



# EDUCATION LAW NOTES

## Federal and Virginia Developments in School Law

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### ***VIRGINIA SUPREME COURT AFFIRMS TEACHER FIRST AMENDMENT RIGHTS***

School Board meetings currently are a hot-bed for public discourse, garnering significant media attention – usually for the conduct of citizens during public comment regarding topics such as mask mandates and curricular issues. The Loudoun County (Virginia) Public Schools (LCPS) is receiving its share of attention based in part on the School Board's deliberations regarding adoption of the Virginia Department of Education's (VDOE) Model Policies Regarding the Treatment of Transgender Students.

Byron Tanner Cross worked in LCPS as an elementary school physical education teacher for eight years. Two years ago the Virginia General Assembly directed that the VDOE promulgate the Model Policies, a version of which the Loudoun School Board deliberated earlier this summer. The policy addressed use of students' preferred names and pronouns irrespective of name and gender assigned at birth; allowing students to use facilities of their choice; and participation in extra-curricular activities consistent with students' chosen gender identities. Citing scientific evidence regarding gender and child development, his philosophical views on the rights of parents and educators, and his Christian beliefs, Cross objected to (1) the idea that someone can be transgender, (2) treating children as transgender, and (3) numerous aspects of the proposed policy.

Cross addressed the School Board during its May 25, 2021, public comment period: "I love all of my students, but I will never lie to them

regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God." Cross taught his classes the next day, but the following morning the LCPS administration placed him on administrative leave with pay. He received a letter from an assistant superintendent explaining that he was being investigated for allegations that he engaged in conduct having a disruptive impact on the operations of Leesburg Elementary School. The administration banned Cross from all LCPS property and events subject to permission from his principal and sent an e-mail to all Leesburg parents and staff informing them of his absence.

Cross' legal counsel demanded that he be reinstated. Cross received a response advising the suspension was due to the "significant disruption" his public comments caused, including "multiple complaints and parents requesting that . . . Cross have no contact with their children." Cross alleged he wanted to speak at additional Board meetings but was concerned about retaliation; he presented affidavits of five employees who asserted they wished to speak about the policy but were also fearful and asserted that teachers previously made public comments about other proposed policies, including in support of the transgender policy, without consequence. Cross sued the School Board claiming deprivations of his free speech rights under the Virginia Constitution, and his religious freedom rights under the Virginia

Constitution and the Act for Religious Freedom. He sought a temporary restraining order and a permanent injunction directing that he be reinstated and not punished for speaking about the transgender policy.

At a June 4 Circuit Court hearing, the School Board argued that Cross' comments created a continuing disruption for the school and it reasonably anticipated Cross would not comply with existing LCPS' non-discrimination policy or the proposed transgender policy. The Defendants presented the Court with evidence that Cross, a week before his public comments, sent a lengthy e-mail to Board members, which at least one Board member interpreted to indicate he would not follow LCPS' "pronoun usage policy." Notably, the Division took no disciplinary action against Cross at that time because the e-mail caused no disruption of school operations. The Defendants also presented evidence that the morning after Cross' public comments, students' parents were discussing them on social media and the school principal received e-mails from five parents asking that their students not attend any of Cross' classes and/or interact with him. The Division Superintendent received multiple e-mails from community members concerning Cross' comments. He informed the Court that LCPS has a generally applicable practice of suspending with pay any employee whose speech or conduct disrupts LCPS' operations. School officials argued that Cross' comments undermined the mission of LCPS, impaired the maintenance of discipline, impeded the performance of his duties, and violated existing school board policies and law (specifically Title IX and the recent *Grimm v. Gloucester County School Board* case).

The Circuit Court ruled that Cross' suspension was an act of retaliation - that his right to speak as a private citizen on matters of public concern outweighed the School Board's interest in restricting the speech. The Virginia Supreme Court on August 30, 2021, affirmed noting that the School Board did not dispute that Cross spoke

on a matter of public concern. The Court wrote that Defendants' arguments "incorrectly minimized" Cross' interest and cited federal precedent for the proposition that because he spoke at a public meeting "both the teacher and the public are centrally interested in frank and open discussion of agenda items." The Court highlighted that Cross was offering not only his religious beliefs, but his opinion on the well-being of children and that because Cross was opposing a policy that might burden his freedoms of expression and religion, his interest in doing so was compelling. "We believe Cross has a strong claim to the view that his public dissent implicates fundamental societal values deeply imbedded in our Constitutional Republic," giving sufficient weight to the School Board's heightened interest in regulating Cross' speech because, as a teacher, he occupies a position of significant public contact and trust.

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Cross' suspension was not supported by the disruption school officials said they reasonably anticipated once parents expressed their concerns about his comments. The Court simply did not agree that the few complaints the School Board received were sufficient to indicate Cross could not fulfill his duties. The School Board presented no evidence that it would have been problematic or administratively taxing to accommodate the parents who requested Cross not teach their children, nor was there any clear evidence the Principal diverted material time from his other obligations to manage the fallout from Cross' comments. "The only disruption the Defendants can point to is that a tiny minority of parents requested that Cross not interact with their children."

The case is noteworthy because it centered on the teacher's free speech rights at a public comment period of the School Board; not on his speech during the school day when he is directly performing duties for his public employer. Cross was invited to speak along with other citizens at a public comment period on a policy matter then pending before the School Board.