



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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January 10, 2024

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The Honorable Joseph D. Morrissey
Member, Senate of Virginia
Post Office Box 96
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Dear Senator Morrissey:

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

Issues Presented

You present several inquiries regarding the authority of a Virginia school division to enter into settlement agreements. You specifically ask whether such agreements are subject to approval by the school board or local governing body. You also ask whether the terms of a settlement agreement may be made subject to a confidentiality or nondisclosure agreement and whether the school division may withhold how much money was paid pursuant to the settlement.

Response

It is my opinion that school boards have the authority to compromise claims against a school division and that such authority is exclusive to the school board and includes the power to make confidentiality arrangements. It is further my opinion that a school division may withhold a settlement agreement that includes confidentiality or nondisclosure provisions to the extent the agreement was created for litigation purposes. Lastly, it is my opinion that payment information contained in accounting records are distinct from settlement agreements and are subject to disclosure.

Background

You express concern that nondisclosure agreements are being used by school boards to prevent the disclosure of important information to the public. You state that taxpayer money is being used to settle disputes, with the final settlement agreement containing confidentiality provisions that prevent information regarding the dispute, including the basis of the underlying claim and the settlement amount, from being released.

Applicable Law and Discussion

As part of its duty to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth,"¹ the General Assembly has directed the State Board of Education to "divide the Commonwealth into school divisions of such geographical area and school-age population as will

¹ VA. CONST. art. VIII, § 1.

promote the realization of the standards of quality required by . . . the Constitution of Virginia[.]”² Virginia law makes clear that “[t]he supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.”³

A school board overseeing a school division is a “body corporate” that is “vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law.”⁴ In exercising their supervisory role, “[s]chool boards only have those powers expressly granted or necessarily implied by statute.”⁵ Per statute, “a school board may adopt regulations ‘not inconsistent with state statutes . . . for the supervision of schools.’”⁶ Where a power exists, the “reasonable selection of method” rule “permits local public bodies to exercise discretionary authority where a grant of power is silent upon its mode or manner of execution.”⁷

School boards are expressly empowered to “manage and control the funds made available to the school board . . . and may incur costs and expenses”⁸ for legitimate and proper school purposes.⁹ School boards additionally are authorized to “sue, be sued, contract, be contracted with and . . . purchase, take, hold, lease and convey school property, both real and personal.”¹⁰ The power to sue and be sued encompasses the power to settle litigation and spend available funds as part of a settlement agreement.¹¹ Moreover, the General Assembly has granted school boards the authority to secure liability insurance specifically “to cover the costs and expenses incident to liability, including those for *settlement*, suit or satisfaction of judgment, arising from [personnel] conduct in discharging their duties or in performing functions or services for a school.”¹² Accordingly, a school division, acting through its duly constituted school board, may enter into settlement agreements with prospective claimants.

Absent valid legislation providing otherwise, this power is exclusive to the school board.¹³ A local governing body generally “has no authority . . . to prohibit the [s]chool [b]oard from expending [school funds] for a legitimate and proper purpose.”¹⁴ Because “public school boards are by law established as bodies corporate

² VA. CODE ANN. § 22.1-25(A) (2021).

³ VA. CONST. art. VIII, § 7. *See* Bristol Va. Sch. Bd. v. Quarles, 235 Va. 108, 119 (1988).

⁴ VA. CODE ANN. § 22.1-71 (2021).

⁵ *Sosebee v. Franklin Cnty. Sch. Bd.*, 299 Va. 17, 25 (2020). *See also* Commonwealth v. Cnty. Bd. of Arlington Cnty., 217 Va. 558, 574 (1977) (citing *Kellam v. Sch. Bd.*, 202 Va. 252, 254 (1960)).

⁶ *Sosebee*, 299 Va. at 25 (ellipsis in original) (quoting Code § 22.1-78).

⁷ *Cnty. Bd. of Arlington Cnty.*, 217 Va. at 574.

