VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

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

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S PLEAS IN BAR OF SOVEREIGN IMMUNITY AND STATUTE OF LIMITATIONS

Plaintiff Jane Doe, by counsel, submits this Brief in Opposition to Defendant's Pleas in Bar of Sovereign Immunity and Statute of Limitations. Plaintiff challenges a guidance document issued by the Virginia Department of Education ("VDOE")—the "Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools" (the "2023 Model Policies")—as contrary to law, because it contravenes the mandate of the statute that authorizes the VDOE to issue such guidance. Rather than comply with the statutory requirement to formulate guidance for schools on how to create educational environments that include and protect all students, including transgender students, VDOE directed schools to adopt policies that discriminate against and harm transgender students. As a direct result of VDOE's guidance, Plaintiff was excluded from educational opportunities because she is transgender.

The Virginia Administrative Process Act ("VAPA") clearly authorizes judicial review of guidance documents. Va. Code § 2.2-4002.1, -4026. VDOE nevertheless claims sovereign immunity because Plaintiff did not follow procedures that apply to agency regulations[1] and case

[1] Because VAPA uses the terms "regulation" and "rule" interchangeably, Va. Code § 2.2-4001, this brief's use of the term "regulation" encompasses the term "rule."

decisions, but not to guidance documents. VDOE's pleas in bar depend entirely on the premise that particular Rules of the Supreme Court of Virginia (the "Rules") apply to court actions challenging guidance documents; but by their plain language, these Rules apply only to appeals of "regulations" and "case decisions," which VAPA explicitly distinguishes from "guidance documents." For challenges to guidance documents, VAPA requires *only* that a plaintiff bring an "appropriate and timely" claim in circuit court (as Plaintiff has done here)—not that such a claim be filed within thirty days of the guidance document being issued or that particular forms be used, as VDOE argues. § 2.2-4026. Therefore, because Plaintiff's action is timely and appropriate, VAPA waives sovereign immunity, and the Court should therefore overrule Defendant's pleas in bar.

STANDARD OF REVIEW

The party asserting a plea in bar bears the burden of proof. *Massenburg v. City of Petersburg*, 298 Va. 212, 216, 836 S.E.2d 391, 394 (2019). To rule on a plea in bar, a court may hear evidence, or may rely solely on the pleadings. *Id.* Where a court relies solely on the pleadings, the facts alleged by the plaintiff are accepted as true. *Lostrangio v. Laingford*, 261 Va. 495, 497, 544 S.E.2d 357, 358 (2001). The court must "not only accept as true the facts alleged, but also grant the plaintiff the benefit of all 'reasonable factual inferences that can be drawn' from such a view of the facts." *Montalla, LLC v. Commonwealth*, 900 S.E.2d 290, 296 (2024) (quoting *Vlaming v. West Point Sch. Bd.*, 302 Va. ——, 895 S.E.2d 705, 716 (2023)).

SUMMARY OF ARGUMENT

In bringing this challenge to the 2023 Model Policies, Plaintiff complied with all applicable procedural requirements. VDOE acknowledges, and Plaintiff agrees, that the 2023 Model Policies are a guidance document, and that VAPA waives sovereign immunity to allow

judicial review of guidance documents under some circumstances. But VDOE insists that certain procedural requirements contained within the Rules governing agency regulations and case decisions *also* apply to guidance documents. They do not—as the text, history, and structure of VAPA and the Rules make clear.

VAPA's procedures have long applied to "regulations" and "case decisions," and in 2018, the General Assembly amended VAPA to establish unique procedures that govern the issuance of "guidance documents," while exempting guidance documents from the other requirements of VAPA. VAPA now permits individuals aggrieved by a guidance document, regulation, or case decision to pursue judicial review via "an appropriate and timely court action," and authorizes the Supreme Court of Virginia to adopt rules prescribing what is "appropriate and timely." Va. Code § 2.2-4026. The Supreme Court has promulgated such rules for regulations and case decisions. It has not done so for guidance documents.

