first to be filed."). Because neither the Plaintiff in this case nor the Hanover County case filed the required notice of appeal, there is no "first to be filed" notice.

Plaintiff cannot evade the orderly process established by VAPA for considering administrative appeals, especially with respect to a statewide guidance document, by ignoring VAPA's straightforward requirements. This suit does not satisfy the conditions for invoking VAPA's limited waiver of sovereign immunity. *Halberstam*, 251 Va. at 251 ("[S]trict compliance with *all* of its provisions is required.") (emphasis added). The Department's sovereign immunity therefore bars this action.

B. The Declaratory Judgment Act does not waive sovereign immunity

Sovereign immunity also bars Plaintiff's claim under the Declaratory Judgment Act. As the Supreme Court has held in multiple cases, the Declaratory Judgment Act, Code § 8.01-184, does not waive sovereign immunity. *Montalla, LLC v. Commonwealth*, __ Va. __, __, Record No. 230365 (May 9, 2024), slip op. at 10 ("[A]bsent its consent, the Commonwealth, subject to certain exceptions, enjoys immunity . . . from declaratory judgment actions."); *Afzall*, 273 Va. at 231–32 (explaining that a declaratory judgment action could be brought against an agency of the Commonwealth only when a separate statutory waiver of immunity itself authorized that action); *id.* at 234 (holding that "the bar of sovereign immunity applies in this case because the Commonwealth has not waived that defense in the context of a declaratory judgment action" under the separate statutory regime at issue in *Afzall*); see also *Daniels v. Mobley*, 285 Va. 402, 411–12 (2013) ("[T]o the extent that [plaintiff] had requested a declaration of his rights, such declaration would be barred by sovereign immunity. A resolution of the declaratory judgment action in a manner which adjudicated [plaintiff's] rights would enjoin the Commonwealth from acting, in violation of the prohibition articulated in *Afzall*."); *DiGiacinto v. Rector & Visitors of George*

Mason Univ., 281 Va. 127, 137 (2011) (holding that sovereign immunity bars "declaratory judgment proceeding[s] against the Commonwealth . . . [in] merely statutory claims"); *Ligon v. County of Goochland*, 279 Va. 312, 319 (2010) ("[A] waiver of sovereign immunity cannot be implied from general statutory language" like that in the Declaratory Judgment Act); *Transparent GMU v. George Mason Univ.*, 97 Va. Cir. 212, 217 (2017) ("[T]he Declaratory Judgment Act does not broaden the Sovereign Immunity waiver specifically provided for under [the Virginia Freedom of Information Act]."), aff'd 298 Va. 222 (2019).

Plaintiff also cannot circumvent the procedural requirements of VAPA's Article 5 through a declaratory judgment proceeding. Indeed, the General Assembly specifically amended VAPA to remove "imprecise language" that had previously been interpreted to allow challenges to agency actions through declaratory judgment actions. *Virginia Bd. of Med.*, 13 Va. App. at 468. Thus, it is now well-established that "[a] declaratory judgment cannot be substituted for an appeal under the Administrative Process Act." *Homestretch Corp. v. Board of Supervisors of Culpeper Cnty.*, 22 Va. Cir. 549, 550 (Culpeper Cnty. Cir. Ct. 1988). Therefore, where "proceedings are governed by the Administrative Process Act . . . the aggrieved party may not circumvent the procedural steps outlined in [VAPA] by filing a declaratory judgment action." *Foster v. Dupler*, 54 Va. Cir. 29 (Chesterfield Cnty. Cir. Ct. 2000) (citing *Virginia Bd. of Med.*, 13 Va. App. at 468–69). As the Complaint acknowledges, challenges to guidance documents, including the 2023 Model Policies, are governed by VAPA. Compl. ¶ 100. Plaintiff's request for a declaratory judgment, like Plaintiff's VAPA claim, is therefore jurisdictionally barred by the Department's sovereign immunity.