⁸ Section 22.1-89 (2021).

⁹ *See* Cnty. of Lancaster v. Latimore, 97 Va. Cir. 401, 409 (2013) (“There is also no authority for the school board to expend any sum for what is not a lawful or proper school purpose.”).

¹⁰ Section 22.1-71.

¹¹ 1979-80 Op. Va. Att’y Gen. 297, 297.

¹² Section 22.1-84 (2021) (emphasis added). Special insurance provisions govern pupil transportation. *See* §§ 22.1-188 to -198 (2021).

¹³ *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972).

¹⁴ *Cnty. Sch. Bd. v. Farrar*, 199 Va. 427, 433 (1957). The school board may employ counsel to defend itself, and all liabilities must be paid out through insurance or from funds appropriated to the school board. Section 22.1-82 (2021).

independent of the respective local governing bodies,”¹⁵ a school board, absent special circumstances, may enter into a settlement agreement on behalf of the school division without the approval of the local governing body.¹⁶

You ask whether a school-board settlement agreement may include a confidentiality or nondisclosure arrangement. Settlement agreements typically are created “to resolve an existing dispute and to memorialize and evidence the terms of that resolution.”¹⁷ They are designed to avoid or end litigation, which can be costly and distracting; and it is not unusual for parties to a dispute to stipulate to nondisclosure terms in order to facilitate swift resolution of the matter outside of an administrative process or the judicial system. Accordingly, consistent with a school board’s power to engage in litigation and the corresponding authority to enter into settlement agreements, I conclude that stipulating to confidentiality terms as part of a settlement negotiation is a “reasonable method” to employ in resolving disputes, and thus a permissible action of a school board on behalf of the school division.¹⁸

As public bodies, however, school boards are subject to the Virginia Freedom of Information Act (FOIA),¹⁹ which provides that public records are to be open for inspection, unless certain exemptions apply.²⁰ A public record is defined as “all writings and recordings . . . prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.”²¹ A settlement agreement to which a school board is a party involves the transaction of public business, and thus constitutes a public record under FOIA. Nevertheless, to the extent a public record qualifies as “[l]egal memoranda and other work product compiled specifically for use in litigation[,]” it is exempt from mandatory disclosure.²² When nondisclosure arrangements are incorporated into settlement agreements that are created specifically for litigation purposes, the

¹⁵ 1979-80 Op. Va. Att’y Gen. 299, 299; accord 2005 Op. Va. Att’y Gen. 44, 45 (“A local government and local school board are separate and distinct governmental agencies of the Commonwealth.”). Cf. Bd. of Supvrs. v. Cnty. Sch. Bd., 182 Va. 266, 275 (1944) (“It would be illogical to make the School Board solely responsible for the efficient conduct of the school system, and then give another board control over the expenditures to be made by the School Board.”).

¹⁶ Notwithstanding a school board’s independent power to settle claims monetarily, a school board may not contract to expend “any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board.” Section 22.1-91 (2021). In addition, when school funds are appropriated by classification, see § 22.1-115 (2021), “no funds may be expended by the school board except in accordance with such classifications without the consent of the board of supervisors.” *Latimore*, 97 Va. Cir. at 404 (citing Code § 22.1-89). See also VA. CODE ANN. § 15.2-1214 (2018) (allowing county government to provide motor vehicle liability insurance coverage for the operation of motor vehicles owned or leased by the county school board).

¹⁷ 1987-88 Op. Va. Att’y Gen. 35, 36.

¹⁸ The “law favors compromise and settlement of disputed claims.” *7-Eleven, Inc. v. Dep’t of Env’t Quality*, 42 Va. App. 65, 76 (2003) (quoting *Snyder-Falkinham v. Stockburger*, 249 Va. 376, 381 (1995)).

¹⁹ See VA. CODE ANN. § 2.2-3701 (Supp. 2023) (defining “public body” to include “school boards”).