Nevertheless, VDOE argues that the Rules pertaining to regulations and case decisions also apply to guidance documents. But VDOE's reading ignores the plain language of the Rules, which explicitly apply only to regulations and case decisions, not guidance documents. Traditional canons of statutory interpretation prohibit adding language to VAPA or to the Rules that is not there. In addition, the procedures described in the Rules cannot possibly be applied to guidance documents because those procedures are keyed to events (such as the publication of a final regulation in the Virginia Register of Regulations or service of a case decision's final order) that do not occur when an agency issues a guidance document.

Because the Supreme Court has not adopted any Rule specifying the procedural requirements applicable to challenges to guidance documents, Plaintiff needed to comply only with the requirement of VAPA itself that this case be brought on an "appropriate and timely"

basis. Plaintiff did so by bringing her challenge within the Commonwealth's default two-year statute of limitations.

ARGUMENT

I. VAPA Distinguishes Guidance Documents from Regulations and Case Decisions.

Since VAPA became law in 1975, it has governed the issuance of and challenges to regulations and case decisions. *See* Va. Code Comm'n, Rep. to the Governor and the Gen. Assembly of Va., H. Doc. No. 26, (1975) (providing rationale for VAPA).[2] VAPA requires agencies to follow an extensive process to promulgate regulations. For example, an agency must publish a Notice of Intended Regulatory Action, allow various periods of public comment (including oral and written submissions), hold a public hearing on the proposed regulations (in some circumstances), publish certain information along with the proposed regulation, and provide additional comment periods if the agency makes any revisions to the proposed regulation before it becomes final. *See* Va. Code §§ 2.2-4007.01 to -4009. VAPA also requires agencies to develop public participation guidelines that include provision of additional notice about proposed regulations to interested parties and means for those parties to provide input. § 2.2-4007.02. VAPA states that the purpose of these procedures is to "provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution." § 2.2-4012. Once final, an agency must transmit the regulation to the Virginia Register of Regulations, which then publishes the regulation within two weeks. §§ 2.2-4012(E), -4031(A).

As with regulations, VAPA describes formal procedures that agencies must follow when making case decisions. The statute sets out a multi-step process that includes both an informal

[2] https://rga.lis.virginia.gov/Published/1975/HD26/PDF.

resolution process and a procedure for a full evidentiary hearing, with notice and opportunities to present evidence, give oral argument, cross examine witnesses, and submit proposed findings and conclusions. *See* §§ 2.2-4019 to -4020.

Prior to 2018, VAPA defined "guidance documents"[3] separately from "regulations"[4] and "case decisions,"[5] indicating that none of these terms are interchangeable with each other. 2011 Va. Acts ch. 241.[6] Courts agreed that guidance documents are qualitatively different from regulations. *See, e.g.*, *Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 533, 612 S.E.2d 239, 243 (2005) (quoting *Jackson v. W.*, 14 Va. App. 391, 399, 419 S.E.2d 385, 389 (1992)) ("Not subject to the scrutiny associated with promulgated regulations, agency guidelines 'do not purport to be a substitute for the statute.'").

Notably, prior to 2018, VAPA did not require agencies to follow any procedures before adopting guidance documents, and it did not authorize judicial review of guidance documents. In 2018, however, the General Assembly amended VAPA to create a separate procedural regime for guidance documents. 2018 Va. Acts 1290 to 91. Those amendments explicitly exempted

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[3] "'Guidance document' means 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, excluding agency minutes or documents that pertain only to the internal management of agencies. Nothing in this definition shall be construed or interpreted to expand the identification or release of any document otherwise protected by law." Va. Code § 2.2-4101 (incorporated by § 2.2-4001).

[4] "'Rule' or 'regulation' means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws." Va. Code § 2.2-4001.

[5] "'Case' or 'case decision' means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." Va. Code § 2.2-4001.