II. The Complaint is time-barred

Plaintiff's claims are also time-barred because this action was brought months after the thirty-day deadline to challenge the 2023 Model Policies expired.

There is no dispute that the 2023 Model Policies are a guidance document. Compl. ¶ 1 ("This action challenges . . . issuance of a guidance document"); Compl. Ex. 3, 2023 Model Policies at 2 ("The 2023 Model Policies are a guidance document issued pursuant to §§ 2.2-4002.1 and 2.2-4101 of the *Code of Virginia*"); *Christian Action Network v. Atif Qarni*, 108 Va. Cir. 313, 317 (Lynchburg City Cir. Ct. 2021) (finding "that the [2021] model policies [were] a guidance document"). Under VAPA, "[a]ny person who remains aggrieved after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ 2.2-4025 et seq.)." Code § 2.2-4002.1(C). That article permits an aggrieved party to challenge an agency action through "an appropriate *and timely* court action . . . in the manner provided by the Rules of Supreme Court of Virginia." Code § 2.2-4026(A) (emphasis added). To be timely, challenges to an agency action must be made within thirty days of the challenged action by filing a notice of appeal within that time frame. Rule 2A:2(a). For a guidance document, the notice of appeal must be filed within thirty days of the guidance document's effective date. Code § 2.2-4002.1; Rule 2A:2(a).

Here, Plaintiff alleges that the 2023 Model Policies went into effect on July 18, 2023. Compl. ¶¶ 1, 5. But Plaintiff never filed the required notice of appeal. See Part I.A, *supra*. Instead, Plaintiff delayed nearly seven months from the time the 2023 Model Policies went into effect, filing this suit on February 15, 2024. Thus, Plaintiff's claims are untimely and barred by VAPA's thirty-day time limit.

Nor does Plaintiff's request for a declaratory judgment save the Complaint from VAPA's time bar. Courts "will not permit a complainant to use the declaratory judgment statute as a vehicle to circumvent the statute of limitations applicable to the substance of a complaint." *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 465 (2003). Here, as Plaintiff acknowledges, the substance of the Complaint is a challenge to the 2023 Model Policies under VAPA. See, *e.g.*, Compl. ¶ 1, 99–109. Therefore, the applicable limitations period is thirty days from the July 18, 2023 effective date of the 2023 Model Policies. Plaintiff's request for a declaratory judgment does not change that window. Otherwise, the limitations period for an administrative appeal of agency action would be a nullity—a party could simply seek declaratory relief mirroring the relief authorized by VAPA, as Plaintiff attempts to do here.

Application of VAPA's time bar is particularly appropriate here because Plaintiff's real grievance is with the actions of the York County School Board, not the Department. The section of the Code permitting challenges to actions of school boards mirrors VAPA's statute of limitations. Specifically, Code § 22.1-87 permits the "parent, custodian, or legal guardian" of a student "who is aggrieved by an action of the school board" to "petition the circuit court" to "review the action of the school board." Code § 22.1-87. Any such petition, however, must be filed "within thirty days after such action" of the school board. *Id.* Plaintiff here did not bring any timely challenge to the school board's adoption of the policies in question. Plaintiff cannot resurrect untimely claims regarding the actions of the school board by instead pursuing an administrative appeal against the Department; VAPA's statute of limitations bars the attempt.

This Court should grant the Department's Plea in Bar of Statute of Limitations and dismiss this action with prejudice as untimely.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's Plea in Bar of Sovereign Immunity and Plea in Bar of Statute of Limitations, dismiss the Complaint with prejudice, and grant any other relief that the Court deems just and proper.

Respectfully submitted,

VIRGINIA DEPARTMENT OF EDUCATION

By: T. Sanford

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Attorney General

Steven G. Popps (VSB No. 80817)
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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, pursuant to an agreement of counsel, a true and correct copy of the foregoing Brief in Support was sent via electronic mail to the following addresses:

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