²⁰ Section 2.2-3704(A) (Supp. 2023). I am unaware of any other statute that would preclude a school board from entering into nondisclosure agreements with respect to pending or anticipated legal claims against them. I note however, that settlement agreements are sometimes filed with a court, and public bodies, just as any other entity, must comply with court orders that prevent disclosure of records. See Va. FOIA Council Op. AO-01-11.

²¹ Section 2.2-3701. FOIA thus governs the disclosure of existing public records; it does not pertain to the disclosure of information otherwise not contained in a public record. See §§ 2.2-3704(A) (providing generally that public records are to be open to inspection); 2.2-3701 (defining “public record”); 2.2-3704(D) (providing that public bodies are not required to create a public record in response to a FOIA request).

²² Section 2.2-3705.1(3) (Supp. 2023).

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agreement may be withheld under FOIA.²³ Whether a particular record satisfies this condition is a fact-specific determination beyond the scope of an opinion.²⁴

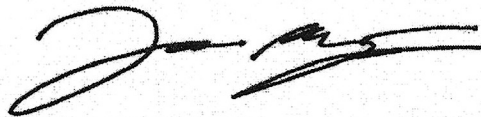
Although a particular settlement agreement itself may not be subject to mandatory disclosure, the relevant FOIA exemption does not necessarily pertain to disclosing the amount a school board has paid pursuant to a settlement agreement. Records associated with financial transactions and expenditures are distinct public records²⁵; and the use of public funds generally is not considered confidential.²⁶ Moreover, unlike settlement agreements, which are created between parties during or under threat of litigation, financial records are “generated in connection with the payment process, after the mutual agreement to settle.”²⁷ I therefore conclude that financial documents revealing payments associated with finalized settlement agreements are separately created public records business and absent an applicable exception, must be disclosed upon request pursuant to FOIA.²⁸

Conclusion

Accordingly, it is my opinion that school boards have the authority to compromise claims against a school division and that such authority is exclusive to the school board and includes the power to make confidentiality arrangements. It is further my opinion that a school division may withhold a settlement agreement that includes confidentiality or nondisclosure provisions to the extent the agreement was created for litigation purposes. Lastly, it is my opinion that payment information contained in accounting records are distinct from settlement agreements and are subject to disclosure.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

²³ *Id.* See Va. FOIA Council Op. AO-01-11 (concluding that, under the facts presented, the requested settlement agreement was exempt from mandatory disclosure); 1987-88 Va. Op. Att’y Gen. at 36. Additionally, personnel information, which is “data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity,” may be withheld pursuant to § 2.2-3705.1(1). *Hawkins v. Town of South Hill*, 301 Va. 416, 432 (2022).

²⁴ ~~See 2004 Op. Va. Att’y Gen. 13, 18.~~

²⁵ See § 22.1-89.2 (2021) (providing that “[s]chool boards shall retain and dispose of financial records in accordance with [applicable state] regulations”).

²⁶ Indeed, school boards are required to submit annual reports of their overall expenditures to the bodies that appropriate funds to them, and the “report[s] shall also be made available to the public.” Section 22.1-90 (2021).

²⁷ ~~LeMond v. McElroy~~, 239 Va. 515, 521 (1990). See Va. FOIA Council Op. AO-06-13; Va. FOIA Council Op. AO-14-00; 1987-88 Op. Va. Att’y Gen. 30, 32 (concluding that a billing statement reflecting the litigation activities of the Town attorney was created only for billing purposes and thus did not fall under FOIA’s legal memoranda/work product exemption).

²⁸ Cf. § 2.2-4116 (2022) (providing that nothing in the Virginia Administrative Dispute Resolution Act “shall prevent the use of the Virginia Freedom of Information Act to obtain . . . the amount of money paid by a public body or agency to settle a dispute”). Other information contained in a disclosed record, however, may be subject to redaction. See § 2.2-3704.01 (Supp. 2023); 1987-88 Op. Va. Att’y Gen. at 31.