[6] For a brief one-year period, the General Assembly actually excised the "guidance document" definition from VAPA as it consolidated provisions relating to guidance documents in the Virginia Register Act. 2017 Va. Acts 812–14. When the General Assembly added a procedural framework specific to guidance documents to VAPA in 2018, however, it re-incorporated the definition.

guidance documents from the formal procedures that apply to regulations and case decisions. Va. Code § 2.2-4002.1(A) ("Guidance documents shall be exempt from the provisions of this chapter, pursuant to this section."). Instead, agencies may promulgate guidance documents through a unique, abbreviated process. § 2.2-4002.1(B)-(C) (requiring agency to certify that guidance document complies with the statutory definition, publish it on the agency's website, and provide a brief comment period). This simple and streamlined process differs markedly from the more rigid, multi-step processes required to promulgate regulations and reach case decisions. These procedural differences reflect a fundamental qualitative distinction between guidance documents on the one hand, and regulations and case decisions on the other.

II. VAPA Authorizes Courts to Review Guidance Documents and the Supreme Court of Virginia to Establish Procedures for Such Review.

VAPA provides that "[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.)." Va. Code § 2.2-4002.1. Article 5, in turn, provides:

> Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) shall have *a right to the direct review thereof 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.

§ 2.2-4026(A) (emphasis added). VDOE concedes that this provision waives sovereign immunity to allow challenges of guidance documents in some circumstances. Def.'s Br. at 8. The "main effect of the sovereign's waiver of immunity is to allow an ordinary citizen to do what is normally prohibited—sue the Commonwealth in a state court." *Williams v. Commonwealth*, 80 Va. App. 637, 652, 900 S.E.2d 184, 191 (2024). There is therefore no dispute that guidance documents like the 2023 Model Policies may be challenged in court; the only dispute here is whether Plaintiff's challenge is "appropriate and timely."

VAPA authorizes the Supreme Court of Virginia to "provide" procedures for affected persons to seek "appropriate and timely" judicial review. As described below, the Supreme Court has established such procedures for regulations and case decisions, but it has not done so for guidance documents. Therefore, this action is not subject to the time limits and procedural requirements that VDOE argues Plaintiff should have followed.

III. The Supreme Court of Virginia Has Not Adopted Rules Pertaining to Court Actions Challenging Guidance Documents.

The Supreme Court of Virginia has not adopted any Rule governing challenges to guidance documents. VDOE contends that Part 2A of the Rules—specifically, its 30-day deadlines,[7] requirement for filing separate notices of appeal and petitions for appeal,[8] limitation on discovery,[9] and requirement for actions to be consolidated (i.e., the so-called "first-to-file" rule)[10]—applies to guidance documents. It does not. Part 2A governs "the review of, by way of direct appeal from, the adoption of a *regulation* or the *decision of a case* by an agency." Rule 2A:1 (emphasis added). For example, Rule 2A:2(a) requires "any party appealing from a *regulation* or *case decision*" to file a notice of appeal "within 30 days after adoption of the *regulation* or after service of the final order in the *case decision*." (emphasis added). The term "guidance document," despite being clearly defined in VAPA, does not appear anywhere in the Rules.

That omission should be presumed to be intentional. In examining the meaning of Part 2A of the Rules, the Court of Appeals has reasoned that the Supreme Court "is presumed to be aware of the decisions of th[e] Court [of Appeals]" when amending its Rules and is presumed to

[7] Def.'s Br. at 10-11 (citing Rules 2A:2, 2A:4).

[8] *Id.* at 11 (citing Rules 2A:2, 2A:4).

[9] *Id.* at 12 (citing Rules 2A:2, 2A:3, 2A:5).

[10] *Id.* at 12-13 (citing Rule 2A:3(b)).

have "chose[n] with care the words it used[.]" *Muse Const. Grp., Inc. v. Commonwealth of Va. Bd. for Contractors*, 60 Va. App. 92, 96, 724 S.E.2d 216, 218 (2012) (citation omitted). And it would stand to reason that the Supreme Court would be at least as familiar with the legislation enacted by the General Assembly as the decisions of the Court of Appeals. After VAPA was amended in 2018 to provide for judicial review of guidance documents, the Supreme Court could have chosen to amend Part 2A of the Rules to specify procedural requirements for those cases, but it has yet to do so, despite making other amendments to Part 2A as recently as November 2020.[11] *See* Va. Sup. Ct., Amendments to Rules of the Supreme Court of Virginia, effective March 1, 2021, Va. Cts. (Nov. 23, 2020).[12]

Although the Supreme Court has not adopted Rules covering guidance documents, VDOE argues that this Court should construe the Rules as if they nonetheless apply. That position is plainly inconsistent with the text of the Rules themselves, which never refer to guidance documents but do refer specifically to regulations and case decisions. The Rules do not use any language that would encompass multiple types of agency action collectively,[13] but consistently refer to regulations and case decisions separately. This construction clearly indicates that the Rules are not intended to apply to all agency documents, enactments, or conduct, but only to appeals of regulations or case decisions.

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[11] Part 2A of the Rules of the Supreme Court of Virginia have been substantively amended several times over the years. *See, e.g.*, https://www.vacourts.gov/courts/scv/amendments/2014_07_02_rules2_404_2_413_2_803_2_902_2A_2_3A_8_7C_6_8_18.pdf; https://www.vacourts.gov/courts/scv/amendments/2011_0301_efiling_part_1_4_seven_8.pdf; https://www.vacourts.gov/courts/scv/amendments/2010_0226_apendixrules2a_4_1.pdf.

[12] https://www.vacourts.gov/courts/scv/amendments/rule_1_1_et_seq.pdf.

[13] For example, VAPA defines "agency action" as "either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court." Yet the Rules do not use this term, but instead use only "regulation" or "case decision."

The Rules must be interpreted in accordance with traditional canons of statutory interpretation. *See*, *e.g.*, *Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 226 (2017) ("The language of Rule 3:25 is plain."); *LaCava v. Commonwealth*, 283 Va. 465, 471, 722 S.E.2d 838, 840–41 (2012) (applying plain language canon to Supreme Court Rule).[14] An exercise in statutory interpretation always begins with the plain language of the statute or rule. *See Muse Const. Grp., Inc. v. Commonwealth of Va. Bd. for Contractors*, 61 Va. App. 125, 130–31, 733 S.E.2d 690, 692 (2012).[15] Lower courts may not add language that the Supreme Court did not see fit to include in one of its Rules. *Cf. Wakole v. Barber*, 283 Va. 488, 496, 722 S.E.2d 238, 242 (noting that courts must refrain from "read[ing] into a statute language that is not there"). And accepting VDOE's argument that the Rules apply to actions challenging a guidance document would require this Court to add words to the Rules that are not there. This interpretation, therefore, must fail.

In addition to contravening the instructions of the most basic canons of statutory construction, VDOE's interpretation of the Rules is not supported by the case law it relies on. Importantly, VDOE does not cite a single case applying the Rules to guidance documents. The cases they do cite instead involve agency regulations or case decisions. For example, *Va. Bd. of Med. v. Va. Physical Therapy Ass'n* dealt with a *de facto* rule challenged under VAPA provision concerning judicial review of agency regulations. 13 Va. App. 458, 469, 413 S.E.2d 59, 65–66 (1991). *Washington v. Caroline Cnty. Dep't of Soc. Servs.* involved the failure to follow procedural

[14] *See also Kessler v. Smith*, 31 Va. App. 139, 144, (1999) (noting in discussion of Supreme Court Rule that "[w]here the language of a [rule] is clear and unambiguous, we are bound by the plain statement of legislative intent." (internal quotations and citations omitted)).

[15] The Virginia Supreme Court has also "consistently applied the time-honored principle *expressio unius est exclusio alterius*" when interpreting statutes. *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 543–44 (Va. 2016) (internal quotations omitted). That canon of interpretation counsels against expanding the plain text of Part 2A of the Rules to apply to judicial review of guidance documents, when the Rules include a specific and finite list of the agency actions that they govern.

requirements for service of process when challenging an agency case decision. 71 Va. App. 308, 315–16, 835 S.E.2d 913, 917–18 (2019). Finally, in *Kinuani v. George Mason Univ.*, the court held that students aggrieved by tuition eligibility decisions must use a specific statutory appeals process, rather than VAPA, to challenge them. No. 0042-22-4, 2023 WL 138332, at *4. None of these cases even discuss whether, much less require that, actions seeking judicial review of guidance documents be treated the same as actions seeking judicial review of regulations or case decisions.

Contrary to VDOE's plea, there are significant practical problems that preclude the application of the Rules' 30-day notice-of-appeal deadline and related requirements to actions challenging guidance documents. Under the Rules, there are two triggering events that could start the 30-day "clock" for the filing of a notice of appeal: (1) "publication in the Register of Regulations," which signals "adoption" of a regulation; or (2) "service of the final order" in a case decision. Rule 2A:2(a). Guidance documents are not "served" like case decisions, so service cannot be the triggering event for guidance documents. With respect to "publication," VAPA does not require guidance documents to be published in the Register upon enactment, and it appears that the 2023 Model Policies were *not* included in the biweekly publication of the Register prior to this lawsuit. *See* Va. Reg. of Regul., Vol. 39, Iss. 25 (July 31, 2023)—Vol. 40, Iss. 13 (Feb. 12, 2024).[16] Therefore, even under the Rules on which VDOE relies, neither of the events that might trigger the start of the 30-day clock took place with respect to the 2023 Model Policies prior to Plaintiff's challenge.

[16] VDOE published draft 2022 Model Policies in the biweekly publication of the Register in September 2022. Va. Reg. of Regul., Vol. 39, Iss. 3 (Sept. 26, 2022). But VDOE concedes that publication of this draft did not trigger the running of the statute of limitations. Def.'s Br. at 11 (arguing that the "effective date" of the 2023 Model Policies—July 19, 2023—triggered the thirty-day deadline).

Separately, the Virginia Register Act requires agencies to file a list of all guidance documents on which they currently rely with the Register annually, Va. Code § 2.2-4103.1, and the Register then compiles and publishes that list "once each year."[17] The 2023 Model Policies appear to have been included for the first time on the Register's annual list that was published on April 22, 2024.[18] *See* Va. Reg. of Regul., Vol. 40, Iss. 18 (Apr. 22, 2024). This list does not constitute "publication" as contemplated by the Rules because it is not tied to the "adoption" of a regulation. Rule 2A:2. But even if Plaintiff were required to bring her challenge to the 2023 Model Policies within 30 days from this list's publication (i.e., by May 21, 2024), she met that deadline by filing this lawsuit on February 15, 2024.

IV. VDOE's Arguments Would Foreclose Challenges Authorized by VAPA.

VAPA clearly contemplates that guidance documents be subject to judicial review, and that any person who is aggrieved[19] by a guidance document after its finalization should have the opportunity to challenge the guidance document's lawfulness in court. Va. Code § 2.2-4002.1. However, VDOE's position would essentially foreclose judicial review of guidance documents. This is because in many cases, it may take much longer than 30 days for impacted parties to

[17] Va. Reg. of Regul., "Guidance Documents (For The Year Ending December 31, 2023)," https://register.dls.virginia.gov/guidancedocs.aspx.

[18] The Register's annual list of guidance documents reflects those guidance documents on which the agencies relied the prior year. *See* https://register.dls.virginia.gov/guidancedocs.aspx (stating that list is for the year ending on December 31, 2023). This approach reflects the Virginia Register's requirement that agencies submit their respective lists to the Register on or before January 1 each year. § 2.2-4103.1 This fact, read in combination with the Register's statement that it publishes the list "once a year" indicates that (1) the 2023 Model Policies would not have appeared in the Register's list until at least 2024, and (2) April 22, 2024, is the sole date of publication this year. The list is not updated on a regular basis, as further evidenced by the fact that guidance documents adopted in 2024 have not been added to the list. *See, e.g.*, "Virginia Regulatory Town Hall" at https://townhall.virginia.gov/L/GDocs.cfm; https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=7657; https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=7658.

[19] *See Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals of City of Virginia Beach*, 231 Va. 415, 419–20, 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.").

understand that they are "aggrieved" by the guidance. Because guidance documents do not have the force of law and must be applied either by the agency or by regulated entities in order to have any practical impact, those impacts may not be immediately known nor felt.

The failure of a challenge to the 2021 Model Policies illustrates this problem precisely. In *Christian Action Network v. Virginia Dep't of Educ.*, the Lynchburg Circuit Court held that the plaintiffs were not aggrieved by the 2021 Model Policies because the local school district had not yet adopted policies consistent with them or applied the guidance to the plaintiffs in any way. 108 Va. Cir. 313, 2021 WL 8314573, at *4 (2021) (The plaintiffs "do not claim that the model policies apply to or have had an effect upon them, nor do they assert that their particular school boards have adopted the model policies or any policies consistent with the model policies.").[20] If, as VDOE asserts, a plaintiff cannot challenge a guidance document more than 30 days after it is issued, *see* Def.'s Br. at 10, this would effectively deny any right of judicial review to people—like the Plaintiff in this case—who are clearly aggrieved by the unlawful guidance issued by VDOE. VAPA contains no such limitation on parties' rights to judicial review. *See* Va. Code §§ 2.2-4002.1, 2.2-4026(A).

The facts of this case illustrate these problems with VDOE's assertion that the Rules must apply to challenges of guidance documents. The 2023 Model Policies were posted to VDOE's website on July 18, 2023, and indicated that they would become effective the very next day, July 19, 2023. Ex. 3, Compl. No other notice regarding the impending finalization of the 2023 Model Policies was provided to stakeholders who submitted written comments. While at that point, Plaintiff may have had a generalized concerned that she would be impacted by the 2023 Model

[20] Unlike in *Christian Action Network*, where the plaintiffs failed to allege any personal or specific harm from the 2021 Model Policies and instead only had a "remote or indirect interest" at stake, 2021 WL 8314573 at *4, the Plaintiff in this case has alleged that the 2023 Model Policies injured her personally.

Policies, she did not actually become "aggrieved" by them until the York County School Board amended its policy regarding student records to conform with the 2023 Model Policies on August 24, 2023, and Plaintiff was excluded from educational opportunities at the start of the 2023-2024 school year because of York County Public Schools' reliance on the 2023 Model Policies. Compl. ¶¶ 67-98. These events occurred more than 30 days after the 2023 Model Policies took effect, so under VDOE's interpretation, by the time Plaintiff became aggrieved by the 2023 Model Policies, it was already too late to challenge them.

The 2023 Model Policies themselves contain no deadline by which local school districts must adopt consistent policies, so this same problem is likely to arise across the Commonwealth. For instance, Powhatan County recently adopted the 2023 Model Policies on April 16, 2024.[21] As a result, no student from that county would have been aggrieved by the 2023 Model Policies before then, but they may well be now. VDOE's position requires that these students would have no recourse to challenge the 2023 Model Policies. Other districts, like Loudoun County, are still in the process of deciding whether to revise their policies to conform with the 2023 Model Policies.[22] If they follow the Superintendent's August 25, 2023 instruction to conform their policies to the 2023 Model Policies, Compl. ¶ 44, the VDOE's position would likewise bar their students from bringing challenges.

Finally, VDOE cannot evade responsibility by arguing that "Plaintiff's real grievance is with the actions of the York County School Board, not the Department." Def.'s Br. 16. Although Plaintiff was not "aggrieved" by the 2023 Model Policies until their practical and legal consequences were made clear to her through the School Board's actions, that does not mean that

[21] https://go.boarddocs.com/vsba/powhatan/Board.nsf/goto?open&id=D3NSAD71B9CA.

[22] https://go.boarddocs.com/vsba/loudoun/Board.nsf/goto?open&id=D3CUA27165AC.

her *only* grievance is with the School Board. To the contrary, VDOE clearly directed local school districts (including the York County School Board) that they were *required* to adopt policies consistent with the 2023 Model Policies, Compl. ¶ 44, and this Court must take as true Plaintiff's allegation that VDOE's adoption of the 2023 Model Policies directly caused Plaintiff's exclusion from educational opportunities. *See* Compl. ¶¶ 67-98; *supra* "Standard of Review," at 2. Thus, it is clear that Plaintiff's injury flowed directly from VDOE's issuance of the 2023 Model Policies.

IV. In the Absence of Any Limitations Period Specifically Applicable to Guidance Documents, This Court Should Apply Virginia's Default Limitations Period.

As described above, VAPA requires only that a plaintiff's challenge to a guidance document be "appropriate and timely." Va. Code §2.2-4026. Because neither VAPA nor the Rules of the Supreme Court of Virginia specify a time in which an action challenging a guidance document must be brought, this Court should apply Virginia's default two-year statute of limitations, which applies to actions "for which no limitation is otherwise prescribed." Va. Code § 8.01-248. This action was timely filed because Plaintiff did not become "aggrieved" by the 2023 Model Policies until York County Public Schools relied on them to her detriment at the start of the 2023-2024 school year, and this suit was filed less than six months later, in February 2024.

CONCLUSION

VAPA waives sovereign immunity to permit Plaintiff's appropriate and timely challenge to the 2023 Model Policies. This Court should reject VDOE's attempt to rewrite the Rules of the Supreme Court of Virginia to apply to guidance documents when their plain language clearly does not. Because VDOE's arguments are legally unsupported and would bar the courthouse doors to challenges of guidance documents by directly impacted individuals, this Court should

overrule VDOE's pleas in bar and hold that Plaintiff's cause of action under VAPA is not barred by sovereign immunity or any statute of limitations.[23]

RESPECTFULLY SUBMITTED,
JANE DOE by JILL DOE

By Counsel: 

Geri M. Greenspan, VSB #76786
Wyatt Rolla, VSB #85625
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF VIRGINIA
P.O. Box 26464
Richmond, VA 23261
Phone: (804) 491-8584
ggreenspan@acluva.org
wrolla@acluva.org

Andrew J. Ewalt (*pro hac vice*)
Meghan E.F. Rissmiller (*pro hac vice*)
Jennifer B. Loeb (*pro hac vice*)
Ross C. Svenson (*pro hac vice*)
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
700 13th Street NW, 10th Floor
Washington, DC 20005
Telephone: (202) 777-4500
Facsimile: (202) 777-4555
andrew.ewalt@freshfields.com
meghan.rissmiller@freshfields.com
jennifer.loeb@freshfields.com
ross.svenson@freshfields.com

[23] Count 2 of Plaintiff's complaint asserts an independent claim based on the Declaratory Judgment Act. Because equivalent relief is available under VAPA, and Plaintiff seeks such equivalent relief in Count 1, Plaintiff does not oppose dismissal of Count 2 in order to streamline the issues for the Court's consideration.

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2024, pursuant to an agreement of counsel, a true and correct copy of the foregoing Brief in Opposition was sent via electronic mail to counsel for Defendant.

Geri M. Greenspan, VSB #76786